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EU National Judges and the Aarhus Convention – How the Judiciary can further the Implementation of the Third Pillar

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Before national judges can apply an International Convention like the Aarhus Convention that Convention should be well known, not only by judges and other judicial officers, but also by other legal stakeholders. Indeed, in our system, judges cannot make their own cases. Cases must be brought before them by those who are entitled to do so. Generally these persons relay or are even obliged to relay for that on professional lawyers.

I believe the Convention is already well known by the larger environmental NGO's and a lot of information on the Convention is directed to them. Although the situation may be different from one Member State to another, I have the impression that lawyers, especially those who are dealing frequently with environmental cases, have a growing knowledge of the potentialities of the Aarhus Convention. In general, lawyers will tray to build up a case in the first place on the basis of domestic law. If domestic law is not sufficient, they will in the EU Member States turn to European Union Law and they can build in doing so on the case law of the Court of Justice of the EU. The existence of that Court and its case law is very important to convince national judges to take European Union Environmental Law seriously, even when it is not properly implemented in a Member State. That is an essential difference with International Law. International Law in general and International Environmental Law in particular is often seen as "a far from my bed show", something for diplomats, without practical effect in daily live. So it is very important that legal stakeholders are becoming aware that the Aarhus Convention is giving in some respects a larger protection to the environmental rights of individuals and NGO's, than domestic or European Union Environmental law is doing and that the Convention provides for a relatively strong compliance mechanism. As the EU is also party to the Aarhus Convention this means that the Aarhus Convention is according to settled case law of the CJEU to be considered as EU Law too, so that national judges can or even are obliged in some instances to address questions of interpretation of the Convention for a preliminary ruling to the CJEU.

In my opinion, a first priority should indeed be the dissemination of adequate information towards all relevant legal stakeholders. Initiatives of different nature are necessary. Although in international environmental handbooks and journals there is relative high attention for the Aarhus Convention, the same is not always truth for national environmental law handbooks and journals that form the basic reference materials for most of the legal profession. One should seek possibilities to fill that gap.

Secondly, the Aarhus Convention should be an important item in training activities for judges and other judicial officers. EUFJE may be cited as a good example as we discussed the Aarhus Convention already during our first Annual Conference in The Hague in December 2004. The Task Force organised also regional training activities in Kiev and Tirana. But the item should also be included in national training programmes as we do in Belgium in our periodical initial and advanced training courses in Environmental Law for judicial officers.

The next step is off course the application of the Aarhus Convention in relevant environmental cases. The way national judges can be confronted with Aarhus related cases can however be very different.

In most of the EU-counties – but not all[1] – there is a Constitutional Court. Access to the Constitutional Court, however, is not always regulated in the same way. The right to lodge an appeal directly with the Constitutional Court is usually only open to political authorities, sometimes with diversification according to the nature of the regulation against which the appeal is lodged (e.g. Poland: the president; Germany: the government; France: the Prime Minister; Portugal: the House of Representatives, etc.)[2]. Express direct access for natural and legal persons to the Constitutional Court exists only in the minority of EU countries[3]. But in most of the countries ordinary judges can refer constitutional questions to the Constitutional Court or a constitutional complaint can be lodged against a judicial decision in last instance. I believe that Constitutional Courts can play an important role in the enforcement of the Aarhus Convention. They generally can combine provisions of their national constitution with relevant provisions of international treaties and check not only the constitutionality of federal or regional Acts of parliament (or sometimes also regulations), but also their conformity with international provisions, such as those of the Aarhus Convention. There are already some Constitutional Courts that apply the Aarhus Convention in their case law. The Belgian Constitutional Court e.g. referred so far in 13 cases to the Aarhus Convention. It annulled partially by Judgement N° 137/2006 of 14 September 2006 an Act of a Regional Parliament for violation of article 23 of the Constitution in combination with Directive 2001/42/EC and Article 7 of the Aarhus Convention[4]. It annulled also by Judgment N° 144/2012 of 22 November 2012 another Act of a Regional Parliament for violation of the Articles 10, 11 and 23 of the Constitution, Article 2(2) of the Aarhus Convention and Article 1(5) of Council

[1] There is e.g. no Constitutional Court in Denmark, Finland, Greece, Sweden, The Netherlands and the United Kingdom.

[2] See also: AARHUS CONVENTION COMPLIANCE COMMITTEE, *Armenia* ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 37.

