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Mr Jeremy Wates
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH -1211 Geneva 10
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Dear Mr Wates

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)

As discussed in our recent correspondence, we now attach our responses to a number of questions asked of us in your letter dated 16 January 2009 in relation to the communication to the Aarhus Convention Compliance Committee (ACCC/C/2008/33) (the 'Communication') on behalf of all the communicants in this matter.

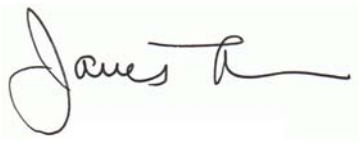
Questions 1 and 3 of your letter are inter-related in terms of their subject matter and we address them together in Appendix I to this letter. The answer to Question 2 is set out in Appendix II. In Appendix III we have also addressed the question on a legal assistance mechanism put to Dr Åsa Sjöström of Defra in your letter to Defra on 16 January 2009. In addition, and as already discussed in our previous correspondence, in Appendix IV we also attach a discussion of the results of the comprehensive review of civil litigation costs carried out by Lord Justice Jackson recently where those results impact on the points made in the Communication.

As already indicated in our letter of 27 May, we are aware that the Aarhus Convention Compliance Committee will be discussing cases ACCC/C/2008/23 and ACCC/C/2008/27 in its meeting on 1 July. The subject matter of both these cases overlaps with the Communication as regards costs-related issues. We would therefore ask the Aarhus Convention Compliance Committee to also consider the submissions made in the Communication in this regard (see Claim 2, paras 32 -36 and paras 92 - 149 and Annexes III, IV and V of the Communication), as well as Appendices II, III and IV to this letter, when discussing the other two UK cases on 1 July and beyond.

In addition, questions regarding the direct applicability of the Aarhus Convention in the UK have been raised both by Defra in comments to the Compliance Committee regarding case

ACCC/C/2008/23[1] and by the Court of Appeal in the recent case of *Morgan & Anor v Hinton Organics (Wessex) Ltd*[2] (discussed in Appendix II). We regard these questions as being of fundamental importance to the cases in front of the Committee on 1 July, as well as to the Communication, and address them in Appendix II. We would therefore ask you to also consider the comments we make in this regard when discussing the other two UK cases on 1 July and beyond.

Yours sincerely



James Thornton
ClientEarth

[1] Letter from Dr Åsa Sjöström, Defra, to Jeremy Wates, Secretary of the Aarhus Convention, dated 30 October 2008 in relation to case ACCC/C/2008/23.

[2] [2009] EWCA Civ 107: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/107.html&query=aarhus&method=boolean (*'Morgan v Hinton')* (document 72, Appendix V, Additional Documents Index ('ADI').

Reply from ClientEarth to the

Aarhus Convention's Compliance Committee's questions

Communication ref ACCC/C/2008/33

Appendices I – V

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Appendix I

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)

Answers to questions 1 and 3
of letter of 16 January 2009

1) In the communication, reference is made to 'contact with the relevant bodies of the OSPAR Convention and the European Commission' (see paragraph 13). What were the results of those contacts?

1. Robert Latimer repeatedly reported his concerns to the OSPAR Commission and to the European Commission[3].

OSPAR – results of contacts

2. The OSPAR Commission advised Robert Latimer on the OSPAR Commission's role in relation to the dumping of dredged sediment and the rules that parties to the OSPAR Convention have to follow (e.g. in relation to Article 9 and Annex II of the OSPAR Convention or the OSPAR Guidelines for the Management of Dredged Materials)[4] and informed Robert Latimer that:

'the OSPAR Commission does not have any role in supervising the activities of national authorities in relation to individual projects. The OSPAR Commission is a mechanism to enable the Governments involved (together with the European Community) to cooperate in developing and implementing policies to improve protection of the marine environment of the North-East Atlantic. Nevertheless, there is a requirement on the Governments to report to the OSPAR Commission on their activities, so that the Commission can collectively assess what is happening and consider whether international agreements on policies are needed to improve the situation[5].'

[3] See letter and email from Alan Simcock, OSPAR Commission to Robert Latimer, dated 18 November 2004 and 18 September 2006; email exchange between Robert Latimer and David Johnson, OSPAR Commission between 16 October 2006 and 6 November 2006; email exchange between Robert Latimer and Hanne-Grete Nilsen, OSPAR Commission on 6-7 December 2006; email exchange between Robert Latimer and David Johnson, OSPAR Commission on 4 February 2009 – (documents 1-6, ADI).
[4] See letter from Alan Simcock, OSPAR Commission, to Robert Latimer, dated 18 November 2004, paras 4 and 6; and email from David Johnson, OSPAR, to Latimers, dated 11 January 2007 (documents 1 and 5, ADI).
[5] See point 1 in email from Alan Simcock, OSPAR Commission to Robert Latimer, dated 18 September 2006 (document 2, ADI).

3. However, the OSPAR Commission did decide that the Port of Tyne trial to dispose of and cap contaminated material at sea was of interest and that it would be

   '*useful for there to be an exchange of information on the problems involved, and for [the Biodiversity Committee (BDC)] to consider whether further OSPAR action was needed to address this type of technology'*[6].

4. Therefore it asked the UK to present a report on the trial to its (Environmental Impact of Human Activities) (EIHA) Working Group[7]. The UK has reported to the EIHA Working Group and the BDC Committee of the OSPAR Convention on the Port of Tyne capping trial in their meetings in 2006-2008[8].

5. After its first report in 2006[9], the EIHA Working Group decided to follow the issue and invited the UK to report on progress in subsequent meetings. The UK's subsequent reports in 2007 and 2008 appear to have been limited to saying that no results/reports on the Port of Tyne capping trial were available yet, and the subject was kept on the agenda for the 2009 meeting. Reports in the BDC meetings appear to have been similarly brief and no mention at all was made of the trial in the BDC's 2009 meeting[10].

6. Therefore, the OSPAR Commission has not been able to reach any conclusions on this matter yet.

The European Commission

7. The European Commission responded to Robert Latimer's correspondence in three letters dated 23 June 2006, 28 August 2006 and 8 November 2006[11]. In these letters, the European Commission informed Robert Latimer that the UK authorities had advised the Commission that

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[6] See points 2-5 in email from Alan Simcock, OSPAR Commission to Robert Latimer, dated 18 September 2006 (document 2, ADI).

[7] See point 5 in email from Alan Simcock, OSPAR Commission to Robert Latimer, dated 18 September 2006 (document 2, ADI).

[8] *Summary Record* of the Meeting of the Working Group on the Environmental Impact of Human Activities (EIHA) in Galway (Ireland), 7 – 9 November 2006; *Summary Record* of OSPAR EIHA Working Group meeting in Madrid (Spain), 2-4 October 2007; *Summary Record* of OSPAR EIHA Working Group meeting in Lowestoft (UK), 4-7 November 2008; *Summary Record* of OSPAR Biodiversity Committee (BDC) meeting in Brussels (Belgium), 26-30 March 2007; *Summary Record* of OSPAR Biodiversity Committee (BDC) meeting in The Hague (Netherlands), 25-29 February 2008; UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention: *Capping of Contaminated Dredged Material Case Study Port of Tyne UK* (the 'UK OSPAR Report'), undated – already submitted as part of main communication (documents 7-12, ADI).

[9] UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention: *Capping of Contaminated Dredged Material Case Study Port of Tyne UK* (the 'UK OSPAR Report'), undated (document 12, ADI).

[10] All as in footnote 9 above.

[11] See documents 13-15, ADI.

'*consideration as to the need for an environmental impact assessment was not deemed to be necessary as the operation did not, in their view, constitute a qualifying project under Annex I or II of [the EIA Directive][12]*',

mainly because the disposal took place at an existing disposal site, and the disposal was not regarded as a '*new or proposed sludge-deposition*' under Article 4(2) of the Directive and paragraph 11(d) of Annex II. In addition, the Commission considered

'*that there is insufficient evidence to indicate that the change of normal use of the disposal site was such as to have a significant adverse effect on the environment[13]*'

which would trigger screening requirements under paragraph 13 of Annex II of the Directive.

8. However, in their letter of 8 November 2006, the Commission informed Robert Latimer that:

'*the Commission has already initiated separate infringement proceedings against the UK for its general failure to implement the [EIA Directive], as regards marine dredging projects listed in Annex II of the Directive*', and that

'[i]n the circumstances, the Services of the Commission have come to the view that it would not be useful to pursue a separate individual case on the application of the Directive to marine dredging projects. However, should the above case fail to be resolved satisfactorily, [the Commission] will if necessary, use the information [Robert Latimer has] provided in support of any subsequent proceedings[14].'

9. Having made further enquiries to the Commission, the Marine Conservation Society (MCS) has now been told that the Commission thinks that the infringement proceedings against the UK referred to above were closed because the UK introduced legislation requiring environmental impact assessments (EIAs) for marine dredging projects[15].

10. One of the problems that Robert Latimer faced in relation to his complaint to the European Commission was that he did not have enough relevant information available

[12] See Letter from Julio Garcia Burgues, European Commission to Robert Latimer, dated 23 June 2006, para 2 (document 13, ADI).
[13] Ibid., para 6.
[14] See letter from Julio Garcia Burgues, European Commission to Robert Latimer, dated 8 November 2006; para 2 (document 15, ADI).
[15] See email from Sibylle Grohs, European Commission, to Thomas Bell, MCS, dated 23 April 2009, contained in email exchange between Thomas Bell and Sibylle Grohs between 23 April 2009 and 27 April 2009 (document 17, ADI).

to him to be able to provide more evidence to the Commission of the potential environmental risk which would have made an EIA necessary (see Conclusion below). However, he has recently sent additional information to the Commission asking for the case to be re-opened[16].

3) Were any of the substantive assertions made in the communication regarding the Port of Tyne situation brought to the attention of the relevant administrative authorities? If so, what was the result? If not, why not?

11. Both MCS and Robert Latimer (the 'Complainants') have been in almost constant contact with the authorities since they first found out about this trial. We attach a number of representative documents exemplifying the extent of contact that has taken place, and showing that the main issues in relation to this trial project were raised by the Complainants at an early stage (or as early as was possible), in particular:

- the lack of a full EIA;
- the suitability of the disposal site, in particular in relation to the question of the dispersiveness of the site;
- the availability and consideration of alternative disposal methods (i.e. the question of best practicable environmental option);
- at a later stage, the review of the progress and success of the trial, and the breach of licence conditions relating to the make-up, thickness and integrity of the cap.

