ANNEX F – NOTE OF COUNSEL'S CLOSING REMARKS

1. The article 3(2) complaint is essentially a complaint that the explanation as to why the development did not require environmental assessment was ill founded and that, on behalf of the UK, I have sought to retrofit an explanation onto the document.

2. In response, I draw attention to the actual reasons given on the contemporaneous document, i.e. the July 2012 EIA screening determination, as set out at paragraph 7 of my speaking note. That contemporary document records that the development proposal would both address risk, not result in significant environmental impacts and would improve the environmental performance of the site:

> *"Based on the current location of the lagoons, the Department had determined in June 2008 that there was no requirement for an environmental statement as all aspects of the application could be dealt with through the normal planning process. The consultation process established that NIEA had concluded, through its appropriate assessment consideration, that there will not be significant adverse impact on the SAC and ASSI subject to amendment of the proposal. It was established that the current lagoons are within the flood plain and as a result had the potential to impact on the nearby River Faughan if a flood event occurred. On foot of this a revised scheme was submitted, which proposes to decommission the current lagoons and relocate them outside the flood plain and further away from the area of acknowledged importance, the River Faughan ASSI and SAC.*
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> *The Department has determined that the relocation of the lagoons can also be dealt with through the normal planning process. It is satisfied that the relocation has reduced the probability of impact and has moved the proposal away from the River Faughan ASSI and SAC and outside the flood plain. Essentially therefore the overall size of the development*

subject of the application is the same as June 2008 and the location of the new lagoons is an improvement on the current location. In conclusion an EIA is not required".

3. The complaint was in substance a *Wednesbury* complaint – i.e. that the July 2012 negative screening determination was ill-judged and irrational. The domestic legal procedures allowed that to be reviewed as part of the ordinary judicial review process. In other words, the Communicant's argument that the basis of the negative screening was wrong was properly tested at the hearing of its judicial review.

4. The 'buildability' of the scheme was also addressed head on by the Judge: in paragraph 94 of the judgment. The matter was squarely before the Judge and he dealt with it. Again, the substance of the Communicant's argument was that no reasonable planning authority could have authorised a scheme that was not capable of being constructed in accordance with the conditions that governed the 2012 planning permission. Having considered the approved plans, the Judge rejected the factual premise on which the Communicant based its argument. The Judge concluded that the scheme was capable of being constructed in accordance with the conditions imposed on the 2012 planning permission. That conclusion was on the facts of the case before the Court and cannot provide a proper basis for a complaint to this Committee.

5. It is regrettable that the 2012 Development Management Report was not provided when it was asked for on 13 September 2012, but that was soon corrected when it was provided on 19 September 2012. That short delay in making the development management report available did not hinder the Communicant's participation in the process.

6. With respect to the article 6 complaint, the proposed activities were subject to a screening decision in July 2012. The facts are that (i) the proposed development did not fall within article 6(1)(a); and (ii) had been subject to EIA screening and found not to fall within article 6(1)(b). In the result, the proposal activities were not within the scope of Article 6 so therefore there was no specific requirement for public engagement under the terms of that article. Of course, the normal public participation process of consulting on non-EIA applications applied – in line with the generality of the Treaty. See the Development Management Report where there are references to the Communicant's objections – the Communicant was consulted and its representations are on record as having been taken into account.

7. With respect to article 9, the Committee has raised its ongoing concern about the intensity of judicial review under the *Wednesbury* principle. If the Committee would like further written submissions in this respect I am happy to provide them. But that concern is beside the point in this case, since the Communicant's actual complaint was based on conventional *Wednesbury* grounds: i.e. on the alleged lack of rationality of the negative screening decision and the alleged perversity of granting a planning permission that was incapable of being built in accordance with its conditions. The judicial review hearing addressed both the basis for the screening decision and the buildiability of the scheme. On any reasonable view, the Communicant had access to the legal remedy that it actually sought. The requirements of Article 9(2) and 9(3) were fulfilled.

8. In summary, in this case the Communicant wanted to bring a complaint about legality and mistake of fact. The Judge dealt with both matters and was in a position to grant the remedy sought. The real complaint is that the Judge rejected the Communicant's case

on its merits. The Communicant had access to the remedies that it actually sought.

25 February 2018