[3] L. LAVRYSEN, "The Role of National Judges in Environmental Law", in Th. ORMOND/M. FÜHR, *Environmental Law and Policy at the Turn to the 21ste Century*, Lexxion, Berlin, 2006, 85.

[4] L. LAVRYSEN, *Presentation of Aarhus related cases of the Belgian Constitutional Court*
Access to Justice Regional Workshop for High-Level Judiciary (Eastern Europe and South Caucasus Region) , Kiev, Ukraine, 4-5 June 2007; http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/ConstCourInter_Env_Wallonie/Belgium_2006_Inter-Environnement_Wallonie.pdf

Directive 85/337/EEC[5]. The Constitutional Court of Slovenia found an Act (the Act Amending the *Lipica Stud Farm Act*) inconsistent with the Aarhus Convention as it prevents the public from participating in the development of a detailed plan of national importance (U-I – 406/06). References to the Aarhus Convention were made also by the Constitutional Court of the Czech Republic (Judgment of 17 March 2009, IV. US 2239/07), the Constitutional Court of Latvia (Judgment of 14 February 2003, 2002-14-04[6] , Judgment of 17 January 2008, 2007-11-03[7] and Judgment of 6 July 2009, 2008-38-03)[8].

It is noticeable in this respect that the CJEU in its Judgment(Grand Chamber) of 18 October 2011 in Case C-128/09 *Boxus and Others*[9] held that Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337/EC must be interpreted as meaning that when a project falling within the ambit of those provisions is adopted by a legislative act, it must be possible for the question whether that legislative act satisfies the conditions laid down in Article 2(2) of the Aarhus Convention and Article 1(5) of that Directive to be submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law. If no review procedure of such nature and scope were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the requested review and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

In the vast majority of the EU countries a dual judicial structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil and criminal cases,

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[5] http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/ConstCour_Solvay/Belgium_2012_Solvay.pdf

[6] http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/Latvia_2003_Olaine.pdf

[7] http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/Latvia_2008_Free_Port_of_Riga.pdf

[8] http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/Latvia_2009_Jurmalas.pdf

[9] Confirmed by Joined Cases C-177/09 and C-179/09 *Le Poumon vert de la Hulpe and Others* (Order of 17 November 2011) and Case C-182/10 *Solvay and Others* (Judgment of 16 February 2012) in which case the CJEU held:

"2. Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.

3. Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:

– when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and

– if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act."

and on the other hand administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal matters, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It can be expected that administrative courts will be confronted in the first place with Aarhus-related cases as the decisions and acts referred to in article 9, paragraph 1, 2 and, as far as public acts are concerned, paragraph 3, will normally fall under the jurisdiction of administrative courts. It should be pointed out, however, that the powers of the administrative courts might differ from Member State to Member State[10]. Due to the different legal history and legal culture, the various legal systems of Member States have taken different approaches for legal standing. They range from an extensive approach where standing is broadly recognised by way of an "*actio popularis*", to a very restrictive approach allowing standing only in cases where the impairment of and individual legally granted right can be shown[11]. In most of the countries the legislation uses a rather vague formula in describing the conditions to have standing. E.g. in Belgium a natural or legal person that asks for suspension or annulment of an administrative act or a regulation by the Supreme Administrative Court (the Council of State) must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be directly and unfavourably affected by the challenged act or regulation. This concept can however be interpreted broadly or narrowly. As we look at the Belgium situation more or less the same criterion applies for the Supreme Administrative Court as for the Constitutional Court. Just by now, the Constitutional Court has nearly never declined an environmental NGO for lack of standing. As the Supreme Administrative Court is concerned there are some variations in time and even between the different Chambers. There were the Council of State developed a broad view on standing for NGO's in the eighties, there was later on some tendency to become stricter, maybe under influence of an ever growing case-load. Were the Chambers dealing with environmental legislation generally continued to have a broad view, the Chambers dealing with land use planning legislation developed gradually a stricter view. Meanwhile the Aarhus Compliance Committee found that if the jurisprudence of the Council of State is not altered in that respect, Belgium will fail to comply with article 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans[12]. In my opinion, the Council of State can reinterpret the existing national provisions on standing without any problem in conformity with Article 9, paragraph 2, 3 and 4, of the Aarhus Convention. If the Council will do that – without an intervention of the legislator – has to be seen. For the moment it seems that the jurisprudence of the Council of State is subject to evolution. In a more recent judgment of the general assembly of the Council of State[13], the Council used the usual formula of the Constitutional Court concerning standing requirements for NGO's, in stating that a non -profit organization that has legal personality (*association sans but lucrative*) has standing if its statutory objective is of a particular nature, and thus different from that of general interest, that she is defending a collective interest, that de statutory aim can be affected by the challenged act and that it is

[10] L. LAVRYSEN, "The Role of National Judges in Environmental Law", in Th. ORMOND/M. FÜHR, *Environmental Law and Policy at the Turn to the 21ste Century*, Lexxion, Berlin, 2006, 85.