12. As well as the OSPAR Commission and the European Commission, which are discussed in relation to question 1 above, the Complainants also communicated with:

Defra (including the Marine Consents & Environment Unit (MCEU, the Information Resource Centre and other departments) and Cefas:

13. MCS's initial written contact with Defra was in January 2005. At this stage, MCS was mainly concerned whether the necessary EIA had been carried out, and formally requested a copy of the relevant EIA from Defra (after being told by the Port of Tyne that Defra could supply a copy)[17]. Defra sent MCS information relating to the licence, monitoring programme and work plan and explained why a full formal EIA was not

[16] See email from Robert Latimer to Sibylle Grohs, European Commission, dated 2 April 2009 (document 16, ADI).
[17] See email from Thomas Bell, MCS to Andrew Dixon, MCEU, Defra, dated 6 January 2005, para 1, contained in email exchange between Thomas Bell, MCS and Andrew Dixon, MCEU, Defra and Mike Smith, Defra, between 6 January 2005 and 7 January 2005 (document 18, ADI).

carried out[18], which did not wholly satisfy MCS's concerns about the lack of a full EIA and led to a number of further concerns regarding liability, funding, the scientific basis for the project (especially in relation to the dispersiveness of the site) and the extent to which alternative disposal methods were considered[19]. In relation to the background information that Defra did send to MCS, Defra, on the grounds of commercial confidentiality, refused to release much of the information that may have enabled MCS to make a judgment on whether the potential impacts of the project had been adequately considered, particularly documents relating to the contaminated sediment removed, the risk assessment framework, sampling and analysis specifications and disposal and remediation options, all of which are at the core of the questions MCS has been asking throughout[20]. Many of MCS's subsequent requests for information on the main issues of concern either received no or only a very limited response from Defra[21], necessitating further requests for information[22], until repeated requests were made between March and November 2007[23] and in October 2008[24] under the UK Freedom of Information Act 2000 ('FOI requests') both to Defra and to Cefas. Even then, and in spite of a statutory time limit of 20 days for a response to such a request, it took Defra and Cefas until December 2007 to send MCS the relevant information in relation to the first FOI request and until December 2008, in relation to the second.

14. Robert Latimer has been in constant contact with Defra and its agencies since the end of 2004, repeatedly raising the crucial issues in this case, for example in relation to the adequacy of the environmental assessment carried out, the scientific basis used, the

[18] See email from Mike Smith, Defra, to Thomas Bell, MCS dated 7 January 2009, at para 1, contained in email exchange between Thomas Bell, MCS and Andrew Dixon, MCEU, Defra and Mike Smith, Defra, between 6 January 2005 and 7 January 2005 (document 18, ADI).

[19] See letter from Thomas Bell, MCS to Mike Smith, MCEU, Defra, dated 11 January 2005 (document 19, ADI).

[20] See email from Mike Smith, Defra, to Thomas Bell, MCS dated 7 January 2009, at para 2, contained in email exchange between Thomas Bell, MCS and Andrew Dixon, MCEU, Defra and Mike Smith, Defra, between 6 January 2005 and 7 January 2005 (document 18, ADI) and letter from John Maslin, Defra, to Thomas Bell, MCS, dated 3 February 2005, paras 4 and 5 (document 20, ADI).

[21] See emails from Thomas Bell, MCS, to John Maslin, Defra, dated 7 October 2005 (document 21, ADI); from Andrew Dixon, Defra, to Thomas Bell, MCS, dated 14 November 2005 (document 22, ADI); from Thomas Bell, MCS, to Andrew Dixon, Defra, dated 14 November 2005;(document 23, ADI); and letters from Thomas Bell, MCS, to Andrew Dixon, MCEU, Defra, dated 4 September 2006 and 20 December 2006 (this letter in particular raises most of the important issues again) (documents 24 and 25, ADI).

[22] See for example letter from Andrew Dixon, MCEU, Defra to Thomas Bell, MCS, dated 2 November 2006, and Thomas Bell's response dated 20 December 2006; or letter from Dr Chris Vivian, CEFAS to Thomas Bell, MCS, undated (document history shows dated 12/01/07), entitled '*FEPA 1985 – Port of Tyne Authority Licence 31995/04/1 – Confined Disposal of Contaminated Dredged Material*' (documents25-27, ADI).

[23] See letters from Thomas Bell, MCS, to Geoff Bowles, MCEU, Defra, dated 15 March 2007, and to Kevin Jackson, Defra, dated 1 November 2007 (documents 28 and 31, ADI) and emails to Mike Waldock, Cefas, and Dr Chris Vivian, Cefas, both dated 15 March 2007 (documents 29 and 30, ADI).

[24] See letters from Thomas Bell, MCS, to Kevin Jackson, Defra, and to Records and Information Unit, Cefas, dated 29 October 2008 and to Kevin Jackson, Defra, dated 1 December 2008 (documents 33-35, ADI); and email response from Chris Vivian, CEFAS (document 36, ADI).

alternative options considered, the thickness and integrity of the cap, etc[25]. Although Defra and Cefas responded to many of Robert Latimer's letters, they did not generally do so to the satisfaction of Robert Latimer:

- An FOI request made to Defra by Robert Latimer on 18 February 2007[26] was never properly answered[27], sometimes refusing information[28], or saying that Defra was not required to explain data[29]; or Robert Latimer was asked to travel to inspect documents[30]. Indeed, on 25 November 2008, Robert Latimer received a letter from the Marine Fisheries Agency informing him that he would no longer receive answers to information requests on this issue because his requests were 'manifestly unreasonable'[31].
- Questions were only partly answered (this is generally evidenced throughout the attached documents[32]), often referring to additional reports still being expected and to be sent at a later stage[33].
- Often information given was misleading, confusing or contradictory in relation to information already received, for example in relation to compliance with licence conditions[34]; the dispersiveness of the site[35]; the consideration of environmental

[25] See list of Defra correspondence with Mr Latimer attached to Letter from Anna Sargeant, MFA to Mr Latimer, dated 25 November 2008 (document 53, ADI). See also Letter from Robert Latimer to Andrew Dixon, MCEU, Defra, dated 18 February 2007(document 46, ADI); email exchange between Robert Latimer and Rodney Anderson, MFD, Andrew Dixon, Defra and Michael Meekums, Defra, between 21 August 2006 and 30 August 2006 (document 39, ADI) and email exchange between Robert Latimer and Chris Vivian between 29 November 2006 and 6 February 2007 (document 45, ADI).

[26] See letter to Andrew Dixon, MCEU, Defra from Bob Latimer dated 18 February 2007 (document 46, ADI).

[27] See email exchange between Robert Latimer and Chris Vivian between 29 November 2006 and 6 February 2007; email exchange between Robert Latimer, Rodney Anderson, Defra, and Andrew Dixon, Defra between 19 February 2007 and 30 March 2007; email from Robert Latimer to Rodney Anderson, Defra, dated 16 April 2007; email exchange between Geoff Bowles, Marine & Fisheries Agency (MFA), Defra, Robert Latimer and Rodney Anderson, Defra between 27 April 2007 and 29 April 2007; email exchange between Geoff Bowles,MFA, Robert Latimer and Rodney Anderson, Defra between 1 May 2007 and 15 May 2007 (documents 45 and 49-52, ADI).

[28] See email exchange between Robert Latimer and Chris Vivian between 29 November 2006 and 6 February 2007, answers to questions 8 – 10 (document 45, ADI).

[29] See Letter from Michael Meekums, MCEU, Defra to Robert Latimer dated 12 December 2006 (document 43, ADI).

[30] Letter from Andy Dixon, MCEU, Defra, to Bob Latimer dated 12 April 2006, paragraph 2 (document 37, ADI).

[31] Letter from Anna Sargeant, MFA to Mr Latimer, dated 25 November 2008, attaching list of Defra correspondence with Mr Latimer, paras 6 – 9; (document 53, ADI).

[32] Throughout documents 37 – 53, ADI.

[33] E.g. in letter from Alexis Tregenza, Customer Contact Unit, Defra, to Robert Latimer dated 6 September 2006, para 4 (document 41, ADI); and letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 18 October 2006, para 4 (document 42, ADI).

[34] See email exchange between Robert Latimer and Rodney Anderson, MFD, Andrew Dixon, Defra and Michael Meekums, Defra, between 21 August 2006 and 30 August 2006: email of 21 August, points 6 and 11 – 30 (document 39, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 30 August 2006, point 6 (document 40, ADI) and letter to Andrew Dixon, MCEU, Defra from Bob Latimer dated 18 February 2007, points 5 and 15 (document 46, ADI).

[35] See email exchange between Robert Latimer and Rodney Anderson, MFD, Andrew Dixon, Defra and Michael Meekums, Defra, between 21 August 2006 and 30 August 2006: email of 21 August, points 10 and 11 ff. (document 39, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 30 August 2006, points 4, 9&10 (document 40, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 18 October 2006, Annex I, paras 25-26 ('*Choice of disposal Site for the CDM'*) (document 42, ADI); letter or email, undated, probably February 2007, from Dr Chris Vivian, Cefas to Mr Latimer referring to

impacts, alternative options and the need for an EIA in this or in any future case[36]; or the amount of capping material used on the site and the resulting thickness of the cap[37].

Environment Agency

15. Robert Latimer repeatedly contacted the Environment Agency, starting on 27 October 2004, raising the need for an EIA and asking the Environment Agency about its involvement in the licensing procedure[38]. The Environment Agency responded on 13 October 2006, explaining that both the dredging and subsequent disposal of contaminated sediment and capping materials did not fall within the Environment Agency's responsibilities or powers, but were subject to the Port of Tyne's and Defra's authority instead[39].

16. MCS contacted the Environment Agency on 26 January 2005 asking for information on the capping trial and was sent the monitoring protocol agreed with the Port of Tyne in response[40]. However, no response was received from the Environment Agency to two FOI requests submitted by MCS in relation to this matter in 2007 and 2008[41].

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email of 7 February 2007 from Robert Latimer to Dr Vivian, points 1-5 (document 44, ADI); and entire email exchange between Robert Latimer and Chris Vivian between 29 November 2006 and 6 February 2007 (document 45, ADI); letter from Bob Latimer to Andrew Dixon, MCEU, Defra, dated 18 February 2007, points 1 and12 (document 46, ADI); email from Lindsay Murray, Cefas, to Robert Latimer, dated 2 March 2007, para 8 (document 48, ADI).

[36] See letter from Andy Dixon, MCEU, Defra, to Bob Latimer dated 12 April 2006, para 5 (document 37, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 30 August 2006, second to last para (document 40, ADI), letter from Alexis Tregenza, Customer Contact Unit, Defra, to Robert Latimer dated 6 September 2006, para 2 (document 41, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 18 October 2006, para 2 (document 42, ADI); letter from Bob Latimer to Andrew Dixon, MCEU, Defra dated 18 February 2007, point 3 (see document 46, ADI); all of document summary compiled by Dr Chris Vivian on 2 March 2007 (according to electronic document history), entitled: *'Information for Mr. Latimer on Question 8 Dealing with the Issue of Alternative Disposal Options for Disposal of the Contaminated Sediment'* (document 47, ADI); and email from Lindsay Murray, Cefas, to Robert Latimer, dated 2 March 2007, para 6 (document 48, ADI).

[37] See for example, letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 17 August 2006, paras 3 and 4) (document 38, ADI); email exchange between Robert Latimer and Rodney Anderson, MFD, Andrew Dixon, Defra and Michael Meekums, Defra, between 21 August 2006 and 30 August 2006: email of 21 August, points 5c and 9&10 (document 39, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 30 August 2006, points 5 and 9&10 (document 40, ADI); letter from Alexis Tregenza, Customer Contact Unit, Defra, to Robert Latimer dated 6 September 2006, para 3 (document 41, ADI); letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 18 October 2006, para 4 and Annex I, paras 26 – 28 ('*Maintenance of Cap'*) (document 42, ADI); letter to Andrew Dixon, MCEU, Defra from Bob Latimer dated 18 February 2007, points 7 – 16 (document 46, ADI).

