



CLIENTEARTH
JUSTICE FOR THE PLANET

**Reply from ClientEarth to the Aarhus Convention Compliance
Committee's questions**

Communication ACCC/C/2008/32

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1. Please specify whether the communication concerns:

- a. a specific case of a right of access to justice being violated by the jurisprudence of the European Courts, or**

Yes. However, this is not our main argument. Our main argument is that there is a general failure to implement access to justice provisions of the Convention because of the interpretation of the European Courts of article 230 paragraph 4 EC Treaty and the way the access to justice provisions of the Convention are implemented by Regulation 1367/2006. Case T-91/07 (WWF-UK) in which we argue that the Convention has been violated is just an illustration of the general failure of the Courts to provide access to justice. Therefore, if the Committee were to disagree with our analysis of Case T-91/07, our main argument still remains to be decided and retains its full force.

- b. a general failure to implement access to justice provisions of the Convention?**

The communication also concerns a general failure to implement access to justice provisions of the Convention.

2. If the answer to question 1(a) is yes, please specify:

- a. precisely which of the many judgements described in the communication you allege to be in non-compliance with the Convention?**

Only the judgement in case T-91/07 (WWF-UK) can be considered in violation of the Convention as it is the only one in which the action was brought after the approval of the Convention by the EC. This case demonstrates that there has been no change in jurisprudence after the Convention entered into force in the EC. The *Plaumann* jurisprudence still applies. However, the other judgements described in the communication would have violated the Convention if the actions had been brought to the Court after the approval of the Convention by The EC.

- b. precisely which provision of the Convention has been violated in the judgment in question and what was the nature of this violation?**

Paragraphs 2, 3, 4 and 5 of article 9 and article 3, paragraph 1 of the Convention have been violated.

Nature of the violation: WWF-UK should have been granted standing to challenge the legality of Council Regulation EC 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and group of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required.

3. If the answer to question 1 b) is yes please specify:

- a. Precisely which of the Community legal acts referred to in the communication and which provision(s) of such act you allege to violate the Convention?**

The Community legal act referred to in the communication and which violates the Convention is the following:

Regulation 1367/2006 of the European Parliament and the Council on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, article 2 paragraph 1 (g) and (h), articles 10 and 12 thereof.

We would also like to stress the point that the main violation of the Convention is not done by a Community legal act but by the interpretation of the Court of First Instance and of the European Court of Justice of article 230, paragraph 4 EC Treaty, the Convention and Regulation 1367/2006. In case T-236/04 and T-241/04 (EEB), case T-91/07 (WWF-UK) and case T-137/04 (Regiao Autonoma dos Açores) cases, the interpretation by the Court of First Instance of the Convention and of Regulation 1367/2006 contravenes article 9, paragraph 3 of the Convention as it does not allow members of the public, NGOs and local regions, to institute proceedings before the Courts to challenge EC institutions' decisions which contravene EC environmental law, taking in account that only the WWF-UK case was initiated after the approval of the Convention in the EC. The interpretation of the Court of First Instance and of the European Court of Justice of article 230 paragraph 4 EC Treaty in these three cases as well as in the other cases mentioned in the communication (case T-585/93 and case C-321/95 (Greenpeace), case C-219/95 (Danielsson)) would also contravene article 9 paragraph 3 of the Convention if the cases had been initiated after the approval of the Convention by the EC. We will not develop further on that point as it is already explained in the communication and that the question bears on Community legal acts.

b. Precisely which provision of the Convention is violated by the provision(s) in question and what is the nature of this violation?

The following provisions of the Convention are not properly implemented by the provisions of the legal act mentioned in paragraph a):

- Article 6 paragraph 1 and article 9 paragraph 2 of the Convention

Article 7 of the Convention on plans and programmes relating to the environment is transposed by article 9 of Regulation 1367/2006. However, Regulation 1367/2006 does not transpose article 6 of the Convention, as a result article 9 paragraph 2 of the Convention is not transposed either. Yet, certain EC institutions' decisions are article-6 type decisions and should be challengeable under the conditions set out by article 9 paragraph 2 of the Convention.

In the proposal for the regulation implementing the Convention at EC level, which then became Regulation 1367/2006, the European Commission considered that decisions to authorise the listed activities in Annex 1 of the Convention were not taken at Community level but by Member States. Article 6 paragraph 1a) was thus not implemented by Regulation 1367/2006. The European Commission also considered that article 6 paragraph 1b) of the Aarhus Convention was "not of application in relation

to the Community level.”¹ It first, considered that the Aarhus Convention did “not explicitly require public participation in financial decision-making related to the activities covered” and second, in relation to decisions to list substances under various directives on the placing on the market of products containing these substances, it considered that “administrative decisions on the authorisation of chemicals, pesticides and biocides are, as a rule taken at the level of Member States.” These arguments are not relevant. Article 6 paragraph 1 b) is drafted in a sufficiently broad way to include financial decision-making which may have adverse effects on the environment. And article 6 paragraph 1b) refers to “decisions on proposed activities not listed in Annex I which may have a significant effect on the environment” and not to decisions to authorise activities.

Consequently, Regulation 1367/2006 is in breach of article 6 of the Aarhus Convention by not providing public-participation in such decision-making.

The following measures adopted at EC level are examples of decisions which should be considered as subject to article 6 paragraph 1 b):

- The European Commission’s decisions which authorize the placing on the market or the cultivation of genetically modified plants. Regulation 1829/2003² on genetically modified food and feed explicitly modified Directive 2001/18 and replaced the national authorization for such products by an EC authorization. At least as far as Regulation 1829/2003 extends, there is no longer a national authorization procedure.
- Decisions by the European Chemicals Agency (ECHA), taken under Regulation 1907/2006 (REACH)³ to include a substance in Annex 14 of that Regulation. Such a decision has the consequence that the substance may be put into circulation within the European Union only with an authorization. ECHA’s decision has thus far-reaching consequences for such substances. Indeed, where a substance is not listed in Annex 14, a Member State may not provide for a national authorization to put the substance into circulation.
- The European Commission’s decisions to include active substances in Annex I to Directive 91/414 on the placing of plant-protection products on the market⁴. The decision of the Commission to submit a draft directive to include an active substance in Annex I to Directive 91/414 enables Member States to authorize plant protection products containing this substance. Products containing active substances that are not listed in Annex 1 to Directive 91/414 may not be authorized by national authorities.

