Communication to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

1. Fundacja ClientEarth Prawnicy dla Ziemi (a foundation registered in Poland)

Address: ul. Żurawia 45, II piętro, 00-680 Warszawa

Telephone: t. +48 (0) 22 307 01 83

E-mail: mstoczkiewicz@clientearth.org

The contact person authorized to represent the organization in connection with this communication:

Name: Contact person: Dr Marcin Stoczkiewicz

Title/Position: Chairman of the Management Board
Telephone: t. +48 (0) 22 307 01 83

Email: mstoczkiewicz@clientearth.org

Please copy in all correspondence: Boleslaw Matuszewski at: bmatuszewski@clientearth.org

II. Party concerned

2. Sweden

III. Facts of the communication

3. The present communication to the Aarhus Convention Compliance Committee concerns a failure by Sweden to comply with the provisions of the Aarhus Convention on access to justice, and in particular Articles 3(1), 3(4), 3(9), 9(2) and 9(3) of the Convention.

4. The communication raises a systemic issue of non-compliance illustrated by a specific court challenge filed by the communicant, ClientEarth Prawnciy dla Ziemi ("**ClientEarth**"). Swedish law – both legislative acts and jurisprudence – fails to provide a clear, transparent and consistent framework to implement the provisions of this Convention and imposes an undue and discriminatory burden on foreign environmental organizations to have access to a review procedure before a court of law to challenge decisions, acts or omissions subject to the provisions of article 6 and acts or omissions contravening national laws relating to the environment.

5. In accordance with Section 2 of the Swedish Act on Judicial Review of Certain Government Decisions (2006:304) (the "**JR Act**"), an NGO fulfilling the requirements of Chapter 16 of the Swedish Environmental Code may challenge a permit decision that falls under Article 9(2) of the Aarhus Convention.[1]

6. Section 13 of chapter 16 of the Environmental Code establishes four cumulative criteria for standing for both foreign and Swedish legal persons:

   (1) the primary objective of the legal person must be to further the interests of environment or nature protection,

   (2) it must not be profit-making,

   (3) it must have carried out activities in Sweden for at least 3 years, and

   (4) it must have at least 100 members or in some other way show that its activity has public support (see Annex 1).

7. Section 13 of chapter 16 applies based on its own wording also to the cancellation of protection areas under Chapter 7, supervision measures under Chapter 10 and other matters regulated in specific regulations, thus also covering some challenges, though arguably not all,[2] that would fall under Article 9(3) of the Aarhus Convention.[3]

8. As further set out below, the criterion specified in pt. (3) discriminates against foreign NGOs who wish to initiate judicial review of a decision issued by Swedish authorities, but who have not carried out activity within Sweden for at least 3 years.

9. The criterion specified in pt. (4) above referring to the demonstration of public support in "some other way" is overly vague and allows for excessive discretion limiting NGO review of environmental decisions. This is demonstrated by a recent court challenge filed by ClientEarth that gave rise to this communication, the facts of which are set out in the following paragraphs.

10. On 7 June 2018, the Swedish Government adopted decision N2016/05812/FÖF of 7 June 2018 granting the Swiss corporation Nord Stream 2 AG a permit for laying pipelines for the transport of natural gas on a specified route on the continental shelf within Sweden's exclusive economic zone in the Baltic Sea (the "**NS2 Permit Decision**").

11. On 6 September 2018, ClientEarth applied to the Swedish Supreme Administrative Court (the "**SAC**") for judicial review of the NS2 Permit Decision, presenting detailed arguments both as to standing, as well as substantive issues concerning the breach by the NS2 Permit

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[1] The provision reads: "An environmental organization referred to in Chapter 16, Section 13 of the Environmental Code may apply for judicial review of such permit decisions by the Government covered by Article 9 (2) of the Convention on 25 June 1998 on access to information, public participation in decision-making processes and access to judicial review in environmental matters" (unofficial translation). See Annex 1.

2 There are some challenges, for instance tort (non-contractual liability) or class action claims as well as claims lodged under chapter 31 or 32 of the Environmental Code, that do not fall within the scope of chapter 16, section 13 of the Environmental Code but arguably under article 9(3) Aarhus Convention. However, for the purposes of this communication, it suffices to say that there are claims that fall within the ambit of article 9(3) of the Aarhus Convention for which an NGO will need to demonstrate compliance with the criteria of chapter 16, section 13 in order to be granted standing.