[38] See letter from Graeme Warren, Environment Agency, to Robert Latimer, dated 29 October 2004, para 1; email from Catherine Ruane, Environment Agency, to Robert Latimer, dated 4 September 2006 and letter from Dr J B Hogger, Environment Agency, to Robert Latimer, dated 13 October 2006 (documents 54 - 56, ADI)].

[39] See letter from Dr J B Hogger, Environment Agency, to Robert Latimer, dated 13 October 2006 (document 56, ADI).

[40] Fax from Dr J B Hogger, Environment Agency, to Thomas Bell, MCS, sent on 26 January 2005 (document 57, ADI).

[41] Letter from Thomas Bell, MCS, to Environment Agency dated 6 November 2007 (document 58, ADI) and letter from Thomas Bell, MCS, to Environment Agency dated 29 October 2008 (document 59, ADI).

17. No further information could be gathered and no further action could be taken by MCS or Robert Latimer with regard to the Environment Agency.

The Port of Tyne Authority

18. MCS requested a copy of the full environmental impact assessment carried out in relation to the trial capping project from the Port of Tyne Authority in January 2005[42] and was told verbally that this could be obtained from Defra[43] (see paragraph 13 above). On 6 November 2007, MCS asked for information on the trial capping, and was told in response that the trial had been undertaken with the aim of establishing the best practicable environmental option and had been '*subject to rigorous annual monitoring in 2006 and in the summer of [*2007]'[44], but that the final monitoring report was still outstanding and a stakeholder meeting would be arranged to discuss the results at a later date. Thomas Bell was further referred to the Marine and Fisheries Agency for further enquires[45].

Contaminated Marine Sediments Steering Group.

19. In early 2007, MCS joined the Contaminated Marine Sediments Steering Group, a stakeholder group set up

    'to assist and facilitate the development of the UK strategy for handling and managing contaminated material to be dredged from UK marine waters, and to support and advise on the practical implementation of the strategy[46]'.

20. The group's work was to include the establishment of '*best practice for the current and future disposal and treatment options for contaminated marine sediment both in the UK and internationally'*, and a review of '*current methods of treating contaminated marine sediment in both a UK and international context ... together with a review of new technologies, their practicality and cost'[47].*

[42] Email from Thomas Bell, MCS, to Keith Wilson, Port of Tyne Authority, dated 6 January 2005 (document 60, ADI).

[43] See email from Thomas Bell, MCS to Andrew Dixon, MCEU, Defra, dated 6 January 2005, para 1, contained in email exchange between Thomas Bell, MCS and Andrew Dixon, MCEU, Defra and Mike Smith, Defra, between 6 January 2005 and 7 January 2005 (document 18, ADI).

[44] Letter from Thomas Bell, MCS, to Brian Reeve, Port of Tyne Authority, dated 6 November 2007 (document 61, ADI) and letter from Brian Reeve, Port of Tyne, to Thomas Bell, MCS, dated 8 November 2007, paras 2 and 3 (document 62, ADI).

[45] Letter from Brian Reeve, Port of Tyne, to Thomas Bell, MCS, dated 8 November 2007, paras 4 and 5(document 62, ADI.

[46] http://www.defra.gov.uk/marine/sediment/background.htm.

[47] http://www.defra.gov.uk/marine/sediment/tasks.htm; description of Task 5.

21. As the Port of Tyne capping trial is directly relevant to the work of this Steering Group, MCS tried to suggest several times that the trial should be examined by the Group[48], including at a meeting of the group in March 2007. However, MCS got no response to its suggestions and was not invited to any further meetings.

Natural England

22. In November 2007, MCS also contacted Natural England, to obtain copies of any statutory advice or other written information prepared by Natural England in relation to the Port of Tyne capping trial, but received no written response from Natural England[49]. A telephone conversation with the presiding officer for Natural England gave MCS to understand that the agency believed that the operation was licensed under tightly defined parameters as a trial and that these parameters were not being upheld. The officer also indicated that Defra's approach in simply allowing events to run their course in a fashion bearing little relation to the original licence conditions was not acceptable to Natural England and the agency would not countenance another licence application under these terms. The officer also said it was debatable whether maintenance of the cap was technically feasible and that there was no willingness on the part of Defra to enforce the licence. He also mentioned that Natural England remained to be convinced, technically and legally, that the course of action in question was the right one and that Natural England would have liked to see a new licence agreed to put the trial back on track.

North Eastern Sea Fisheries Committee

23. MCS was also in contact with the North Eastern Sea Fisheries Committee 57, which has always objected to the Port of Tyne capping trial[50] and has shared many of the Complainants' fundamental concerns, for example in relation to the consideration of a best practicable environmental option[51], the need for a full EIA[52], post-operational monitoring[53] and liability[54], the risk of environmental damage[55] and cap integrity[56].

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[48] Email exchange between Thomas Bell, MCS, Andrew Greaves and Neil Pattinson, Defra, between 13 March 2007 and 22 August 2007 (document 63, ADI).

[49] See emails from Thomas Bell, MCS, to Mike Quigley, Natural England, dated 5 November 2007 and 23 November 2007 (documents 64 and 65, ADI).

[50] Letters from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 May 2004 at para 3; 14 June 2004, last para; and 10 September 2004, para 2, (documents 67-69, ADI); email from Thomas Bell, MCS to David McCandless dated 30 October 2008 (document 70, ADI); email from David McCandless, North Eastern Sea Fisheries Committee, to Thomas Bell, MCS, dated 30 October 2008 (document 71, ADI).

[51] Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 11 March 2004, para 2, bullet point 1 (document 66, ADI).

[52] Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 11 March 2004, para 2, bullet point 2 (document 66, ADI).

[53] Ibid., para 2, bullet point 3 (document 66, ADI); letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 June 2004, para 5 (document 68, ADI).

24. However, the North Sea Fisheries Committee's concerns have not been addressed by Defra or the other relevant authorities.

Conclusion

25. The attached documents show that the Complainants exhausted the administrative and legal avenues open to them by being in constant contact with the authorities, making repeated requests for information, exploiting their rights to access environmental information, and taking the case to the European Commission by making a formal complaint and complaining to the OSPAR Commission.

26. However, the attached documents also show that even though the authorities did communicate with the Complainants, they frequently did not answer letters (even requests for information under the UK Freedom of Information Act), did not fully answer questions and did not provide all relevant information in relation to the crucial issues being raised.

27. Without that information the Complainants could not possibly compile a legally sound case, whether to bring an action for judicial review proceedings or bring a private prosecution. It is very unlikely that they would have received a judge's permission to bring an action for judicial review, or been able even to come close to meeting the criminal standard of proof (beyond reasonable doubt) in a private prosecution.

28. Even had they received permission to bring judicial review proceedings, the lack of evidence caused by not being provided with sufficient information from the authorities meant that the risk of losing a potential case and having to bear the defendants' costs was not a risk that the Complainants' could rationally incur.

29. Even now, where more evidence has been made available by the authorities, providing the basis for a stronger case, it is still not possible for the Complainants to bring an action for judicial review for the following reasons (all argued in the Communication):

    - The relevant time limits for bringing an action for judicial review expired a long time ago. Under English law, an action for judicial review has to be brought 'promptly'

[54] Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 11 March 2004, para 2, bullet point 4 (document 66, ADI).
[55] Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 May 2004, para 3 , bullet points 1-2 and last para (document 67, ADI); and letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 June 2004, para 4 (document 68, ADI).
[56] Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 May 2004, para 3, bullet point 4 (document 67, ADI).

and at the latest within three months of the time when a claim first arose (this being the time of the decision claimed against, not of the complainant's knowledge), which in the Port of Tyne case would probably have been in 2005/06. The fact that evidence was only made available years later is irrelevant in this context (see pp.13, 14, 49 – 53 of the Communication).

- Most of the issues at stake, in particular in relation to questions of the adequacy of the environmental impact assessment, the relevant risk assessment and the consideration of the alternative disposal methods and the best practicable environmental option, as well as other issues surrounding licence breaches, the dispersiveness of the site, cap thickness and integrity and the threat of environmental damage, relate directly to the facts/merits of the case and do not fall within the main 'procedural' grounds in relation to which judicial review is permitted in the UK (see pp. 10-11, 23-29 of the Communication).
- Even the responses the OSPAR Commission and the European Commission have been able to give the Complainants have been hampered by the fact that it has not been possible to look into the 'merits' of this case, i.e. the substantive reasons for which decisions were made by the competent authorities.

30. Therefore, the Port of Tyne case is a very clear demonstration of the fact that English law does not currently permit the public access to justice in accordance with Article 9 of the Aarhus Convention. In fact, the case goes even further and shows that by failing to provide the Complainants with any remedies or any clear mechanisms for review, the UK is also in breach of Article 3(1) of the Aarhus Convention because it has not taken the

    '*necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the ... access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention'*.

31. Even now, the potential costs of a judicial review action are too high for the Complainants to rationally incur, even more so given the risk that they may have to bear the defendants' (and possibly an interested party's) costs should they lose. The prospect of a protective costs order does not help in this context, as it would not only be uncertain whether one would be made in the first place, but as the caps generally imposed on costs in protective costs orders (e.g. £10,000) would be too high for the Complainants to be able to pay, and because the costs of the judicial review proceedings themselves (as well as potential interim proceedings for a protective costs order) are already prohibitive (see pp. 11-12; 31-43, as well as Annex IV, of the Communication,).

32. Therefore, even now, with more evidence being available to the Complainants showing a strong potential case against the Port of Tyne Authority and/or Defra, it is impossible for the Complainants to gain access to justice in this case.

Appendix II

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)

Answers to question 2
of letter of 16 January 2009

2) Have any of the assertions made in the communication been tested in court with reference to the relevant provisions of the Aarhus Convention?

1. As far as the Claimants (as defined in the Communication) are aware, none of the assertions made with reference to the relevant provisions of the Aarhus Convention in relation to Claims 1, 3 and 4 of the Communication have been tested in court.

2. However, the Aarhus Convention has been either mentioned or, to some extent, considered in relation to some of the costs issues discussed in relation to Claim 2 of the Communication in a few recent English and Irish cases, although none of the judges' statements in the English law cases are binding in this regard, having all been obiter dicta (i.e. not relevant to the actual decisions in the cases). The cases in question, as well as references made by Advocate General Kokott in her recent opinion on a relevant Irish case, are summarised below.

3. Paper copies of the case reports are not attached, as they are public documents and we do not wish to swamp the Committee with more paper. However, we have included links to the relevant web-sites where the case reports can be found, and we have attached a copy of the Court of Appeal's decision in *Morgan v Hinton*[57] because of its central importance to the arguments below. In addition, we would of course be happy to supply copies of any cases if needed.

