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ClientEarth
Justice for the Planet

Ms Aphrodite Smagadi
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment, Housing and Land Management Division
Room 332, Palais des Nations
CH -1211 Geneva 10
Switzerland

22 September 2010

Dear Ms Smagadi

Re: 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)

Further to receiving the draft findings in the above Communication by letter dated 25 August 2010, ClientEarth would like to thank the Committee on behalf of all the communicants in this case (ClientEarth, the Marine Conservation Society and Robert Latimer) for the careful consideration it has given to all submissions made throughout the progress of this Communication. We welcome the Aarhus Compliance Committee's Findings and Recommendations and are sure that they will help the UK achieve better compliance with the standards set out in the Aarhus Convention, and this will ultimately lead to greater access to environmental justice and greater environmental protection for the benefit of all.

There is only one point - in relation to the communicants' views on Protective Costs Orders (PCOs) - on which we would seek the Compliance Committee's clarification (see paragraphs 1-3 below).

Other than this very minor change, we do not have any further proposed amendments, and we very much welcome the Committee's finding of non-compliance in respect of the requirement to ensure non-prohibitive costs in cases coming under the Convention and its findings concerning the need to implement fair and equitable rules for the time frames when such cases can be brought. We also welcome the Committee's findings on the meaning of Articles 9(2) and 9(3) and their view on how the UK could provide the kind of substantive review required by the Convention.

A. <u>Clarification sought</u>

The communicants' view on Protective Costs Orders

1. In relation to paragraph 48 of the Aarhus Compliance Committee's draft findings, the communicants would like to emphasize that in their view it is not possible to modify Protective Costs Orders (PCOs) sufficiently to be capable of forming the basis of a cost system which is compliant with the Convention because it is in the nature of PCOs that they

are based on judicial discretion and thus uncertainty.[1] The Committee itself highlights this at paragraphs 127 and 133 of the draft findings. Instead, the communicants' position was set out in its original Communication[2]:

'*The UK Government needs to amend the Civil Procedure Rules in E&W to provide a presumption that in environmental cases falling under the Aarhus Convention (which are by definition in the public interest), as long as the claimant has not acted in bad faith, the claimant should never have to pay for the defendant's costs. Instead, the defendant should pay for the claimant's costs*'.[3]

Therefore, the communicants have consistently argued for one-way costs shifting in environmental public interest cases, and it is their view that PCOs have no place in a regime of one-way cost-shifting.

2. In this context, the communicants would also like to re-emphasise that, as previously argued, qualified one-way cost shifting, as recommended by the Jackson Review, is also insufficient to ensure compliance with the Convention[4]. (This view has recently been echoed by Lord Justice Sullivan in his updated report – see below at paragraphs 14 - 15).

3. *The communicants would therefore ask that the findings at paragraph 48 of the Committee's draft findings be amended to reflect that the communicants only accept that a costs regime is compliant with the Convention if it incorporates an unqualified one way cost shifting mechanism or otherwise ensures that a claimant knows at the outset that they will not be liable for the respondent's costs or to any third party in damages, and, if the claimant wins, that they will receive their costs from the losing party.*

B. <u>We particularly welcome the following findings of the Committee:</u>

On the costs system

5. The communicants welcome the Committee's recognition of the excessive costs hurdles intrinsic in the legal system of England & Wales. We note that in addition to the four problems set out in paragraphs 127-132 of the Committee's findings, the Committee has in effect also recognised a fifth issue, that of the existence of "considerable judicial discretion" (see paragraph 133 of the Committee's draft findings) which in this context is an additional concern in its own right (see also paragraph 1 above). As has been confirmed by the European Court of Justice in *Commission v Ireland*[5] and as discussed in our original Communication and in four of our subsequent letters to the Committee[6] , judicial discretion to limit the risk of prohibitive costs does not amount to adequate implementation of a ban on prohibitively expensive procedures. We therefore strongly agree with the Committee that any reformed costs system must provide certainty to claimants at the outset and must not rely on the exercise of judicial discretion.

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[1] See original Communication dated 02.12.2008 (paragraphs 114-117); letter to the Committee dated 09.06.2009 (Appendix II paragraphs 39-45); and letter to the Committee dated 09.09.2009 (paragraphs 10-14).