[3] The provision reads: "Appeal judgments and decisions on permits, approvals or exemptions in accordance with this Code, regarding the cancellation of protection of areas in accordance with Chapter 7 or supervision pursuant to Chapter 10 or in such matters as may have been issued under the regulations, may be appealed by a non-profit association or other legal person who [fulfil the conditions listed in para. 6 of this communication]" (unofficial translation). See Annex 1.

Decision of relevant Swedish and EU law provisions.

12. ClientEarth is registered as a foundation under Polish law and does not have any members. In order to nonetheless demonstrate compliance with section 13, pt. (4), of chapter 16 of the Environmental Code, ClientEarth submitted:

(1) a public petition signed by over 2,000 named natural persons attesting to their support for not only the application for judicial review but also for other ClientEarth actions against the NS2 project (Annex 3);

(2) written testimony of the General Director of Greenpeace Nordic which not only confirmed that Greenpeace Nordic – an environmental organisation which itself has more than 160,000 supporters, and which had itself objected to the Swedish NS2 development proposal – supported the activity of ClientEarth both in bringing the application for judicial review and all its other activities more widely, but also attesting to the fact that - even beyond Greenpeace Nordic - "*ClientEarth has acquired considerable public support for its activities*". This testimony clarified that these activities include inter alia in Poland, "*conduct[ing] litigation, engag[ing] in policy-making, procedures, expert analysis and tak[ing] part in the public debate concerning environmental policy and law*", and more specifically "*a number of projects, most notably... convincing the European Commission and the Court of Justice of the European Union to stop the illegal logging in the Bialowieza Forest*" (Annex 4).

13. On 21 December 2018, the SAC summarily dismissed ClientEarth's application without considering the merits (case no. 4840-18 - "**the Swedish NS2 Judgment**", Annex 2). The SAC confirmed that the project authorised by the NS2 Permit Decision is an Annex I project under the EIA Directive and Aarhus Convention. However, the SAC ruled that ClientEarth lacked standing based on pt. (4) of section 13, chapter 16, of the Environmental Code, i.e. for failing to show support of the public.

14. As regards the letter of Greenpeace, the SAC stated that ClientEarth needed to show "direct support", a requirement not found in the Swedish law.

15. With regard to the petition submitted by ClientEarth, the SAC stated that: "*it is the support of the public for the organization's activity as such which must be proven, not – as is the case with this particular petition – the public's support for an application in an individual case [...] Thus, the petition does not prove that ClientEarth's activity has the support of the public in the sense that is now relevant.*"[4] Again, this requirement cannot be found in the Swedish law but is an interpretation by the Court.

16. No appeal is possible against the SAC's judgment.

IV. Provisions of the Convention with which non-compliance is alleged

17. Chapter 16, Section 13, pt. (3), of the Environmental Code, in conjunction with section 2 of the JR Act, violates Articles 9(2) and 9(3), both in conjunction with article 3(9) of the Aarhus Convention.

18. Chapter 16, Section 13, pt. (4) of the Environmental Code, in conjunction with section 2

[4] SAC decision, p. 5, unofficial translation.

of the JR Act, violates Articles 3(1), 3(4), 9(2) and 9(3) of the Aarhus Convention, both individually and when read together.

V. Nature of alleged non-compliance

19. Article 9(2) of the Convention establishes an obligation for each Party of the Aarhus Convention to ensure that members of the public concerned have access to administrative or judicial procedures to challenge decisions issued by a permitting authority in a procedure requiring public participation as regulated under art. 6 of the Aarhus Convention. The provision further clarifies that environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to such a review procedure.[5]

20. Article 2(5) of the Convention states that "*non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*" and therefore form part of the "public concerned".

21. The Parties to the Convention accordingly enjoy some discretion to establish "requirements under national law". However, this discretion is not unfettered. As the Compliance Committee has previously held, any such requirements must not be inconsistent with the principles of the Convention, meaning that they should be "*clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.*"[6] This is also reflected in the Implementation Guide, which states that the discretion of Member States in setting requirements must be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the requirement in article 3(4) of the Convention to provide "appropriate recognition" for NGOs.[7]

22. Article 9(3) Aarhus Convention gives a right to members of the public to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, "*where they meet the criteria, if any, laid down in [...] national law.*" As for the possibility to impose "requirements" under article 2(5), Parties enjoy some but not unfettered discretion in formulating these criteria. As the Compliance Committee has consistently held: "*Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as Article 9, paragraph 3, should be read in conjunction with Articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.*"[8]

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[5] See also ACCC/2005/11 (Belgium), para. 27.

[6] ACCC/C/2009/43 (Armenia), para. 81 and ACCC/C/2008/31 (Germany), para. 71.