4. It should be noted, as the Aarhus Compliance Committee is aware, that the recent UK case of *Morgan v Hinton*[58] is the basis of another complaint to the Committee against the UK in relation to excessive costs (ACCC/C/2008/23), which is to be discussed by the Aarhus Convention Compliance Committee in its twenty-fourth meeting (30 June – 3 July 2009) on 1 July 2009. On the same day, the Committee will also be discussing

[57] See footnote 2.

[58] See footnote 2.

another case against the UK, which partly concerns the issue of costs (ACCC/C/2008/27). As already mentioned in the body of our letter above, we would ask the Committee to take the following comments into account when discussing cases ACCC/C/2008/23 and ACCC/C/2008/27 on 1 July 2009. Our comments on the applicability of the Aarhus Convention in the UK as a matter of international and EU law are particularly relevant and important in this regard, and it should be noted that they apply generally to all the provisions of the Aarhus Convention, not just to Article 9(4) relating to prohibitive costs, and therefore apply equally to Claims 1, 3 and 4 of the Communication.

UK cases that refer to the Aarhus Convention

1) Morgan v Hinton

5. Since the submission of our initial Communication in December 2008, there has been an appeal on an interim matter in *Morgan v Hinton*, in which the application of the Aarhus Convention was discussed in the Court of Appeal. It should be noted that the Court of Appeal decided that it was

   '*unnecessary ... to consider the application of the Convention in further detail, because there [was] in [the court's] view an insuperable objection to the claimant's case in this respect. That is that the point was not mentioned before the judge*[59].'

   Therefore, all of Carnwath LJ's statements in relation to the Aarhus Convention must be regarded as '*obiter dicta*' and are therefore not binding under English law. However, unless there is a change in statute law, any future court will take these statements made by a Court of Appeal judge into account as being a persuasive statement of the law in this regard.

6. In this context, it is important to discuss some of the main conclusions of Carnwath LJ:

Status of the Aarhus Convention in domestic law

7. In his conclusions on the applicability of the Aarhus Convention, Carnwath LJ states:

   'Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be

[59] *'Morgan v Hinton'*, see footnote 2, at para 49, see also para 51. The court's decision was made on arguments that '*the judge's order was flawed, even on conventional principles*'; see para 52.

considered. ...With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion[60]*.'*

8. Earlier on in the judgment, Carnwath LJ also quotes from Defra's comments to the Aarhus Compliance Committee in relation to Case ACCC/C/2008/23, which state that:

'The rights and obligations created by international treaties have no effect in UK domestic law unless legislation is in force to give effect to them, i.e. they have been "incorporated". The provisions of the Aarhus Convention cannot therefore be said to apply directly in English law to any particular procedure or remedy[61]*.'*

9. The letter (as quoted by Carnwath LJ) further says:

'There is, however, in English law a presumption that legislation is to be construed so as to avoid a conflict with international law, which operates where legislation which is intended to bring the treaty into effects is ambiguous. The presumption must be that Parliament would not have intended to act in breach of international obligations.

In the kind of case in question, ... the rules which govern civil court procedure in England and Wales (the Civil Procedure Rules 1998 or "CPR"), as laid down in secondary legislation under powers in the Civil Procedure Act 1997, are therefore, insofar as they are ambiguous/discretionary rather than clearly prescriptive, to be construed so as to be consistent with article 9(3) and (4) of the Convention[62]*.'*

10. Because the UK is a 'dualist' country as regards international law, it is not surprising that an English court should make these points and claim that an international convention has no direct effect in the UK and that in this case, the English costs rules prevail. However, except as regards the statement that '*the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs*' (see paragraph 7 above), we disagree with Defra's and the Court of Appeal's interpretation of the law relating to the applicability of the provisions of the Aarhus Convention in the UK.

11. Firstly, since the relevant costs rules are clearly ambiguous and discretionary (see arguments in relation to Claim 2 in the Communication), even under the very limited rules of construction referred to by Defra (see paragraph 9 above), the courts should be

[60] Ibid. at para 47(ii) and (iii).

[61] Letter from Åsa Sjöström, Defra, to Jeremy Wates, Secretary to the Aarhus Convention, dated 30 October 2008 referring to case ACCC/C/2008/23, para answering to question 1; and and per Carnwath LJ at para 25 of *Morgan v Hinton.*

[62] Ibid., in addition see also para 44 of *Morgan v Hinton.*

construing the English costs rules '*so as to be consistent*' with articles 9(3) and (4) of the Aarhus Convention. This is clearly not happening, as confirmed by Advocate General Kokott in relation to equivalent Irish laws[63] and by Lord Justice Carnwath in his conclusion in relation to the directives incorporating parts of the Aarhus Convention into EU law (see paragraph 7 above).

12. Secondly, it is extremely misleading of the UK Government to argue that the Aarhus Convention cannot be applied in domestic law by judges because it has not been 'incorporated'. In saying this, the UK is effectively hiding its own non-compliance with international obligations and with EU law behind the asserted inability of its domestic courts to go beyond their own domestic (non-compliant) law.

13. As already explained in the Communication, section 2(1) of the European Communities Act 1972 provides for the direct applicability of EU law in the UK, which means that all EU law has to be given legal effect and must be enforced without further enactment[64]. This principle has been confirmed by the European Court of Justice in decisions regarding the supremacy of EU law[65]. In this context it should be noted that the direct applicability of EU law in the UK under section 2(1) applies to all types of EU legislation, including regulations, directives, treaty provisions and case law, and also international conventions entered into by the Community, such as the Aarhus Convention, and not only to EU directives implementing international law provisions, as is argued by Defra and the Court of Appeal.

14. Had it been only the UK and other EU Member States who had ratified the Aarhus Convention, and not the European Union itself, then the UK's dualist doctrine may arguably have applied (but still subject to the rules of Articles 18, 26, 27 and 31 of the Vienna Convention on the Law of Treaties 1969[66]). However, the EU also adopted the Aarhus Convention, which means that the Aarhus Convention forms part of EU law - and therefore also of English law, as is shown in the following paragraphs.

15. Under EU law, Article 300(7), TEC (formerly Article 228(7) of the EC Treaty) makes international agreements entered into by the Community binding on Member States. Article 300(7) effectively makes such international agreements part of EU law. As the Community has entered into the Aarhus Convention, this means it is now part of EU

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[63] *Commission v Ireland* [2009] EUECJ C-427/07_O; http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2009/C42707_O.html&query=aarhus&method=boolean

[64] As confirmed by the ECJ judgments in the two *Factortame* cases: *R v Secretary of State for Transport, ex p Factortame* [1996] ECR I-1029 and *R v Secretary of State for Transport ex p Factortame Ltd (No. 2)* [1990]ECR I-2433.

[65] See para 4, Annex III of the Communication.

[66] See also para 24 below in relation to the UK's obligations under the Vienna Convention on the Law of Treaties 1969, and the Aarhus Compliance Committee's own comments in ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, paras 41 and 42.

law. It is binding and Member States have to comply with it. This is confirmed by settled case law, according to which '*the provisions of such an [international] agreement form an integral part of the Community legal order once the agreement has entered into force*[67]'.

In *Kupferberg*[68], the European Court of Justice explained this point in detail:

'*The Treaty establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the Treaty. According to Article 228(2)*[69] *these agreements are binding on the institutions of the Community and on Member States.* ***Consequently it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements****. The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted... either by the Community institutions or by the Member States. ... In ensuring respect for commitments arising from an agreement concluded by the Community institutions* ***the Member States fulfil an obligation... above all in relation to the Community which has assumed responsibility for the due performance of the agreement***[70]***. That is why the provisions of such an agreement ... form an integral part of the Community legal system****. ... It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that state assigns to international agreements concluded by it...*[71]' (emphasis added).

16. Because the Aarhus Convention relates to environmental protection, it falls within the sphere of joint Community/Member State competence[72], which makes the Aarhus Convention a 'mixed' agreement. As already referred to in Annex III of the Communication, mixed agreements have the same status in Community law as agreements which are subject to Community competence only, as long as their

[67] Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39 (*'Opel'),* paras 49 and 101; see also Case C-181/73 *Haegeman v Belgium* [1974] ECR 449 (*'Haegeman'),* paras 3-5; Case 12/86 *Meryem Demirel v Stadt Schwaebisch Gmuend* [1987] ECR 3719 (*'Demirel'),* para 7.

[68] Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641 (*'Kufperberg').*

[69] This should read Article 228(7), which is now Article 300(7).

[70] See also *Demirel*, para 11; and Case C 239/03 *Commission v France* [2004] ECR I-9325, para 26; Case-13/00 *Commission v Ireland* [2002] ECR I-2943, para 15.

[71] *Kupferberg* (see footnote [69] above), at paras 11-14.

[72] See *Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters:* Preamble, paras (5) – (7) refer to the shared competence of the Community and its Member States; and see also Annex, para 1)'European Community declaration of competence under the Treaty', and in particular under Article 175(1) of the Treaty, which relates to environmental protection.

provisions are within the scope of Community competence[73]. Therefore they also form an integral part of EU law[74] and Member States are obliged to comply with them. Indeed, Carnwath LJ effectively confirms that the Aarhus Convention is part of EU law and enforceable as such against the UK in *Morgan v Hinton*, stating that

'*[r]atification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community Competence[75].*'

17. It is clear in this respect that the general obligation on Member States to comply with international treaties which have been entered into by the EU is strong enough anyway to show that the Aarhus Convention applies in the UK as a part of EU law. The fact that there is no specific EU legal instrument implementing Article 9(3) (or Article 9(4) as applied only to Article 9(3)) is not relevant in this context. In fact, in *Commission v France*[76] the European Court of Justice examined whether Articles 4(1) and 8 of the Barcelona Convention[77] and Article 6(1) and (3) of the Athens Protocol to the Convention[78], which had not directly been the subject of EU legislation, fell within the scope of Community law[79]. After concluding that the Convention and the Protocol were mixed agreements which have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence[80], the Court explained:

'*In the present case, the provisions of the Convention and the Protocol without doubt cover a field which falls in large measure within Community competence... Environmental protection, which is the subject-matter of the Convention and the Protocol, is in very large measure regulated by Community legislation, including with regard to the protection of waters against pollution...Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments... The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question. It follows from the foregoing that the application of Articles 4(1) and 8 of the Convention and Article 6(10) and (3) of the Protocol to*

[73] See Case 12/86 *Demirel* [1987] ECR 3719, para 9; Case-13/00 *Commission v Ireland* [2002] ECR I-2943, paragraph 14; Case C 239/03 *Commission v France* [2004] ECR I-9325, para 25.

[74] See Case C-181/73 *Haegeman v Belgium* [1974] ECR 449, para 5; Case 12/86 *Demirel* [1987] ECR 3719, para 7; Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39, paras 101-102.

[75] Ibid. at para 22.

[76] Case 239/03, see footnote 74 above.

[77] The Convention for the protection of the Mediterranean Sea against pollution 1976.

[78] The Protocol for the protection of the Mediterranean Sea against pollution from land-based sources 1980.

[79]Case C 239/03 (see footnote 74 above), at para 22 and 23.

