Welcome to the May/June 2017 edition of e-law. The theme for this issue is access to justice.

Access to environmental justice is a key pillar of the Aarhus Convention requiring that the costs of bringing certain environmental challenges are fair, equitable, timely and not prohibitively expensive. The principle has been enshrined in a number of EU directives and regulations, as well as costs capping provisions introduced in the Civil Procedure Rules (CPR) through the 2013 Jackson reforms to environmental costs protection. And although the importance of access to justice is indisputable, implementation has proved contentious.

The CPR reforms came as an overdue clarification of the UK’s international and European obligations concerning access to environmental justice, as a number of cases (at the UK Supreme Court, the European Court of Justice and the United Nations Cross Compliance Committee) found that access to justice obligations were left wanting.

The environmental costs protection rule change provided straightforward rules whereby the costs recoverable by a defendant from a claimant were capped at a maximum of £5,000 where the claimant is an individual (and £10,000 in any other circumstances) and those recoverable by a claimant from a defendant were capped at £35,000.

But changes made to these CPR environmental costs capping provisions in February 2017 mean that the access to environmental justice landscape has changed again. These developments now allow a court in environmental cases to vary or remove altogether these costs caps in certain circumstances, where to do so would not make the costs of the proceedings prohibitively expensive for the claimant.

But how do we know what would make the proceedings ‘prohibitively expensive’? Potential claimants in environmental cases now need to provide detailed evidence about their financial means, before they can rely on costs protection. This means more time spent on preliminary issues, as well as giving rise to concerns that community contributors fearing non-party costs orders won’t want to take part in community claims.

The new provisions do allow claimants to potentially argue for a variation of the costs caps if they can demonstrate that, without such variation, the costs of the proceedings would be prohibitively expensive for them. But to get to this point, the parties would need to have detailed arguments about the applicability of the Aarhus Convention and the importance of the case;
all of which would take time and have to be done before the claimant had any certainty on costs.

The Ministry of Justice claims these most recent changes were made to ‘introduce more certainty’ and ‘to create a level playing field’ but the reality is that the waters have been very much muddied, without any sensible or fair justification.

The upshot is that people will almost certainly be deterred from making an environmental challenge if they do not have certainty about costs and, contrary to the Aarhus Convention, access to environmental justice will be diminished. At a time of so much uncertainty around environmental protection in the UK, we really need to make sure that environmental justice is promoted and accessible and this is what ClientEarth, Friends of the Earth and RSPB are seeking to do in their challenge against the latest changes to environmental costs protection.

The EU recently published new guidelines to clarify how individuals and associations can challenge decisions, acts and omissions by public authorities related to EU environmental law before national courts. The guidance is based on access to justice provisions in the Aarhus Convention, as well as in EU environmental law, which have also faced scrutiny recently. It's a useful read, for as long as we have it.

And as post-Brexit we don’t know how reliable the mechanisms to hold government to account will be, it’s crucial that access to environmental justice is not impeded and that people are empowered to take action to protect the environment.

In this edition of e-law, we have a number of interesting articles that explore some of these themes:

- Gillian Lobo from ClientEarth takes us through the new costs capping rules in Aarhus Convention claims that came into effect on 28 February 2017 for England and Wales in Cold freeze ahead for environmental claims.
- Helen McDade from the John Muir Trust looks at Protective Expenses Orders in Scotland, in Are Protective Expenses Orders delivering access to justice in Scotland?
- Adrienne Copithorn from Richard Buxton Environmental & Public Law focuses on access to justice in the developing world, in Access to the UK courts for environmental claims in the developing world.
- Anaïs Berthier, Senior Lawyer/Juriste at ClientEarth considers EU access to justice in The EU on access to justice: do as I say, not as I do.

We also have Stephen's final words from the Chair and working party news, where we hear about Brexit and the Great Repeal Bill.

And finally, I hope to see many of you at the annual conference in Nottingham this July.

Best wishes,

Simone Davidson
E-Law Acting Editor
My two-year time as UKELA’s Chair is very nearly up; I will be handing over the baton to our Chair Elect, Anne Johnstone, at the annual conference this July. So, these are my final words as your Chair, but there is no cause for sadness.

In the first of my 12 contributions to e-law, back in July 2015, I wrote: ‘I am sure that, together, we will achieve great things over the next couple of years, and make this a vintage year period for UKELA.’ As a result of our collective endeavours, I hope members will agree that this aspiration has been met.

Some of the changes we have made to UKELA have been relatively low key but nonetheless vital for the good of our association:

• We have transitioned to a leadership model used by the American Bar Association’s Section of Environment, Energy and Resources of having a Chair Elect, Chair and Past Chair – allowing us to have a smoother succession;
• We have more Vice Chairs now (4 rather than 2) with whom I have regular monthly calls to chart the course ahead; and
• To save travel time for staff and colleagues – and to cut our carbon emissions – there is one fewer Council meeting and one of our Executive Committee meetings takes place by phone.

The overall aim has been to ease the administrative load on staff and volunteers so that we can all get more things done. With hindsight, it was absolutely crucial to effect these changes. For example, I doubt whether UKELA would have been able to respond as well as we have done to the many, complex and very time-consuming challenges presented by Brexit had we not increased our efficiency.

More generally, I have written in previous editions of e-law about the many things we have achieved together over the past two years. I am particularly proud of the following:

• An enhanced role for women – Anne will be only our second female Chair and Pamela Castle OBE was our first female Garner Lecturer;
• An internationalist outlook – with links being forged with countries such as China (please see the letter to UKELA from Chinese Supreme Court), South Korea and other countries;
• An expert contribution to Brexit – our Brexit Task Force is most ably led by Co-Chairs Richard Macrory and Andrew Bryce, with staff input from Rosie Oliver and Joe Newbiggin, and the assistance of many members too; and
• A revamped strategy to bolster membership – our Membership Development Group is ably led by Paul Davies and supported by Alison and Elly-Mae.

I am proud to have served as your Chair. I have been fortunate to have had the stalwart support of our President, Lord Carnwath. I have also had a fabulous team of Vice Chairs and pay tribute to Anne, Kirsty Schneeberger, Haydn Davies and Ben Stansfield; and to my other Executive Committee Members, Penny Latorre and our excellent Treasurer, Nick Whitaker. I have worked closely throughout my time as Chair with our fabulous members of staff: Linda, Alison, Rosie, Elly-Mae and Joe. Thanks also to my fellow UKELA Trustees who all give their time freely for the good of our association and, ultimately, for the good of our environment.

So, what comes next for UKELA? Whilst I have plenty of ideas about this, it is not really for me to answer this question, even though I have plenty of suggestions. Anne and her team of Vice Chairs will know exactly what to do next and I am sure UKELA will be in very safe hands. For my part, I will shortly be UKELA’s Past Chair and, as such, will continue to play my part as I have done since joining UKELA some 25 years ago. I will be adopting a lower profile and helping to bolster our finances (which are strong, but we can do even more as an organisation if they become stronger).

As I wrote in e-law in July 2015: ‘Like many members I have been helping UKELA quietly, behind the scenes and without expecting any recognition, but simply because I believe in developing the law for a better environment.’ That belief is just as strong today as it has always been. With the environmental challenges we face, there can be no doubt that UKELA is needed now more than ever.

Thank you for your support and let’s ensure that this vintage period continues.

Regards,

Stephen Sykes
UKELA Chair
Letter from the Supreme People’s Court of the People’s Republic of China

During a visit by a delegation from the Supreme People’s Court of the People’s Republic of China, UKELA was represented by and is very grateful to Lucy Bruce Jones of Norton Rose Fulbright.

Dear Mr. Stephen Sykes of UKELA, and Mr. Paul Davies of Latham & Watkins,

On behalf of the Supreme People’s Court, please accept our gratitude for your generous support to our delegation on environmental adjudication to the UK and Sweden from November 9-16, 2016. With your help, we had a very successful visit and learned much about European experiences.

Rulings and guidance on environmental cases are important work of the Supreme People’s Court, particularly since China enacted its new Environmental Protection Law in 2014. The Supreme People’s Court established an Environment and Natural Resources Tribunal in 2014, and there are now over 550 specialised tribunals throughout the country. We have also issued numerous judicial interpretations on environmental law, and have released guiding cases to assist judges with their rulings.

The importance of building the capacity of our judges cannot be
overstated, as they must hear and rule on complex environmental cases. We also recognize the transboundary and international nature of environmental justice.

We greatly appreciate the opportunity to visit the UK and to learn about its environmental law system through its top practitioners. The fruitful exchanges we had with UKELA and Latham & Watkins left a lasting impression on our judges, and we were greatly inspired by the work you are doing on environmental law.

Delegations such as these have a lasting impact on the way the system of environmental law is developed in China. This will have a positive influence on China’s environment, but also the environment around the world.

Thank you so much for your great support in making this happen!

Best wishes from Beijing,

Yours Sincerely,

Chief of the delegation

Supreme People’s Court
I was delighted to attend the Canadian Bar Association’s (CBA) Environment, Energy and Natural Resources Summit in Montréal on 27 and 28 April. The Summit brought together over 100 environmental lawyers and other professions from across Canada. I was invited to join two panels. The first, moderated by Janet Bobechko of Norton Rose Fulbright, addressed international issues, and naturally my focus was on Brexit, with Seth Davis, Chair of the Section of Environment, Energy and Resources of the American Bar Association, talking about the Trump administration. The second panel, moderated by Tony Crossman of Blake, Cassels and Graydon, looked at climate change and carbon pricing in Canada, the US and the EU.

The two day Summit was also packed with fascinating sessions such as those on the Canadian approaches to water, environmental impact, aboriginal rights and transactions, at federal and provincial and municipal level. It was a great opportunity to see how other countries do things differently but also to remind ourselves how much common ground there is between our legal systems and our approaches to environmental law.

I also discovered that Canada and the UK have another thing in common: the warmth and friendliness of its community of environmental professionals. As I said in my opening remarks to the CBA, at a time when some countries are becoming more insular and inward-looking, it is all the more important the UKELA and its equivalents elsewhere in the world come together and share knowledge so that we can all work to make better law for the environment.
Visit to California State Assembly, 4 May 2017

Linda Farrow, UKELA Executive Director.

While on a personal visit to California in early May, I was delighted to be able to include a visit on UKELA’s behalf to environmental colleagues in the State Assembly in Sacramento — known to us through our connections with the American Bar Association (ABA), facilitated by UKELA Vice Chair, Ben Stansfield.

