

Dear Members,

Kim, Mhairi McKenna and I as CATS representatives had the privilege to attend Christine Metcalfe's hearing before the Compliance Committee at the United Nations Economic Commission for Europe in Geneva last Wednesday. Of all the things that I have done on CATS behalf over the last two years, this has been the most important and gives us the most hope.

As first time participants at the Compliance Committee, we found it fascinating and enlightening. Christine (the 'Communicant' or Complainant) and her team had to be prepared to undergo cross examination which they did for several hours. But it was great also to see the EU and the UK having to answer questions. In our opinion many of their questions were not properly or fully answered. Indeed, the Committee Members, while very nice people and unfailingly courteous, were well capable of asking focused questions, which is not surprising when you see their calibre below.

The Chairman stressed that the proceedings were "non-adversarial". During the morning session we listened intently to the cross examinations and we were astonished at some of the comments from the respondents, the UK and the EU,

A Scottish QC represented the UK Government Counsel. She was hard on Christine, seeking to discredit her as a witness rather than to address the subject matter of the Convention and the clear failures raised in the Communication. She repeatedly said that she did not understand what all the fuss was about!

When being questioned as to why Christine had not been given access to the Scottish Government's EIA and the reasons for giving Carraig Gheal and Western Argyll Timber Haulage Route consent to go ahead, it emerged that Ministers had been given a private briefing containing an assessment of the programme and the project – a briefing which had never been seen by the public.

The question of the Scottish Government's Renewables Routemap 2020 came up, along with its history, justification and current status. You will imagine the surprise of all those present to learn that despite the many recent pronouncements of Mr Fergus Ewing MSP and of

course the First Minister, that document, and the Energy Generation Policy Statement are still officially *drafts*. Nobody explained why reporter after reporter had relied on the documents in their decision making. There was obvious shock from the committee when it was realised that there was no scientific justification and no SEA (Strategic Environmental Assessment) and that the most up to date documents were still drafts after all these years of developing turbines!

Jean-François Brakeland, the Head of Legal Enforcement at the Directorate General (DG) Environment of the EU Commission, when being questioned on giving information to the public about carbon emissions made a series of dismissive comments including, memorably, "If we were to take instead of a 110 m high wind turbine a 110 m high metal statue of Mickey Mouse, you would not be expected to do a detailed carbon assessment on that, so why do you expect a detailed carbon assessment for the wind turbine?" Words failed us.

After the break for lunch, the Compliance Committee met privately to discuss the morning session before we all returned. Much to our surprise the observers (and there were many of us, from all over Europe) were invited to ask questions or comment on what we had heard that morning.

I began with the following observations:

1. 'This is not an isolated case. There is an epidemic throughout Scotland of such cases, where there is no real transparency and only limited consultation.'
2. 'The competent authority rarely produces its own EIA (Environmental Assessment), decisions on applications are almost always made on the EIS (Environmental Report) submitted by the developer.'
3. 'Thousands of turbines, in fact 3500+ have been given planning permission based on a Renewables Routemap which has no SEA (Strategic Environmental Assessment).'
4. 'Any alternatives to wind are never discussed'.

Mhairi illustrated the problems for the public in gaining access to information by describing how it was necessary to make a round trip from Ballantrae of 90 miles just to see a presentation on an offshore wind farm which could be sited 8 miles from Ballantrae!

Kim reiterated a point made by a Belgian observer who described the anger, frustration and cost to communities and councils when applications had been refused at all levels, and then the developer reapplies under a slightly different guise a mile or so down the road, or even on the same site with a different layout.

The questions presented at the end of the day by the Committee has put the onus on the Scottish authorities to prove in writing, that they have complied with the necessary public participation concerning both the Carriag Gheal / WLATHR projects and the Renewables Programme itself. In addition, they now have to demonstrate that within the Scottish legal framework, there is actually a step for preparing and making available a written analysis of public participation step in coming to the decision on such projects. These no doubt will be difficult for them to respond to, in order to demonstrate any sort of reasonable compliance with the Convention. However, when the Romanian Committee member added his last question, it was the 'icing on the cake', as he started off mentioning a fundamental premise of European law, namely the Principle of Proportionality. When one is bogged down in the mire of bureaucracy, it is somewhat difficult to rise above it to these principles, but the Principle of Proportionality is very important in overarching areas of law. Namely:

- EU Environmental Legislation is not based on zero impact but on consideration of the balance among the costs, benefits, impacts and alternatives available. An overriding principle of EU Legislation is the Principle of Proportionality, which requires that the extent of the action must be in keeping with the aim pursued. When applying the general principle of proportionality, the European Court of Justice frequently states that the principle requires an act or measure to be “suitable” to achieve the aims pursued, or it rather concludes that a decision is disproportionate because it is “manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue”.