[80] Ibid. at paras 24 and 25.

discharges of fresh water and alluvia into a saltwater marsh, those discharges not having been the subject of specific Community legislation, falls within the Community framework since those articles are in mixed agreements concluded by the Community and its member States and concern a field in large measure covered by Community law[81]*.'*

18. *Commission v France* shows that even provisions of an international agreement that have not been subject to specific EU legal instruments are still part of EU law, as long as they are within the scope of Community competence - and must therefore be implemented in and complied with by Member States. In relation to Article 9(3) (and 9(4) as applied to Article 9(3)) of the Aarhus Convention there is no question as to whether they are within the scope of Community competence. As witnessed by the Council's decision on the conclusion of the Aarhus Treaty[82], they clearly are. Indeed, in 2003 the Commission published a proposal for a Directive relating to Article 9(3)[83], proving that Article 9(3) is definitely within Community competence. Moreover, in the absence of this proposal being passed into Community law, the Community expressly made its Member States responsible for the performance of Article 9(3) until the Community adopts its own measures in this field[84] in order to ensure that the Community can meet its international obligations. In addition, Article 13(1) of the Environmental Liability Directive[85] provides for '*access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority'*. This is a clear confirmation, and indeed implementation, of access to justice rights under Article 9(3) of the Aarhus Convention, confirming that Article 9(3) is within the scope of Community competence and part of EU law.

19. In this context it should be noted that the specific provisions of an international agreement are held to be directly applicable in the internal legal order of Member States:

'when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'[86].

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[81] Ibid. at paras 27-31.

[82] See footnote 73 above.

[83] See Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM 2003/624 final).

[84] Note that the emphasis is on responsibility for the performance of obligations. This is not a statement saying that Member States have exclusive competence in relation to Article 9(3), which of course is completely impossible anyway, given that shared competence is clearly established and the Commission has already proposed a Directive in relation to Article 9(3) anyway. This case is therefore quite different from cases where parts of international agreements are subject to Member State competence only (e.g. Case C-459/03 *Commission v Ireland* [2006] ECR I-4635*).*

[85] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

[86] *Demirel*, para 14, see also Case C-213/03, *Syndicat professionnel coordination des pecheurs de l'etang de Berre et de la region v Electricite de France (EDF)*, at paras 39-41, and *Commission v France*, at para 78.

The rules of the Aarhus Convention regarding the ban on prohibitively expensive procedures, the requirement of fairness and access to administrative or judicial review procedures in Article 9 are clear, precise and not subject to the adoption of subsequent measures. Indeed, the Aarhus Compliance Committee itself has stated that '*[i]t is quite likely that some provisions of the Aarhus Convention ... have such properties as to be directly applicable in the EU member States'*, and that in *'such a case the provision of the Aarhus Convention must be applied by national courts and administrative authorities in the EU member States'*[87]. The Committee also concludes that:

'*although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in article 3, paragraph 1*[88]*'*.

20. In addition, the principle effectiveness (or effective judicial protection) applies in this context. Effective judicial protection is a principle of EU law[89]. It ensures that national legal procedure cannot make it impossible in practice to exercise a right under EU law (which national courts have a duty to protect) and it obliges national courts to implement relevant rules in a way that ensures effective judicial protection of an individual's rights under Community law[90]. In relation to the Communication, the principle of effectiveness means that national legal procedure cannot prevent members of the public from exercising their rights under Article 9(3) and 9(4) of the Aarhus Convention. However, that is exactly what is happening in the UK, not only in relation to the costs issues, but in relation to all four claims set out in the Communication.

21. Member States are also subject to the principle of co-operation between Member States and Community institutions under Article 10, TEC. Article 10 obliges Member States to take all appropriate measures to fulfil their obligations resulting from action taken by the institutions of the Community (inter alia). This is confirmed by settled case law, according to which the principle of co-operation, flowing from the requirement of unity in the international representation of the Community, also applies to the fulfilment of treaty obligations[91].

[87] ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 16.

[88] Ibid., at para 43.

[89] See Case C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271, para 37.

[90] Ibid., paras 43 and 44, see also Case 33/76 *Rewe* [1976] ECR 1989, para 5 and 6; Case 45/76 *Comet BV v Produktschapvoor Siergewassen* [1976] ECR 2043,paras 13 and 16; Case C-78/98 *Preston v Wolverhampton Healthcare Trust* [2000] ECR I-3201, para 31.

[91] See Case 22/70 *Commission v Council* [1971] ECR 263, para 21 and 90; Ruling 1/78 [1978] ECR 2151, paras 34 -36; *Opinion 2/91* [1993] ECR I-1061, para 36; *Opinion 1/94* [1994] ECR I-5267, paras 108-109; *Opinion 2/00* [2001] ECR I-9713, and confirmed in *Kupferberg*, para 13. Moreover, Member States are under a duty under Article 11(2), TEU to '*support the Union's external ... policy actively and unreservedly in a spirit of loyalty and mutual solidarity'*.

22. In relation to English law, Article 2(1) of the UK European Communities Act 1972 ensures that all EU law is directly applicable in the UK:

'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly: and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

23. In addition, section 1(2) and 1(4) of the UK European Communities Act 1972 together ensure that the EU Treaty and case law set out above is properly applied by including international treaties entered into by the European Community in the definition of '*Community Treaties'* (or '*Treaties')* as covered under section 2(1) of the Act (see above). No additional legislation is necessary. Section 1(3) stipulates that any additional treaties entered into **by the UK** can only become part of the '*Treaties'* through the introduction of specific legislation (an Order in Council), but this does not apply to '*any other treaty entered into* ***by any of the Communities****, with or without any of the member States'* under section 1(2)[92].

24. Lastly, the UK is also subject to international obligations under Articles 18, 26, 27 and 31 of the Vienna Convention on the Law of Treaties 1969. Article 27 provides that a State may not invoke its internal law as justification for failure to perform a treaty. The Aarhus Convention Compliance Committee itself has pointed this out and has further stated that all branches of government, including the judiciary, '*should make an effort to bring about compliance with an international agreement ... the judiciary might have to carefully analyse its standards in the context of a Party's international obligation, and apply them accordingly'*[93].

25. Therefore, we do not agree with Defra's or the Court of Appeal's assertions that the principles of the Aarhus Convention '*are at most a matter to which the court may have regard in exercising its discretion'* (see above) or the distinction made between rules which are reflected in EU directives, in relation to which the Court of Appeal has stated that implementation in the UK may not be adequate and a rule change may be needed (see above) and provisions of the Aarhus Convention which are not subject to specific EU legislation where the Court of Appeal says that the traditional English costs rules remain effective. In our opinion, the Aarhus Convention is directly applicable in UK

[92] European Communities Act 1972, Section 1(2), last sentence.

[93] ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, paras 41 and 42.

courts, which are obliged to give effect to its provisions (including Article 9(3) and (4)) on access to justice and costs, because the Aarhus Convention is an integral part of EU law, which binds Member States. This is further supported by the other fundamental rules and principles of EU law set out above, for example the principle of co-operation and the principle of effectiveness, as well as by international rules on the application of Treaties.

Reasonable costs in judicial proceedings and full costs of proceedings

26. In his conclusions on the Aarhus Convention, EU law and costs (including protective costs orders), Carnwath LJ concludes that the '*requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders*'[94].

27. We welcome this conclusion, which supports the claims made in the Communication.

28. In addition, Carnwath LJ concludes, at least in relation to the existing EU instruments implementing principles of the Aarhus Convention (as already mentioned above), that *'the court's discretion* [in relation to costs] *may not be regarded as adequate implementation of the rule against prohibitive costs... [s]ome more specific modification of the rules may need to be considered*[95]*'*.

29. If our arguments above on the direct applicability of the Aarhus Convention in English law are correct, then this conclusion will necessarily also apply to the entirety of Article 9(3) and 9(4), even where there is no separate EU implementing legislation. It will also mean that the Court of Appeal has effectively confirmed that the arguments made in the Communication as regards the application of costs rules in English courts are correct and that current English jurisprudence in this regard is in breach of Articles 9(3) and 9(4) of the Aarhus Convention.

No difference between environmental cases and other public interest issues

30. Carnwath LJ also concludes that there is no difference between environmental and other public interest cases in the English jurisprudence relating to protective costs orders, although the principles are to be applied '"*flexibly*"'[96], and that *'[f]urther development or refinement is a matter for legislation or the Rules Committee*'[97].

[94] At para 47(i).
[95] At para 47(ii).
[96] At para 47(iv).
[97] Ibid.

31. In our opinion, Carnwath LJ's conclusion is correct in so far as it reflects the current jurisprudence of the courts. However, we assert that the jurisprudence of the courts itself is already in breach of the Aarhus Convention and therefore EU law and that the courts could and should apply a different costs rule, ideally one similar to that used in the USA, as discussed in the Communication[98]. However, new legislation or costs rules would also remedy this problem (see general arguments in the Communication).

The Jackson Review

32. Carnwath LJ suggests that a general civil litigation costs review currently being carried out in England by Lord Justice Jackson should also consider '*the Aarhus principles in the context of the system of costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee*[99]'.

33. The Jackson Review is an examination of all civil litigation costs, not just costs in environmental cases. Lord Justice Jackson recently published his preliminary findings, which we have summarised, where relevant, in Appendix IV. The Jackson Review presents a good opportunity to review the costs rule as applied in environmental cases, and we have sent Lord Justice Jackson our comments in this regard. What we think would be particularly useful, would be for the Jackson review to be able to take account of the views of the Aarhus Convention Compliance Committee in relation to the application of the Aarhus Convention as regards the rules on costs in environmental cases (see also Appendix IV).

The variety and lack of coherence of jurisdictional routes available to potential litigants

34. In his final concluding comment, Carnwath LJ also states:

    'Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable and timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives'[100].

35. We welcome these statements as supportive of the arguments made in the Communication in relation to Claims 1, 3 and 4.

[98] At paras 141-143.

[99] At para 47(v).

[100] At para 47(vi).

36. In this context, Carnwath LJ also states earlier on that he regards the Aarhus Convention as '*capable of applying to private nuisance proceedings*[101]'. We agree with and welcome this statement, as it shows that the English courts accept that Article 9(3) can be applied against private individuals, not just public authorities.

2) Other UK cases which have made reference to the Aarhus Convention

37. There are a number of English cases which make a reference to the Aarhus Convention:

- *R (Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp (Rev 1)*[102]
- *R (Compton) v Wiltshire Primary Care Trust*[103]
- *Davey v Aylesbury Vale District Council*[104]
- *R (England) v London Borough of Tower Hamlets & Ors*[105]
- *R (Burkett) v London Borough of Hammersmith & Fulham*[106].

38. However, none of these judgements actually apply the Aarhus Convention to the case in question. Most of the references to the Aarhus Convention are mere mentions that there are concerns that the current approach of the courts to costs issues may not be compliant with the Convention or that the Aarhus Convention '*may also be relevant*'[107], as well as references to the various studies and reports that have been published in this field[108].

