Communication to the Aarhus Convention's Compliance Committee concerning compliance by Ireland regarding the costs of access to justice: (ACCC/C/2014/113)

OPENING COMMENTS ON BEHALF OF IRELAND

A. Background

1. The Aarhus Convention was ratified by Ireland on 20th June 2012 and entered into force on 18th September 2012, following full transposition of each part of the Convention into Irish domestic law.

2. On 5 August 2014, the communicant sent a communication to the Aarhus Convention's Compliance Committee ("the Committee") in which he alleged the special costs provisions provided for in Irish legislation do not satisfy the requirements of the Aarhus Convention ("the Convention"). His 'complaint' was in three parts. He alleges:

(i) The special cost provisions provided for in section 50B of the Planning and Development Act 2000 (as amended) (the "PDA") and section 3 of the Environment (Miscellaneous Provisions) Act 2011 (the "EMPA")(together "the Special Costs Provisions") do not provide sufficient certainty that an applicant for a remedy will not be exposed to a liability for costs which are not prohibitively expensive;

(ii) There are circumstances in which an applicant for a remedy may not be in a position to present their application for relief themselves and it may be necessary to incur prohibitively expensive costs in securing representation. In this regard, it is noted that the communicant (correctly in Ireland's view) distinguishes between an applicant's liability for the costs of other parties to proceedings falling within the

scope of the Aarhus Convention and liability for one's own costs. As part of this aspect of his complaint, the Applicant complains about the mechanisms for regulating legal costs which are available in Ireland;

(iii) The Irish legal system has a lack of transparency, as it does not publish (i) the majority of outcomes of legal costs adjudication, (ii) the outcomes of professional complaints procedures and (iii) information in respect of special costs procedures in applicable environmental cases.

3. Ireland denies that its legislative provisions fail to ensure that the requirements of the Convention are met; it is Ireland's position that the costs regime in respect of environmental cases goes further than the minimum requirements of the Convention and adequately facilitate access to justice in environmental matters. In particular, Ireland contends:

i. The Special Costs Provisions ensure that insofar as is necessary in environmental cases, an applicant for a remedy will not be exposed to any liability for the other parties' costs of those proceedings. There is no lack of certainty about the protection afforded by the Special Costs Provisions; any residual discretion left to the Courts in applying the Special Costs Provisions is appropriate and necessary to enable the Courts to regulate their processes and thereby ensure that access to justice is facilitated for all;

ii. There are a number of mechanisms available in Ireland which ensure that an applicant's own costs are not prohibitively expensive. In any event, the Convention does not require that an applicant for a remedy be provided with their own legal representation at any particular cost; to the extent that the communicant argues otherwise, he would, in effect, have to argue that the Convention imposes a requirement that the signatories to the Convention provide legal aid in respect of

cases to which the Convention applies. In circumstances where he has expressly confirmed that he makes no such claim, his complaint regarding "own costs" lacks any substance.

iii. The complaints made regarding the inadequacies of mechanisms for regulating own costs and the lack of transparency in respect of those mechanisms have no relevance to the substance of the complaint made in these proceedings. The Irish legislative regime ensures that in environmental litigation, an applicant for a remedy will not have any liability for the other parties' costs; this meets the requirements of the Convention. The question of regulating those costs simply doesn't arise. The regulation of costs in cases to which the Convention does not apply is not a matter for this Committee.

4. Before briefly elaborating on the above responses, it is necessary to address a preliminary observation which goes to the admissibility of the communication in this case.

B. Preliminary Observation

5. It is noted that the communicant in this case is not and has never been (insofar as his communication suggests) an applicant for a remedy or has never sought "*to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*" within the meaning of Article 9(2) of the Convention.

6. The complaint made by the communicant does not therefore relate to any alleged *actual* breach of the Convention but refers only to hypothetical or alleged potential breaches of

the Convention. For the reasons set out in Ireland's Response to the Communication, it is submitted that the communication is therefore inadmissible.

7. It is important to note that this is not simply a procedural objection to the admissibility of the communication. Firstly, since the communicant did not seek any domestic remedy at all, it follows that he hasn't exhausted domestic remedies and therefore Ireland was given no opportunity to address the complaints made at a domestic level. The communicant's position seems to be that he didn't need to exhaust domestic remedies because there was no particular decision which he was seeking to challenge. The communicant thus seeks to put himself in a better position to advance a complaint before the Committee than a party which met the sufficient interest requirements of the Convention and sought to (or wished to) challenge same precisely because he has no particular decision which he wishes to challenge and therefore no personal right which he is seeking to vindicate. Such an anomalous position can't have been intended when the procedures provided for in Decision I/7 were developed.