Clearly the Romanian Committee Member wanted to see how the disadvantages of the Carraigh Gheal wind farm were properly evaluated and communicated to the public, in association with a clear assessment of the benefits, which were used to justify the position (according to the Principle of Proportionality) for approval, i.e. the benefits were somehow demonstrated to outweigh the disadvantages. Now of course this will be really difficult for

the Scottish administration (or any developer) to properly answer.

So it is important to maximise the outcome of this going forward and we plan to develop models for you all to use in your local cases to put their decision makers on the spot. There is also a role for us who attended as observers, and you can perhaps see that this offers us all some real hope.

A case in Ireland is questioning the validity of the Irish Renewables Programme, and the Planning Appeals Board (*Am Bord Pleanola*) have already delayed their decision and have now come out with a letter in which they are highly critical of an ES completed by the developer. I hope we can start to make this happen all over Scotland.

Best wishes to all

Susan Crosthwaite

Just for information

United Nations Economic Commission for Europe's (UNECE) Århus Compliance Committee present:

**Chairperson:** Mr. Jonas Ebbesson (Sweden)

Mr. Jonas Ebbesson is Professor of Environmental Law, Dean of the Faculty of Law, and Director of Stockholm Environmental Law and Policy Centre, at Stockholm University. In his research, Mr. Ebbesson essentially focuses on transboundary dimensions of environmental law. He has written substantially about legal aspects on public interests, public participation and access to justice in environmental law. This includes comparative work on access to justice in environmental matters in the EU, and studies on the notions of public participation and environmental impact assessments in international law. He also conducts research on responsibility for transnational corporations for harm to health and the environment, on justice aspects of environmental law, and on law and social-ecological resilience. He has acted as consultant for various governmental, intergovernmental and non-governmental bodies as well as for law firms and environmental consultants.

**Vice-Chair:** Mr. Alexander Kodjabashev (Bulgaria) (from 30 March 2012, replacing Ms. Kravchenko)

Mr. Alexander Kodjabashev is a Senior Partner specializing in environmental law matters at Dobrev & Partners in Sofia, Bulgaria. Mr. Kodjabashev is the founder of the Bulgarian Association of Municipal Environmental Experts, and is a member of the Environmental Law Alliance Worldwide and Environmental Lawyers from Central and Eastern Europe. Mr. Kodjabashev was the legal advisor to the National Ecological Ecofund, where he oversaw the assessment of the legal aspects of financing for public-private partnership projects. In addition, Mr. Kodjabashev developed a legislative framework for the creation of the Water Regulatory Body in Bulgaria as well as a legal scheme for implementing the SAPARD programme for agricultural activities in Bulgaria. Mr. Kodjabashev attended the University of Sofia and obtained his law degree from the Robert

Schumann University (now University of Strasbourg) in France.

**Other members:**

Mr. Pavel Černý (Czech Republic)

Mr. Pavel Černý is a Senior Partner specializing in environmental, administrative and constitutional law at Šikola & Partners in Brno. Mr. Černý is a member of the Environmental Law Service, the first public interest law organization founded in the Czech Republic. From 2006 to 2011, he has been a member of the Legislative Council of the Government of the Czech Republic. Mr. Černý has published numerous articles and studies in the field of administrative and environmental law and has cooperated with the Justice & Environment network on analyses concerning the implementation of the Aarhus Convention and EU environmental legislation, as well as on organizing an international conference on the implementation of the Aarhus Convention in practice. Mr. Černý has obtained his law degree at the Masaryk University of Brno

Mr. Ion Diaconu (Romania)

Mr. Ion Diaconu is professor of international law, with a focus on human rights law, at universities in Bucharest. As a human rights expert, he is member of the Committee on the Elimination of Racial Discrimination within the the United Nations and of the Committee for Regional and Minority Languages within the Council of Europe. He is the author of numerous monographs and university textbooks on international law and human rights.