[101] At para 44.
[102] [2008] EWCA Civ 1209; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2008/1209.html&query=aarhus&method=boolean.
[103] [2008] EWCA Civ 749; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2008/749.html&query=aarhus&method=boolean.
[104] [2007] EWCA Civ 1166; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2007/1166.html&query=aarhus&method=boolean.
[105] [2006] EWCA Civ 1742; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/1742.html&query=aarhus&method=boolean.
[106] [2004] EWCA Civ 1342; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2004/1342.html&query=aarhus&method=boolean.
[107] *England*, at para 15.
[108] See *Buglife* at para 16 and 24, *Compton* at para 19 and 20, *Davey* at paras 17 and 18 (adding Article 9 of the Aarhus Convention as a source of policy and law to be considered and referring to the Public Participation Directive 2003/35/EC, Art 3.7, but not discussing these points any further); *England* at para 15, *Burkett*, Addendum paras 74-76.

Relevant non-UK cases

1) Commission v Ireland[109]

39. In an opinion delivered on 15 January 2009, Advocate General Kokott discussed the application of the Aarhus Convention in a complaint by the Commission against Ireland for, inter alia, not transposing the access to justice provisions of Directive 2003/35/EC, which are based on Article 9 of the Aarhus Convention. The Advocate General's recommendation was that the Commission's complaint in this context should fail because Ireland had transposed the relevant requirements - it just had not done so adequately. This was not argued by the Commission, as the Commission reserved the right to examine the quality of transposition in subsequent proceedings[110].

40. Crucially, however, Advocate General Kokott went on nonetheless to discuss the issue of legal costs and the 'loser pays' rule, which also applies in Ireland, and stated categorically that *'[t]he ban on prohibitively expensive procedures therefore extends to all legal costs incurred by the parties involved*'[111].

41. In this context she also stated that Article 3(8) cannot be used to argue that the 'loser pays' rule is a reasonable cost in judicial proceedings in relation to parties exercising their rights under the Aarhus Convention, as the second part of Article 3(8) has to be read in conjunction with the first part and solely serves to make it clear '*that the award of costs in respect of judicial proceedings is not to be regarded as a penalty, persecution or harassment*[112]*'*.

42. In relation to the 'loser pays' rule she adds that the possibility of limiting the risk of prohibitive costs through a discretion not to apply the 'loser pays' rule, is, in her view, only sufficient to show that an implementing measure exists[113], but it does not amount to proper implementation. She then goes on to say:

'I wish to make the supplementary observation that the Commission's wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive

[109] See footnote 64 above.
[110] At para 44.
[111] At para 93.
[112] At para 90.
[113] At paras 97-98.

since such a practice can be changed at any time. However, this objection already concerns the quality of the implementing measure and is therefore inadmissible[114]'.

43. This statement reflects settled Community case law to the effect that:

'*the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty[115]'.*

44. Basically, this is an application of the principle of legal certainty according to which the law, including national law that is regarded as implementing EU law, should be clear, precise and binding[116].

45. These points clearly confirm the argument made in the Communication stating that it is the '*uncertainty created by the courts' wide discretionary powers and the ways the courts' jurisprudence has applied them, which means that the UK is in breach of the Aarhus Convention[117]*', and therefore, as already set out above, also of EU law.

2) *Kavanagh v MJELR & Ors[118]* and *Sweetnam v An Bord Pleanala & Ors[119]*

46. In both these 2007 judgments of the High Court of Ireland in relation to Directive 2003/35/EC, the judges were of the opinion that the costs of access to justice in Irish Courts were not unreasonable or prohibitive.

47. In *Sweetnam* Mr Justice Clarke said that the requirement that costs should not be prohibitive in Directive 2003/35/EC did not extend to '*cover the exposure of a party to reasonable costs in judicial proceedings'* and that he did not believe that there were '*substantial grounds for the contention that the level of the exposure which a party might have to*

[114] At para 99.

[115] See Case C-197/96 *Commission v France* [1997] ECR I 1489, para 14; Case C-358/98 *Commission v* Italy [2000] ECR I 1244, para 17; Case C-145/99 *Commission v* Italy [2002] ECR I'2335, para 30; and Case C-33/03 *Commission v United Kingdom* [2005] ECR I-1865, at para 25 – refers to '*Community law*', not just the Treaty.

[116] For example, Case C-197/96 *Commission v France*, para 15 – see footnote above.

[117] See para 104 of the Communication.

[118] [2007] IEHC 389; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IEHC/2007/H389.html&query=aarhus&method=boolean.

[119] [2007] IEHC 153; http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IEHC/2007/H153.html&query=aarhus&method=boolean.

costs in the Irish judicial review context is "unreasonable" so as to be in breach of Article 9 para. 3 of the Aarhus Convention[120]*'.*

48. In *Kavanagh,* Mr Justice T.C. Smyth stated that

'*the Directive's requirement that the proceedings to which it applies should not be "prohibitively expensive" does not extend to an unsuccessful litigant's exposure to legal costs. Altogether from the absence of proof that these proceedings were "prohibitively expensive' it seems to me that if the Directive's terms were to be applied literally in the abstract and devoid of context then every litigant no matter how vexatious should have carte blanche to engage without risk of basic responsibility – in short a crank's charter. In this regard I attach considerable significance to the provisions of Article 3(8) of the Convention which provides as follows ... In my opinion the Convention is concerned to ensure that the "cost of entry" upon litigation, i.e. court fees are not prohibitively expensive. Furthermore the mechanism for providing for taxation of costs is a form of assurance that costs will not be "prohibitively" expensive, if as contended by the plaintiff the Convention is concerned with the fees – other than court fees – of litigation*[121]*.'*

49. In this case, the judge also ruled that delay brought the plaintiffs in this case outside the Directive, which means that these pronouncements again have to be considered as obiter dicta.

50. In any case, these are Irish, not English law cases. However, we mention them since the jurisprudence on costs is similar in many ways. We would argue in any case that all the evidence we refer to in the Communication, together with the statements referred to above by English courts and by Advocate General Kokott, mean that this is an erroneous interpretation of the Aarhus Convention and of EU law.

[120] At para 7.8-7.9.

[121] At para (c)

Appendix III

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)

Additional question – asked of Defra:

3) Has 'the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice' (article 9, paragraph 5) been considered in the United Kingdom? If so, what were the results of these considerations? If not, why not?

1. Legal aid is available in the UK as part of the 'Community Legal Service' under the Access to Justice Act 1999. However, under section 4 of the Act, legal aid is only available to individuals and not to public interest organisations[122]. In addition, even for individuals, there are further restrictions on eligibility, particularly in the form of financial criteria[123], as well as conditions that must be met in relation to merits[124].

2. Also, although legal aid is available for public interest cases, including environmental cases, and such cases are subject to lower merits conditions than 'private' legal aid cases[125], there is also a general requirement for alternative funding if a positive outcome in a case will be of wider public benefit, i.e. it will also benefit other persons or bodies[126]. In such circumstances legal aid can be refused, or there may be a requirement for funding to be partly through legal aid and partly privately funded[127].

3. Moreover, Advocate General Kokott discussed the need for a financial assistance mechanism under Article 9(5) of the Aarhus Convention in her opinion in relation to *Commission v Ireland*[128] and says moreover that '*Article 47 of the Charter of Fundamental*

[122] See also Standard Criterion ('SC') 4.5 of the General Funding Code; http://www.legalservices.gov.uk/docs/civil_contracting/Funding_code_criteria_Jul07.pdf; and Rule C4.1 of the Funding Code Procedures; http://www.legalservices.gov.uk/docs/cls_main/Procedure.pdf.

[123] See SC 4.9 of the General Funding Code; Volume 2F (Financial Eligibility) of LSC Manual sets the financial eligibility limit for applicants at £2647 gross income per month and disposable capital of £8,000, including any partner's income and joint assets (see paras 3.1.1, 4,2 and 7.2.1).

[124] For example: under SC 7.5.2 there is a presumption of funding in relation to judicial review cases which have a significant wider interest. In other cases however, there are stringent criteria regarding the merits (and potential likelihood of success of the case) and cost-benefit assessments – see SC 7.4.5, 7.4.6 and 7.5.3.

[125] See footnote above.

[126] See SC 5.4.2; and Rule C18 of the Funding Code Procedures.

[127] Rule C18 of the Funding Code Procedures.

[128] See footnote 64 above, at para 91.

Rights of the European Union also requires legal aid to be granted in so far as such aid is necessary to ensure effective access to justice. Since the Treaty of Lisbon has not yet been ratified, the charter as such admittedly does not yet have any binding legal effect comparable to that of primary law. However, as a source of legal guidance it sheds light on the fundamental rights which are to be observed when interpreting Community law[129]'.

4. She is further of the opinion that, *'[i]n this regard, Ireland's submissions that rules providing for legal aid - the Attorney General's Scheme - exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General's Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland's own submissions, he can only make recommendations and cannot make binding decisions.*[130]'.

5. These statements of Advocate General Kokott support our assertion that due to the restrictions imposed on environmental organisations and individuals in relation to eligibility for legal aid (as described above), it cannot be said that the UK provides any 'appropriate assistance mechanism to remove or reduce financial and other barriers to access to justice' in the UK, which means that the UK is in breach of its obligations under Article 9(5) of the Aarhus Convention in this regard.

6. A useful and concise summary of the rules and requirements of legal aid is contained in the Sullivan Report[131], as well as in the Liberty Report[132].

[129] Ibid. at para 92.

[130] Ibid. at para 96, and referred to by Carnwath LJ in *Morgan* at para 27.

[131] '*Ensuring access to environmental justice in England and* Wales', Report of the Working Group on Access to Environmental Justice chaired by the Hon. Mr Justice Sullivan, May 2008, http://www.lawcentres.org.uk/uploads/Access_to_Environmental_Justice.pdf, at paras 27-33 and Annex II.

[132] *'Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation'*, Liberty and the Civil Liberties Trust, July 2006, http://www.liberty-human-rights.org.uk/publications/6-reports/litigating-the-public-interest.pdf, at paras 21 – 40.

Appendix IV

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)

Review of Civil Litigation Costs in England & Wales
Lord Justice Jackson's Preliminary Review[133] (the 'Jackson Review')

1. In November 2008, Lord Justice Jackson, a judge of the Court of Appeal, was appointed to carry out a wide-ranging independent review of the entire system of civil litigation costs in England & Wales during 2009 and to make recommendations to '*promote access to justice at proportionate costs'* by the end of 2009.

2. In May, Lord Justice Jackson published the Jackson Review, a first preliminary discussion of the relevant issues, running to a total of over 660 pages and an additional 30 appendices. In this review, Lord Justice Jackson examines the nature and extent of litigation costs in England & Wales in their entirety, including in relation to environmental cases. However, the Jackson Review is only a preliminary report, and Lord Justice Jackson has called on stakeholders to comment on it by the end of July. He will draft his final report from September onwards and publish it in December 2009.

3. This is particularly relevant in the context of the Aarhus Convention Compliance Committee's discussion of Cases ACCC/C/2008/23, 27 and 33. Any recommendations the Committee may make before the end of the year would be directly relevant to Lord Justice Jackson's costs review and it is important that they should be considered and incorporated into his final report.