[7] Aarhus Convention: An Implementation Guide, 2nd edition, p. 58.

[8] ACCC/C2008/31 (Germany), para. 92. See also ACCC/C/2005/11 (Belgium), paras 34–36; ACCC/C/2006/18 (Denmark), paras 29- 30; ACCC/C/2008/32 (European Community) (Part I), paras 77-80; ACCC/C/2010/48

23. The Compliance Committee has previously recognized that certain criteria are compatible with the principles of the Convention, for instance a requirement that an NGO demonstrates by reference to its by-laws that its objective is to further environmental protection.[9] Points (1) and (2) of the criteria established in chapter 16, section 13, of the Environmental Code (see para. 6 above) are to be characterized as such requirements. It is entirely appropriate to require an applicant organisation to show that it is non-profit making and seeks to protect the environment.

24. Points 3 and 4 of section 13, chapter 16, Environmental Code are on the other hand inconsistent with the principles of the Convention and accordingly fail to comply with the requirements of articles 9(2) and 9(3) and the associated articles 3(1), 3(4) and 3(9).

Chapter 16, Section 13(3): 3 years of activity in Sweden

25. Section 13(3) of Chapter 16 of the Environmental Code requires an organization to have carried out activities in Sweden for at least 3 years prior to filing the action. In the judgement that gave rise to the present communication, the SAC did not address this aspect of Section 13 but considered point 4 of Section 13 first. The Court, therefore, did not address ClientEarth's arguments on this point.

26. Article 3(9) of the Convention requires that, "*within the scope of the relevant provisions of this Convention, the public shall [...] have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.*"

27. Article 9(2) and 9(3), both in conjunction with article 3(9), of the Convention therefore requires that an environmental organization can obtain a review of an act, decision or omission for an activity that falls under article 6 of the Convention or of an act or omission that violates national law relating to the environment without discrimination as to where its registered seat or effective centre of activities is. This connection is also reflected in the Implementation Guide, which states that "*any requirements [imposed on NGOs] should be consistent with the Convention's principles, such as non-discrimination.*"[10] While section 13(3) of Chapter 16 of the Environmental Code does not explicitly impose such a requirement, the effect of the provision amounts to the same, namely it discriminates against organisations registered abroad which focus on environmental protection in a neighbouring state.

28. This is explicitly recognized by the Implementation Guide, which states that:

"*For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9.*"

29. The same follows when considering the underlying rationale of articles 9(2) and 9(3) of the Convention. Article 9(2) seeks to ensure that the public that has an interest in a given project has the possibility to bring a court challenge. As regards individuals, these will be first and foremost, although not only, those persons living in the affected area. Equally then

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(Austria), paras 51 and 68–70; ACCC/C/2010/50 (Czech Republic), para. 85 and ACCC/C/2011/58 (Bulgaria), para. 65.

[9] ACCC/C/2008/31 (Germany), para. 72.

[10] Implementation Guide, p. 58.

for environmental NGOs, those environmental NGOs that focus on the protection of an affected area should be accorded standing. When considering a project such as NS2, which affects the Baltic Sea which borders the country of registration and main centre of activities of ClientEarth Poland, it is clearly apparent that requiring an organisation to have had activity in a specific state before that project arose does not respect the objective of article 9(2) of the Convention. The same would apply if a specific act would violate Swedish environmental law that is meant to protect the Baltic Sea and a Polish NGO would seek to bring a case under article 9(3) of the Convention.

30. The need to grant foreign NGOs standing in such circumstances was acknowledged by the Finnish Supreme Administrative Court in a parallel challenge lodged by ClientEarth against the development permit issued for Nord Stream 2 in Finland. In its judgment of 19 August 2019 ,[11] the Finnish Supreme Administrative Court held that domestic legal provisions regarding standing in environmental cases must be assessed broadly in the light of the provisions of the Aarhus Convention and EU law and that, as a result of this, an NGO must be granted standing if it challenges a project which may impact the environment within the operating area of the NGO. The court held: "[ClientEarth]'s operating area covers Poland and other countries. The scope of the foundation's operations may be defined as the location of the contested water management project [Nord Stream 2], and as regards the sphere of influence, it should also be considered as being in line with the purpose and the actual activities of the foundation as intended in the domestic legislative preparatory work. [...] [T]he area of operation of [ClientEarth] cannot be [...] restricted to the territory of Poland. Nor should the wording of the provision be interpreted restrictively, having regard to Article 9 (2) of the Aarhus Convention (...) and the case law of the Court of Justice concerning the right of appeal by independent organizations in relation to Union environmental law." This general conclusion led to a specific finding that ClientEarth must be granted standing to challenge the relevant development permit. This judgment stands in stark contrast to the Swedish SAC judgment denying ClientEarth standing regarding the same project.