¹ Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM(2003)622 final, 24/10/2003, p.13.

² Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268, 18.10.2003, p.1-23.

³ Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals, OJ L 396, 30.12.2006, p. 1-849.

⁴ Council Directive 91/414/EEC of 15 July 1991 concerning the placing of Plant Protection Products on the market, OJ L 230, 18.1.1991, p.1.

- Likewise, the European Commission's decisions to include an active substance in Annex I to Directive 98/8⁵ concerning the placing of biocidal products on the market.
- The European Commission's decisions taken under article 9 of Directive 98/83⁶ to provide exemptions to Member States from the parametric values applicable to water intended for the human consumption set out in Annex 1 part B to the Directive. These decisions allow certain Member States to apply a less stringent level of human health protection.
- The European Commission's decisions, taken under article 11, paragraph 3 of Directive 94/62⁷ on packaging and packaging waste, to provide exemptions for certain types of packaging from the requirement on concentration levels of heavy metals (laid down in article 13, paragraph 1 of the Directive). These decisions allow certain packaging containing dangerous substances to be placed on the market.
- The European Commission's decisions taken under Article 6(4) of directive 92/43⁸ on the protection of natural habitats and wild fauna and flora. It is true that the Commission only issues an opinion in the cases which are mentioned in that provision. However, in substance, a project which is initiated by a Member State will practically not go through, where the Commission signals that it contradicts EC environmental law.
- The European Commission's decisions on pilot projects for carbon capture and storage (CCS). These pilot projects are either authorized by the Commission – and in this case, it is a decision to realize a specific project at a specific location and within a specific time-span. Or the Commission authorizes a Member State's specific project, by declaring it compatible with Community law (on State aid, competition, on waste, etc). This issue leads to the next point:
- The European Commission's – or the European Investment Bank's - decisions to financially support a project which either comes under Article 6 paragraph 1 a) or otherwise has significant impacts on the environment. It is a reality within the European Union that many projects, in particular infrastructure projects, would not be realized without the financial support of the European Union. It is not possible to separate economic activities into "realizing activities" and "financing activities". The banker too, bears responsibility and must bear responsibility for the result of the "realizing activity" that is financed by him. As stated, Article 6 paragraph 1 b) is

⁵ Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, OJ L 123, 24.4.1998, p.1.

⁶ Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, 5.12.1998, p.32-54.

⁷ Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste, OJ L 365, 31.12.1994, p.10.

⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora, OJ L 206, 22.7.1992, p.7-50.

sufficiently broad to cover also such decisions. Decisions adopted in case T-585/93 (Greenpeace case) and case C-325/94 P (An Taisce) are examples of such decisions.

As a result of the European Commission's interpretation of article 6 of the Convention, article 9, paragraph 2 was not implemented either by Regulation 1367/2006⁹. Consequently, the procedural and substantial legality of article 6-type decisions adopted at EC level may not be challenged under the conditions set out by article 9 paragraph 2.

Moreover, article 9 paragraph 2 of the Convention should also be applied at EC level to enforce the provisions of article 7 of the Convention (which is implemented by article 9 of Regulation 1367/2006). Article 9, paragraph 2 applies to decisions, acts and omissions to which provisions of article 6 apply. Indeed, article 9 paragraph 2 refers to "any decision, act or omission subject to the provisions of article 6." Yet, the provisions of article 6 do not apply only to decisions falling into the scope of article 6, decisions to permit an activity listed in Annex I or decisions on proposed activities referred to in paragraph 1 (b) of article 6, but also to decisions, acts and omissions adopted on the basis of other provisions of the Convention but which are subject to provisions of article 6. Indeed, according to article 7 of the Convention, the preparation of plans and programmes relating to the environment is subject to the requirements of article 6 paragraphs 3, 4 and 8. Article 7-type decisions should therefore also clearly be enforced under article 9 paragraph 2.

The Convention implementation guide (hereinafter the implementation guide) confirms that interpretation.¹⁰

Yet, articles 10 and 12 of Regulation 1367/2006 do not clearly provide the right to NGOs to contest decisions not to allow the public to participate in the preparation of plans and programmes and other

⁹ COM(2003)622 final, *ibid*, p.16.

¹⁰ The Aarhus Convention: An Implementation Guide, S. Stec, S. Casey-Lefkowitz in collaboration with J. Jendroska, United Nations, 2000: "*Paragraph 2 [of article 9] provides access to justice through formal review of matters relating to public participation under article 6. It also expressly applies to "other relevant provisions" of the Convention as provided for under national law. This means that Parties may apply the review procedures to other provisions in the Convention by providing for review in those cases in national law...the provisions of article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) and the provisions of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments, describe additional processes that require public participation. Implementation of these procedures also could be reviewable under article 9, paragraph 2,*" p.128; "*The closed relationship between article 6 and 7 and the direct incorporation of some of the requirements of article 6 are an indication that rights and obligations under article 7 are good candidates for the application of the access-to-justice provisions in article 9, paragraph 2. There, the Convention sets forth review procedures for persons aggrieved by decisions, acts or omissions under article 6 or "other relevant provisions" of the Convention. To make use of article 9, paragraph 2, however, a person must meet the standing requirements of that article, including being a member of the "public concerned" as defined in article 2, paragraph 5,*" p.117.

article-6 type decisions or to contest the improper organisation of public participation in the decision making process. Article 9, paragraph 2 of the Convention is therefore not transposed and article 9 paragraph 3 is only partially transposed by Regulation 1367/2006 (see communication, p.22-23).