[2] See summary p. 14, paragraphs 145-146 and summary on p. 43, all original Communication (see footnote above).

[3] Ibid., see summary on p. 43 and at paragraph 30 of Appendix IV of our letter to the Committee dated 09.06.200.

[4] For reasons set out in the letter to the Committee dated 29.01.10 (Appendix I); see also letter to Committee dated 02.06.10 (paragraph 4).

[5] Case C-427/07.

[6] See references in footnote 1 above, plus letter to Committee dated 02.06.2010 (paragraph 4).

6. The communicants also welcome the finding at paragraph 133 of the draft findings that the requirement of fairness under Article 9(4) of the Aarhus Convention relates to the claimant and not to the respondent. Again, we strongly agree with the Committee that the UK must properly consider the public interest character of environmental cases and that any system which penalizes or deters a bona fide claimant either by forcing them to use pro bono representation or by introducing a rule that each party (winning or losing) bears its own legal costs, is neither fair to the claimant nor within the letter or spirit of the Convention.

On substantive review

7. The communicants are pleased to note the findings of the Committee at paragraphs 121-122 that both Articles 9(2) and 9(3) require the UK to ensure substantive as well as procedural review procedures.

8. The communicants also agree with the doubts and concerns expressed by the Committee in paragraphs 123 - 125 as to whether the UK 'meets the standards of review required by the Aarhus Convention as regards substantive legality', a doubt that is borne out by many of the substantive questions raised in the Port of Tyne case as set out at paragraph 82 of our original Communication.

9. The Committee is right to express concern about the high threshold for reviewing "irrational" decisions using the *Wednesbury* test and to note criticism of judicial review by the Supreme Court, where the *Wednesbury* test has been called a "*retrogressive decision*" which limits the scope of judicial review to "*capricious or absurd*" decisions.[7]

10. The communicants also agree with the Committee's findings in paragraph 124 that the proportionality principle could provide an adequate standard for review in environmental cases, as long as it 'does not generally or prima facie exclude any issue of substantive legality from review'.

On timing rules

11. The communicants fully agree with the Committee's reasoning in relation to timing rules in paragraphs 136 -137 and paragraph 141. As set out in Appendix II of the communicants' letter dated 29th January 2010, this approach is fully consistent with the recent ruling of the European Court of Justice[8] concerning the need for fairness and certainty of timing rules. The Committee's recommendations also meet the communicants' proposals as set out in their original Communication[9].

12. We have discussed this matter with CAJE and draw the Committee's attention to CAJE's email of 21 September 2010 asking the Committee to disregard their comments on timing in their letter of 7th September 2010.

C. <u>Challenging acts of private persons</u>

13. The communicants note the Committee's finding that the case in respect of challenges against private persons was not substantiated in relation to the present communication.

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[7] See *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 para 32.

[8] *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08).

[9] At paragraphs 167- 169 and 175, as well as summary on pages 14 and 53.

D. The updated Sullivan Report

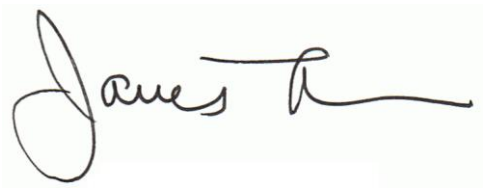
14. We are grateful to CAJE for submitting (with their letter of 7th September 2010), an update to the Sullivan Report[10], dated 6th September 2010 which we would ask the Committee to note.

15. The updated report revises the conclusions drawn in the original Sullivan Report with regard to reforming the PCO system and, instead, acknowledges that 'tinkering' with PCOs[11] is insufficient, and confirms the communicants' position that a one way costs shifting rule is required in the UK (with the only exception relating to 'unreasonable' behavior, or, as the communicant put it in its original Communication, 'bad faith').[12]

E. Typographical errors

16. We assume that the reference to paragraph 31 at paragraph 137 of the Committee's draft findings should refer to paragraph 133.

Yours sincerely



James Thornton
CEO, ClientEarth

[10] Ensuring access to environmental justice in England & Wales, already submitted to the Committee.

[11] See Introduction to Sullivan Report Update, and see also paragraph 29ff of the updated report.

[12] See, for example, the communicant's original Communication (paragraph 145 and summary recommendations on pages 14 and 43).