8. The fact that this is a hypothetical complaint creates fundamental difficulties for Ireland in responding to the communication and for the Committee in considering same. The communicant has offered no evidence that the costs regime operated in any particular case in breach of the requirements of the Convention. His communication suggests possible ways in which the regime could operate in a non-compliant way but in the absence of concrete examples of the regime so operating, it is not possible for Ireland to respond to the complaints made or for the Committee to assess the merits of the complaint. There is no case in which the Committee have been advised of all the relevant circumstances in order to assess the merits of any complaint that the costs regime has not been compliant with the requirements of the Convention in that case.

C. Irish Legal System

9. The Irish legal system is a common law system in which disputes before the Courts are dealt with on an adversarial basis. If a party wishes to challenge the procedural or substantive legality of any decision on an environmental matter, it is possible to do so by challenging that decision in the Irish Courts typically by way of judicial review.

10. Judicial review in Ireland is typically a two-stage process. The first stage provides for what is known as an *ex parte* application pursuant to which an applicant for a remedy makes an application to Court for leave to bring judicial review proceedings. At this stage, no other party is represented and the applicant must persuade the Court that there is sufficient merit to the case which they wish to advance that it should be permitted to proceed.

11. In the event that leave to seek judicial review is granted, as a matter of fair procedures and constitutional justice other parties likely to be affected by that challenge must be notified of the decision and given an opportunity to respond. This will typically include the decision-maker, any party to which the decision under challenge applies (e.g. the party who obtained the planning permission/licence the subject matter of the proceedings) and, in certain cases, the State.

12. Whilst any such case will involve the exchange of court papers or pleadings between the parties, the Irish system provides that the main substance of the complaint is dealt with at an oral hearing, heard in public, at which each party is entitled to set out the basis of its challenge or defence and at which each party is entitled to engage legal representation. Such legal representation is typically engaged on a case-by-case basis from lawyers working in the private sector.

13. It is apparent that there is an inevitable cost in such a process. This has been recognised by Ireland and in order to ensure access to justice in environmental cases (in accordance with the requirements of the Convention) it has taken steps to insulate applicants from

such costs by introducing the special costs provisions in section 50B of the PDA and section 3 of the EMPA.

D. Certainty of the Special Costs Provisions

14. It does not appear to be argued by the communicant that an applicant for a remedy who is entitled to the benefit of the Special Costs Provisions is exposed to a liability for the other parties' costs which could be regarded as prohibitively expensive. No such claim could be made in circumstances where the operation of the provisions ensures not only that an applicant is not liable for costs which are prohibitively expensive but that s/he is not liable for costs at all. In this regard, the Special Costs Provisions clearly go further than is required by the Convention.

15. The claim made by the communicant is that the entitlement to the benefit of the Special Costs Provisions is not sufficiently certain. In this regard, two complaints are made. First, that the costs of seeking a declaration pursuant to section 7 of the EMPA that the Special Costs Provisions apply to a particular case are themselves prohibitively expensive; and second, that the circumstances in which a Court may exercise its discretion to disapply the Special Costs Provisions are too vague.

16. Whilst it is not accepted that there is any evidential basis for the communicant's claim that the costs of seeking a declaration pursuant to section 7 are prohibitively expensive, the first complaint can be readily addressed by pointing out that the complainant has failed to recognise that the costs of such an application are themselves covered by the Special Costs Provisions. If the Court determines that the case is a case which falls within section 3 of the EMPA, then the costs of that application will be dealt with according to the Special Costs Provisions. If the application is refused, then axiomatically, it is a case which the Court has decided is not a case to which the protection afforded by the Act and the Aarhus Convention applies. Any complaint that

the costs in a case to which the Convention does not apply are prohibitively expensive clearly falls outside the remit of the Committee.

17. As to the second complaint, it is not accepted that there is any uncertainty regarding the circumstances in which the Special Costs Provisions will be disapplied. It is considered necessary to give a Court some limited discretion in relation to the awarding of costs to enable a Court to ensure that it can regulate procedures before it to ensure justice for all the parties which appear before it and to ensure that access to justice for all is facilitated.