- Article 9 paragraph 3 of the Convention

Article 9 paragraph 3 of the Convention is not correctly transposed by Regulation 1367/2006 for several reasons outlined below.

Article 12 of Regulation 1367/2006 only allows NGOs to make internal review requests to EC institutions and bodies and to institute proceedings before the courts, whereas Article 9, paragraph 3 of the Convention allows "*members of the public*" in general to have access to administrative or judicial procedures. Members of the public are defined by article 2 paragraph 4 of the Convention as "*one or more natural or legal persons*" and therefore include individuals. It also includes legal persons in general which means that other entities, such as local authorities, provinces or regions, are also considered as members of the public and should therefore have access to judicial procedures at EC level in environmental matters (see communication, p.23).

In addition, the definitions, laid down in article 2 paragraph 1 (g) and (h) of Regulation 1367/2006, of the acts and omissions that may be challenged under the regulation are also much too restrictive. Regulation 1367/2006 only allows contesting administrative acts of individual scope and omissions to adopt such acts which results in the exemption of a whole range of acts from legal scrutiny while Article 9, paragraph 3 of the Convention only refers to "acts and omissions" (see communication, page 20).

Also, the fact that article 12 provides that the right to institute proceedings before the Court of Justice is provided "*in accordance with the relevant provisions of the Treaty*", that is in accordance with article 230 paragraph 4, implies the risk that the Courts maintain their interpretation of that provision and continue to systematically deny NGOs the right of standing as already demonstrated in cases T-236/04 and T-241/04 (EEB), case T-91/07 (WWF-UK) and case T-137/04 (Regiao Autonoma dos Açores). Instead, the Courts should interpret article 230 paragraph 4 in the light of article 9 of the Convention.

Finally, it seems that the right to contest the lack, refusal or improper organisation of a public participation process is not clearly provided by Regulation 1367/2006. Articles 10 and 12 allow NGOs to make internal review requests. Yet, articles 10 and 12 do not mention the right to challenge the omission or refusal of an EC institution or body to organise the participation of the public in the adoption, review or modification of a plan or programme relating to the environment. It does not either provide for the right to institute proceedings in case the public participation has been carried out without complying with the requirements of article 9 of Regulation 1367/2006. NGOs only have the right to challenge an administrative act or the omission to adopt an administrative act.

Yet, it is doubtful whether the decision to organise the participation of the public qualifies as an administrative act in the meaning of article 2(1)(g) of Regulation 1367/2006.

It is also doubtful whether the omission or refusal to organise the participation of the public qualifies as an omission to adopt an administrative act in the meaning of article 2(1)(h) of Regulation 1367/2006 (see communication, pages 21 to 23).

- Article 9 paragraph 4 of the Convention

Individuals are not qualified entities under articles 10 to 12 of Regulation 1367/2006 and thus do not benefit from the rights granted by the Regulation. And as the interpretation of the European Courts of article 230 paragraph 4 EC Treaty prevents individuals from having standing to sue¹¹, individuals are not provided with judicial protection and effective remedies in the meaning of article 9, paragraph 4 of the Convention against EC institutions and bodies' decisions.

The remedies available against EC institutions' decisions are neither fair nor equitable for individuals and NGOs in comparison to the ones granted to industries. Industries may challenge decisions that impact their economic interests. Chemical or pesticide producers may contest decisions which prohibit the use of these substances while individuals and environmental NGOs do not have standing to challenge authorisations to use these substances when they consider these will hurt the environment. The jurisprudence of the European courts has, indeed, established an unbalanced situation (see communication p.13).

- Article 9 paragraph 5 of the Convention

Articles 10 to 12 of Regulation 1367/2006 in only allowing NGOs to make internal review requests and to institute proceedings before the Courts establish barriers to access to justice for individuals by not allowing them the same rights.

The interpretation of the Courts of article 230 paragraph 4 of EC Treaty also violates article 9, paragraph 5 of the Convention as it constitutes a barrier to access to justice for NGOs and individuals on imposing restrictive limitations on standing for members of the public.

- Article 3 paragraph 1 of the Convention

The lack of effective remedies mentioned in the four preceding paragraphs demonstrates that Regulation 1367/2006 does not transpose article 9 paragraphs 2 to 5 of the Convention into European Community law in a sufficiently clear, transparent and consistent manner and therefore also results in the violation of article 3 paragraph 1 of the Convention.

4. In relation to case WWF-UK (T-91/07), where the judgment was rendered when the Aarhus Convention was already in force, you claim the judgment to contravene both article 9, paragraph

¹¹ See Case T-219/95, *Marie-Thérèse Danielsson, Pierre Largentreau and Edwin Haa v. Commission* [1995] ECR II-03051, Case T-585/93 *Greenpeace and others v Commission* [1995] ECR II-2205, Case C-321/95 *Greenpeace and others v Commission* [1998] ECR I-1651.

2, and article 9, paragraph 3, of the Convention, as well as article 9, paragraph 4 and 5. In this context please explain:

In case T-236/04 and T-241/04 (EEB) and case T-137/04 (Regiao Autonoma dos Açores), the judgements were also rendered after the entry into force of the Convention, however, it is only in case T-91/07 (WWF-UK) that the action was initiated after the approval of the Convention by the EC.

a. What in your opinion, is the legal difference between paragraphs 2 and 3 of article 9 and how this applies to the case in question?

- The legal difference between paragraphs 2 and 3 of article 9 of the Convention

Paragraph 2 of article 9 enables the public concerned to enforce the public-participation provisions of article 6 and possibly indirectly of article 7 of the Convention, but also to challenge the substantive legality of any decision, act or omission subject to these provisions.

Paragraph 3 of article 9 has a much broader scope as it allows challenging any acts and omissions by private persons and public authorities. As such, it also provides the right to contest the lack of or the improper organisation of public participation in the adoption of decisions subject to article 7 of the Convention.