4. We would oppose any arguments which may potentially be made to postpone the Committee's deliberations until the final Jackson Review is published, as, in our opinion, this would lead to further delay and potential complications if the Committee's recommendations and those of Lord Justice Jackson did not coincide. It would be much easier and much more useful, both from a practical and from a legal point of view, for the Jackson Review to be able to consider the Committee's views in its final report and make recommendations accordingly.

[133] *Review of Civil Litigation Costs: Preliminary Review* by the Right Honourable Lord Justice Jackson, May 2009; http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm (the 'Jackson Review).

5. In any case, in his preliminary review, Lord Justice Jackson has raised a number of issues that are central to the Communication and also to communications ACCC/C/2008/23 and 27, so they are summarised here:

The UK's compliance with the Aarhus Convention in relation to prohibitive costs

6. In Chapter 6 on environmental claims, Lord Justice Jackson recognises that:

'..., unless the claimant has legal aid or the benefit of a protective costs order, in the event of losing he is likely to incur a substantial liability for the defendant's costs[134]*.'*

7. He also comments that:

'As our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention, to which the UK has voluntarily signed up[135]*'*; and that

'[i]*t must be recognised that unless there are radical reforms ..., it is possible that England and Wales are in breach of their obligations under the Aarhus Convention*[136]*.'*

8. Lord Justice Jackson mentions insurance, protective costs orders and conditional fee arrangements in this context (see following paragraphs) and goes on to suggest **three options for reform**:

> '*(i) to introduce one way costs shifting;*
> *(ii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), applicable only to the claimant's costs liability;*
> *(iii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), with a substantially higher cap upon the defendant's costs liability than the cap upon the claimant's costs liability*[137]*.'*

9. All of these options would be an improvement on the current situation, but in our opinion, option (iii) would still impose prohibitively high costs on claimants and would not eliminate the uncertainty connected with the courts' discretion surrounding costs orders.

10. Option (i) on the other hand reflects the American practice on one-way costs shifting which allows claimants in environmental (public interest) cases to recover their costs

[134] The Jackson Review, Part 7: Chapter 36; p. 336; para 4.4.
[135] Ibid. Part 7: Chapter 36; p. 336/337; para 4.7.
[136] Ibid. Part 7: Chapter 36; p. 337; para 4.8.
[137] Ibid. Part 7: Chapter 36; p. 337; para 4.7.

from defendants, but otherwise requires each party to bear their own costs (so defendants cannot recover their costs from claimants, at least in the absence of bad faith). We would strongly support this option (see also paras 141 -143 of the Communication).

11. Option (ii) could be almost equivalent to option (i), unless protective costs orders are used to cap costs rather than to eliminate them entirely, which could mean that potentially helpful funding arrangements, such as conditional fee agreements, could not be used. Moreover, options (ii) and (iii) will still be linked to very high and potentially prohibitive costs because they involve what Lord Justice Jackson terms '*satellite*' litigation, which means that additional court proceedings are needed (at a potentially substantial cost) in order to apply for protective costs orders[138].

The loser pays rule and one-way cost shifting

12. One option that Lord Justice Jackson discusses in detail in the Jackson Review, not only in relation to environmental judicial review claims, but in general in relation to civil litigation cases, is to abandon the current English rule on cost shifting (the 'loser pays' rule) and to replace this with a new one-way cost shifting rule in favour of the claimant in civil proceedings.

13. In this context, Lord Justice Jackson notes that there seems to be a consensus amongst commentators that the traditional English cost shifting rule should be retained. However, he concludes:

'*The general consensus must be critically examined. This unanimity of view about cost shifting is, at first blush, surprising. There are after all, several jurisdictions within England and Wales where either cost shifting has never existed or, alternatively, where cost shifting has recently been abolished without the heavens falling in. It is, therefore, necessary to examine critically those jurisdictions (and similar jurisdictions overseas), in order to ascertain how the absence of cost shifting impacts upon the parties and their lawyers*[139]*.*'

14. He notes that although the '*culture of the courts is that cost shifting promotes access to justice ... the culture of tribunals is that cost shifting inhibits access to justice*[140]', and that in relation to employment tribunals, even though they '*are strongly adversarial and very much akin to litigation, nevertheless the no cost shifting tradition of tribunals prevails in those proceedings*[141]'. Indeed, in relation to legal aid he even mentions that the '*practical effect of the legal aid*

[138] See para 116 of the Communication.

[139] The Jackson Review; Part 8: Chapter 46; p. 473; para 4.2.

[140] Ibid. ,Part 8: Chapter 46; p. 471; para 3.6.

[141] Ibid. Part 8: Chapter 46; p. 472, para 3.14

rules ... that in funded cases one way costs shifting is the norm[142]*.'* He further notes that one of the consequences of this approach is that '*satellite litigation about costs is avoided*[143]*'*.

15. In fact, Lord Justice Jackson says that:

'The argument that adverse costs orders against claimants have an important deterrent effect is certainly true, but difficult to justify in terms of its practical application. We have arguably reached the position in this jurisdiction where the level of costs is so high that facing a full adverse costs order is likely to be a disaster for most ordinary citizens. This is so much so that litigation on behalf of individuals does not tend to happen these days unless a mechanism can be found to protect the claimant (either legal aid cost protection or after-the-event insurance). Even small corporate bodies like NGOs will not litigate on important issues if there is a risk of full costs exposure[144]*.'*

16. Thus, Lord Justice Jackson concludes that:

'Whilst there are different arguments for cost shifting for and against claimants, it appears that in most categories of litigation the case for retaining cost shifting in favour of successful claimants is a strong one. My working assumption is, therefore, that cost shifting in favour of claimants, in the sense that successful claimants should generally expect to recover their costs, should continue. The quantification of such costs is, of course, an important area of potential reform...[145]*'*

17. He also mentions that one way cost shifting should particularly be considered for judicial review claims and environmental claims[146] , in relation to which he notes that there:

'*have already been cases in which the court has declined to make a costs order in a public authority's favour, even though the authority had successfully defeated the claim. This is because there were matters of 'real public importance' that needed to be resolved... The test of 'real public importance' is not the same as the matter simply being of 'public interest'. One possible option would be to expand the test and to introduce one way cost shifting for all environmental judicial review claims, leaving the "permission" requirement as a sufficient mechanism to weed out weak claims*[147]*.'*

[142] Ibid., Part 4: Chapter 12; p. 149; para 4.7.
[143] Ibid. Part 8: Chapter 46; p. 473; para 4.5.
[144] Ibid. Part 8: Chapter 46; p. 475; para 5.2.
[145] Ibid. Part 8: Chapter 46, p 474, para 4.10.
[146] Ibid. Part 8: Chapter 46;P. 476; para 6.5.
[147] Ibid. Part 7: Chapter 36; P. 336, para 4.6, last sentence.

18. Indeed, Lord Justice Jackson's first option for reform to ensure compliance with the Aarhus Convention is one way cost shifting (see above).

19. Thus the Jackson Review shows that there are serious problems with the prohibitive costs of access to justice in England & Wales in general, in relation to all kinds of civil actions, but with a particularly strong negative effect on judicial review and environmental cases.

The application of the rules in relation to protective costs orders in judicial review actions

20. The Jackson Review discusses protective cost orders (PCOs) in the context of judicial review in general, not so much in relation to environmental claims specifically. It sets out a number of possible criticisms of the PCO regime[148] and raises the question whether '*the norm should be no costs orders against unsuccessful claimants'*, and possibly at the same time no success fee for claimants' lawyers if claimants are successful[149].

Alternative funding of civil cases, including legal aid, conditional fee arrangements and so-called '*ATE*' ('*after the event*') insurance

21. The Jackson Review considers the funding of civil litigation in great detail. In the context of environmental claims it has already been noted that the potential costs are prohibitive, and that legal aid is only available in very restricted circumstances. Two other relevant potential funding mechanisms are the use of success fees by lawyers under conditional fee agreements ('CFAs') and the use of insurance instruments in the form of so-called 'after-the-event' ('ATE') insurance.

22. ATE insurance covers the potential costs liabilities of parties arising out of litigation, including in particular the other side's costs and sometimes also a party's own costs. Importantly, the ATE premium is normally also treated as a cost covered by the policy, and is recoverable from the losing party[150]. This means that an insured never has to pay the premium. It is either paid for by the opposing losing party as part of the winning insured party's costs, or if the insured party loses, the risk is the insurer's.

23. Although this sounds like a good solution for the type of environmental cases at issue in the Communication, there are several problems with this type of insurance. First of all, it would appear that:

[148] Ibid. Part 7: Chapter 35; p. 331, para 4.4.

[149] Ibid. Part 7: Chapter 35, p. 331, para 4.5

[150] See section 29, Access to Justice Act 1999.

'*save in rare and exceptional cases, ATE insurance is not available in environmental judicial review claims. Therefore, unless the claimant has legal aid or the benefit of a protective costs order, in the event of losing he is likely to incur a substantial liability for the defendant's costs*[151].'

24. In contrast, ATE insurance can be available in other environmental cases, for example environmental private nuisance actions. However, even then there are problems with ATE insurance. Because the insured party often does not pay for the insurance premium, and, particularly in environmental and judicial review claims, because of the complexity of the cases, ATE premiums can be substantial[152] and may be set at too high a level, imposing a disproportionate costs burden on losing parties[153].

25. Thus, the Jackson Review notes that in *Bontoft v East Lindsey DC*[154] (a private nuisance case relating to refuse operations near to the claimant's home),the court awarded:

- damages of approximately £75,000.
- an interim costs order of £130,000, which included an ATE premium of £97,362 (and a success fee of £157,231)[155].

26. The defendant's own costs in this case were £157,231. According to Lord Justice Jackson:

'*Material placed before the court at the end of the trial indicated that (a) the claimants had considerable difficulty in obtaining any ATE cover; (b) the premium for the actual cover obtained was 61.923% of the defendants' fees .... Thus the ATE premium alone exceeded the value of the claim*[156].'

'Cases such as Bontoft give rise to the question whether a one way fee shifting regime (subject to an exception in cases of unreasonable or frivolous conduct) might not be beneficial for all parties. A one way fee shifting regime, such as has always in practice prevailed in legal aid cases at first instance, would spare defendants the huge costs of ATE insurance in those cases which they lose[157].'