Alf Brandt, Senior Counsel to Assembly Speaker Anthony Rendon, welcomed me very warmly and took time out of his busy schedule to brief me on California’s water resources management and the recent long drought. While this winter and early spring had been the wettest since records began in the 1850s, the impacts of the drought were far from over. Groundwater levels had fallen by as much as 160 feet in 3 years and drought-related subsidence on islands in the California Delta Region — a key water resource for central valley agriculture formed by the confluence of the Sacramento and San Joaquin rivers — had made the levee system vulnerable to breaches and flooding. Nitrate contamination in groundwater supplies were also an increasing issue for drinking water quality for up to 2 million (5%) of California’s residents. Innovative water resource infrastructure solutions were in planning — such as ‘the Governor’s Tunnels’ — two 35 mile-long, 40 feet wide underground pipes that would transfer freshwater across the Delta from the Sacramento River in the north to central and southern California.

Alf also introduced me to colleagues Marie Liu, Speaker’s Advisor on Climate Change, and to Josh Tooker, lead consultant to the Assembly’s committee on Environmental Safety and Toxic Materials.

In wide-ranging conversations, it was clear the impact of the Trump administration was being felt. California is more determined than ever to achieve its goal of a 40% reduction on 1990 greenhouse gas levels by 2030 and — breaking news as I arrived — was discussing a target for 100% renewables by 2045.

At the same time, the state is poised to hear what the impact of US EPA budget cuts on the state will be and how far this will affect state projects typically funded by the EPA — including grants for clean drinking water, funds to implement Federal law e.g. on hazardous waste, and monies for the clean-up of military and NASA sites.

At this time of great potential change in our environmental law landscape, our connections with colleagues internationally are increasingly important to make sure we continue to look outwards for the best ways to make better law for the environment. Alf Brandt, in commenting on this article, asked me to convey California’s continuing interest in working with environmental lawyers in Britain and around the world.
UKELA news

Council elections

Nominations were recently sought for vacancies on our Council. We are delighted to welcome 3 new trustees – Christian Jowett, barrister from 30 Park Place Chambers in Cardiff who will be filling the National Council seat for Wales; Dr Veneta Cooney, a consultant physician from London; and Warren Percival, a director at RSK in Manchester.

Returning to Council for a second term are Karen Blair (National Council member for Northern Ireland), Haydn Davies, Penny Latorre and Simon Tilling. Philip Hunter from Brodies LLP, who was recently co-opted to fill the National Council seat for Scotland, continues in a substantive post.

We are delighted to welcome new and returning trustees. Find out more about them in the next edition.

Recyclists head to Nottingham for the annual conference!

The Recyclists have again assumed the mantle of turning their pedals to raise funds for the Lord Nathan Fund for the Environment. The fund was established by UKELA to help support the public information website ‘Law and Your Environment’. The website aims to give people information on their environmental rights and raising awareness and knowledge of environmental law.

This year the Recyclists’ challenge starts at Hitchin on Thursday 6th July where the peloton will begin their 140km journey to the outskirts of Leicester. The next day they will get back in the saddle and with sore legs will make the final 45km push to the University of Nottingham – and the launch of UKELA’s annual conference on Friday 7th July.

How can you help? You can sponsor the team to inspire them to keep their pedals turning or, if you are feeling energetic, why not join them? If you would like to take part, please contact James Burton at 39 Essex Chambers, who is co-ordinating this year’s outing.

It’s UKELA’s 30th anniversary next year!

For those of you around for our 25th anniversary, it seems incredible that 5 years will have flown by once we enter 2018 and celebrate our 30th birthday. Were you in Cambridge in 2013? Whilst we are, of course, in the thick of preparations for our fabulous 2017 conference in Nottingham (booking details on our website), it is also time to start thinking about how we will celebrate next year.

Our trustee team for 2018, led by Simon Tilling of Burges Salmon, welcome any ideas you may have to mark our anniversary in appropriate style, either at the 2018 conference or during the year. We’ll be talking about this more over the coming months, but please feel free to get in touch with your thoughts in the meantime.

We look forward to hearing from you!
Regional news

North West

Look out for details coming soon of a fracking seminar in Manchester, organised by the Society of Legal Scholars and hosted by Weightmans, taking place on the afternoon of 1 November.

North East

The North East regional group is planning a seminar on Enforcement Undertakings at the offices of Irwin Mitchell in Leeds, with speakers from the Environment Agency, taking place on the evening of 12 October.

More details about both events to follow in future editions of e-law.
The nuts and bolts of the Great Repeal Bill

As trailed in the March White Paper, Legislating for the United Kingdom’s withdrawal from the European Union.

Rosie Oliver, UKELA’s working party adviser.

A major strand of UKELA’s work on Brexit is to scope for issues that may need addressing under the Great Repeal Bill (Bill). Our priority is to ensure that environmental legislation can be smoothly ‘rolled over’ after withdrawal from the EU, providing regulatory stability and ensuring there is no reduction in the level of protection.

We had expected the Bill to be published in May but the decision to call a snap general election in June has delayed things. Whilst we do not yet have sight of the Bill, the Conservative Government’s White Paper of March 2017 outlines key elements of their proposed approach. What follows is a summary of that approach, with some brief comments on how it relates to environmental legislation. Of course, should the Conservatives fail to be re-elected, it would be open to a new government to take a different approach.

Impact on the statute book

The headline purpose of the Bill is to repeal the European Communities Act 1972 so as to implement the decision to leave the EU and ‘take back control’ of our laws.

Much of the White Paper, however, focuses on how the Bill will ‘ensure that wherever practical and sensible, the same laws and rules will apply immediately before and immediately after our departure’. This will be done by:

• Converting directly applicable EU regulations and decisions into UK law; and
• Preserving domestic laws that implement EU law. This is a hugely important task in the environmental field, as so many environmental regulations have been made under powers in section 2(2) of the European Communities Act 1972.

The Bill will also create a ‘power to correct the statute book where necessary, to rectify problems occurring as a consequence of leaving the EU’. The White Paper anticipates some 800-1000 pieces of secondary legislation under this power, to ‘correct’ both secondary and primary legislation. It cites provisions that refer to the UK’s ‘EU obligations’ or to European institutions, such as the Commission, as examples of problems that may need rectifying in this way.

Together with UKELA’s working parties, we have been identifying areas of environmental legislation where some kind of amendment or clarification will be needed to enable the law to continue to operate effectively. This will not always be straightforward. For example, some significant policy decisions will need to be taken as to whether and how to repatriate functions carried out by EU institutions. Areas such as REACH raise particularly difficult questions about how to replicate a European regulatory system at national level. We will be scrutinizing the raft of regulations proposed under this new power to ensure they address these detailed issues satisfactorily.

The power to make secondary legislation on a massive scale is likely to be the most contentious aspect of the Bill. In the environmental field, there will be fears that it could be used as a vehicle for deregulation and downgrading levels of environmental protection. More generally, there will be inevitable concerns as to the lack of Parliamentary scrutiny attached to secondary legislation, and resistance to the creation of new ‘Henry VIII’ powers to amend primary legislation.

Recognising these concerns, the White Paper cites the ‘need to ensure that the right balance is struck between the need for scrutiny and the need for speed’. Without these powers ‘a prohibitively large amount of primary legislation’ would be required, which simply could not be introduced by the date of withdrawal. The White Paper indicates that:

• ‘The power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU’; and
• ‘The power will be time-limited’, as most of the changes will need to be made before withdrawal from the EU.

Whilst these limitations seem appropriate to the purpose of the Bill, they raise the question of how future governments will be able to legislate to bring in new environmental policies. The repeal of the European Communities Act 1972 will end the general supremacy of EU law and enable governments to introduce new legislation that takes precedence over preserved EU-derived law. However, limits on Parliamentary time will mean there is little scope for new primary legislation. Furthermore, after Brexit governments may struggle to find the necessary powers to make regulations. For example, in areas such as nature conservation and water pollution, heavy reliance has been placed on powers in section 2(2) of the European Communities Act 1972 to legislate by regulations. Under the Great Repeal Bill,
section 2(2) will be repealed, and the White Paper makes no mention of new powers to replace it to bring in policy changes unrelated to Brexit.

**Interpretation of EU law after Brexit**

After Brexit, questions of interpretation of EU law will become a matter for our national courts as the CJEU will cease to have jurisdiction in relation to domestic cases. The White Paper states that **the Bill will not require domestic courts to consider the CJEU’s jurisprudence**. However, it also indicates that questions of interpretation ‘will be determined in the UK courts by reference to the CJEU’s case law as it exists on the day we leave the EU’. The Great Repeal Bill will provide that ‘historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court’. The White Paper indicates that the government would expect the Supreme Court to take a ‘sparing approach’ to departing from CJEU case law.

The White Paper leaves it open as to how courts should approach future CJEU case law raising the possibility of a future divergence of approach. It does, though, state that after Brexit ‘our courts will continue to be able to look to the treaty provisions in interpreting EU laws that are preserved’. No doubt, much attention will be given to how far this might allow for a continued, purposive approach to interpretation, and for domestic courts to be steered towards taking a similar approach to the CJEU in future cases.

**International environmental law under the proposed Bill**

**Joe Newbigin, Research Assistant to the UKELA Brexit Task Force.**

In parallel with UKELA’s work on the ‘roll-over’ of EU environmental legislation we have also been looking at the technical challenges Brexit presents for other layers of environmental governance. What follows is a brief overview of one our strands of enquiry: the impact of Brexit on the UK’s international environmental obligations.

The White Paper has acknowledged the role international law has had in delivering ‘tangible environmental benefits’ and states that the UK will ‘continue to honour our international commitments and follow international law’. Unfortunately, the White Paper does not detail which international environmental agreements the UK will remain a party to, and therefore which commitments the UK will be obliged to honour. To shed light on this we have mapped all the international agreements that the UK is currently bound by, and how each has been implemented and enforced at an EU and national level.

When we analysed whether any of these agreements will ‘fall away’ we noted two main issues. First, the White Paper has not addressed the status of the international agreements which the EU entered into on behalf of Member States under its exclusive competence. Our analysis suggests that these agreements will no longer apply to the UK post-Brexit unless the UK signs and/or ratifies these agreements. The immediate consequences of a ‘do nothing’ scenario for the UK may include:

- Losing the ‘backstop’ these agreements provide in terms of environmental obligations, rights and minimum standards;
- **Immediate impact on international relations**, such as the effect of leaving the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes for lakes spanning the border between Northern Ireland and the Republic of Ireland; and
- **Forfeiting membership of inter-governmental bodies**, including fisheries bodies such as the North Atlantic Salmon Conservation Organisation.