The other difference between the two paragraphs is that paragraph 2 is more precise than paragraph 3 as it sets clear conditions for NGOs to institute judicial proceedings. Paragraph 2 of article 9 provides that “the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above”. As a result, NGOs promoting environmental protection are deemed to have a sufficient interest to be granted access to court.¹² Under that provision, NGOs shall also “be deemed to have rights capable of being impaired.” And although what constitutes a sufficient interest or an impairment of a right must be determined “in accordance with the requirements of national law”, it must be decided “with the objective of giving the public concerned wide access to justice within the scope of this Convention”¹³.

Unlike paragraph 2, paragraph 3 of article 9 does not set out any conditions according to which the public should have standing, it only refers to criteria laid down in national law and gives therefore much more discretion to the parties to the Convention, and notably to the EC, in determining these criteria.

- How it applies to the case in question

The challenged decision may amount to a decision subject to article 6, article 7 or to an act challengeable under article 9, paragraph 3.

¹² ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 27.

¹³ ECE/MP.PP/C.1/2006/4/Add.2 (Belgium), *Ibid*, para 33.

First, the Council's decision can be considered as an article 6-type decision (see answer to question 4(b)).

Article 9 paragraph 2 of the Convention should then apply to this case in relation to the participatory claim of WWF-UK. WWF-UK participated in the decision-making process resulting in the adoption of the Council's decision in providing advice to the Council through the North Sea Regional Advisory Council (RAC). In accordance with article 4 paragraph 2 of Regulation 2371/2002, the Council is obliged to take into account the advice provided by the RAC prior to adopting the decision setting the fishing TACs. However, WWF-UK claimed that the Council failed to properly take into account its point of view expressed within the North Sea RAC¹⁴ in addition to challenge the substantial legality of the Council's decision.

Before the CFI, WWF-UK argued that its statutory entitlements under article 6, paragraph 2 of the Aarhus Convention made it individually concerned by the contested measure, in the meaning of article 230 paragraph 4 EC Treaty, and therefore gave it standing. The CFI rejected the claim.

Yet, WWF-UK met the requirements of article 2, paragraph 5 of the Convention, given that it is a NGO that promotes environmental protection, and had thus a sufficient interest for the purpose of subparagraph (a) of article 9, paragraph 2. WWF-UK should therefore have been granted standing to challenge the Council's decision.

Second, the Council's decision could also amount to a plan or a programme relating to the environment subject to article 7 of the Convention (see answer to point b) below). WWF-UK considered so since it also invoked the entitlements provided for under article 9, paragraph 3 of Regulation 1367/2006 (which transposes article 7 of the Convention). Thus, if article 9, paragraph 2 of the Convention may be used to enforce the participatory rights provided by article 7 of the Convention, WWF-UK should also have had standing to challenge the Council's decision.

Article 9, paragraph 3 of the Convention would also apply if the challenged decision was considered as a plan or a programme relating to the environment.

Third, the Council's decision is in any case challengeable under article 9 paragraph 3. Indeed, the applicability of article 9 paragraph 2 does not prevent the one of article 9, paragraph 3 of the Convention¹⁵ which also clearly applies to the WWF-UK case. The act challenged was adopted by a public authority and is allegedly contravening EC law, notably Regulation 423/2004¹⁶ (the "Cod Recovery Plan") and the precautionary approach as required by article 174 EC Treaty which sets out the objectives the Community Policy relating to the environment must aim at achieving. The allegedly violated laws thus relate to the environment.

¹⁴ Case T-91/07, *WWF-UK v Council* [2008] REC II-81, para 49.

¹⁵ ECE/MP.PP/C.1/2006/4/Add.2 (Belgium), *Ibid*, para. 34.

¹⁶ Council Regulation N°423/2004 of 26 February 2004 establishing measures for the recovery of cod stocks, OJ L 70, 9-3-2004, p.8-11.

The criteria laid down in national law applicable under article 9 paragraph 3 are the ones laid down in article 230 paragraph 4 of EC Treaty. The applicant, under that provision, has to be directly and individually concerned by the contested decision to be granted access to a judicial procedure. A requirement which could be easily fulfilled by an NGO, if interpreted in the light of article 9 paragraph 3 of the Convention, but which the European courts have interpreted so narrowly that NGOs, including WWF-UK, have never been granted standing to challenge EC institutions' decisions.

b. Whether the activity of the Council being challenged in court amounts to a decision on whether to permit a proposed activity “subject to article 6 of the Convention”, or – if it is not – how otherwise you consider that article 9, paragraph 2, applies to such activity?

The challenged decision does not permit a proposed activity listed in Annex 1 to the Convention. However, it amounts to a decision, subject to article 6 paragraph 1 (b), on proposed activities which may have a significant effect on the environment.

- The fact that the challenged decision takes the form of a regulation does not prevent it from being a decision subject to article 6

The Committee considered that “when determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, [...] it is determined by the legal functions and effects of a decision¹⁷.” The Committee also considered that decrees could contain article 6-type decisions even though they were “not typical of article 6-type decisions on the permitting of specific activities”.¹⁸ For a decree to, not only specify the general type of activity, but also to specify the specific activity that may be carried out and other specific elements, was considered by the Committee as an element more characteristic of a type of decision falling within the scope of article 6.¹⁹ It is also settled EC case law that it is the substance of an act, not its form, which determines its classification.²⁰ The fact that the challenged decision takes the form of a regulation does not therefore prevent it from being a decision subject to article 6 of the Convention.

Moreover, because the fisheries policy is linked to agricultural policy, article 37 EC Treaty is the legal ground which allows the Council to adopt pieces of legislation in this domain. However, the challenged decision, Regulation 41/2006, is not based on article 37 EC Treaty. Rather it refers to Regulation 2371/2002, in particular to its article 20 which requires the Council to establish the TACs. The challenged decision is therefore not a regulation per se but an implementing administrative measure of the Council Regulation 2371/2002.