[11] See on, this subject: MILIEU ENVIRONMENTAL LAW & POLICY, *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, September 2007, 6-11; J. DARPÖ, Effective Justice ? Synthesis Report of the Study on the Implementation of Articles 9 (3) and 9 (4) of the Aarhus Convention in Seventeen on the Member States of the European Union in J.H. JANS, R. MACRORY & A.-M. MORENO MOLINA, *National Courts and EU Environmental Law*, The Avosetta Series 10, Europa Law Publishing, Groningen, 2013, 176-178.

[12] AARHUS COMPLIANCE COMMITTEE, *Findings and Recommendations, Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)*.

[13] Council of State, n° 187.998, 17 November 2008, *Coomans et. al., TMR* 2009, 64-94.

obvious that she is pursuing her statutory objective in an active way. A similar formula was used in later judgments[14]. Together with pressures from the ECtHR[15], the Constitutional Court[16] and the Aarhus Compliance Committee[17], it can be expected that the Council will become more lenient again. For the moment there is however no clear picture. Triggered by the Aarhus Convention, some judgments can be welcomed[18], while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention[19]. To overcome possible further resistance from the Council of State, some members of the Parliament introduced, with reference to the Aarhus Convention and the Findings and Recommendations of the Aarhus Compliance Committee, a bill to clarify under which conditions environmental NGO's have standing before the Council of State.[20] But I repeat that an interpretation of the national provisions on standing in the light of art 9 of the Aarhus Convention can solve the problem too.

A convincing example has been delivered last week by the Belgian Supreme Court[21]. In a judgment of 11 June the Supreme Court is radically changing its case law concerning standing of Environmental NGOs in view of implementing Art 9 (3) of the Aarhus Convention. It follows from the ratification of the Aarhus Convention, according the Court that Belgium has engaged itself to secure access to justice for environmental NGOs when they are willing to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may however not be construed or interpreted in such a way that they deny such organizations in such cases access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention. According Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belong to the victims. They shall demonstrate a direct and personal interest. And the Court to conclude that when such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so.

As far I can see, in most of the Member States, such a solution is possible and I hope that the different judiciaries will take that view. I think it is more than a possibility; there is a legal obligation to do so.

In Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Grand Chamber Judgment of 8 March 2011) (also known as the *Slovak Brown Bear* case) the CJEU indeed held that although Article 9(3) of the Aarhus Convention does not have direct effect in European Union law, it is, however, for the referring court to

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[14] Council of State, n° 192.085, 31 March 2009, *vzw Natuurpunt e.a;* Council of State, n° 211.533, 24 February 2011, *vzw Milieufront Omer Wattez.*

[15] ECHR, 24 February 2009, *L'Erablière ASBL* v. Belgium.

[16] Constitutional Court, n° 109/210, 30 September 2010, *Christel Demerlier.*

[17] Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW.*

[18] E.g. Council of State n°. 166.889, 15 February 2007, *VZW Milieufront Omer Wattez*. See in the same sense: Council of State, n° 193.593, 28 May 2009, *vzw Milieufront Omer Wattez*; Council of State, n° 197.598, 3 November 2009, *vzw Stichting Omer Wattez*; Council of State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*; Lefranc (2010) 447.

[19] E.g. Council of State, n° 197.509, 3 November 2009, *vzw Milieufront Omer Wattez* and more than 20 other judgments in the same sense; Lefranc (2010), 446

[20] See also: AARHUS COMPLIANCE COMMITTEE, *Compliance by Belgium with its obligations under the Convention – Addendum* – ECE/MP.PP/2008/5/aad.3, 2 April 2008, 2.

[21] Hof van Cassatie, 11 June 2013, *PP and PSLV v. Gewestelijke Stedenbouwkundig Inspecteur and M vzw (P.12.1389.N/1)*

interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organization, such as the *Lesoochranárske zoskupenie,* to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

Similarly the CJEU held in its Judgment of 12 May 2011 in Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (also known as the *Trianel* Case) that non-governmental *organizations promoting environmental protection*, as referred to in Article 1(2) of that directive, *can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorizing projects 'likely to have significant effects on the environment'* for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, *even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this*."