Second, there is a high degree of uncertainty surrounding the status of ‘mixed agreements’ which contain elements falling within both EU and Member State competence. One perspective is that as the UK is already a party to these agreements in its own right and will be obligated to stick to these commitments once we leave. Others have argued that both exclusive and mixed agreements will fall on Brexit day, meaning they will have to be renegotiated after Brexit. A third view is that the UK would remain bound only by the elements of an agreement which were within the UK’s competence. The White Paper does not endorse the legal basis for any of these positions. The Task Force have identified nearly 50 mixed agreements, spanning most areas of environmental law: **it is unclear whether the environmental obligations contained in these agreements will constitute part of the UK’s post-Brexit international commitments.**

Recognising these limitations, we have started to scope possible issues in relation to the implementation and enforcement of each agreement. Often these relate to the mechanisms proposed in the White Paper. For example, **under the model for converting and preserving EU-derived law, will future changes to an international convention lead to a corresponding change in domestic regulations?** For instance, the appendices to CITES are frequently
updated and this is reflected in the annexes to the implementing EU regulations, to which domestic regulations cross-refer in turn. Without a new mechanism for updating the UK's domestic regulation a ‘snap-shot’ of EU law, taken on the day of Brexit, would quickly become out-of-date and potentially put the UK in non-compliance with its international obligations. Issues like this illustrate the additional complexities that multi-layered governance will pose for ‘correcting’ instances of referential drafting in EU-derived law.

The White Paper leaves many other questions unanswered in relation to the scope and implementation of the UK’s future international obligations. As we prepare for the publication of the Great Repeal Bill we will continue to map these ‘known unknowns’ and prepare a framework with which to analyse the Bill’s effects.
Student news

Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members’ journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to Mark Davies or Rosie McLeod, our student advisors. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is ‘sustainable cities,’ expected to be published in the week commencing 31 July.
UKELA events
Climate change and energy working party: Brexit update – 29 June, London

The CCEWP will be holding a meeting to discuss how Brexit negotiations may impact UK climate change and energy policies. The meeting will take place at 5.30pm on 29 June 2017 at 6 Pump Court. More details are available on our website.

Annual conference – 7-9 July, University of Nottingham

Join us at the University of Nottingham for our annual conference on the theme of Cities of the Future. More than half the world’s population now lives in towns and cities and this is growing inexorably. Living sustainably in cities is therefore a key challenge for politicians, planners, engineers, architects and lawyers. The conference will cast light on the role of lawyers and regulators in making cities more sustainable, sharing knowledge and best practice relevant to the UK context. More details are available on our website.

UKELA diary dates

25 September – London meeting on EIA
27 September – Nature Conservation working party meeting
5 October – UKELA Scotland annual conference
12 October – North East region seminar on enforcement undertakings
13 October – Conference on the Great Repeal Bill
1 November – North West region seminar on fracking
6 November – London meeting on the Aarhus Convention
8 November – Careers evening
29 November – Annual Garner lecture

For more details about these events and our whole programme, please visit our website.
What is your current role?
I currently work in the private sector and my role includes advising small and large businesses as to their environmental risks, responsibilities, and regulatory concerns. I also advise on damage limitation and defending businesses if they are prosecuted for breaches of environmental legislation.

How did you get into environmental law?
I worked for many years as a family lawyer which included an overspill into criminal law mainly in relation to domestic violence. I have always had a keen interest in environmental issues and have closely followed the development of environmental law. 2005 was my now or never moment for transition to environmental law when I saw an advertisement for a role in the legal department at the Environment Agency. I applied for the role and amazingly they offered me the job.

What are the main challenges in your work?
Trying to persuade the regulator to be more flexible in its approach to environmental regulation when investigating breaches of environmental law; there have been occasions when adopting a more flexible approach could have been a win-win for the environment.

What environmental issue keeps you awake at night?
The ever-increasing march of urbanisation and our inability to stem the rapid loss of biodiversity. I live in a small rural village in Worcestershire. In the 6 years that I have lived in my current property I have seen the disappearance of 5 different species of birds. There has been no obvious change in land use in the area and it worries me that there are unseen changes occurring to our environment as well as the obvious visible changes that are causing the loss. Species are reducing in numbers and disappearing. It is such a sad loss.

What’s your UKELA working party of choice and why?
My working party of choice has to be the environmental litigation working party of course, although I am member of the nature conservation working party as well. All the working parties do fantastic work but I love the commitment and passion of the nature conservation working party. However, the environmental litigation working party was where I thought I could be of best use by using the experience I had gained from working both in the public and private sector of environmental law.

What’s the biggest benefit to you of UKELA membership?
The biggest benefit for me is being part of an influential and respected voice in environmental law. It so rewarding when you see that the government has actually taken notice of some of the points made in our responses to its consultations on changes to environmental law even if they are only small changes. Another major benefit is being in contact with likeminded people and this gives me hope for the future.

On a final note if there is enough time left of my 60 seconds, I would really like everyone to take this thought away by John Stuart Mill, Principles of Political Economy (1848):

‘If the earth must lose that great portion of its pleasantness which it owes to things that the unlimited increase of wealth and population would extirpate from it, for the mere purpose of enabling it to support a larger, but not a better or a happier population, I sincerely hope, for the sake of posterity, that they will be content to be stationary, long before necessity compels them to it.’
Government must publish draft air quality plan before the general election (High Court)
Practical Law Environment
On 27 April 2017, the High Court rejected the government’s application for an extension to the deadline for publication of the UK’s draft air quality plan and ordered the government to publish the plan on 9 May 2017, after the local elections on 4 May 2017. The final plan must be submitted to the European Commission by 31 July 2017.

The application for an extension follows ClientEarth’s successful judicial review challenge in November 2016, where the High Court ordered the government to publish a new UK air quality plan for consultation by 24 April 2017, and to submit it to the European Commission by 31 July 2017.

In deciding to refuse an extension, the court is reported to have decided that purdah guidelines are not a principle of law but a convention that can be overridden in this case, given the exceptional threat that air pollution poses to public health.

The government confirmed, on 2 May 2017, that it would not appeal against the High Court decision.

ClientEarth announced, on 31 May 2017, that it would be making a further court application. It said that it had scrutinised the government’s plans since they were published on 5 May 2017, and had written to the Department for the Environment, Food and Rural Affairs (Defra) to ask for improvements. Defra refused, therefore ClientEarth stated that it would ask the court for judicial review.

For more information, see Legal update, Government must publish draft air quality plan before the general election (High Court).

Record £20 million fine imposed on Thames Water for water pollution offences
LexisPSL Environment
In March 2017, Thames Water Utilities Ltd (TWUL) was fined a record £20,361,140.06, including costs, following offences at six facilities in the Thames Valley between 2012 and 2014. The Environment Agency (EA) found that TWUL had been reckless in relation to two of the offences and that the remaining offences were caused by negligence which, among other things, led to the death of wildlife and distress to the public. TWUL had a number of previous convictions for environmental offending.

The case shows how the approach to sentencing has changed following the introduction of the Sentencing Council’s definitive guideline on environmental offences. It doesn’t add to the general principles of sentencing but it has raised the bar for sentencing very large organisations and is the first example of a sentencing exercise where the culpability for a very large organisation has been classified as reckless.

This case demonstrates conclusively that courts treat incidents of environmental pollution seriously and represents the largest penalty ever handed to a water utility for an environmental incident, being nearly ten times larger than the previous record fine for an environmental offence. It should therefore drive home the message that companies are at risk of highly significant fines and should take firm steps, when dealing with an environmental incident or investigation, to ensure that they are in as good a position as possible to mitigate any potential financial consequence.

For more information, see News Analysis, Prosecuting environmental offences under the definitive guideline?

Civil Procedure Rules reform costs protection for Aarhus Convention claims
Practical Law Environment
The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) requires contracting states to ensure that the costs of taking certain environmental challenges in court are not prohibitively expensive. The UK and EU are signatories.

In England and Wales, the Civil Procedure Rules (CPR) recognise the requirement to ensure that access to environmental justice is not prohibitively expensive by a specific costs regime for Aarhus Convention claims. Until 28 February 2017, the CPR 45 set specific caps on costs liability (and so litigation risk) for claimants (CPR 45.41 to 45.55).

The provisions on costs capping orders (CCOs) codify established common law principles for protective costs orders specifically for Aarhus Convention claims.

For more information, see Legal update, Government must publish draft air quality plan before the general election (High Court).
The Civil Procedure (Amendment) Rules 2017 (SI 2017/95) implement the government’s reforms to costs protection for Aarhus Convention claims under the CPR, which are intended to ensure that access to justice in environmental matters is not prohibitively expensive. In particular, amendments to CPR 45 allow the court to vary any party’s costs caps up or down according to their financial resources. The CPR amendments apply to Aarhus Convention claims commenced on or after 28 February 2017.

On 24 February 2017, ClientEarth, Friends of the Earth and the RSPB announced they had applied for permission to commence judicial review proceedings against the Lord Chancellor and the Secretary of State for Justice concerning the introduction of the revised CPR rules in Aarhus Convention claims, in particular, the court’s power to vary costs caps according to its evaluation of the claimant’s financial resources.

For more information, see [Legal update, Civil Procedure Rules reform costs protection for Aarhus Convention claims](#).

Permission for fracking exploration in Lancashire upheld (Preston New Road)

In October 2016, Cuadrilla’s planning appeal to test frack in Lancashire was granted, enabling shale gas to be fracked horizontally for the first time. Lancashire County Council previously refused permission for Cuadrilla to extract shale gas at two sites, Roseacre and Preston New Road, on grounds of noise and traffic impact. Applications for statutory review of the decision were made to the High Court under section 288 of the Town and Country Planning Act 1990 (TCPA 1990).

In Preston New Road Action Group and Frackman v Secretary of State for Communities and Local Government, Lancashire County Council and Cuadrilla [2017] EWHC 808 (Admin), the High Court dismissed the two appeals. The court found no error in the Secretary of State for Communities and Local Government’s decision to grant planning permission.

The case marks the latest development in the nascent hydraulic fracturing industry in the United Kingdom, which continues to face heavy local opposition. While the case largely turned on its facts, it nevertheless provides useful guidance on the application to fracking projects of established legal principles, including in respect of the interpretation of planning policy, cumulative impacts required to be assessed as part of environmental impact assessment, and the operation of the precautionary principle.