¹⁷ ECE/MP.PP/C.1/2006/4/Add.2 (Belgium), *Ibid*, para. 29.

¹⁸ ACCC/C/2004/08 (Armenia), ECE/MP.PP/C.1/2006/2/Add.1, para. 23, 28 and 34.

¹⁹ *Ibid*, para 34.

²⁰ Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, para 27; case T-84/01 *Association contre l'heure d'été v Parliament and Council* [2002] ECR II-99, para 23.

- The decision permits a proposed activity

Paragraph 1(b) of article 6 does not refer to “decisions on whether to permit” an activity but to “decisions on proposed activities which may have a significant effect on the environment.” As explained in the implementation guide, “the flexibility in subparagraph (b) enables article 6 to be applied to additional forms of decision-making as their environmental significance is realized.²¹” We therefore demonstrate in this section that the challenged decision clearly fulfils the criteria set out in article 6 paragraph 1(b) but that it also amount to a decision to permit a proposed activity in case this was required by the Committee.

As explained above, it is the legal functions and effects of a decision which categorizes it under the Convention.

The challenged decision “fixes fishing opportunities for the year 2007, for certain fish stocks and groups of fish stocks, and the associated conditions under which such fishing opportunities may be used” (article 1 of Regulation 41/2007²²). The part of the decision which has been challenged is the one setting the TACs for cod, that is, according to article 3(a) of Regulation 41/2007, the “quantity that can be taken and landed from each stock each year” within the areas defined by Regulation 423/2004.

The challenged decision is reviewed each year, it is addressed directly to Member States but also to Community fishing vessels, it fixes the quantities of fish and species of fish that the Community vessels can be fished (TACs) and the geographical areas where these species can be fished as well as the nationality of the fishing vessels authorised to fish. It also fixes the specific conditions under which Community vessels are authorised to make catches, to land the fish and what the Community vessels may not do. It therefore sets very precise fishing opportunities and conditions which are, for some of them, directly addressed to and directly applicable to the fishing vessels concerned.

The legal functions of the challenged decision are thus to fix the fishing opportunities for 2007 and to permit a proposed activity which is to fish certain quantities of a certain species of fish, cod, under certain conditions and in certain areas. The legal effect of this decision is to allow the fishing fleet of the Member States which have been allocated TACs to carry out their fishing activity.

The Committee has also decided that “the extent to which the provisions of article 6 apply ... depends inter alia on the extent to which the [decisions] ... can be considered “decisions on specific activities”, that is, decisions that effectively pave the way for specific activities to take place.”²³ The challenged decision setting fishing TACs definitely “pave the way” for a specific activity to take place which is the fishing of certain fish stocks and species.

²¹ The Aarhus Convention: An Implementation Guide, Ibid, p. 94.

²² Council Regulation 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ L 15, 20.1.2007.

²³ ECE/MP.PP/C.1/2006/2/Add.1 (Armenia), Ibid, para 28.

The provisions of the challenged decision clearly demonstrate that its function and effect are to specifically authorise fishing vessels to carry out their activity.²⁴ Moreover, if the Council decides to fix zero TAC for one species, as WWF-UK argued it should do for cod, fishermen are not allowed to fish that species. The decision of the Council therefore acts as a permit without which the activity cannot take place. The Council's decision thus concretely permits the activity to be carried out by setting the TACs and does not leave any discretion to the Member States apart from the one to allocate the TACs among their fishing vessels and to adopt the fishing permits per se.

In addition, the decision takes the form of a Regulation, it is therefore directly applicable within the legal orders of the Member States and does not need to be transposed by any further national act.

Linked to that, the Committee has considered that the fact that a decision would need to be followed by further decisions on whether to grant permits before the activities in question could legitimately commence did not prevent public participation to take place at the stage of adoption of that decision because "public participation must take place at an early stage of the environmental decision-making process under the Convention"²⁵. This decision of the Committee implies that the requirements of article 6 of the Convention apply to decisions even when they do not grant permits per se but only authorise an activity to be carried out.

Consequently, although the challenged decision only allows Member States and the Community fishing vessels concerned to carry out the fishing activity, but that it is then to the Member States to allocate the TACs among their national fishing vessels and to deliver the fishing permits per se, it should be considered as a decision to permit an activity subject to article 6.

Indeed, for the public participation to be meaningful, it has to take place at the stage of adoption of the Council's decision setting TACs, otherwise the main options are no longer open for discussion. Once the Council decision to set the TACs is adopted, it is too late to prevent the fishing activity from taking place or to require certain conditions to be fulfilled. In line with that reasoning, the Council has to consult and take the advice of the RACs and the scientific bodies referred to in Regulation 41/2007 into account before adopting its decision. This procedure allows the members of the public concerned to participate in the decision-making in relation to the fixing of TACs. If such a consultation was organised at a later

²⁴ Article 5 of Regulation 41/2007 provides that "the catch limits for Community vessels in Community waters or in certain non-community waters and the allocation of such catch limits among Member States and additional conditions in accordance with article 2 of regulation EC N° 847/96 are set out in Annex 1". "Community vessels are hereby authorised to make catches, within the quotas limits set out in annex I, in waters falling within the fisheries jurisdiction of the Faroe Islands, Iceland, Norway, and the fishing zone around Jan Mayen, subject to the conditions set out in articles 10, 17 and 18." Article 13 states that "fishing vessels flying the flag of Venezuela or Norway and fishing vessels registered in the Faroe Islands shall be authorised to make catches in Community waters, within the catch limits set out in Annex I, and subject to the conditions provided for in articles 17 to 16 and 19 to 25". Article 18 provides that "Community vessels licensed to conduct a directed fishery for one species in waters of the Faroe Islands may conduct directed fishery for another species provided that they give prior notification to the Faroese authorities".