31. Before the SAC, ClientEarth admitted that it did not fulfil the test under pt. (3) of section 13 of Chapter 16 but contended that EU law and the Aarhus Convention precluded its application, particularly in a case concerning trans-boundary environmental impacts such as the NS2 case, because it unlawfully discriminates against organisations based in member states other than Sweden. ClientEarth also observed that Sweden's own Law Council (consisting of sitting and retired Supreme Court and SAC justices advising during the legislative process) and its Environmental Ministry had publicly recognized that to make standing in this context conditional upon prior activity within Sweden unlawfully discriminates against organisations based in member states other than Sweden.

32. In light of the foregoing, section 13(3) of Chapter 16 of the Environmental Code fails to comply with article 9(2) and 9(3), both in conjunction with article 3(9) of the Convention.

Chapter 16, Section 13(4): At least 100 members or demonstrate that its activity has public support

33. On paper, Section 13(4) of Chapter 16 of the Environmental Code is phrased in a manner

[11] See Annex 5 for the judgement in Finnish. ClientEarth can provide a translation of the judgement if it will aid the Committee's deliberations

that may appear compliant with the Convention's principles. However, the interpretation of this provision by the SAC fails to comply with the Convention.

34. As stated in para. 12 above, ClientEarth had provided the SAC with two main pieces of evidence to demonstrate public support, a letter from Greenpeace Nordic and a public petition signed by over 2000 persons. ClientEarth had provided both pieces of evidence because it was not clear from the legal framework what the exact requirements would be to demonstrate public support. In its judgement, the SAC dismissed both pieces of evidence based on criteria that are not evident from the wording of section 13(4) of Chapter 16 of the Environmental Code, namely that support be "direct" (see para. 14 above) and that the public support needed to concern the activities of ClientEarth beyond the individual case (see para. 15 above). This lack of clarity alone substantiates a violation of article 3(1) of the Convention, which requires the Parties "*to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*"

35. Neither could such an interpretation be derived from earlier jurisprudence, which rather appears to contradict this new judgement. While the national court cited with regard to the latter criteria to a previous case (Hanö Bay Wind Farm),[12] the passage cited appears to suggest that ClientEarth should have had standing. In that paragraph, the court had held that the applicant organization had not fulfilled section 13(4) because it had cited to a petition which (a) had no connection to the association and (b) did not express support for the association's case against the petition.[13] The petition submitted by ClientEarth had (a) been started by ClientEarth and (b) explicitly referred to the fact that the very purpose of the petition was to demonstrate public support for ClientEarth's court action (see section: "Why is this important?") but was nonetheless denied standing.

36. Even though the SAC has now provided some interpretation of section 13(4) of Chapter 16 of the Environmental Code, the applicable requirements are arguably less clear than before. It is not clear how an organisation, which because of its organisational structure does not have members, is supposed to demonstrate generally public support for its activities. A petition must necessarily be linked to a specific issue, it does not appear workable to collect signatures of the public to support all the activities of a given organisation. Even if such a petition was attempted, it will be difficult to gain public support without having a clear objective.

37. Moreover, neither the judgement nor any other material provides guidance as to the ways in which public support can be demonstrated, for instance by indicating other ways than a petition. ClientEarth Poland has indeed run a number of campaigns with broad public support on environmental protection issues in Poland, which could have been considered relevant. However, it is not clear what the required threshold of support would be or if

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[12] NJA 2012 s.921 (the Hanö Bay Wind Farm case)

[13] The paragraph of that judgement reads: "The issue then arises as to what conclusions can be drawn from the other circumstances in the case. It is unclear how much support there is around the association as such, even if there is a large local engagement among the public when it comes to issues concerning the wind farm. The association has relied upon a petition with the title "Save Hanö Bay – Stop the Wind Farm!" which has been signed by about 900 people. But there is no evidence to indicate that the petition had any connection to this association. No support from the public for this association as a representative for opposition to the wind farm can be read into the petition. Against that background, the association cannot be considered to carry on its activity in such a way that it represents the public when overseeing the interests of nature and environmental protection. It was therefore correct of the Land and Environment Court of Appeal to summarily dismiss the association's appeal to it." (unofficial translation, emphasis added)

providing evidence of such activities could be relevant. As mentioned above, the letter of Greenpeace Nordic mentioned such activities of ClientEarth but the SAC did not consider this.