For more information, see [News Analysis, Permission for fracking exploration in Lancashire upheld (Preston New Road)](#).

EU ETS: competent authority can require surrender of wrongly-issued unused emission allowances from operator

ArcelorMittal Rodange et Schifflange SA (ArcelorMittal) is a steel company in Luxembourg that suspended its steel-making operations in 2011-12. The Minister acting as the EU Emissions Trading Scheme (EU ETS) competent authority for the State of the Grand Duchy of Luxembourg required ArcelorMittal to surrender, without compensation, 80,922 unused EU Allowances (EUAs) for the period in 2011-12 when the steel making operation was suspended.

ArcelorMittal challenged the Minister’s decision in the Luxembourg Administrative Court, which referred questions to the Court of Justice (ECJ) for a preliminary ruling on whether:

- The national Luxembourg EU ETS legislation was compatible with the EU ETS Directive 2003 (Directive 2003/87/EC) in allowing a competent authority to require the surrender, without full or partial compensation, of unused EUAs.
- The allowances in dispute could be classified as ‘EUAs’ within the meaning of the EU ETS Directive 2003 and, if so, what is the legal nature of those allowances?

On 8 March 2017, ECJ decided in ArcelorMittal Rodange et Schifflange SA v Etat du Grand-duche de Luxembourg Case C-321/15 that the EU ETS Directive 2003 must be interpreted as follows:

- National legislation can allow a competent authority to require the surrender, without full or partial compensation, of unused EU emission allowances that were improperly issued to an operator because the operator failed to inform the competent authority in good time that it had ceased to operate its installation.
- Those wrongly-issued allowances cannot be classified as emission ‘allowances’ within the meaning of Article 3(a) of the EU ETS Directive 2003.

For more information, see [Legal update, EU ETS: competent authority can require surrender of wrongly-issued unused emission allowances from operator (ECJ)](#).
Japanese Knotweed and the growth of an actionable nuisance (Waistell v Network Rail Infrastructure Limited; Williams v Network Rail Infrastructure)

LexisPSL Environment

This first instance decision in the county court case is believed to be the first decided case on the liability for property damage caused by Japanese knotweed (JKW).

The case held that it is an actionable private nuisance to have JKW growing within seven metres of a built structure on neighbouring land and that there is no requirement for the plants rhizomes to have encroached into the neighbour’s soil.

The judge held that encroachment by the JKW rhizomes was not actionable unless they had caused physical damage. He found, however, that there was an actionable nuisance as the JKW interfered with the amenity value of the claimants’ bungalows, because they could not sell them for their full market value. He rejected an argument that this amounted to pure economic loss, as being a principle which applied in negligence not nuisance claims.

This judgment, if it stands, has important consequences. It heralds the emergence of ‘proximate nuisance’—that is, something that one does purely on one’s own land, which does not carry over onto a neighbour’s land, is still actionable. As a result a homeowner can now sue a neighbour simply because they have JKW in close proximity to their home.

For more information, see News Analysis, Japanese Knotweed and the growth of an actionable nuisance (Waistell v Network Rail Infrastructure Limited; Williams v Network Rail Infrastructure).

New environmental impact assessment regulations come into force

LexisPSL Planning


These New Regulations transpose into English and Welsh law the amendments to EU Directive 2011/92/EU made by EU Directive 2014/52/EU to the EIA regime insofar as it applies to town and country planning and nationally significant infrastructure matters.

Some of the key changes introduced by the New Regulations include:

- Updating the list of environmental factors to be considered as part of the EIA process and there is a new requirement to consider the effects on the environment arising from the vulnerability of the development to the risks of major accidents and disasters.
- A new requirement for EIAs to be produced and environmental statements to be written by competent experts.
- Increasing the timeframe for public consultation to a period of ‘no shorter than 30 days’ for all projects.
- A new requirement for the consenting authority to ensure that a coordinated approach is taken for EIA projects that are also subject to assessment under the Habitats Directive 92/43/EEC.
- Prescribing the content of decision notices, which must now include consideration of whether monitoring measures are required.

For more information, see Planning analysis, New environmental impact assessment regulations come into force.
Access to justice
Cold freeze ahead for environmental claims

Gillian Lobo, ClientEarth.

At a glance
- New costs capping rules in Aarhus Convention Claims came into effect on 28 February 2017 for England and Wales.
- These new rules replace the previous fixed costs caps with 'hybrid' costs caps, namely a 'default' cap, which can be increased or decreased at any time during the proceedings. They also require the claimant to file a schedule of financial resources with the claim form.
- These changes have altered the landscape for environmental claims, as they remove prior certainty and increase financial risk for claimants who choose to bring such claims in the public interest.

Background
Environmental cases fall into a particular class of case, as they are typically brought in the public interest by members of the public or the environmental organisations they support.

The Aarhus Convention1 (the Convention) grew out of the recognition by many countries, including the UK, of the need to advance the public's right to protect the environment on behalf of others, including by improving access to the courts when public authorities fail to comply with their duties. The availability of such legal redress is at the heart of a mature democracy.

The Convention is built on three pillars that give members of the public rights to: access information; participate in decision-making; and access justice – all regarding environmental matters. It adjusts the power balance between citizens and governments because it empowers members of the public to defend their right to a healthy environment and to have access to the courts, if required. A core obligation under Article 9(4) of the Convention is for signatory states to provide legal procedures that have 'adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'.

The UK's non-compliance with Article 9(4) on the issue of costs has been extensively considered by the both European Commission and the Aarhus Convention Compliance Committee (ACCC), the latter in communication ACCC/C/2008/33 and subsequently by the Meeting of the Parties in decision IV/9i.4

In 2013, England and Wales implemented costs capping provisions for Convention claims in Part 45, Section VII of the Civil Procedural Rules (CPR). These rules introduced fixed costs caps for environmental judicial reviews. Shortly thereafter, the European Court of Justice (CJEU) gave guidance in two cases — Case C-260/11 Edwards v. Environment Agency [2013] 1 W.L.R. 2914 (Edwards) and Case C-530/11 Commission v UK [2014] 3 W.L.R. 853 (Commission v UK) — on the factors to be considered when assessing what is prohibitively expensive for a claimant under EU law.

What is prohibitively expensive for a claimant?
The CJEU provided guidance on the meaning of 'prohibitively expensive' in Edwards. It confirmed that the costs of the proceedings for the claimant must neither exceed the financial resources of the person concerned, nor appear to be objectively unreasonable.5 This is a two-stage assessment. Firstly, the level of costs must be subjectively reasonable, in that they must not exceed the available financial resources of the claimant. If the level of costs does exceed the available financial resources of the claimant, then they are prohibitively expensive, regardless of whether they are objectively reasonable.

Secondly, if the level of costs does not exceed the available financial resources of the claimant, they must also not be objectively unreasonable.

At paragraph 42 the CJEU sets out the factors to be considered under the objective test, namely: (i) the situation of the parties concerned; (ii) whether the claimant has a reasonable prospect of success; (iii) the importance of what is at stake for the claimant and the protection of the environment; (iv) the complexity of the relevant law and procedure; (v) the potentially frivolous nature of the claim at its various stages; and (vi) the existence of a national legal aid scheme.

Additionally, the CJEU confirmed in Edwards that members of the public must not be prevented from bringing or pursuing a claim by reason of the financial burden that may arise.6 Furthermore, in Commission v
UK, the CJEU held that the effective transposition of a directive into UK domestic law required the full application of the directive in a sufficiently clear and precise manner. The CJEU also recognised the need for predictability in judicial proceedings in the UK, given the high cost of lawyers’ fees.

The new environmental costs protection regime

The Ministry of Justice carried out a consultation on proposals for a new environmental costs protection regime between September and December 2015. It published its chosen proposals in November 2016. There was overwhelming opposition to the key proposal, entitled ‘hybrid costs caps’. Nevertheless, on 2 February 2017 the Lord Chancellor made rule 8(5) of the Civil Procedure (Amendment) Rules 2017/95 (the Amendment Rules), which made significant changes to Part 45 of the CPR, which introduced new rules into Section VII of Part 45 of the CPR, which replace the previous fixed costs cap regime.

The most significant change is the move from the certainty of fixed costs caps to hybrid costs caps, where the initial default caps (£5,000 for an individual claimant, £10,000 for a claimant organisation and a cross-cap of £35,000 for a defendant public authority) can be increased, decreased or removed altogether by the court, at any time during the proceedings. The court must, however, be satisfied that such variation or removal will not make the costs prohibitively expensive for the claimant.

In assessing what is prohibitively expensive for the claimant, the court must consider both the subjective and objective tests set out in CPR 45.44(3). In the case of the subjective test, the costs will be considered prohibitively expensive if the likely costs (including the court fee payable by the claimant) ‘exceed the financial resources of the claimant’. However, if the costs do not exceed the claimant’s financial resources, the court must then consider the objective test, and whether the costs are prohibitively expensive by reference to the factors in CPR 45.44(3)(b), namely the factors, other than the availability of legal aid, set out at paragraph 42 in the CJEU’s judgment in Edwards.

To be eligible for a hybrid costs cap the claimant must file with the claim form a schedule of financial resources, which takes into account any financial support that any person has provided or is likely to provide to the claimant. Such a schedule must be verified by a statement of truth.

Other changes include extending the scope of the rules to cover statutory reviews under Article 9(2), but not Article 9(3), individual costs caps for multiple claimants, and the removal of the deterrent of indemnity costs for defendants who unsuccessfully challenge the Convention status of the claim under the Amendment Rules.

What does this mean for claimants?

The move from fixed to hybrid costs caps has altered the landscape for environmental claims. When bringing environmental claims, potential claimants must reassess the financial risks, both for themselves and their funders. Some claimants have had to do this very quickly because the Amendment Rules came into effect within a month of being made.

The requirement that the claimant must file a schedule of financial resources introduces a new procedural step, and obliges claimants and their third-party funders to disclose their financial information, which may then be discussed in open court. The level of detail to be disclosed is not clear, but this provision, if overly intrusive, could have a chilling effect on ordinary members of the public to challenge the lawfulness of environmental decisions, or the willingness of philanthropic third parties to provide financial support to bring such claims. The Court of Appeal recognised this in R v Elmbridge Borough Council, ex p Garner, in the context of an application for protective costs orders. The Court stated that the more intrusive the investigation into the means of the applicant, and the more detail that is required of them, the more likely it is that there will be a chilling effect on ordinary members of the public to challenge the lawfulness of environmental decisions. The Amendment Rules provide a sign-post to CPR 39.2(3)(c), which allows for a hearing to be held in private if it involves confidential information. However, this is not a mandatory requirement.

