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27<sup>th</sup> August 2015

To:

Ms Fiona Marshall

Secretary to the Aarhus Convention Compliance Committee  
ACCC  
Geneva

Your Reference: [ACCC/C/2014/113](#)

Re- Request for time extension:

Dear Ms Marshall,

I note the request from Ireland for a six week time extension. Due to the 3 month interval between ACCC meetings, this request is effectively akin to a request for a 3 month extension.

I understand the position of the Dept. of Environment and have some empathy for its position. However, while Ireland may only have had 5 months official notice of a need to reply; in reality it has been on notice now for over a year that it would have to respond to the issue of prohibitive legal costs, and the likely admittance of my communication.

I responded to the Dept. of Environment's public consultation of summer 2014 on 19<sup>th</sup> August 2014<sup>1</sup>, where that consultation had a deadline of September 29<sup>th</sup> 2014. This submission largely corresponded with my communication [to the ACCC], with additional suggestions in response to the invitation. The government was also put on notice by most of the other submissions, of Ireland's significant shortcomings in relation to the issue of prohibitive legal costs. Due to a technical issue, in relation to the size of the document file relating to my communication; this issue has already provided the government with an effective 6 week time extension (from 27<sup>th</sup> July 2015 to 15<sup>th</sup> September 2015). Notice of the earlier deadline had been posted on the UNECE website.

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<http://www.environ.ie/en/Environment/AarhusConvention/PublicConsultation/SubmissionsReceived/FileDownload,39269,en.pdf>

In the spirit of the consultative approach of the communication system, I am happy to afford the government an extension of two weeks to 5pm on 29<sup>th</sup> September 2015, provided that this extension does not interfere with any scheduled consideration of the communication by the ACCC at the meetings of 6<sup>th</sup> to 9<sup>th</sup> October 2015 (with the reply cc'd to me).

Ideally, I would need at least three days to respond to any substantial reply from the government, if this is permitted. The key issue is that any extension does not cause an effective three month delay in the overall process. My proposed new deadline of September 29<sup>th</sup> should be rolled backwards, where this is required to meet the ability of the ACCC to engage in an appropriate review of the documentation before the relevant ACCC meeting. I understand that the ACCC may have amended its policy so as to reject last-minute submissions that do not afford a sufficient review before scheduled meetings, and I contend that this policy adds to the fairness of the process.

In assessing any re-scheduling, cognisance of the fact that a general election will have to be called to be held no later than 8<sup>th</sup> April 2016, should be taken into account. While the issue of legal costs is currently largely apolitical (and in fact, I would argue that this is part of the problem – there is little political competition between political parties on the issue of citizens' rights of access to courts), the current government did advance as part of its program for government that Ireland would ratify the Aarhus convention.<sup>2</sup> Therefore, the degree to which it has fulfilled that promise [in practice]<sup>3</sup> should ideally be presented, before the current government dissolves.

Looking to the pattern of C99 [re Spain], it appears to me that the ACCC would need to be in a position to deal with a communication over at least two separate meetings, before issuing draft findings. Therefore, for any findings/recommendations to be issued before the next general election (assuming the term will be extended to near the end, as previously indicated by the government), the ACCC may need to be in a position to discuss my communication at its October 2015 meeting, with the possibility of reaching draft findings at its December 2015 meeting.

A recent report issued by the EU Commission on the Troika's failed efforts to encourage legal system reform in Ireland, highlights structural deficiencies in Ireland's ability to affect law reform. The report cites apparent claims of a shortage of suitably qualified legal-draft-persons.<sup>4</sup> The current staff-leave problems resonates with this. However, it is a long established principle of International law that countries are not allowed to rely on structural deficiencies for failure to comply with convention law.<sup>5</sup> This principle should similarly be extended to obligations under any process of compliance assessment.

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<sup>2</sup> <http://www.per.gov.ie/wp-content/uploads/ProgrammeForGovernmentFinal.pdf>

<sup>3</sup> Ratification involves the legal obligation for the ratifying State to apply the Convention.

<sup>4</sup> See, for example, the EC report's comment – "[Several important reforms \(including on legal services costs, and the establishment of a centralized credit registry\) were delayed because of bottlenecks in the administration's capacity to draft legal texts.](#)

"[http://ec.europa.eu/economy\\_finance/publications/eeip/pdf/ip004\\_en.pdf?utm\\_content=buffer3daee&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip004_en.pdf?utm_content=buffer3daee&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)

<sup>5</sup> As Prof McDougal stated - "...defects in a state's institutional structure may not be pleaded to avoid performance of international duty". McDougal, Myres S., "The Impact of International Law upon National Law:

I'm sure that the Dept. of Environment can ameliorate its staff-leave problem by calling on the advises and assistance of outside help from suitably qualified lawyers (at a reasonable cost<sup>6</sup>), as was done, for example, in Ireland's intervention in the Aarhus compliance related CJEU case of *Commission v UK* (Case C-530/11 on 13<sup>th</sup> Feb 2014).

I therefore submit, that Ireland has no insurmountable hurdle to meeting the September 15<sup>th</sup> deadline, which is still over two weeks away. The request letter refers to three other communications. In the case of C129, it appears that that communication falls to be considered at the October meeting for admittance - so the government will have 5 months post publication of an admittance decision to reply. Communications C107 and C112 each require a reply by November 29<sup>th</sup> 2015, which is well clear of September 15<sup>th</sup>. The government therefore only has to respond, in the near future, to my communication.

It is submitted that the circumstances outlined by Ireland are not of a sufficiently exceptional nature to warrant an extension of an already generous time-period. In International law, it is accepted, that where a state fails to make an appearance; this should not derail an adjudication process: In *Nicaragua v US [1986]*<sup>7</sup>, for example, the International Court of Justice held that "*the Court has to ensure that the party which declines to appear should not be permitted to profit from its absence*". Similarly, at the ECHR, cases have proceeded without a state filing a defence. The principle of *audi alteram partem* requires only that a party should be given a real *opportunity* to be heard – this condition is fulfilled here. Further, any *draft findings* can be further contested by a party at a later stage. I therefore submit, that the ACCC should not delay its consideration of my communication.

Yours sincerely,

Kieran Fitzpatrick

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A Policy-Oriented Perspective" (1959). Faculty Scholarship Series. Paper 2614. (p47)  
[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3562&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3562&context=fss_papers)

<sup>6</sup> As evidenced by the reply to an FOI request by me to the Attorney General's office.

<sup>7</sup> <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5> Judgment of 27 June 1986.