Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the scope of judicial review, costs, timing and other issues related to access to justice (Ref. ACCC/C/2008/33)

Annex

to ClientEarth letter Aarhus Convention Compliance Committee of 06 September 2009

This is a more detailed response (in addition to the shorter letter to which this document is attached) to the email dated 29 September from Jeremy Wates, Secretary to the Aarhus Convention Compliance Committee, inviting the Communicants in case ACCC/C/2008/33 to respond in writing to the UK's letter complaining that any findings in relation to case ACCC/C/2008/33 (and also cases 23 and 27) will be tainted because of an alleged conflict of interest of one of the Compliance Committee members. This statement is made on behalf of all the Communicants in Case ACCC/C/2008/33 to emphasise that in the Communicants' view no conflict of interest issue arises in relation to ACCC/C/2008/33.

We are aware that the Compliance Committee has asked us to be brief in our response, and we have attempted to be as brief as possible. However, we feel that since the allegations in question will be referred to in the Committee's report, a discussion of the relevant issues may be of assistance.

The Aarhus Convention Compliance Committee

It is one of the fundamental and distinctive characteristics of the Aarhus Convention Compliance Committee that its members are all highly eminent and very experienced jurists who serve on the Committee in a personal capacity. This is no accident. Rather this is intended to secure the independence and impartiality of the Committee. Members are not representatives of governments, who may be put under pressure by their government. Neither are they lay persons who may be more easily influenced (as would be the case, for example, in jury proceedings, magistrates' courts and certain tribunals in the UK – leading to the need for special rules to protect the independence of such lay persons). It is precisely the eminence, calibre and independence of the members of the Compliance Committee that secure the impartiality of the Aarhus compliance mechanism.

Therefore, a careful distinction should be drawn between panels of highly qualified legal experts who can be relied upon to be fair, unbiased and impartial, and bodies which include unqualified lay persons, which have to be protected in this respect.

The Aarhus Convention compliance mechanism

It is also one of the fundamental and distinctive characteristics of the Aarhus Convention compliance mechanism that it is (and is intended to be) extremely open and transparent. Unlike national and even EU legal proceedings for example, all non-confidential documentary evidence is accessible to

the public on the Conventions' web-site. Hearings in relation to cases are open to public participation. The parties in relation to a case before the Committee, as well as outside observers, are given great scope to make their views known to the Committee and the public, both in writing and at public hearings. The Committee is accustomed to dealing with this process and to giving relevant communications and statements (including from any outside observers) their due weight. In fact, this degree of transparency and openness (as well as the potential of public observers to make communications and to comment) is generally accepted to be one of the outstanding strengths (and a fundamental guarantee and defence of the democratic ideals) of the Aarhus Convention, especially as compared to many other international compliance mechanisms.

Conflict of interest rules

The Aarhus Convention Compliance Mechanism is subject to rules on 'conflict of interest':

"'*Normal principles' of conflict of interest apply for the Committee. This implies that in a case where a Committee member found himself or herself faced with a possible or apparent conflict of interest, that member would be expected to bring the issue to the Committee's attention and decision before consideration of that particular matter. Being a citizen of the State whose compliance was to be discussed would not in itself be considered as a conflict of interest (MP.PP/C.1/2003/2, para 22)'.*

(Modus Operandi of the Aarhus Convention Compliance Committee)

This rule has in fact been applied a few times by the members of the Compliance Committee where they felt they were subject to a conflict of interest. However, it is noteworthy that even in complaints brought against their own country, Compliance Committee members, according to the rules, are not automatically considered to be subject to a conflict of interest. It is hard to imagine then that a marital relationship between a Committee member and a member of the public who participated in discussions as an observer would in itself necessarily lead to such a conflict, especially if the marital status of the Committee member is known to her colleagues.

The nature of communications to the Compliance Committee

Communications to the Compliance Committee are made where parties to the Convention or members of the public feel that a party is not complying with the Convention in relation to any of its three pillars, i.e. rights to access to environmental information, public participation in environmental decision-making and access to justice. In this context, complaints can relate to specific instances of non-compliance (e.g. many or most communications from the public) or can be of a more general nature alleging a party's general lack of compliance with particular provisions of the Convention.