Ms. Heghine Hakhverdyan (Armenia)

Ms. Heghine Hakhverdyan is a lecturer of Environmental Law at the Faculty of Law, Yerevan State University (YSU). She also works as a lawyer at the Environmental Law Resource Centre of YSU. Since 2009, Ms. Hakhverdyan is a member of Armenian Bar Association and "Environmental Public Advocacy Centre" (EPAC) NGO – the first public interest environmental NGO established in Armenia. As an environmental law expert she has participated in various projects within the framework of ENPI FLEG and UNDP-GEF. Ms. Hakhverdyan is the co-author of the book "Environmental Law of Armenia" (Collection of legal acts). In 2009 Ms. Hakhverdyan obtained her Master's Degree in Civil Law and Civil Procedure at YSU. Currently she is a PhD student at YSU doing research on legal issues relating to environmental insurance in the Armenia

Ms. Ellen Hey (Netherlands)

Dr. Ellen Hey is the Head of the Public International Law Department at Erasmus School of Law in Rotterdam. Her key areas of expertise include international institutional law and international natural resources law. Prof. Hey is the co-editor of the Oxford Handbook of International Environmental Law, the Editor in Chief of the Erasmus Law Review, and a member of the Editorial Board of the Netherlands Yearbook of International Law. Prof. Hey is also a member of the Advisory Board on Legal Aspects of Water Management for the Netherlands, which advises the Dutch government and parliament. In addition, Prof. Hey has worked as a consultant for various international organizations including the European Union, the World Bank, the U.N. Food and Agriculture Organization and the U.N. Development Program. Dr. Hey holds law degrees from Utrecht University and a M.Sc from the University of Wales.

Mr. Jerzy Jendrośka (Poland)

Dr. Jerzy Jendrośka is the Managing Partner of Jendrośka Jerzmanski Bar & Partners, which is an environmental law firm based in Poland; and Adjunct Professor of European and International Law at Opole University, and of

Environmental Law at Wrocław University. Dr. Jendroška has been involved in the Aarhus Convention process since the very beginning, including serving as the Vice-chair of the Aarhus Convention negotiations (1996-1998), as the Secretary to the Aarhus Convention (1998-1999) and as the vice-Chair (1999-2002) and later the Chair (2002-2003) of the Aarhus Convention Bureau. In addition, Dr. Jendroška serves as an arbitrator at the Permanent Court of Arbitration in the Hague (since 2002) and as a member of the Implementation Committee of the Espoo Convention (since 2004). Dr. Jendroška has authored or edited about 28 books and 250 articles on environmental law. Dr. Jendroška obtained his Master of Laws from Wrocław University and Ph.D. from the Institute of Law at the Polish Academy of Sciences in Warsaw. Dr. Jendroška also received a Diploma in International Law from the Vienna University Summer School.

Mr. Gerhard Loibl (Austria)

Dr. Gerhard Loibl is a Professor of International Law and Law of the European Union at the Diplomatic Academy of Vienna. Dr. Loibl is also a Professor for the Institute for International Law and International Relations at the University of Vienna, and a Visiting Professor at the University of London. Dr. Loibl is also a consultant for the Ministry of Agriculture, Forestry, Environment and Water Management. Dr. Loibl served as the Editor of the Austrian Review of International and European Law from 1999 until 2006, and has written numerous chapters and papers in the field of International Law including "Environmental Law and Non-Compliance Procedures: Issues of State Responsibility". Dr. Loibl also served as co-chair of the Conference on the Role of Precaution in Chemical Policy in Vienna.

Ms. Dana Zhandaeva (Kazakhstan) (from 30 March 2012, replacing Ms. Kravchenko)

Ms. Dana Zhandaeva is currently working as a free-lance, independent consultant on issues related to international law. Ms. Zhandaeva has gained extensive professional experience over the past sixteen years in international project management, research and analysis, and has worked with a number of international organizations, including the UN. She holds an LL.M. degree in international law and the law of international organisations, with a focus on international environmental law. Some projects she was involved in legal analysis include: ensuring environmental sustainability in the Republic of Kazakhstan and analyzing the provisions of the Framework Convention for the Protection of the Marine Environment of the Caspian Sea.