²⁵ ACCC/C/2005/12 (Albania), ECE/MP.PP/C.1/2007/4/Add.1, para 71 and 72.

stage, that is, at national level when the fishing permits per se are adopted, the public advice would not be taken into account as the TACs and all the fishing conditions would have already been set. All the main options would not therefore be opened for discussion in the meaning of article 6 paragraph 4.

- The decision is considered by the EC as potentially having a significant effect on the environment

The Council's decision may certainly have a significant effect on the environment in the meaning of paragraph 1 b) of article 6 of the Convention. The part of the challenged decision on TACs for cod is undoubtedly also having a significant effect on the environment. According to the International Council for the Exploration of the Sea ("ICES"), cod stocks are at serious risk of collapse because of overfishing. It is also clear that the European Community has considered that the challenged decision may have a significant effect on the environment, as it is taken pursuant to article 4 of Regulation 2371/2002 which requires the Council to adopt the necessary measures to ensure the sustainable pursuit of fishing activities. In addition, a whole procedure is established prior the adoption of the decision setting TACs aiming at consulting Scientifics and the concerned members of the public, through RACs, who have an interest in the matter including environmental NGOs.

- The requirement for public participation is provided in EU law

The EC has not determined whether the activity authorised by the challenged decision is subject to the provisions of article 6, as required under article 6, paragraph 1 (b) of the Convention. There is however, a formal procedure established under Regulation 2371/2002 according to which the Council shall take its decision after having sought the advice of RACs. Article 4 (2) of Regulation 2371/2002 provides that the Council shall establish the measures governing the sustainable pursuit of fishing activities taking into account available scientific, technical and economic advice as well as in the light of any advice received from RACs. These measures include recovery plans, measures limiting catches and limiting fishing effort; they therefore include measures adopting TACs.

Article 31 paragraph 2 of the same regulation states that RACs are "composed of fishermen and other representatives of interests affected by the Common Fisheries Policy such as representatives of the fisheries and aquaculture sectors, environment and consumer interests and scientific experts from all Member States having fisheries interests in the sea area or fishing zone concerned". Environmental NGOs which are members of the General Assembly of the North Sea RAC are: Birdlife International, European Bureau for Conservation & Development, Living Sea, Seas at Risk, EUCC-The Coastal Union, WWF.

The RACs are therefore composed of representatives of different sectors of civil society which are the members of the public concerned and as such participate in the decision-making process of the Council on the setting of TACs. The members of the RACs fulfil the conditions laid down in the definition of the public concerned under article 2 paragraph 5 of the Convention as being "the public affected or likely to be affected by, or having an interest in, the environmental decision-making" and should therefore be considered as such.

It follows that although the EC has not determined whether the Council's decision on the proposed activity should be subject to article 6, it has already established a public participation procedure on the adoption of the decision similar to the one set out in article 6. As pointed out by the Committee in a former case, the fact that the participation of the public is foreseen prior the adoption of such a decision points to the EC "legislator's recognition of [its] potential environmental impact". Thus, the decision "could be seen as subject to article 6, paragraph 1(b) of the Convention".²⁶

Moreover, similarly to the fact that TACs are fixed year by year, the fact that a specific consultation procedure is foreseen for the adoption of these Council decisions also demonstrates that they are of an administrative nature. Consultation of NGOs such as WWF does not exist in an ordinary legislative procedure.

The Council decision setting fishing TACs should therefore be considered as a decision on a proposed activity subject to article 6 paragraph 1b) of the Convention.

How otherwise can article 9, paragraph 2 can apply to the case?

In addition to invoke article 6 paragraph 2 of the Convention, WWF-UK invoked article 9 of Regulation 1367/2006 before the CFI. This means that WWF-UK considered that the challenged decision could also be considered as a plan or a programme relating to the environment.

Indeed, the Committee considers that the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions.²⁷ If the challenged decision of the Council cannot be considered as a decision subject to article 6 of the Convention, it could therefore be considered as a plan or a programme subject to article 7.

The Convention does not provide any definition of plans and programmes relating to the environment but the Committee has considered that a zoning activity "i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not)" could be linked with article 7²⁸. In the WWF-UK case, the challenged decision sets the fishing opportunities applicable in Community waters and more precisely in waters where watch limitations are required. Within these designated waters, it determines that certain activities, fishing certain species, may be carried out and other types may not, fishing other species. The challenged decision could thus amount to a zoning activity although it is much more precise than that.

As an indication, according to the European Commission guide for implementation of Directive 2001/42, a "plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could, include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." Points 1 and 2 of the preamble of the challenged decision refer to article 4 of the Common

²⁶ ECE/MP.PP/C.1/2006/2/Add.1 (Armenia), para. 30.

²⁷ ECE/MP.PP/C.1/2007/4/Add.1 (Albania), Ibid, para.65; ECE/MP.PP/C.1/2006/2/Add.1 (Armenia), Ibid, para.28.

²⁸ ECE/MP.PP/C.1/2007/4/Add.1, (Albania), Ibid, para. 68.

Fishery Policy (CFP) Regulation 2371/2002 which requires the Council to adopt measures to ensure access to waters and resources and sustainable pursuit of fishing activities taking account of available scientific advice and to establish the TACs by fishery or group of fisheries. Article 20 of Regulation 2371/2002 provides that “the Council ... shall decide on catch and/or fishing efforts limits and on the allocation of fishing opportunities among Member States as well as the conditions associated with those limits.” Indeed, that is what the Council did by adopting the challenged decision. The Council has thus set out how to carry out or implement the Common Fishery Policies and its decision amounts to a ‘plan’.

The challenged decision relates to the environment as it is on the state of elements of the environment such as biological diversity and its components in the meaning of article 2 paragraph 3 (a) of the Convention. Fish is always qualified as the “natural resources of the sea” by the European Court of Justice.

The decision of the Council could therefore also be considered as a plan or a programme relating to the environment subject to article 7 of the Convention. As such, it could be challenged under article 9 paragraph 2 of the Convention (See paragraph 3 b on the applicability of article 9 paragraph 2).

