12 May 2014

COMPLIANCE COMMITTEE
Environment Housing and Land Management Division
United Nations Economic Commission for Europe
Palais des Nations
CH-1211 GENEVA 10

SWITZERLAND

By registered mail

Madam/Mr Chair,

Our Ref.: CARRIERE BODARWE 00000639 RC/LR/72
Your Ref.:

A) **Judgment in *Ardennes liégeoises a.s.b.l. and Terre wallonne a.s.b.l.***

I wish to submit a complaint to the Aarhus Convention Compliance Committee on behalf of the two non-profit environmental protection associations represented by me in the above case, concerning the judgment of the Twelfth Chamber of the Cour d'appel (Court of Appeal) of 29 October 2013 (see Annex 1). All the details of these two communicants are to be found in the judgment attached.

This complaint concerns the aspect of the judgment to be found in the final section on page 6:

1. The Court orders the two environmental protection associations to pay the costs of the proceedings at both instances, in an amount of €1,200 + an amount of €2,500. These sums are prohibitive in themselves, and they infringe article 9, paragraph 4, of the Convention.

Indeed, pages 41 and 42 of the associations' Submissions state:

> "If, however, the Court were to dismiss the appellants' action, it should be taken into account that these are non-profit associations pursuing a legal remedy specifically available to them and which is provided for the collective environmental good, that they should not be penalized for their efforts to achieve this objective and that they should have to pay only the minimum case preparation allowance, i.e. €75.
>
> Under the third paragraph of Article 1022 of the Civil Procedure Code, the Court is to take account of the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance (an ancillary step might be to compare it to the respondent's substantial financial capacity) and of the manifestly unreasonable nature of the situation that would result from imposing the standard case preparation allowance.
>
> The Court will consider, as necessary, the position of the Aarhus Convention Compliance Committee, which has taken the view that, in environmental litigation, ordering the applicant to pay the costs at first instance and on appeal contravenes the terms of this Convention, since it does not comply with article 9, paragraph 4, of the Convention; especially, see page 74 of José Juste-Ruiz and Eduardo Salazar-Ortuno, 'Non-respect par l'Espagne des obligations de la Convention d'Aarhus: Communication ACCC/C/2008/24 dans le cas "Senda de Grenade" à Murcie [Non-compliance by Spain with its obligations under the Aarhus Convention: Communication ACCC/C/2008/24 in the

"Senda de Granada" case in Murcia]', *Revue juridique de l'environnement* 2011/1, (supporting document No. 25).

The Court should also take account of the fact that the defendant has never had a co-operative attitude towards the proceedings, either during preliminary negotiations or at first instance, and merely sent five lines of explanation (see supporting documents) as to why it claimed that the calculation of the time-limits in the Summary Report on the Administrative Appeal was wrong. If there was a mistake at that level, the reason for it was simple and did not require lengthy submissions to be forced – perhaps unnecessarily – on the applicants."

2. The Twelfth Chamber of the Cour d'appel de Liège (Court of Appeal of Liège) has not given reasons for its judgment as regards the last quoted paragraph of the Appeal Submissions on the question of costs.

Put simply, the main complaint against Carrière et entreprise Bodarwé & Fils s.a. [a public limited company operating a quarry] was that it did not have a valid environmental permit, since the required notification of consent was made too late, which resulted in a tacit rejection.

Instead of relying from the outset on the factors in its favour, the defendant (later the respondent) provided sparse information, compelling the environmental protection associations to undertake time-consuming work drafting submissions, which ultimately proved unnecessary.

The associations were misled by the erroneous calculation of the Regional Administration's time-limits set out in its Summary Report on the Administrative Appeal (pages 29 and 30 of the Summary Appeal Submissions according to the Supplementary Procedural Timetable, lodged by the two appellants; Annex 2) and therefore they did not deserve an appeal case preparation allowance (recoverable under fixed-rate provisions) differing from the standard amount of €1,320 to be set by the Court of Appeal at €2,500.

3. The Court is of the opinion that the environmental protection associations have not adequately established reasons relating to their exact financial position that would allow the Court to reduce the case preparation allowances normally calculated according to the statutory scales for such proceedings.

However, it is necessary to counter that argument with the fact that the accounts of non-profit associations are public, since they are lodged at the Registry of the Tribunal de commerce (Commercial Court). Article 26 *novies*, §1, of the Law of 27 June 1921 states:

"A file is to be kept at the Registry of the (Commercial Court) for each Belgian non-profit association (referred to in this chapter as 'association') that has its registered address in the district.

This file is to contain:

(…)

5) the association's annual accounts, drawn up in accordance with Article 17;

(...)

The King is to specify how the file is to be compiled and establish the fee to be charged to the association for that purpose, which may not exceed the actual cost. The King may provide that the documents referred to in the second paragraph can be lodged and reproduced in a specified form. Under conditions specified by the King, copies are to be regarded as authentic original documents and may be substituted for them. The King may also permit automatic processing of specified information in the file.

The King may authorize linking of data files. If necessary, detailed rules are to be laid down for doing this."

These accounts indicate that these two associations have no significant financial resources.

On the other hand, although the respondent had not, in its own submissions, requested production of the non-profit associations' accounts, if the Court of Appeal considered that it should seek broader clarification, an order for the hearing to be re-opened and the applicants' accounts to be produced would have displayed the procedural fairness required by article 9, paragraph 4, of the Convention.[1]

However, it is self-evident that non-profit environmental protection associations generally do not have large resources. Indeed, this is a well-known fact.

B) <u>'Environmental' appeal on a point of law is prohibitively expensive</u>

In addition, it should also be pointed out that the Belgian State's system of requiring parties to consult a lawyer with special rights of audience before the Cour de cassation (Court of Cassation) would have required the appellants to incur €3,000 to €5,000 of additional costs and fees in order to appeal on a point of law – which would have been largely non-recoverable, since the Court of Cassation takes the view that there can be no such recoverability for cases before it. Thus, this system discourages the use of further appeal on a point of law by NGOs promoting environmental protection whose appeal has been dismissed.

The latter constitutes a separate ground for complaint, this time directed not against the decisions of the Twelfth Chamber of the Court of Appeal of Liège, but against the entire Belgian procedural system in light of article 9, paragraph 4, of the Aarhus Convention. It also provides a more specific explanation as to why no action has been brought before the Court of Cassation in this case, concerning the three grounds of complaint set out above and others which might relate to various other improper aspects of the judgment of the Court of Appeal of Liège of 29 October 2013.

<u>On those grounds,</u>

The Compliance Committee is requested to declare on any of the four grounds cited above that the Belgian State has failed to comply with its obligations under article 9, paragraph 4, of the Aarhus Convention, through the judgment of the Court of Appeal of Liège of 29 October 2013 and through the prohibitive expense of its system of appeal on a point of law.

Should you require any additional information, please do not hesitate to contact me.

Yours faithfully,

Axelle CHARLIER
Lawyer

Alain LEBRUN
Lawyer

VAT No. 0850.936.260
http://www.avocat.be/communication/reglements,fr.73.html

[1] This was particularly necessary because, two days after the appellants lodged their Appeal Submissions on 9 April 2013, the Court of Justice of the European Union gave its judgment of 11 April 2013 in Case C-260/11 clarifying the meaning of 'not prohibitively expensive' proceedings, whereas European Union law was in issue before the Court of Appeal and therefore this judgment required consideration of the factors thus defined by that new case-law.

LIST OF ENCLOSURES:

Annex 1: Judgment of 29 October 2013

Annex 2: Full text of the appellants' Summary Appeal Submissions (...), dated 9 April 2013.