The ACCC in their second progress report of the UK’s implementation of decision V/9/n commented on the consultation proposal to require claimants to file a schedule of financial resources. The ACCC noted at paragraph 84 that the ‘phrase “support likely to be provided in the future” is vague and ambiguous’. The ACCC then noted that the requirement for disclosure of any financial support from a third party, may limit the financial resources available to a claimant because not all third-party supporters will want ‘either the fact of their support, or the amount of that support, declared publicly’.

Hybrid costs caps fail to provide claimants with early certainty of the extent of their costs liability. The risk for claimants is that should the court order a higher cap at a later stage of the proceedings, it would be too late for them to discontinue the claim because at that stage they will be liable to pay the defendants’ costs on discontinuance, unless the court orders otherwise. Also, for some claimants, had they known the true extent of their final costs liability at an earlier stage, they may not have brought the proceedings in the first place.
The only way a claimant can avoid the risk of being liable for the defendant’s costs at a level greater than the default cap, is not to bring the proceedings. This is because the level of the default cap does not offer any certainty or predictability of what the ultimate costs liability will be.

Conclusion
Despite the intention and purpose of the Convention, the Amendment Rules shift the balance of power away from claimants, once again in favour of public authorities. In this altered landscape, only the very rich or courageous claimant will accept the uncertainty and financial risks created by the Amendment Rules.

From anecdotal reports, it seems that claimants have already caught a chill when it comes to bringing environmental claims. Let us hope that this does not lead to them freezing, as we need ordinary members of the public, and the organisations they support, to challenge unlawful decisions that damage the environment we all share.

Gillian Lobo is a lawyer in ClientEarth’s Climate Litigation team. Before joining ClientEarth she worked as a senior lawyer for Government Legal Department, where she undertook a mix of high profile and complex litigation.

Footnotes
4 See ECE/MPPP/C.1/2012/2, paragraph 38 and decision V/9n (see ECE/MPPP/2014/2/Add.1).
5 Paragraph 40.
6 Paragraph 35.
7 Paragraph 34.
8 Paragraph 58.
9 The Amendment Rules were laid in Parliament on 3 February 2017 and came into force on 28 February 2017.
10 CPR 45.43.
11 CPR 45.42(i)(b).
12 CPR 45.41(2)(a)(i).
13 CPR 45.43(4).
14 CPR 45.45(3)(b).
Access to justice
Are Protective Expenses Orders delivering access to justice in Scotland?

Helen McDade, John Muir Trust.

At a glance

- Protective Expenses Orders (PEO) were brought into Scots law, implemented through Court Rule 58A, to comply with the Aarhus Convention requirement that there be access to justice in environmental cases which are taken for the public good.
- The Stronelairg development case demonstrates that it can be excessively difficult for an environmental organisation to gain a PEO, or assess whether it will gain one.
- The costs of the court case plus the costs of the PEO process, if the PEO application is unsuccessful, can be huge for a small organisation.
- The risk and the uncertainty throughout the process cannot be mitigated against.
- Scotland is not compliant with the Aarhus Convention, in the author’s opinion.

Protective Expenses Orders (PEOs) were brought into Scots law to address the third pillar of the Aarhus Convention, i.e. access to justice, regarding decision-making in environmental matters. PEOs are intended to ensure that legal action regarding the environment and taken for the public good is not prohibitively expensive – by restricting liability for the other side’s costs if the case is lost. Chapter 58A of the Rules of Court states that ‘proceedings are prohibitively expensive for an applicant for a protective expenses order if the applicant could not reasonably proceed with them in the absence of such an order’ (emphasis added). In this article I consider the cost of access to justice in environmental cases in Scotland, although I believe there are other specific problems for environmental cases in Scotland within the current judicial process.

The John Muir Trust’s experience of applying for and being refused three PEOs, suggests that PEOs can be very difficult for an organisation to obtain; but also that the process of seeking a PEO can massively increase the cost exposure. What I observed, in some of the judges considering our case, demonstrated considerable ignorance of the Aarhus principles and a poor understanding of the planning system, including of environmental impact assessment.

In this article I ask:

- Whether the principles and the process of PEOs, as implemented, make legal action easier for individuals or environmental organisations?
- Are PEOs now a routine tool in the toolbox when seeking environmental protection, or is it still a last stand?
- Can individuals or environmental organisations know which of the above it is at the outset, or estimate risk during the very prolonged process?

Challenging the Stronelairg development through the courts

Stronelairg will be an industrial-scale windfarm development, of 66 turbines (originally 83 were proposed), mostly 135m high, in the Monadhliath mountains, south of Loch Ness. The John Muir Trust (the Trust) is a relatively small charity, with a staff of around forty and a turnover of £2.4 million to cover all its work areas of land management, public engagement and policy work – the latter being a small part of the portfolio. The Trust does not have any legally-qualified staff. Only three of the staff work on policy and campaigns and, as head of policy, I was the member of staff co-ordinating the case with the legal team.

There were a number of grounds of challenge in the Trust’s case against Stronelairg, but in this article, I focus on the PEO process and its impacts, only giving a brief outline of the case for clarity.

Application for a PEO for judicial review against the Highland Council in 2013

In 2013, the Trust began the process of its first-ever legal challenge seeking a judicial review against the Highland Council, which was a statutory consultee in the Stronelairg windfarm Electricity Act 1989, Section 36, application process and had not objected. If the Council had opposed the scheme, a Public Local Inquiry (PLI) would have been mandatory, which the Trust believed was essential for the facts to be properly examined. The Trust believed the Council Planning Officers had not properly taken into account the wild land nature of the site or Scottish Natural Heritage’s strong objection when writing the Officers’ Report. The report had recommended to Highland Council that the Council did not oppose a revised scheme from the developer, Scottish and Southern Energy (SSE). The Council committee accepted the recommendation. This recommendation was made despite a lack of consultation with the public on the revisions. Without the revisions, the Officers acknowledged they would have recommended objection.
The Trust sought a PEO for the judicial review but it was refused. As a consequence, the Trust dropped the case against Highland Council at that stage due to cost, but also in the hope that the government would send the case to the Department of Planning and Environmental Appeals for a PLI. The Trust and the Highland Council agreed to pay their own costs, and the Trust's costs at that stage were about £20,000.

One factor which is not obvious to most lay people is that a significant part of the case for judicial review needs to be worked up before making the case for the PEO. The judge's decision was delivered orally and, since the Trust did not appeal the PEO decision, was not explained in writing – something which seems extra-ordinary to me. I realised later this was unfortunate as it meant that, as a Trust, by the time of the next phase, we were unclear on the grounds of that first refusal.

Scottish Government’s decision in 2014
On 6 June 2014, the Scottish Government (SG) consented the amended scheme of Stronelairg, without any further public consultation. Until the development was consented, the area was included, by Scottish Natural Heritage, in a draft map of wild land areas. On 23rd June, SG published their Scottish Planning Policy 2, which included strengthened protection of wild land areas –

‘200. Wild land character is displayed in some of Scotland’s remoter upland, mountain and coastal areas, which are very sensitive to any form of intrusive human activity and have little or no capacity to accept new development. Plans should identify and safeguard the character of areas of wild land as identified on the 2014 SNH map of wild land areas.’

A response to a Freedom of Information request confirmed that the Stronelairg area had been removed from the wild land areas map which was published on 23rd June 2014 as a consequence of the windfarm approval two weeks previously.

Judicial review against SG
The Trust believed that, if left unchallenged, this consent would undermine any improved protection for wild land areas and there would be a continued significant loss of wild land. Following legal advice and after major fundraising for the case, the Trust decided to seek judicial review of the SG’s consent, seeking a PEO for that. Scottish and Southern Energy (SSE) joined the case as an interested party.

PEO hearing in 2014
PEOs exist so that access to justice is not prohibitively expensive. The court rules say this – ‘proceedings are prohibitively expensive for an applicant for a protective expenses order if the applicant could not reasonably proceed with them in the absence of such an order’. However, a 2013 Supreme Court ruling concluded that the fact that the claimant has not in fact been deterred from carrying on the proceedings is not itself determinative. The devil is in the detail of the judge’s interpretation of ‘prohibitively’ and ‘reasonably’.

This PEO hearing for the Trust’s judicial review lasted an astonishing three days in court and included extensive discussion of the Trust’s accounts. The Trust lodged up-to-date accounts, signed off by our Director of Resources who is a Chartered Accountant and member of the Institute of Chartered Accountants of England and Wales. The Trust was transparent throughout about the fundraising for the case and the Trust’s total turnover. Over 1000 people donated to the case, including major donors. Throughout the case, this prudent approach by the Trust seemed to count against us – an attitude of ‘well, you’ve already raised this much, you can raise more’ came across from the judges’ comments.

SSE’s QC picked out various lines in the accounts and questioned their validity, accuracy or availability for the legal expenses. She implied the accounts presented were not a true picture and more funds might exist – focusing on a legacy of £300,000. The judge was most interested in this, saying, ‘I knew that lady. Is she dead?’ I was one of the Trust representatives present and, although I thought this legacy was included in the presented accounts, there was no way to confirm this ‘on the hoof’. No warning or opportunity was given to enable the Trust’s director of resources, who was away on holiday, to answer.

The SG’s QC said that the SG’s costs for the judicial review would be similar to the Trust’s costs – estimated before the case at £53,000. SSE claimed their costs would also be similar.

The judge for the PEO Hearing, Lord Philip, refused the PEO for the Trust specifying that the estimates would bring the total costs to the Trust, including their own, if they lost, to ‘approximately £160,000’ based on the estimates. In his written judgment, Lord Philip had continued his interest in the legacy highlighted by SSE’s QC by mistakenly adding it in to the legacy total the Trust had presented, thus double-counting £300,000 (one of the judges in the later PEO hearing for the appeal voiced the opinion that ‘that might not have been his fault’, although she did not explain whose fault it might have been). Lord Philip did not take into account the costs of the three days already spent in court. Leave to appeal was refused.