38. In practice, the criteria thus applied will deter environmental NGOs without members from seeking to rely on their access to justice rights, thus violating article 9(2) and 9(3) of the Convention. Even if there is a possibility to meet the criteria at all, which is not clear at this stage, given the inherent financial risks of litigation, an environmental NGO cannot apply to the courts without being able to assess whether they will be accorded standing to bring a challenge.

39. Since the Committee gives in its decision also consideration to the statements of national and regional courts and institutions, a relevant statement to consider is that of Advocate General Sharpston in her Opinion of 2 July 2009 in case C-263/08, "*When national law imposes conditions requiring there to be a link between the organisation and an environmental decision, those conditions must be objective, transparent and consistent with the aims of [the EIA Directive]. It is not, therefore, appropriate to allow the authorities broad discretion to examine, on a case-by-case basis, whether environmental organisations have legitimate aims or not. Nor are conditions acceptable which are framed in such ambiguous or inadequate terms that they give rise to uncertainty or to discriminatory outcomes. Any restriction whose effect is to hinder rather than to facilitate access to administrative and judicial procedures for environmental organisations must, even more evidently, be rejected.*" (emphasis added).[14] It is submitted that pt. 4 of section 13 of Chapter 16 of the Environmental Code gives rise to such uncertainty and discriminatory outcomes.

40. The imposition of this unclear and deterrent requirement also fails to respect Article 3(4) of the Convention, which requires the Convention Parties to ensure that their national legal systems are consistent with the obligation to give appropriate recognition of organizations promoting environmental protection.

41. The requirement of chapter 16, section 13, pt. 4 of the Environmental Code is therefore incompatible with articles 3(1), 3(4), 9(2) and 9(3) of the Aarhus Convention.

Summary

42. In ClientEarth's understanding, the Swedish provisions governing NGO standing in environmental cases are incompatible with the general objective of the Convention to give the public – including thus environmental organizations – wide access to justice and to ensure that "*effective judicial mechanism*" are accessible to the public, including organizations, so that "*the law is enforced*" (Recital 18 of the Convention).

43. ClientEarth believes that the above constitutes a systemic failure by the Party concerned. ClientEarth is conscious of the fact that the Committee, when evaluating the compliance of the Party with the Convention, as a rule considers the "general picture" described by the communicant and the Party concerned, i.e. both the relevant legislative framework and its application in practice. We believe we have adequately demonstrated that the very wording of the relevant Swedish statutory provision and its application in the NS2 case violates art.

[14] Opinion of Advocate General Sharpston on Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, ECLI:EU:C:2009:421, para. 74.

3(1), 3(4), 3(9), 9(2) and 9(3) of the Aarhus Convention, and that the current manner of judicial interpretation of certain criteria in Swedish legislation is incompatible with said provisions of the Aarhus Convention.

VI. Use of domestic remedies

44. As mentioned above, this communication concerns a systemic failure to comply with the Convention, namely a specific legal provision and the interpretation given to it by the courts. However, ClientEarth has also exhausted domestic remedies in the specific case that gave rise to this communication and illustrates the systemic breach.

45. On 6 September 2018, ClientEarth applied to the SAC for judicial review of the NS2 Permit Decision, presenting detailed arguments both as to standing, as well as substantive issues concerning the breach by the NS2 Permit Decision of relevant Swedish and EU law provisions. ClientEarth requested the SAC to quash the development permit.

46. On 21 December 2018 the SAC summarily dismissed ClientEarth's application without considering its merits. There is no appeal against this judgment available.

VII. Use of other international procedures

47. No other international procedures have been invoked.

VIII. Supporting documentation

48. Annex 1: Section 2 of the Swedish Act on Judicial Review of Certain Government Decisions (2006:304) & Section 13, Chapter 16 of the Environment Code (1998:808);

49. Annex 2: The judgment of the Swedish Supreme Administrative Court of 21 December 2018, in case no. 4840-18;

50. Annex 3: A public petition signed by over 2,000 named natural persons attesting to their support for not only the application for judicial review but also for other ClientEarth actions against the NS2 project (the original Polish-language version and an English-language translation thereof);

51. Annex 4:Written testimony of the General Director of Greenpeace Nordic.

52. Annex 5: Judgment of the Finnish Supreme Administrative Court of 19 August 2019 (original language, translation can be provided if considered relevant).

IX. Signature

53. Dr Marcin Stoczkiewicz, on behalf of ClientEarth Prawnicy dla Ziemi, 19 September 2019

Prezes Zarządu Fundacji
ClientEarth Prawnicy dla Ziemi
dr Marcin Stoczkiewicz