'If one way cost shifting is introduced, then it may be practicable to reverse the provision making "additional liabilities" recoverable. There would be no adverse costs risk to insure against at vast premiums. The claimant's solicitors and counsel could proceed on a CFA, on the basis that their

[151] Jackson Review, Part 7: Chapter 36; p. 336; para 4.4.
[152]Ibid. Part 4: Chapter 14, p. 158, para 3.6.
[153] See also ibid. Part 7: Chapter 36; p. 333; para 3.2.
[154] [2008] EWHC 2923 (QB).
[155] Jackson Review Part 7: Chapter 36; p. 333; para 3.3 and 3.4.
[156] Ibid. Part 7: Chapter 36; p. 33; para 3.6.
[157] Ibid. Part 7: Chapter 36; p. 33; para 3.7.

success fee would come out of the damages (if any). ... Where success fees are payable under CFAs, they could be capped at 25% of the damages[158]*.'*

27. Therefore, it is clear from the Jackson Review, that first of all ATE insurance is rarely available in environmental judicial review cases, and secondly, even if it is, it is expensive, complex and potentially unfair. Indeed Lord Justice Jackson states that:

'Currently the only way that most members of the public could meet their own costs of bringing an environmental judicial review claim would be (a) with the benefit of legal aid or (b) under a CFA. A CFA is not feasible if a protective costs order is in place which caps both parties' costs, as is pointed out in chapter 10 of the Sullivan Report. On the other hand the courts are reluctant to make a protective costs order in favour of the claimant without also capping the claimant's costs.... Sullivan J recommended that in all cases falling within Article 9 of the Aarhus Convention the claimant, if substantially successful, should recover its costs, including any CFA uplift, free from any cap.[159]*'.*

28. Under a CFA the claimant's lawyer is only paid if the claimant wins, in which case the lawyer will often also ask for a fee uplift in the form of a success fee (i.e. a higher than usual fee, often as high as 100%), which, according to the law, can be recovered from the defendant if he loses[160]. In private nuisance claims the claimant's lawyer's fee can be paid out of any damages or costs awarded. However, in relation to judicial review claims, there are no damages, and conditional and success fees can only be paid if the defendant is ordered to pay the claimant's costs. If a PCO capping or eliminating the defendant's costs has been made, it is therefore not possible for claimants to enter into CFAs, as the final costs order may well not cover the entirety of the claimant's lawyer's costs.

Concluding remarks

29. It is clear that neither ATE insurance nor conditional fee arrangements can alleviate the problems faced by potential claimants in relation to the costs of access to justice in environmental cases (particularly judicial review cases). The restricted availability of legal aid has already been discussed in Appendix III.

30. The current rules on costs, particularly in relation to PCOs, make the situation even more difficult for claimants, unless Lord Justice Jackson's first option for reform, i.e. the introduction of one way fee shifting in favour of the claimant is introduced. This

[158] Ibid. Part 7: Chapter 36; p. 33; para 3.8.

[159] Ibid. Part 7: Chapter 36; p. 336; para 4.5.

[160] See Section 58 and 58A of the Courts and Legal Services Act 1990, as amended by section 27 of the Access to Justice Act 1999.

solution would not only guarantee compliance of the law with the Aarhus Convention, but would also remove the need for ATE insurance, which could substantially reduce the potential costs faced by losing defendants.

Appendix V

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)

Additional Documents Index

1) OSPAR correspondence:

1. Letter from Alan Simcock, OSPAR Commission, to Robert Latimer, dated 18 November 2004.
2. Email from Alan Simcock, OSPAR Commission, to Robert Latimer, dated 18 September 2006.
3. Email exchange between Robert Latimer and David Johnson, OSPAR Commission between 16 October 2006 and 6 November 2006.
4. Email exchange between Robert Latimer and Hanne-Grete Nilsen, OSPAR Commission on 6 and 7 December 2006.
5. Email from David Johnson, OSPAR, to Latimers, dated 11 January 2007.
6. Email exchange between Robert Latimer and David Johnson, OSPAR Commission on 4 February 2009.
7. *Summary Record* of the Meeting of the Working Group on the Environmental Impact of Human Activities (EIHA) in Galway (Ireland), 7 – 9 November 2006.
8. *Summary Record* of OSPAR EIHA Working Group meeting in Madrid (Spain), 2-4 October 2007.
9. *Summary Record* of OSPAR EIHA Working Group meeting in Lowestoft (UK), 4-7 November 2008.
10. *Summary Record* of OSPAR Biodiversity Committee (BDC) meeting in Brussels (Belgium), 26-30 March 2007.
11. *Summary Record* of OSPAR Biodiversity Committee (BDC) meeting in The Hague (Netherlands), 25-29 February 2008.
12. UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention: *Capping of Contaminated Dredged Material Case Study Port of Tyne UK* (the 'UK OSPAR Report'), undated – **NOT ATTACHED as already submitted in relation to the Communication (Annex VIII, point 6)**.

2) Commission correspondence

13. Letter from Julio Garcia Burgues, European Commission to Robert Latimer, dated 23 June 2006.
14. Letter from Julio Garcia Burgues, European Commission to Robert Latimer, dated 28 August 2006.
15. Letter from Julio Garcia Burgues, European Commission to Robert Latimer, dated 8 November 2006.
16. Email from Robert Latimer to Sibylle Grohs, European Commission, dated 2 April 2009.
17. Email exchange between Thomas Bell, MCS and Sibylle Grohs, European Commission, between 23 and 27 April 2009.

3) Correspondence with Defra and Cefas

Correspondence with MCS

18. Email exchange between Thomas Bell, MCS and Andrew Dixon, MCEU, Defra and Mike Smith, Defra, between 6 January 2005 and 7 January 2005.
19. Letter from Thomas Bell, MCS to Mike Smith, MCEU, Defra, dated 11 January 2005.
20. Letter from John Maslin, Defra, to Thomas Bell, MCS, dated 3 February 2005.
21. Email from Thomas Bell, MCS, to John Maslin, Defra, dated 7 October 2005.
22. Email from Andrew Dixon, Defra, to Thomas Bell, MCS, dated 14 November 2005.
23. Email from Thomas Bell, MCS, to Andrew Dixon, Defra, dated 14 November 2005.
24. Letter from Thomas Bell, MCS, to Andrew Dixon, Defra, dated 4 September 2006.
25. Letter from Thomas Bell, MCS, to Andrew Dixon, Defra, dated 20 December 2006.
26. Letter from Dr Chris Vivian, CEFAS to Thomas Bell, MCS, undated (document history shows dated 12/01/07), entitled '*FEPA 1985 – Port of Tyne Authority Licence 31995/04/1 – Confined Disposal of Contaminated Dredged Material*'.
27. Letter from Andrew Dixon, MCEU, Defra to Thomas Bell, MCS, dated 2 November 2006
28. Letter from Thomas Bell, MCS, to Geoff Bowls, MCEU, Defra, dated 15 March 2007.
29. Email from Thomas Bell, MCS, to Mike Waldock, Cefas, dated 15 March 2007.
30. Email from Thomas Bell, MCS, to Dr Chris Vivian, Cefas, dated 15 March 2007.
31. Letter from Thomas Bell, MCS, to Kevin Jackson, Defra, dated 1 November 2007.
32. Letter from Thomas Bell, MCS, to Records and Information Unit, Cefas, dated 5 November 2007.
33. Letter from Thomas Bell, MCS, to Kevin Jackson, Defra, dated 29 October 2008.
34. Letter from Thomas Bell, MCS, to Records and Information Unit, Cefas, dated 29 October 2008.
35. Letter from Thomas Bell, MCS, to Kevin Jackson, Defra, dated 1 December 2008.
36. Email from Dr Chris Vivian, Cefas to Thomas Bell, MCS, dated 29 December 2008, attaching FOI request information.

Correspondence with Robert Latimer

37. Letter from Andy Dixon, MCEU, Defra, to Bob Latimer dated 12 April 2006.
38. Letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 17 August 2006.
39. Email exchange between Robert Latimer and Rodney Anderson, MFD, Andrew Dixon, Defra and Michael Meekums, Defra, between 21 August 2006 and 30 August 2006.
40. Letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 30 August 2006.
41. Letter from Alexis Tregenza, Customer Contact Unit, Defra, to Robert Latimer dated 6 September 2006.
42. Letter from Andy Dixon, MCEU, Defra, to Robert Latimer dated 18 October 2006.
43. Letter from Michael Meekums, MCEU, Defra to Robert Latimer dated 12 December 2006.
44. Letter or email, undated, probably February 2007, from Dr Chris Vivian, Cefas to Mr Latimer referring to email of 7 February 2007 from Robert Latimer to Dr Vivian.
45. Email exchange between Robert Latimer and Dr Chris Vivian between 29 November 2006 and 6 February 2007 contained within an email exchange between various parties between 16 October 2006 and 2 March 2007.

46. Letter to Andrew Dixon, MCEU, Defra from Bob Latimer dated 18 February 2007.
47. Document summary compiled by Dr Chris Vivian on 2 March 2007 (according to electronic document history), entitled: '*Information for Mr. Latimer on Question 8 Dealing with the Issue of Alternative Disposal Options for Disposal of the Contaminated Sediment*'.
48. Email from Lindsay Murray, Cefas, to Robert Latimer, dated 2 March 2007.
49. Email exchange between Robert Latimer, Rodney Anderson, Defra, and Andrew Dixon, Defra between 19 February 2007 and 30 March 2007.
50. Email from Robert Latimer to Rodney Anderson, Defra, dated 16 April 2007.
51. Email exchange between Geoff Bowles, Marine & Fisheries Agency (MFA), Defra, Robert Latimer and Rodney Anderson, Defra between 27 April 2007 and 29 April 2007.
52. Email exchange between Geoff Bowles,MFA, Robert Latimer and Rodney Anderson, Defra between 1 May 2007 and 15 May 2007.
53. Letter from Anna Sargeant, MFA to Mr Latimer, dated 25 November 2008, attaching list of Defra correspondence with Mr Latimer.

4) Environment Agency correspondence

54. Letter from Graeme Warren, Environment Agency, to Robert Latimer, dated 29 October 2004.
55. Email from Robert Latimer to Catherine Ruane, Environment Agency, dated 4 September 2006.
56. Letter from Dr J B Hogger, Environment Agency, to Robert Latimer, dated 13 October 2006.
57. Fax from Dr J B Hogger, Environment Agency, to Thomas Bell, MCS, sent on 26 January 2005.
58. Letter from Thomas Bell, MCS, to Environment Agency dated 6 November 2007.
59. Letter from Thomas Bell, MCS, to Environment Agency dated 29 October 2008.

5) Correspondence with the Port of Tyne Authority

60. Email from Thomas Bell, MCS, to Keith Wilson, Port of Tyne Authority, dated 6 January 2005.
61. Letter from Thomas Bell, MCS, to Brian Reeve, Port of Tyne Authority, dated 6 November 2007.
62. Letter from Brian Reeve, Port of Tyne, to Thomas Bell, MCS, dated 8 November 2007.

6) MCS correspondence with the Contaminated Marine Sediments Steering Group

63. Email exchange between Thomas Bell, MCS, Andrew Greaves and Neil Pattinson, Defra, between 13 March 2007 and 22 August 2007.

7) MCS correspondence with Natural England

64. Email from Thomas Bell, MCS, to Mike Quigley, Natural England, dated 5 November 2007.
65. Email from Thomas Bell, MCS, to Mike Quigley, Natural England, dated 23 November 2007.

8) Correspondence relating to the North Eastern Sea Fisheries Committee

66. Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 11 March 2004.

67. Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 May 2004.
68. Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 14 June 2004.
69. Letter from David McCandless, North Eastern Sea Fisheries Committee, to Mike Smith, Defra, dated 10 September 2004.
70. Email from Thomas Bell, MCS, to David McCandless, North Eastern Sea Fisheries Committee, dated 30 October 2008.
71. Email from David McCandless, North Eastern Sea Fisheries Committee, to Thomas Bell, MCS, dated 30 October 2008.

9) Case law

72. *Morgan & Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/107.html&query=aarhus&method=boolean.