The judicial review in 2015
For a few weeks in 2015, it seemed as if this might not matter, as the Trust won the judicial review. The SG and SSE appealed. This is the point in the court
process when the bizarre (to this layperson) ‘inverse rollover lottery’ effect comes into play. I’m not sure when I realised that, although we had won the judicial review, if we lost the appeal we could be liable for most of the costs throughout all ‘rounds’ of the case. Naively, I had thought that winning in the Outer House would show that our case had some merit, even if we lost the appeal, and that costs would be allocated accordingly. I know now that that could happen but whether such a distribution would be allocated wouldn’t be known until court costs were argued over at the end of the process. This end of the line risk is one thing which gaining a PEO would have mitigated against.

2016 – SG and SSE Appeal – PEO hearing
The Trust’s choices, once the SG had lodged an appeal, were either:

• To drop out of the case due to the potential costs, despite the Outer House win, leading to an almost inevitable liability for costs;
• To assess the risk of the second round in court and proceed if the risk to the Trust was not too high, considering the ‘fighting fund’ raised, and/or
• To apply again for a PEO for this appeal.

The Trust decided to proceed and try again for a PEO since the costs already incurred were considerably more than had been estimated for the first hearing. Due to court holidays and availability, the PEO hearing was heard only a week before the appeal hearing.

Both SG and SSE said once again, in this PEO hearing for the appeal that their costs would be similar to the Trust’s costs, estimated at £50,000. Comparing the numbers of lawyers on each team, this seemed impossible. Both SG and SSE had a senior and junior counsel and at least 1 solicitor. The Trust had a senior counsel and a solicitor.

By that stage, all parties agreed that costs for the first stage of the judicial review proceedings in the Outer House were likely to total about £228,000. Nevertheless, when considering what the Trust could afford for the Inner House appeal, Lady Smith excluded consideration of any costs in the Outer House, despite, on the other hand, including all the funds which had been raised to date for the Stronelairg case. The Inner House refusal of the PEO for appeal was based on costs estimates for the Inner House appeal ‘amounting to about £50,000 each.’

The judges gave this oral refusal of the PEO two days after hearing the case, with no reasons given at the time and no mention of a split decision. There was one working day left before the case as the decision was given on a Friday before a holiday Monday. The written judgment from two of three judges refusing the PEO was given 24 hours before the appeal. Twelve hours before the appeal hearing, the dissenting opinion of Lord Drummond Young was released, supporting the Trust case on Aarhus principles. Clearly, by the time the PEO decision was released there would have been little point withdrawing from the case as most of the cost had been incurred and we could still win.

It was frequently stated throughout the legal process that the Trust could always argue their case against costs later after the judgment, if circumstances had changed.

May 2016 – SG and SSE appeal
Lady Smith, the lead judge on the PEO Hearing (and one of the two judges who had ruled against awarding the Trust the PEO only days before the appeal), was also on the panel to consider the appeal. The Trust had an hour or so to decide whether to challenge her inclusion. We felt her inclusion on the appeal panel was prejudicial but also felt that to challenge it would risk prejudicing our case. We didn’t challenge. The SG and interested party’s appeal was heard over three days.

The Trust lost the appeal, leaving us potentially liable for most of both the SG’s costs and SSE’s from both rounds of the case. The Trust could not risk appealing to the Supreme Court.

In late 2016, the SG produced an itemised account of costs of £189,000. At that time, SSE said they ‘had spent more’. The Trust’s position was that SSE, an interested party which had not brought substantive new arguments to the case but had considerably lengthened the time in court, should not get significant costs.

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2017
The SG agreed to accept a settlement of £75,000. SSE then said they had spent £350,000 and more and enrolled a motion for expenses on behalf of the Stronelairg case. The Inner House refusal of the PEO for appeal was based on costs estimates for the Inner House appeal ‘amounting to about £50,000 each.’

The judges gave this oral refusal of the PEO two days after hearing the case, with no reasons given at the time and no mention of a split decision. There was one working day left before the case as the decision was given on a Friday before a holiday Monday. The written judgment from two of three judges refusing the PEO was given 24 hours before the appeal. Twelve hours before the appeal hearing, the dissenting opinion of Lord Drummond Young was released, supporting the Trust case on Aarhus principles. Clearly, by the time the PEO decision was released there would have been little point withdrawing from the case as most of the cost had been incurred and we could still win.

It was frequently stated throughout the legal process that the Trust could always argue their case against costs later after the judgment, if circumstances had changed.
Learning points
Of course, the financial risks of any court case are huge and a PEO brings costs of another day or several days in court but I have realised there is an additional, important, factor with a PEO application which comes into play. It is the distraction from focusing on the main case. It allows the ‘big boys’ to distract both the petitioner and the judiciary from the substantive points of the case. Even if the legal team for the petitioner restricts their costs, as ours did, everyone working on a charitable organisation’s case is conscious of the cost of preparation work. If the lawyers are working on income and expenditure sheets, they’re not working on the arguments around the case itself. Moreover, and I think this is critical, the judges pre-form their opinions of the substantive case even if the arguments for that are not being formally put.

What is ‘prohibitively expensive’? It clearly doesn’t mean the same thing to me as it does to the judiciary. I would suggest that the average man in the street would think the costs that the Trust was exposed to were prohibitive, unless the petitioner was a millionaire. The Trust’s own costs alone for the judicial review and the appeal, and both PEO hearings, were just under £150,000, even before the potentially, unlimited exposure to the other parties’ costs.

What is ‘reasonably’? Again I realised it meant something different to the legal profession. It was said frequently that the costs being discussed and estimated by the parties were reasonable because it was a complex case. I don’t think that is what Court Rule 58A use of the word ‘reasonably’ is about. Surely it means ‘reasonable to the Petitioner’? Regardless, the costs were two or three times higher in the event than the costs considered in the PEOs.

My conclusion is that this wasn’t accessible justice and that Scotland is definitely not Aarhus compliant with regard to ‘access to justice’ because of:

The uncertainty in the process of applying for a PEO;
The huge costs of judicial review anyway, and;
The extra costs of applying for a PEO.

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Footnotes
1 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or ‘Aarhus Convention’.
2 Chapter 58A of Rules of Court: ‘The court must make a protective expenses order where it is satisfied that:
(a) the applicant is a member of the public concerned;
(b) the applicant has a sufficient interest in the subject matter of the proceedings; and
(c) the proceedings are prohibitively expensive for the applicant.’
4 R (Edwards & Another) v Environment Agency & Others (No 2) [2013] UKSC 78.
5 Opinion of Lord Philip in the Petition of the John Muir Trust [2014] CSOH 172A.
Access to justice
Access to the UK courts for environmental claims in the developing world

Adrienne Copithorne, Richard Buxton Environmental Law.

At a glance
• Access to justice is becoming a well-accepted factor in deciding procedural aspects of claims.
• Communities in the developing world look to the UK courts for remedies they feel are unachievable domestically.
• Bringing foreign environmental claims in UK courts is a complex and uncertain venture.
• As yet the UK courts have not recognised any particular connection between the need for access to justice and environmental claims.

Most environmental lawyers in the UK would agree that the natural world is under a significant threat. Many also would agree that there are significant barriers to using the courts to obtain remedies for the damage caused by these threats. The phrase ‘access to justice’ has taken on a particular association with the prohibitive costs of bringing proceedings, which is recognised in the Civil Procedure Rules by the introduction of the costs caps in so-called ‘Aarhus claims’. One can think of other domestic obstacles to protecting the environment and remedying environmental damage – the lack of third party rights to enforce environmental permits or conditions to planning permissions is a significant example.

But when we look outside of the UK to the developing world the obstacles are even greater. Many countries, where damage of catastrophic proportions happens, lack adequate regulatory agencies or any capacity on the part of local or national governments to clean up the damage and compensate those whose livelihoods have been destroyed as a result. The Aarhus Convention itself has few signatories from outside of the EU apart from the republics which made up the former of the Soviet Union (but not Russia itself).

Many of the countries where these pollution events happen have legal systems with an established body of jurisprudence in tort law or regulatory law which would ostensibly punish polluters and provide compensation. They also have well-trained and competent judges and lawyers. However, slowness or inefficiency in the court systems, weaknesses in enforcement and corruption in many areas of civil society means that even if claims are brought, they have little impact either in deterring future polluters or ameliorating the devastation which has been caused.

The question therefore arises – does the emerging doctrine of ‘access to justice’ encompass the ability to bring claims in the courts of England and Wales for environmental damage caused overseas?

The courts of England and Wales are well-known for international litigation – over 70% of the Commercial Court’s litigation caseload in 2016 involved parties whose only connection with the jurisdiction arose from the parties agreeing to the application of English law in their contractual arrangements. The UK’s colonial past has led to many countries throughout the world having legal systems which derive from and are still heavily influenced by judgments from UK courts. The dominance of English as a language for business and international travel also contributes to the UK courts being perceived as an attractive location for international claims. The UK courts have a reputation for giving fair and well-reasoned judgments.

For these reasons, in addition to the difficulties of obtaining justice in the developing world, a number of claims arising out of incidents of environmental pollution overseas have been brought in London. They have claimed the jurisdiction of the English courts primarily on the basis that the defendant company is a subsidiary of a corporation domiciled in England & Wales. Practice Direction 6b to Part 6 of the Civil Procedure Rules states that in order to determine whether to grant permission to serve a claim form out of jurisdiction on the foreign domiciled party, the court must first of all determine whether there is a ‘real issue that is reasonable for the court to try’ against the corporation domiciled in England & Wales. What this means in practice is that the claimants cannot ‘tack on’ a claim against a parent company merely to bring a claim within the (supposedly more beneficial) UK court system.

The first and perhaps most famous case involved Trafigura, a Singaporean based shipping company which, in 2006, offloaded toxic waste in the port of Abidjan via an agreement with an Ivorian company. That company used a local contractor to spread the waste throughout the city, leading allegedly to 17 deaths and injury to 30,000 people. In 2008 a civil claim was filed on behalf of 30,000 Ivorians in London, which was subsequently settled for £30 million. However, as the claim settled before the hearing, there
was no judicial consideration of the ‘access to justice’ issues.

In 2014, Akenhead J handed down judgment in the Bodo Community & Ords v Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 1973 (TCC). The case concerned contamination of the Bodo lands and territorial waters from crude oil spills in 2008 and 2009. Although related claims were issued in the Nigerian court, Shell Petroleum Development Company (SPDC) admitted liability and submitted to the jurisdiction of the English courts. It is reported that Royal Dutch Shell was not named as a defendant in exchange for SPDC’s admission of liability and willingness to participate in English court proceedings. Interestingly, while the question of liability was determined with reference to Nigerian damages arising out of pollution and environmental declaration that the English court did not have damage at the Nchanga copper mine in Zambia. The first defendant, Vedanta, is the UK domiciled parent holding company to the second defendant, a public company. Vedanta & KCM were directors). The judge concluded that there was a ‘real reason to be tried’ between the claimants and Vedanta and it was not a mere device to enable a claim against KCM.