We may not forget that according to article 9, paragraph 3, of the Aarhus Convention Member States must also ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of its national law (including EU law according to the case law of the Compliance Committee) relating to the environment. If one opts for judicial procedures, such procedures will be in most Member States of the competence of the ordinary judiciary. Here we face similar problems of standing and the views taken by ordinary courts are often even narrower than those of the administrative courts. In some of our jurisdictions there is a large access to civil courts, while in others (e.g. The Netherlands, Belgium, and France) the legislator introduced special provisions to allow Environmental NGO's to ask for injunctions or, even, damages. But the impression remains that in the majority of the Member States the situation is far from satisfactory and that a legislative intervention is necessary if the courts cannot or are not willing to review their jurisprudence on standing[22].

Finally, there is Article 9, paragraph 4, which sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

In this respect the CJEU held in its Judgment (Grand Chamber) of 15 January 2013 in Case C-416/10 *Križan and Others "Article 15a of Directive 96/61, as amended by Regulation No 166/2006, must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that*

[22] See; MILIEU ENVIRONMENTAL LAW & POLICY, *o.c.*, 11-16; J. DARPÖ, Effective Justice ? Synthesis Report of the Study on the Implementation of Articles 9 (3) and 9 (4) of the Aarhus Convention in Seventeen on the Member States of the European Union in J.H. JANS, R. MACRORY & A.-M. MORENO MOLINA, *National Courts and EU Environmental Law*, The Avosetta Series 10, Europa Law Publishing, Groningen, 2013, 204-205.

directive, pending the final decision. A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61, as amended by Regulation No 166/2006, and from Article 9(2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union."

The requirements of Article 9, paragraph 4, are maybe the most difficult of all to fulfil. In a lot of Member States the judiciary is facing an important backlog. Waiting long time for a final decision, in some cases more than 5 years, is daily reality in more than one jurisdiction. In such circumstances only interim relief is an adequate solution, but unfortunately the conditions under which one can obtain interim measures are often very severe and not in accordance with the Treaty requirements. In other countries judicial procedures and lawyers fees are very costly.

In this respect we can refer to the CJEU's Judgment of 16 July 2009 in Case-427/07 (the so called *Irish Costs*-case) were the Court held that that "*it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement. (…) Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts. (…) That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment*[23]*, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35*."

In Case C-260/11 *Edwards and Pallikaropoulos* (Judgment of 11 April 2013) the CJEU held: "*The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24*

[23] '54 It should be recalled that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case C‑ 214/98 *Commission v Greece* [2000] *ECR* I‑ 9601, paragraph 49; Case C‑ 38/99 *Commission v France* [2000] *ECR* I‑ 10941, paragraph 53; and Case C‑ 32/05 *Commission v Luxembourg* [2006] *ECR* I‑ 11323, paragraph 34).

55 It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, inter alia, Case C‑ 197/96 *Commission v France* [1997] ECR I‑ 1489, paragraph 15; Case C‑ 207/96 *Commission v Italy* [1997] ECR I‑ 6869, paragraph 26; and *Commission v Luxembourg*, paragraph 34)."

September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.
In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.
By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.
Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal."

Sometimes the judiciary has indeed some room of manoeuvre regarding cost allocation, so that it can avoid decisions that are infringing art. 9 (4) of the Aarhus Convention[24].

But I think these issues are most of the time difficult to solve by the judges themselves and raise more general questions of judicial management, clear cost allocation rules[25], state investment in the judiciary and appropriate legal aid schemes[26]. I think we need long term work programs on the national level to solve these problems in an acceptable way. And off course these are cross cutting issues that exceeds largely the environmental sector, e.g. the fees shifting issues.

Although, as we have seen, judges themselves cannot solve all the implementation problems raised by article 9 of the Aarhus Convention, I hope I have convinced you that they can at least remove themselves the most striking obstacles for its proper implementation.

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[24] See e.g. AARHUS CONVENTION COMPLIANCE COMMITTEE, *United Kingdom* ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 52; *United Kingdom* ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 44 -45.
[25] See e.g. AARHUS CONVENTION COMPLIANCE COMMITTEE, *United Kingdom* ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, paras. 129 - 139.
[26] See also AARHUS CONVENTION COMPLIANCE COMMITTEE, *Spain* ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.66.