18. In this regard, it is noted that under the Special Costs Provisions, the potential exposure to costs of parties involved operates asymmetrically. An applicant for a remedy will not, save in exceptional circumstances, be liable for a respondent's costs irrespective of whether s/he is successful in the proceedings. By contrast, a respondent is likely to be liable for costs if an applicant is successful but is unlikely to recover their costs even if the applicant's challenge fails.

19. If this were an absolute rule, one consequence of this asymmetry could be that there would be the potential for an unmeritorious applicant for a remedy to conduct themselves in litigation in a manner which unnecessarily incurs costs for the other parties to the proceedings in the knowledge that there is no risk that s/he will end up being liable for those costs. Even a meritorious applicant may not be incentivised to conduct the proceedings in a manner which allows the courts to operate most efficiently thus facilitating access to justice for all. The limited discretion given to the Court in this regard is therefore necessary to avoid any abuse of process. It is submitted that the Court's jurisdiction in this regard is consistent with the jurisprudence of the CJEU. In this regard, see Case C-137/14, *Commission v Germany*, at paragraph 81:

"None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings."

20. To the extent that the communicant complains about the exceptions to the Special Costs Provisions, he appears, therefore, to be arguing that the protection afforded by the Convention should automatically be extended to applicants who have conducted themselves in a manner which amounts to an abuse of process. It is submitted that allowing such conduct to be encouraged or permitted cannot have been the intention of the signatories to the Convention.

21. The complaint made in this regard exemplifies why the Committee should not be asked to consider the merits of an entirely hypothetical argument. In the absence of any particular complaint regarding the application of the provisions of section 50B(3) or section 3(3), it is not possible for the Committee to assess the merits of the complaint by examining the circumstances in which those provisions were applied or the manner in which it was applied.

E. Inadequate regulation of own costs

22. The communicant's complaint in this regard is, in effect, that an applicant may not be able to sufficiently control his/her own costs to ensure that access to justice is maintained. It is submitted that this complaint is without substance and that it ignores the many ways in which an applicant controls his/her own costs. The complaint, as with the balance of his complaints, is advanced on a basis which enables the communicant to hypothesise in relation to difficulties which could theoretically be faced by an applicant without providing any evidence which indicates that those difficulties are in fact faced by applicants at all, still less that such difficulties limit the access to justice of those who wish to challenge the lawfulness of decisions to which the Convention applies.

23. There is no substance to the communicant's complaint in this regard for a number of reasons. Firstly, and fundamentally, there is no requirement on an applicant to incur own costs at all. All natural persons, lay litigants, are fully entitled to represent themselves in any Irish Court. It is a matter for an applicant, therefore, whether s/he wishes to incur the costs of engaging legal representation and, if so, the extent of the

representation which they require: there is nothing in the Irish regime which requires an applicant to incur those costs. Since there is no requirement to incur these costs at all, they cannot be regarded as impeding access to justice in contravention of the Convention and therefore do not fall to be considered by the Committee.

24. An applicant is free to contract for legal representation on any basis s/he wishes. There are obligations on solicitors and barristers to advise in advance of the likely cost of such representation. Exceptionally, notwithstanding that a litigant may have freely contracted for legal representation, the State provides a mechanism (taxation) whereby the charges sought to be imposed for that representation will be assessed for their reasonableness. This represents an interference with freedom to contract for the benefit of the purchaser of legal services.

25. It is accepted that in much environmental litigation both applicant and respondent are legally represented. This itself is an indication that the possible requirement to meet one's own costs does not operate in a manner which limits access to justice. This can be explained by the general availability of legal representation on the basis of conditional fee arrangements. Such arrangements have long been a common-place in the Irish legal system and the amendments made to section 50B and the provisions of section 3 which enable a successful applicant to recover their costs facilitate such arrangements.

F. Lack of Transparency

26. In light of the submissions made above, it is submitted that the complaints regarding lack of transparency etc. are of no relevance to the Committee's considerations. An applicant will not be liable for the other parties' costs and therefore no question of the manner in which such costs are assessed falls to be considered. Insofar as an applicant chooses to incur costs, those costs are not required to be incurred by the Irish legal

system and therefore do not fall to be considered by this Committee. In any event, for the reasons set out in the Response to the Communication, it is submitted that there are no breaches of the Convention as alleged by the communicant.

G. Conclusion

27. For the foregoing reasons, the reasons offered in the Response to the Communication and the reasons to be offered at the discussion before the Committee, the Committee should conclude that the communication does not disclose any failure by Ireland to comply with the Convention.

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