The nature of ACCC/C/2008/23, 27 and 33

ACCC/C/2008/23:

On 24 July 2009, the communicants in Case ACCC/C/2008/23 summarized their complaint against the UK:

'*The above complaint as it now stands is that the UK maintains a system under which public authorities can shift legal costs onto members of the public, as shown by its position in the case of Morgan & Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 15, which is* ***not 'fair' nor 'equitable' and, as such, has breached Article 9(4) of the Convention****. Further, the UK has penalized the Communicant* ***in breach of Article 3(8)*** *by pursuing its costs from the Communicant instead of awaiting the outcome of the costs position at final trial.'*

(ACCC/C/2008/23 – Communicants' Post-Meeting Note, 24 July 2009 – bold emphasis added)

This shows clearly that Case 23 did not involve a consideration of 'prohibitive' costs under English legal procedures in general. Rather it focused very specifically on a particular issue (in relation to one specific costs order for an interim hearing) connected to fairness and equity under Article 9(4) and a potential breach of Article 3(8). This is confirmed by the fact that the communicants' lawyers thought it necessary to write a separate note to the Committee in relation to general costs issues '*in the context of other UK complaints [the Committee may] be considering'* (See letter dated 30 June 2009 from Richard Buxton to Jeremy Wates)

ACCC/C/2008/27:

The following two excerpts from H L McCracken's letter to Jeremy Wates of 26 March 2009 in case 27 show that in relation to costs (there were also additional allegations in this case as regards breaches of Articles 3, 6 and 7), the complaint was a very specific one as regards the extent of a costs order (almost £40,000) which the Cultra Residents Association had to pay in this particular case in relation to judicial review proceedings (and the prohibitive effect of that costs order on a potential appeal against the decision):

'*Costs at the level sought by the Department at the conclusion of the Judicial Review are clearly a major deterrent against residents' groups seeking to protect their environment by legal action. It is therefore submitted that the Department's claim for costs at the level sought by them is contrary to the provisions of Article 9 of the Convention*.'

'The Order of Lord Justice Girvan dated 7 November 2007 was not appealed. The decision of the UK Government to seek full costs against the Communicant in the judicial review proceedings rendered those further proceedings prohibitively expensive and any appeal of the Order financially unrealistic – the Communicant and its associated Residents' Groups could not afford the costs of the judicial review never mind the costs of an appeal of the Order. It is contended that this is a graphic demonstration of the fact that judicial review, as the only remedy available to the Communicant in UK law, is a remedy which is prohibitively expensive.'

(pages 9 and 11)

Even though the communicants here clearly regard case 27 as a demonstration of the wider situation in relation to judicial review in the UK (and they also refer to the Sullivan Report, for example, to support their specific case), no general allegations are made by the communicants in

relation to the UK's costs rules. The case is very clearly about the prohibitive costs order made in this particular case.

ACCC/C/2008/33:

Case 33 is not about a specific case of non-compliance with the prohibitive costs provision in Article 9(4), although it uses the Port of Tyne case as an illustration. Rather it sets out a general case against the UK costs rules and the courts' jurisprudence in this regard. Case 33 makes a much wider and far-reaching argument than both the other cases.

In addition, Case 33 alleges breaches of Article 9(2), 9(3), 9(4) and 9(5) also in relation to the ability to review the 'substantive' legality of a decision, timing rules and rules allowing cases against individuals under Article 9(3). Cases 23 and 27 contain no such complaints.

<u>The nature of the UK Government's 'conflict of interest' complaint</u>

In its initial letter dated 22 July 2009, Defra only complained about an alleged conflict of interest in relation to Cases 23 and 27. Even though it mentioned Case 33 in an unrelated context in the same letter, no conflict of interest was alleged as regards Case33 which has only subsequently been argued to be similarly affected by virtue of 'links and overlaps'.

<u>The nature of Proferssor Bonine's intervention</u>

As far as our contemporary notes of the Compliance Committee's hearing on 1 July show, Proferssor Bonine's comments as an observer on behalf of the general public in the hearing on 1 July 2009 in relation to cases 23 and 27 were of a very general nature, mainly drawing attention to costs rules in a number of other countries. In addition, it is worth noting that the comments were made openly in front of the entire Committee, the party, the communicants and other observers. They were in no way addressed specifically to Mrs Kravchenko and they were not made secretively behind the Committee's backs to influence the Committee indirectly. They were merely intended openly to inform the entire Compliance Committee. Mrs Kravchenko's views in relation the comments made would only have been as relevant as her views are in relation to any other issue discussed by the Committee.