However, the judge also held that England was not the proper place to bring a claim against KCM, having set to one side the claim against Vedanta. All the witnesses of fact and documentary records were located in Zambia. The claimants also were all located in Zambia and it would be much more practical to give evidence at a court there. However, given the existence of a legitimate claim against Vedanta in England and the inconvenience and expense of having two sets of proceedings in two continents, the judge held that both claims should proceed in England.

The judge also considered issues of access to justice. He concluded on the evidence before him that there was a real obstacle to the claimants obtaining justice in Zambia. They were extremely poor and unable to afford legal representation. Conditional fee agreements were unlawful in Zambia and legal aid, such as it was, would be inadequate for such a claim. There was a dearth of lawyers in Zambia and no evidence that the claimants would find proper representation there. The evidence also indicated that proceedings would be chaotic and drawn out, and KCM could benefit from political connections to thwart the case. The judge noted carefully that this was not to be seen as criticism of the Zambia legal system or ‘colonial condescension’ but merely his findings on the evidence.

In February 2017, Laing J referred to the Vedanta case in her judgment in AAA & Ors v Unilever PLC and Unilever Kenya Limited [2017] EWHC 371 (QBD). The claimants were Kenyan nationals who were victims of violent crimes carried out by individuals on the second defendant’s tea plantation following the Kenyan presidential elections in 2007. The claimants alleged that the defendants had a duty of care to protect them from violence and had breached that duty. Although not an environmental claim per se, it is of interest because of Laing J’s comments on access to justice. Having heard substantial evidence on whether the claimants could get ‘substantial justice’ in Kenya, the judge said:
The judge went on to note that the claimants would be at risk of further politically- and tribally- motivated violence if their identities were not made anonymous. However, there is no tradition of making anonymity orders in Kenya and there was cogent evidence that corruption could be used to circumvent any order made. Although the judge noted that ‘substantial justice’ did not mean entitlement to the same quality of representation in Kenya as in the UK, there was a real problem with funding the necessary litigation in Kenya as CFAs were illegal, there was no functioning legal aid system and the claim would be expensive to prepare. The judge concluded there would be a real risk that the claimants could not obtain ‘substantial justice’ in Kenya.

One month before Laing J delivered her judgment, Fraser J handed down a judgment in *His Royal Highness Emere Godwin Bebe Okpabi & Others v Royal Dutch Shell plc & Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC). This case arose out of incidents of oil pollution in the Ogale lands and Bille Kingdom of Nigeria from the Defendants’ oil pipelines. Fraser J’s decision was on a preliminary application by the Defendants that, in essence, the Court lacked jurisdiction to hear the claims. The defendants argued that the claims had nothing to do with the UK jurisdiction and should be tried in Nigeria. Fraser J’s judgment analyses carefully the applicable law and principles but concluded the necessary claim against Royal Dutch Shell (RDS) was not made out. The judge emphasised that it was a fundamental principle of English law that subsidiaries held a separate legal personality to that of their holding company. He was critical of the lack of genuine evidence put forward by the claimants as to the factual case against RDS, rather than SPDC. The claimants’ evidence included, for example, public statements made by ‘the Shell Group’ as to its commitment to environmental issues. The judge noted that references to the Shell Group did not dispel the separate legal personality of the subsidiary (and the statements themselves noted this fact). They also could not be taken as evidence of an assumption of a duty of care. The evidence, the judge concluded, showed that SPDC was the wholly autonomous company which owned, operated and was responsible for the infrastructure which allowed its oil operations in Nigeria. RDS was only concerned with shareholding and financial matters. The evidence did not show SPDC was reliant on RDS for anything other than that. Therefore, the claim against RDS should not proceed and accordingly the claim against SPDC also would not proceed in the English court, as there was then no linkage with the Nigerian context for the claim that would bring it within the UK jurisdiction.

Given this conclusion on liability, Fraser J did not find it necessary to consider the question of access to justice in Nigeria in any depth. However, he did comment that the situation in Nigeria was very different from that of Zambia and therefore Coulson J’s judgment in *Vedanta* had little relevance. CFAs, for example, are lawful in Nigeria. Also while he noted submissions regarding delay, he stated, ‘no modern legal system of which I am aware is without its delays, including the one in this jurisdiction.’

Appeals from both the *Vedanta* and *Okpabi* decisions are to be heard in the Court of Appeal, in July and November of this year respectively. It is likely we will have a more definitive view on the issue of foreign environmental claims being brought in the UK courts by the end of this year.

However, it must be noted that even securing a successful decision in the UK courts does not mean that victims will be compensated or the pollution remedied. Despite RDS agreeing to pay a landmark sum of £55 million to the Bodo people following Akenhead J’s judgment, as of January 2017, no clean-up operation has begun. There is also a subsequent judgment of Akenhead J to the main proceedings (*Bodo Community v CW Law Solicitors* [2014] EWHC 3675 (TCC)) which concerned an injunction application by the claimants’ solicitors relating to a dispute over claimants allegedly being ‘signed up’ by the defendant firm to conduct settlement negotiations with RDS. Similarly, in *Agouman v Leigh Day* [2016] 1364 EWHC (QBD), some of the claimants in Ivory Coast affected by the Trafigura disaster successfully sued their solicitors for having not fulfilled their duty of care when they agreed to have settlement monies paid into an Ivorian bank account before distribution. A third party managed to persuade an Ivorian court to grant an order that the monies were to be transferred to an account under this control, thereafter they vanished. These judgments are a reminder of the practical obstacles to ensuring ‘access to justice’ in the developing world as well as the difficulties faced by any lawyers undertaking these claims.

What is apparent from these judgments is that there is no real recognition that the environmental issues raised by the claims themselves have any bearing on the approach to be taken to deciding them. They are treated as would any other form of civil claim. Although the courts are willing to consider issues of ‘access to justice’ this is not within a context specific to environmental claims. There is no recognition of any global duty to prosecute polluters or remedy the damage they have caused. So while it can be said the emerging doctrine of access to justice is playing a role...
in determining which foreign claims are considered in
the UK courts, the environment itself is largely absent
from that determination.

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Access to justice
The EU on access to justice: do as I say, not as I do

Anaïs Berthier, ClientEarth.

At a glance
• This article discusses the March 2017 findings of the Aarhus Convention Compliance Committee on the EU’s compliance with the Aarhus Convention’s access to justice requirements.
• The Compliance Committee found that Article 9(3) of the Aarhus Convention was breached by:
  (a) The EU courts’ restrictive interpretation of Article 263(4) (the EU’s ‘standing’ test), and
  (b) The definition of acts that can be challenged under the internal review procedure provided to NGOs by the EU’s Aarhus Regulation, and the fact that this review procedure is not open to members of the public.
• The next step is the endorsement of the findings of the Compliance Committee at the next Meeting of the Parties to the Aarhus Convention in September 2017.
• The EU Council and the Commission are now discussing what the EU’s position on this finding should be.
• It is important that the EU endorses the Compliance Committee’s findings and takes steps to remedy the breaches identified.

In March 2017, the Aarhus Convention Compliance Committee (the Committee) adopted its final decision finding the EU in violation of the access to justice provisions of the Aarhus Convention (the Convention). The Committee found that:

‘The EU fails to comply with the Aarhus Convention with regard to access to justice by members of the public because neither the Aarhus Regulation nor the jurisprudence of the ECJ implements or complies with the obligations arising under the Convention’.1

This is a serious blow to the EU as it is the first official decision from a body composed of lawyers finding the lack of access to the EU courts for members of the public, in violation of international law.

The ‘communication’ made by the NGO ClientEarth in 2008 was twofold. The first part challenged the interpretation of the Court of Justice of the EU of Article 230(4) of the Treaty establishing the EC (superseded by Article 263(4) TFEU) which provides for the individual and direct concern criteria that members of the public must fulfill to have standing before the EU courts. The second part questioned the compatibility of the Aarhus Regulation applying the provisions of the Convention to the EU institutions, agencies and bodies with the Convention.

1. The interpretation of the EU Courts of the TFEU provisions is not in line with Article 9(3)(4) of the Convention

This interpretation was adopted in the Plaumann case in 1963 and has been reasserted in all the subsequent cases in which individuals or environmental NGOs were the applicants, even after the Convention entered into force in the European Community:

‘Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed’.2

Under the court’s logic, the larger the number of people affected by the act of an EU institution, the less grounds there are to confer standing to challenge that act. This is, of course, completely inadequate for the purpose of challenging decisions that contravene environmental law. As a result of this test, no NGO or individual has ever been considered to be individually concerned, and therefore to have standing, to challenge any decision of any EU institution.

The Commission, which represents the EU before the Committee, has two main arguments. It contends that Article 263(4) TFEU cannot provide a broader legal standing right than as interpreted by the EU Courts and that the Committee’s findings imply a change in the Treaty. They further argue that access to justice is anyway provided in compliance with Article 9(3) of the Convention through the possibility of requesting a preliminary ruling to the ECJ through national courts under Article 267 TFEU. The Committee has very clearly rejected both arguments. The Committee stated that:

‘[the] jurisprudence of the ECJ is too strict to meet the criteria of the Convention’ and recommended that “a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention’.”3
1.1 No need to amend the Treaty
The Convention was approved by Council’s Decision 2005/370/EC. There is no question about the conformity of the Convention with the EC Treaty. The approval of the Convention by the Council without amending the Treaty confirms that fact.

It also follows from Article 216(2) TFEU that international agreements are binding upon EU institutions; the Convention is therefore binding on the EU institutions including the ECJ.

The Committee recalled that, ‘the CJEU is an institution of the Party concerned and as such subject to the review of the Committee.’ And that:

‘…an independent judiciary must operate within the boundaries of law, but in international law the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government 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.’

The Committee finally recalled that:

‘Its review of the Parties’ compliance with the Convention is an exercise governed by international law. As a matter of general international law of treaties, codified by Article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty.’

Therefore, the provisions of the TFEU may not serve as justification for not complying with the Convention.