If the Committee refuses to consider that article 9 paragraph 2 applies to plans and programmes subject to article 7 in this case, it could however consider that while the challenged decision primarily concerns article 7 decision-making, some of its elements, which are very specific and precise such as the setting of the TACs, fall within the scope of article 6, and that therefore provisions of article 9, paragraph 2, apply²⁹.

However, if the Committee were to disagree with our interpretation of the WWF-UK case, the main point of this communication, the existence of a general failure to implement the Convention’s access to justice provisions because of the interpretation by the Courts of article 230 paragraph 4 EC Treaty and the implementation of these provisions by Regulation 1367/2006, still retains its full force and needs to be decided.

c. Have the issues mentioned in (a) and (b) been invoked before and considered by the court in this case or in any other Community jurisprudence?

- Case T-91/07 (WWF-UK)

WWF-UK invoked article 6 paragraph 2 of the Convention and therefore considered that the contested decision constituted a decision subject to article 6. The NGO further claimed that it constituted the “public concerned” in the meaning of article 2 paragraph 5 of the Convention and that it thus had an entitlement under article 6 paragraph 2 to be involved in the adoption of the TACs and to have its views taken into account by the Council.

²⁹ ECE/MP.PP/C.1/2006/2/Add.1 (Armenia), Ibid, para 35.

WWF-UK also claimed that it had special entitlements deriving from article 9, paragraph 3 of Regulation 1367/2006 implying that it considered that the contested decision could also amount to a plan or a programme relating to the environment. Similarly, WWF-UK alleged that it constituted the public concerned in accordance with article 9, paragraph 3 of Regulation 1367/2006 since it belonged to the public affected by and having an interest in the measures adopted by the contested regulation.

WWF-UK considered that these entitlements gave it a particular status with regard to the adoption of the TACs which made the TACs of direct and individual concern to it within the meaning of article 230 paragraph 4 of the EC Treaty with the result to entitle WWF-UK to challenge the contested regulation.³⁰

Indeed, the entitlements deriving from article 6 of the Convention entail the right to have access to judicial procedures to challenge decisions subject to this provision under article 9, paragraph 2 of the Convention. Likewise, the entitlements deriving from article 9 of Regulation 1367/2006 should entail the right to have access to the courts. Therefore even though article 9, paragraph 2 and 3 of the Convention were not expressly invoked by WWF-UK, the rights deriving from these provisions were implicitly claimed by WWF-UK and considered by the CFI which should have interpreted article 230, paragraph 4 of EC Treaty in accordance with these provisions.

The CFI rejected the claim of the NGO in reasserting its jurisprudence (the *Plaumann* test) to determine whether WWF-UK should be considered as having standing despite the fact that the Convention was in force within the Community legal order.³¹ It also decided that the Aarhus convention and Regulation 1367/2006 must be interpreted in the light of this very same jurisprudence:

“Any entitlements which the applicant may derive from the Aarhus Convention and from Regulation No1367/2006 are granted to it in its capacity as a member of the public. Such entitlements cannot therefore be such as to differentiate the applicant from all other persons within the meaning of³²” the *Plaumann* jurisprudence.

This decision implies that members of the public including NGOs cannot have access to a judicial procedure before the European Courts unless they are individually concerned in the sense of the *Plaumann* test and therefore empties article 9 paragraphs 2 and 3 of the Convention of their substance. This test is so restrictive that it blocks all access to justice and as a result violates the right to judicial protection that the Aarhus Convention aims at providing through article 9.

Also, the Committee, in one of its reports,³³ noted the statement of the European Commission, acting on behalf of the European Community, according to which “the Convention as an agreement concluded by the Council is binding on the Community’s institutions and Member States and takes precedence over the legal acts adopted under the EC Treaty (secondary legislation), which also means that the Community law texts should be interpreted in accordance with such an agreement”. This follows from

³⁰ T-91/07, WWF-UK case, *Ibid*, para. 53 and 55.

³¹ T-91/07, WWF-UK case, *Ibid*, para. 66, 75, 86.

³² T-91/07, WWF-UK case, *Ibid*, para. 82.

³³ ACCC/C/2005/17 (European Community), ECE/MP.PP/2008/5/Add.10, para. 35.

settled case law that community measures must as far as possible be interpreted in conformity with international agreements.³⁴

The European Commission therefore agrees on the fact that the interpretation of Community law texts must evolve as the EC has adopted the Convention. This also means that the European Commission agrees that the Convention takes precedence over Regulation 1367/2006 and that Regulation 1367/2006 should be interpreted by the Courts and by the European institutions in accordance with the Convention.

Yet, the decision of the CFI in the WWF-UK case contradicts the statement of the European Commission. The CFI has considered that Regulation 1367/2006, notwithstanding the fact that it was not in force yet, did not provide any entitlements that article 230, paragraph 4 of EC Treaty, as interpreted in the relevant case law, did not provide itself. This reasoning cannot be upheld. Indeed, the EC has ratified the Convention which implies that the Convention complies with article 230 paragraph 4 EC Treaty, otherwise the EC could not have ratified it without amending the Treaty. The Convention has thus become an integral part of EC law, in accordance with article 300 paragraph 7 of EC Treaty. It therefore means that Regulation 1367/2006, which also complies with article 230, paragraph 4, must be interpreted in accordance with the Convention that is in a way to provide members of the public access to judicial procedures.

- Case T-236/04 and T-241/04 (EEB)³⁵

In the EEB case, the EEB claimed that it had a special consultative status with the European Commission and other European institutions in relation to decisions taken in the context of Directive 92/43. The EEB and Stichting Natuur en milieu did not invoke the Convention, they only invoked the statement of reasons of the Regulation 1367/2006 proposal.

As the applicants only refer to the statement of reason of the Regulation proposal, it is not clear whether they wanted to benefit from the rights deriving from article 9 paragraph 2 or 3 of the Convention. But it is logical to assume that they implicitly referred to articles 10 and 11 of the proposal which implemented article 9 paragraph 3 of the Convention.

