Communicant's response to Ireland's update of 23rd August 2023 -

Date of Reply: 11 September 2023

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland in connection with the cost of access to justice (ACCC/C/2014/113)

Abbreviations used:

NPE = Not Prohibitively Expensive
AG = Attorney General [Ireland}
CJEU = Court of Justice of the European Union
Para= paragraph
The 2011 Act = the Environment (Miscellaneous Provisions) Act 2011
NEPP = The North East Pylon Pressure case
SC = Supreme Court

Introduction:

The party concerned is now attempting to introduce defences in opposition to positions it previously adopted; this together with its attempt to introduce arguments unconnected to the decision in the *Heather Hill* case, amounts to an abuse of process and should not be entertained. Its attempt to attribute the 9-year delay in the case to me, is misguided, and not in compliance with a good-faith participation in a communication process to which it voluntarily committed to partake. In making this misguided claim, it appears to be unaware that the Communication system does not offer any remedy to individual grievances with a particular country. Further, a case which is absent of disputes relating to a myriad of disputed facts relating to an alleged concrete denial of Aarhus rights, objectively, makes dealing with the systematic aspects of a Communication less complex.[1]

Flip-flop-positions:

Re catch 22- Ireland's earlier position was that regardless as to this problem, no violation of the Convention occurred, as the litigants involved were not deemed to be environmental litigants, and thus not entitled to costs protection.[2] Inconsistent legal argument is an abuse of process and makes a communication unnecessarily convoluted.[3]

Now, it seeks to maintain on the basis of the comments of two of the more progressive judges, that litigants should fear no more. This is fanciful. It ignores, that: (1) A high court decision, is only binding on lower courts, which have no role in most environmental litigation; (2) The Supreme Court decision in *Coffey v EPA*(2013), has never been overturned, and as recently as 2018, the Court of Appeal (in Callaghan) effectively endorsed the "catch 22" stance by analogy, without any reference to its deterrence effect on environmental litigants.

One should also bear in mind that an unknown percentage of cases at High court level upwards, involve decisions where no written decision is issued; some of these could involve "catch 22" style decisions contrary to those of the two judges referenced.

While it is welcome, that the party concerned appears to have awoken to the "catch 22" problem, its response demonstrates its bad faith implementation of Aarhus rights. Awaiting a potential variance by the SC, while refusing to amend legislation to clarify the situation, shows that the government is happy to deter environmental litigation by allowing uncertainty in the law to prevail.

For example, the government could , via executive action, direct the Attorney General, to issue a statement to the effect that the state would not seek to recover adverse costs [at least in excess of NPE costs] in any case in which the state was a respondent, which involved litigation relating to the environment, or where an applicant was seeking a costs protection order for such a purported case. This, though not protecting a potential litigant from prohibitive costs from semi-state bodies, or from Notice parties, would demonstrate some goodwill on the part of the government. There is a

[1] The party concerned expresses concern with a nine year delay, while simultaneously hinting that it would like the Committee to await a possible ruling on the "catch 22" issue by the Court of Appeal/SC – This should not be entertained, in my view, as the public interest would be better served by a clear ruling on this issue, as without a clear ruling, a judicial ruling overturning the "catch 22" approach (which I suspect is unlikely), could then be overturned by legislation in the absence of a decision on this issue by the Committee. - Potentially a truly Kafkaesque scenario.

[2] See para 123 of its response of 29 September 2015.

[3] See- Prohibition of inconsistent behaviour- (v*enire contra factum proprium* principle*)* https://www.trans-lex.org/907000/_/prohibition-of-inconsistent-behavior/

precedent for this, when in 1982, the government, via executive action, partook in a convention with the European Commission and other EU member states, to not recover legal costs against other member states/EU Commission, even where the CJEU had issued a costs award in its favour. The fact that this [possible newer declaration] has not yet happened, demonstrates clearly that the ensuring environmental litigants should "fear no longer" prohibitive legal costs, is not a priority for the government (even if it ever was an objective).

The Court of Appeal case of *Callaghan* in 2018, and *Coffey v EPA* in 2013, as mentioned in my 3 July 2023 submission, in regard to the "catch 22" issue (declarations of non-standing or cost-splitting decisions are sub-sets of the "catch 22" problem), remain un-overturned by the comments of high court judges.[4]

Re *McCallig*—The party concerned previously endorsed the high court decision in this case, and now it seeks credit for the fact that the courts have disapproved of this decision. In fact, it had earlier insisted that costs splitting was "necessary for the proper functioning of the Irish courts…".[5]

Whereas, it is acceptable for a state to offer an alternative (or backup) defence, this should be done from the outset to comply with principles of fair procedure and legal certainty. At the outset, the state was offered a 5-month timeframe to outline its defence to a Communication. When seeking an extension of this timeframe, in 2015, the Committee ruled that the 5-month timeframe was immutable. Hence, to allow a state to offer an initial defence, and then to offer a totally different defence at a later stage in the proceeding, would grate against the principle of the 5-month timeframe limit to muster one's defence. The unfairness of the admittance of a new defence is further compounded where a new defence contradicts a position already outlined.