<u>Timing of Compliance Committee considerations and preparation of draft recommendations on ACCC/C/2008/23 and 27</u>

As is clear from the Compliance Committee's draft statement of 24 September 2009, Mrs Kravchenko has not participated in the preparation or adoption of findings in relation to cases 23 and 27. Nor will she do so in relation to case 33. She merely participated in discussions of the cases in open and closed sessions on 1 July 2009. As regards any potential overlap of the three cases in relation to costs, the findings in relation to cases 23 and 27 have been postponed until recommendations are also made in relation to case 33. We assume therefore, that any draft recommendations already finalised in relation to cases 23 and 27 do not relate to general costs issues under case 33, but rather to the specific facts of cases 23 and 27.

Conclusions

In our opinion, the fundamentally open and transparent structure of the Aarhus Committee compliance mechanism, together with the very deliberate emphasis on impartiality in the make-up of the Compliance Committee itself (see above), means that the UK's allegations of a conflict of interest and consequent 'tainting' of cases 23, 27 and 33 are unfounded.

Moreover, we understand that the marital status of the long-standing and highly experienced Committee member Mrs Kravchenko was known to all the Compliance Committee members (see para 4 of the Committee's draft statement of 24 September 2009). Under the Committee's Modus Operandi we are sure that Mrs Kravchenko would have declared a conflict of interest, had she or any of the Committee members felt this to be an issue. As already mentioned, because of the independent and impartial nature of the Committee members themselves, there is not even a presumption of conflict where a Committee member's own country is being complained against.

In any case, if the Compliance Committee was in any way concerned about any potential bias, it could (like a judge in jury proceedings in the UK) simply require the comments made by Proferssor Bonine to be disregarded. If even a jury of laymen is capable of disregarding certain evidence it has heard (on being asked to do so by a judge), we suggest that it would be a serious unfounded and unwarranted attack on the Compliance Committee's professional integrity and impartiality to argue that it was incapable of doing the same.

In addition, Professor Bonine's intervention in relation to cases 23 and 27 was a very general one (the substance of which could have been made equally by any of the other observers present), which would not have been relevant in relation to the specific issues of cases 23 and 27.

In contrast to the specific nature of cases 23 and 27, case 33 alleges a general failure of the UK to comply with Article 9(4) as regards 'prohibitive' costs. Professor Bonine's comments, although themselves general in nature, were not in fact addressed to arguments set out in case 33 (as evidenced by Defra not including case 33 in its initial complaint), and have in any case been entirely superseded by the general evidence presented in relation to case 33. This means that his comments are effectively irrelevant in relation to all three cases (23, 27 and 33). Therefore, any views expressed by Mrs Kravchenko in the discussions in closed session on 1 July would, in our view, probably not only have been irrelevant to the preparation of findings and recommendations that have since been prepared in relation to cases 23 and 27, but are anyway completely irrelevant to case 33. Mrs Kravchenko has of course by her own choice not even been party to any discussions in relation to case 33 at all.

We would also emphasise that contrary to the allegations made in Defra's statement of 25 September 2009, the Compliance Committee has not acknowledged that '*the conflict of interest taints Cases 23 and 27*', as well as Case 33. The Compliance Committee merely accepted that Mrs Kravchenko should not participate in the preparation or adoption of findings in relation to cases 23, 27 and 33 as a precaution and wishing '*to avoid a situation where there are doubts about its*

process'. In fact, it pointed out that the grounds for the UK's conflict of interest claims were '*at least debatable'* (draft statement of 24 September 2009).

In addition, we would like to point out that the circumstances referred to by Defra in which a case in the UK would be re-heard due to issues of bias apply in entirely different circumstances and, even in the UK, would not apply in a situation where there was a panel of eminent lawyers/judges, where simply one of their number was implicated in a conflict of interest. In such a case, the same action would be taken as has been taken by the Committee: the relevant member of the panel would be removed from the decision-making process.