The NGO applicants referred to the statement of the Commission according to which it was not necessary to amend article 230 EC Treaty to provide standing to NGOs provided they met the criteria set out in the regulation proposal.³⁶ They further claimed that they met these criteria and that they should therefore have standing.

³⁴ Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; case C-341/95 *Safety-Hitech* [1998] ECR I-4355, para 20.

³⁵ Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission* [2005] ECR II-4945.

³⁶ COM(2003)622 final, *Ibid*, p.16 and 17.

However, the CFI rejected the claim and decided that even “qualified entities” under the Regulation 1367/2006 proposal had to fulfil the requirements of article 230, paragraph 4 EC Treaty and thus had to demonstrate that they were individually concerned by the contested decisions.³⁷ The CFI considered that Regulation 1367/2006 did not release the applicants from having to show that they were individually concerned by the challenged EC institutions’ acts irrespective of them being “qualified entities” for the purposes of Regulation 1367/2006.³⁸

This interpretation of Regulation 1367/2006 violates article 9, paragraph 3 of the Convention as it prevents NGOs from having standing to challenge acts by public authorities which contravene provisions of EC law relating to the environment.

In addition, the decision of the CFI contradicts the European Commission’s Statement of reasons in the proposal for Regulation 1367/2006 and the Commission’s statement mentioned above which has been done before the Committee. Indeed, the CFI held that the “*principles governing the hierarchy of norms ...preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of article 230 EC. A fortiori the same holds true for the statement of reasons of a proposal for secondary legislation*”.³⁹ However, in line with the Commission’s statements, Regulation 1367/2006 should be interpreted in accordance with the Convention that is in a way to provide NGOs standing.

- Case T-137/04 (Regiao Autonoma dos Açores)⁴⁰

In the Regiao Autonoma dos Açores case, the NGOs which sought leave to intervene in the case in support of the form of order sought by the applicant claimed that the Court should interpret the fourth paragraph of article 230 EC Treaty in compliance with article 9 paragraph 3 of the Convention.

The CFI stated that “Article 9(3) of the Aarhus Convention refers expressly to ‘the criteria, if any, laid down in [the] national law’ of the contracting parties which are laid down, with regard to actions brought before the Community judicature, in Article 230 EC. Although it is true that the conditions for admissibility laid down in that provision are strict, the fact remains that the Community legislature adopted, in order to facilitate access to the Community judicature in environmental matters, Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention... Title IV (Articles 10 to 12) of that regulation lays down a procedure on completion of which certain non-governmental organisations may bring an action for annulment before the Community judicature under Article 230 EC.”

It further considered that “since the conditions laid down in Title IV of that regulation are manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions

³⁷ *EEB* case, *Ibid*, para. 71 and 72.

³⁸ *EEB* case, *Ibid*, para 72.

³⁹ *EEB* case, *Ibid*, para. 71.

⁴⁰ Case T-37/04, *Regiao Autonoma dos Açores v Council* [2004] ECR II-2153.

laid down in article 230 EC.⁴¹ This judgment demonstrates that the CFI considers that the Convention does not impact on the admissibility of legal actions at Community level. Although Regulation 1367/2006 was not applicable, the Court should have interpreted article 230 in the light of article 9 paragraph 3 of the Convention in order to provide the autonomous region of the Azores access to a judicial procedure.

This judgment also contravenes the decision of the Committee according to which the phrase “the criteria, if any, laid down in national law” in article 9, paragraph 3, cannot be interpreted in a way that blocks all access to the courts.⁴² That interpretation would therefore contravene article 9 paragraph 3 of the Convention provided the CFI reasserted it in a future judgment (see communication appendixes p.34).

The issues mentioned in (a) and (b) have not been invoked or considered in any other community jurisprudence that we know of.

d. In what way the judgment in question violated provisions of article 9, paragraphs 4 and 5, of the Convention?

- Violation of article 9, paragraph 4 of the Convention

The interpretation by the CFI of article 230 paragraph 4 EC Treaty in this judgment violates article 9, paragraph 4 of the Convention since it fails to provide adequate, effective and fair remedies to WWF-UK in denying it its right to access to a judicial procedure. WWF-UK cannot use any other remedy to contest the Council’s decision than instituting a proceeding before the CFI since national courts are not competent to annul an EC institution’s decision. The CFI’s decision therefore results in depriving WWF-UK from any remedies against the Council’s decision and in rendering this decision unchallengeable by members of the public.

- Violation of article 9, paragraph 5 of the Convention

The judgment also fails to comply with article 9, paragraph 5 of the Convention since it establishes a barrier to access to justice in imposing excessive limitations on the right of standing of the NGO applicant. The interpretation of the CFI of the right of standing as provided under the EC Treaty, the Convention and Regulation 1367/2006, excludes legal actions by NGOs against measures on environmental grounds as environmental interests are by definition diffuse and shared. The provisions of article 9 paragraph 3 of the Convention are therefore not effective at Community level in the meaning of article 9, paragraph 5 of the Convention.

5. Please indicate if the judgments of the Court of First Instance referred to in the communication are final or if they are subject to appeal to the European Court of Justice, and if the latter whether the allegations concerning violations of the Aarhus Convention were clearly indicated in the appeal?

⁴¹ *Regiao Autonoma dos Açores* case, Ibid, para 93.

⁴² ECE/MP.PP/C.1/2006/4/Add.2 (Belgium), Ibid, para 35 and 36.

The judgments of the CFI in case T-91/07 (WWF-UK)⁴³ and case T-137/04 (Região Autónoma dos Açores)⁴⁴ are subject to appeal before the European Court of Justice. The allegations concerning violations of the Aarhus Convention are not mentioned in the summaries of pleas in law and main arguments of the applicants provided on the website of the European Court of Justice.

⁴³ Case C-355-08 P.

⁴⁴ Case C-444/08 P.