Re Own Lawyer costs: whether the costs of own's lawyers falls within the scope of the fairness provision of article 9.4 of the Convention,- it previously and continues to maintain that it has no relevance, while seeking credit for a court direction, that own-lawyer costs, should be taken into account when determining the NPE of adverse costs by legal costs accountants.

Re *Heather Hill* SC case- the party concerned overplays the comments of the SC in this case regarding the setting aside of Order 99 [adverse costs rule]; for example, it refers to the conditionality regarding damage to the environment, which was formerly a hurdle to be overcome, but which is no longer [but only so, in regard to state respondents] – However, it fails to clarify that this was due to a CJEU decision, and not a precedent of the Irish courts. And the CJEU decision in *NEPP* effectively endorses the costs splitting approach of *McCallig*, and this offers inadequate protection, even in those cases that fall within the scope of EU law. With the mishmash of CJEU decisions and Irish court decisions, many of which stand in contradiction, it is nigh impossible for any litigant to estimate the financial risk involved.

It should also be noted that contrary to the various mentions of interpretative obligations, the *Heather Hill* SC decision was simply a matter of plain statutory interpretation and in no way signals some upgraded implementation of international law relating to Aarhus obligations.

At paragraph 47 of its submission, the party concerned, refers to the Minister and the Attorney General "confirming the state's position in those proceedings"; While it may be the role of the AG to

[4] *North Meath Wind Farm Ltd and Element Power Ireland Ltd v An Bord Pleanála and North Meath Wind Information Group and John Callaghan [*2018] IECA 49, 23 February 2018.; *Stella Coffey v Environmental Protection Agency and Teagasc* 2013 IESC 31, 25 June 2014.

[5] See para 93 of its response of 29 September 2015.

assert the state's stance in *International litigation*, in line with separation of powers doctrine, it is the court's sole role to confirm the state's position domestically; rather, as a member of the executive branch, it is the role of the AG to outline the *government's* position. Again, any high court's interpretation is not binding unless it is later affirmed by the Court of Appeal/Supreme Court, in the context of earlier contradictory rulings of higher courts.

At paragraph 25 of its latest submission, the party concerned again overplays the role of [the extremely lame] interpretative obligation, by referencing paragraph 136 of *Heather Hill*[SC]; however, it fails to clarify that this weak aid is thwarted by the *contra legem* rule, which the court reiterates in four separate paragraphs, paras: 45/80/86/196(ii). The *contra legem* rule steamrolls the interpretative obligation in 99% plus of cases and was also referenced by the Supreme court in the *Sweetman* case [earlier supplied] and by the CJEU. The notion, that the interpretive obligation, will trump Order 99, in all but the most remote of circumstances, remains entirely illusive.

A few other asides:
The party concerned, alleges that I had not provided one instance where scope of the purported costs protection rules, fails to encompass Aarhus encompassed cases. This is incorrect. I accept that a stood back from seeking to survey in detail the divergence in coverage by the costs rules, and what needs to be covered by the Aarhus Convention, to avoid over complicating my communication (with the hope that others might address this issue at a later date); However, I did instance a case, where a shortfall was evident: In my submission of 17 December 2014, at page 6, I gave an example where the scope of the special costs rules had not applied; In *Waterville Fisheries v Aquaculture Licenses Appeals Board [2014] IEHC 52210* , the court held that an SCP could not be obtained for judicial review of the granting of a fish farming licence.

Further, at the open hearing of the Communication in Geneva, on 18 December 2015, the then Vice-Chair of the Committee, Mr. Alexander Kodjabashev raised the question as to whether the enforcement of contracts relating to the environment were encompassed by the then special costs rules; I replied that that there was no provision for costs protection in Ireland for the enforcement of contracts relating to the environment[6]. It is becoming increasingly clear that contracts between individual citizens and both commercial enterprises and semi-state entities will play a huge role in climate change mitigation measures in the near to long-term future. This shortfall in protection will be more consequential for climate change mitigation measures as time progresses.

Summary:
The party concerned's proposed submission is a meandering litany of unsubstantiated claims, unfounded allegations, contradictory positions and incorrect extrapolations (which are way outside the confines of an update on the *Heather Hill* SC case); it should be deemed to be inadmissible for the purpose of influencing any findings, at this late stage in the process, and it bears little impact on the state of the law in Ireland in June 2016, when final submissions had been sought from each side.

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11 September 2023

[6] It should also be noted that it emerged under an EU freedom of information request, that Ireland was at the forefront of EU member states blocking an EU Parliament/Commission proposal [circa 2003] to introduce an EU directive to implement effective costs protection for environmental related contracts enforcement legal actions.