Additionally, the wording of Article 263(4) does not provide for such a restrictive test. The courts must adopt a purposive interpretation of Article 263(4) to bring the EU into compliance with Article 9(3) of the Convention. The courts have already departed from the strict wording of Article 230(4) of the EC Treaty in numerous cases for economic operators and institutions. A similar line of reasoning should therefore be adopted for NGOs and individuals.

1.2 A double standard between access at EU and national level and the NGOs and the industry
The Committee found that there had been no new direction in the jurisprudence of the EU courts that will ensure compliance with Article 9(3)(4) of the Convention. In this regard it noted that in the Slovak Bear case, the ECJ ruled that:

‘If the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

It follows that … it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.’

The Committee concluded that it:

‘Regrets that despite its findings with respect to the national courts, the CJEU does not consider itself bound by this principle. The Committee considers that if the EU Courts had been bound in the same way as the national courts, the EU might have moved towards compliance with Article 9, paragraph 3, and consequently Article 9, paragraph 4.’

Another double standard is established by the jurisprudence of the CJEU between NGOs and citizens on the one hand and the industry on the other hand. It is sufficient to read the case-law of the CJEU to acknowledge that the industry has a much broader access to the CJEU than NGOs and individuals and is therefore allowed to defend their economic and financial interests before the courts. The courts’ jurisprudence thus clearly advantages the protection of private economic interests over public interests including the protection of the environment.

1.3 The ineffectiveness of the referral for a preliminary ruling
The EU argued that access to justice was provided because members of the public in challenging implementing measures before national courts may also challenge the invalidity of EU acts underlying the implementing measures. The national courts could potentially ask for a preliminary ruling to the ECJ which would, according to the EU, constitute access to the EU courts in compliance with Article 9(3) of the Convention. The Committee rejected that argument, saying:

‘While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member states, it cannot be a basis for generally denying members of the public access to the EU courts to challenge decision, acts and omissions by EU institutions and bodies.’

Under this procedure no one can, under any circumstances, sue any EU institution or body directly.
These are immune from any legal challenge under Article 267.

Yet, the EC may not rely on the Member States to comply with the Convention on its behalf and to provide access to the ECJ through the procedure established under Article 267. The EC, as a party to the Convention, may not benefit from a different status than the other parties and has to adopt any necessary measures or changes to bring about compliance with Article 9 of the Convention.

As recognised by the Commission itself in its recently adopted Communication on access to justice, ‘the role of Article 267 may be put in doubt if access to national court is either impossible or rendered excessively difficult’ (paragraph 23).

Access to national courts is indeed not regulated in the same way in the 27 Member States. There are no minimum harmonized standards on access to the courts throughout the EU. Because the proposal for a Directive on access to justice has still not been adopted by the Council, the third pillar of the Convention has not been transposed at Member States level. Access to judicial procedures is thus still an issue in numerous Member States. Where access to courts is still not provided in conformity with the Convention, the procedure established under Article 267 TFEU cannot be used.

Moreover, the procedure is very limited. The applicants in a procedure before a national court cannot oblige that court to put a preliminary question to the ECJ. National courts have complete discretion over whether they submit a preliminary question to the ECJ or not. It is only for national courts whose decisions cannot be appealed any more, that there is an obligation to submit a question under Article 267 TFEU.

The applicants cannot decide what question(s) should be submitted to the ECJ; rather, the formulation of the question(s) is at the discretion of the national court. The parties to the litigation before the national court cannot formulate claims. Moreover, Article 267 does not allow applicants to challenge all types of measures adopted at EU level. Relying exclusively on that procedure entails that certain types of decisions adopted by EU institutions are completely immune from judicial review.

The procedure under Article 267 TFEU is rather a sort of interplay between a national court and the ECJ.

1.4 The Lisbon Treaty has not brought about any change

The interpretation by the CJEU of the ‘direct concern’ criterion under the last limb of Article 263(4) TFEU was also held to be in breach of the Convention. That limb of the article which has been added by the Lisbon Treaty provides that, ‘any natural or legal person may … institute proceedings … against a regulatory act which is of direct concern to them and does not entail implementing measures.’

The Committee started by noting that the wording introduced in that article by the Lisbon Treaty is ‘different and could lead to a change of jurisprudence so as to enable members of the public to have standing before the EU courts. So the Committee considered Article 263(4) TFEU could provide the basis for ensuring compliance with Article 9 of the Convention.’

However, after examining the interpretation of the courts of the criterion in the Microban case the Committee concluded that,

‘An NGO promoting environmental protection would not be directly concerned with a contested measure unless the measure in question directly affected the organization’s legal position. Such an organization would always be excluded from instituting proceedings under the third limb of Article 263(4) when it acted purely for the purposes of promoting environmental protection.’

The Committee reiterated that,

‘whilst parties have a margin of discretion when establishing criteria for the purposes of Article 9, paragraph 3 of the Convention, that margin of discretion does not allow them to exclude all NGOs acting solely for the purposes of promoting environmental protection.’

It concluded that the direct concern criterion alone prevents Article 263(4) from implementing Article 9(3) of the Convention. However, the other criteria in the third limb of the article, that is the definition of a regulatory act and the requirement of not entailing implementation measures, were also considered problematic:

‘whilst Article 9, paragraph 3 allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws.’

Meanwhile, the ruling of the General Court in case T-600/15 confirmed the interpretation of the Committee. NGOs, Pesticide Action Network (PAN) and Bee Life and Union nazionale associazioni apicoltori italiani (UNaapi), sought the annulment of Commission implementing Regulation approving an active substance in accordance with Regulation
The Committee found that the definition of acts that can be challenged under the internal review procedure provided to NGOs by the Aarhus Regulation was in breach. These acts are ‘any measure[s] of individual scope under environmental law, taken by a Community institutions or body, and having legally binding and external effects’ (Article 2(1)(g) of the Aarhus Regulation).

The NGOs relied notably on their statutes and objectives of the campaigns they pursued. The General Court acknowledged that the PAN was a pan-European organisation active in 24 countries, of which 21 are members of the EU. Under its articles of association, it has the objective, inter alia, of promoting activities to reduce or eliminate the use of pesticides. Likewise for Bee Life, its goal is to reveal and solve the environmental problems of pollinating insects, in particular of honey bees, and to strive for agriculture compatible with the wellbeing of pollinators and biodiversity.

However, the General Court found that the contested act did not affect the rights of the NGOs to conduct their campaigns. Therefore, the impact would only be factual and not legal. The impact could also be only indirect given the uncertain authorisation of the products by the Member States.

It is regrettable that the CJEU has not taken the opportunity of the introduction of this new provision in the Treaty to open up the conditions for bringing direct actions.

2. The Aarhus Regulation must be revised

The Committee found that the definition of acts that can be challenged under the internal review procedure provided to NGOs by the Aarhus Convention was in breach. These acts are ‘any measure[s] of individual scope under environmental law, taken by a Community institutions or body, and having legally binding and external effects’ (Article 2(1)(g) of the Aarhus Regulation).

The Committee stressed again the fact that whilst Article 9(3) allows parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow parties any discretion as to the acts or omissions that may be excluded from implementing laws.

The Committee supported the ruling from the General Court in the Stichting Milieu case, in particular the analysis that, ‘there is no reason to construe the concept of “acts” in Article 9, paragraph 3 of the Convention as covering only acts of individual scope’ and that ‘there is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity’.

Moreover, the Committee criticised the fact that the internal review procedure was only open to NGOs. It stated that the term ‘members of the public’ in Article 9(3) is not limited to NGOs. It follows that, by barring all members of the public except NGOs meeting the criteria of its Article 11, the Aarhus Convention fails to correctly implement Article 9(3).

The condition according to which an act, to be considered as an administrative act under the Aarhus Regulation, must necessarily be adopted ‘under environmental law’ has also been considered in breach of the Convention. The Committee found that Article 9(3) is broader than that. Its requirement is to provide a right of challenge where an act contravenes a law relating to the environment. It states that it is clear that an act may contravene laws relating to the environment without being adopted under environmental law within the meaning of the regulation.

Finally, the Committee stated it is not convinced that generally excluding all acts that do not have legally binding and external effects is compatible with Article 9(3).

3. Conclusion

The Commission has heavily commented on all the points made by the Committee and reiterated their position made previously.

The next step is the endorsement of the findings of the Committee at the next Meeting of the Parties to the Aarhus Convention (MoP) in September 2017. The Council and the Commission are now discussing what the EU’s position at the MoP should be, i.e. whether to support the endorsement of the findings or not. Since the establishment of the compliance mechanism in 2002, the main findings of the Committee have always been endorsed by the MoP, with the support of the EU and its Member States. It is of crucial importance that
the EU and its Member States support the endorsement of the findings of the Committee and are already able to report to the other parties on the steps that are being taken to rectify the situation. Failure to support the Committee’s findings simply because the EU is the subject of those findings would set a dangerous precedent and send a stark message to its citizens, other non-EU Parties to the Convention and the rest of the world that the EU has a highly selective approach when it comes to the rule of law.

By supporting the endorsement of the decision, the EU will show its commitment to democratic values and take this as an opportunity to start bridging the gap between citizens and the EU institutions and to address the concerns of an alarming number of Europeans questioning the value and legitimacy of the EU. The findings also aim to ensure a more level playing field between the EU institutions and national public authorities so that they are subject to similar obligations with regard to access to justice.

While in recent years the jurisprudence of the Court of Justice of the EU has given due weight to the implementation of the access to justice provisions of the Convention at national level, it has not ensured the same level of access at EU level. This double standard is justified neither legally nor politically. It is now the role of civil society to rely on the findings in cases before the EU courts and in campaigns to first raise awareness of the lack of implementation of the Aarhus Convention and to give the opportunity to the CJEU to ensure that effective judicial protection is provided to members of the public at EU level as well.

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Footnotes
1 ACC/C/2008/32, Findings and recommendations of the compliance committee with regard to communication ACC/C/2008/32 (Part II) concerning compliance by the European Union
3 ACC/C/2008/32, para. 43.
4 Council Decision 2005/370/EC of 17 February 2005 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, OJ L 124/1.
5 ACC/C/2008/32, para. 42
7 ACC/C/2005/11 (Belgium), Ibid, para 41.
10 Lesoochranarske zoskupenie, paras 49-50.
11 ACC/C/2008/32, para. 83.
13 ACC/C/2008/32, para. 43.
14 ACC/C/2008/32, para. 61.
15 Para. 75.
16 Para. 75.
17 Para. 80.
Public and Regulatory Paralegal (focusing in part on environmental matters)

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