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By E-mail: rioplus20@environ.ie

To the government of Ireland

The Access Initiative - National Coalition for Ireland

We, [the Environmental Pillar, plus the undersigned environmental organisations], are writing to you as The Access Initiative's (TAI) national coalition for Ireland. TAI is the world's largest network of civil society organisations and activists working to ensure that people have the right and ability to influence decisions and policy about the environment and sustainable development. TAI currently comprises some 200 civil society groups in 50 countries.

As you know, the UN is preparing for the next Earth Summit in Rio De Janeiro, Brazil in June 2012. The Institutional Framework for Sustainable Development (IFSD) is one of the two key topics scheduled for consideration at the Summit. In this regard, we wish to draw your attention to Principle 10 of the Rio Declaration of 1992, which was signed by Ireland. Principle 10 recognises that environmental issues are best handled with the participation of all stakeholders and with access to information and access to justice.

There are gaps in Ireland's national laws, institutions and practices that urgently need to be closed in order for Ireland to fulfil its Principle 10 obligations as well as improve national environmental governance.

To date, much of the focus in the UN at preparatory meetings for Rio 2012 has been on international environmental governance, which is clearly very important. However, delegates are not discussing national environmental governance, which is vital to changing environmental conditions on the ground. We believe that, in addition to international environmental governance, the IFSD discussions in preparation for the Rio 2012 Summit should focus on national environmental governance, including the strengthening of our country's institutions, laws and practices. The IFSD discussions in the preparatory process leading to the Earth Summit in Rio 2012 should include a focus on how international institutions such as the UN Environment Program (UNEP) and the UN Commission on Sustainable Development (CSD) can assist Ireland, and others like us, to improve national environmental governance.

In this context, the under-mentioned civil society organisations, forming TAI's national coalition for Ireland, wish to place before you the following three top demands as requiring your

immediate attention and remediation. We are willing to collaborate with the government in any efforts you make to address these demands. We also plan to bring these to the attention of the international community and the media so that these issues can be addressed at the earliest opportunity.

Three Top National Demands

1. **Support the Aarhus Convention:** Ireland should, without further delay:

   (a) ratify and fully implement the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (**the Aarhus Convention**);

   (b) fully implement and enforce the existing EU legal instruments which transpose parts of the Aarhus Convention; and

   (c) support the revival of the European Commission's proposed directive on access to justice in environmental matters. Ireland should make the negotiation and adoption of this directive a priority during the Irish Presidency of the Council of the EU (January to June 2013).

2. **Access to justice:** Pending the adoption of a cross-cutting EU directive on access to justice, Ireland should amend its national laws and practices to ensure that accessing justice in environmental matters is no longer prohibitively expensive. The changes made to Irish law in 2010 and 2011 have improved the situation in some respects but have not achieved this goal.

3. **Promoting Principle 10 globally:** Ireland should pursue every opportunity to promote Principle 10 of the Rio Declaration globally, including: easing accession to the Aarhus Convention; supporting countries that are considering acceding to the Aarhus Convention (e.g. Mongolia); and, at Rio+20, supporting the negotiation and adoption of a global Principle 10 convention (as proposed by Brazil, the host of Rio+20) or other regional or sub-regional Principle 10 conventions (e.g. the idea of a Latin American convention, proposed by Chile and supported by ECLAC). These options should be pursued in tandem.

Justification for the National Demands

1. Support the Aarhus Convention

In 1998 Ireland signed the UNECE's Aarhus Convention, a groundbreaking international agreement on access to information, public participation in decision-making, and access to justice in environmental matters, described by former President Mary Robinson as "a key signpost for the future of human rights and the environment in all parts of the world".[1] Yet more than thirteen years after signing the Convention, Ireland has still to ratify (such that the Convention has not come into force here), leaving Ireland as the only EU Member State in this position.[2]

This failure to ratify has not, of course, prevented the Convention's entry into force elsewhere, but it nevertheless raises serious questions about Ireland's commitment to transparency and environmental protection. A promise in the previous government's renewed Programme for Government to "ensure that Ireland can ratify the Aarhus Convention by March 2010"[3] proved to be merely the most recent in a long line of unfulfilled promises.

Your government's Programme for Government 2011 provides "We will complete ratification of Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters".[4] No timetable is provided for such ratification. We would urge the government to ratify the Convention without further delay, and to fully implement and enforce the existing EU legal instruments which transpose parts of the Convention.

In respect of the access to justice pillar of the Aarhus Convention, on 24 October 2003 the European Commission proposed a directive on access to justice in environmental matters:

http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf.

The negotiation and adoption of this instrument has been consistently blocked by the EU's Member States. The result is that access to justice in environmental matters remains a significant problem across the EU.

In Ireland, we currently have a complex, messy system of costs in environmental cases, caused in part by the failure of Ireland and the EU's other Member States to support the Commission's proposed directive on access to justice. In the absence of such a directive, the European

[1] Robinson, M. (undated) Statements about the Aarhus Convention. http://www.unece.org/env/pp/documents/statements.pdf.

[2] UNECE (2012) Status of ratification. http://www.unece.org/env/pp/ratification.htm.

[3] RPG (2009) Renewed Programme for Government (10 October 2009). http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf

[4] Programme for Government (2011) Programme for Government of Fine Gael/Labour coalition. http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf

Commission has introduced access to justice provisions into certain pieces of EU environmental legislation, where the opportunity has allowed, on an ad hoc basis.

As you will know, the European Court of Justice's (ECJ) decision in Case C-427/07 (paras 92-95) necessitated certain changes to Ireland's rules on costs in environmental cases. In the absence of a cross-cutting directive on access to justice, the ECJ's decision was naturally limited to those environmental directives in which it has been possible to introduce access to justice provisions in a piecemeal manner (EIA, IPPC, SEA).

Many commentators were hoping that Ireland would respond to the ECJ's judgment by changing its costs rules for environmental cases across the board, rather than creating a messy situation with different costs rules applying to different directives, etc. But this is not what the government decided to do.

The government's first attempt at making the necessary changes was via the Planning and Development (Amendment) Act 2010, which introduced a new s.50B to the Planning and Development Act 2000. Section 50B provided that in actions for judicial review in respect of the EIA, SEA and IPPC directives, the general rule for costs would be 'each side bears its own costs', a departure from the standard 'loser pays' rule. There were three key problems with this: (a) it did not avoid prohibitive expense, because even paying one's own legal costs can prove prohibitively expensive in Ireland; (b) it risked stifling the standard model for public interest environmental litigation in Ireland (impecunious claimant and lawyers acting on a 'no win, no fee' basis; not a great model in terms of universal access to justice, but at least some cases managed to be brought in this way). In other words, if a public interest litigant has no possibility of having his or her costs paid by the other side, he or she will not be able to persuade a lawyer to do the case on a 'no win, no fee' basis; and (c) it created a tangled mess of rules, since in some cases (judicial review for EIA, SEA and IPPC cases) one costs rule applied (each side bears its own costs), while in all other judicial review cases (e.g. pursuant to other EU legislation, such as the Habitats Directive) the standard costs rule would continue to apply (loser pays). But in 'mixed' actions for judicial review (e.g. actions raising issues under the EIA Directive (each side bears own costs) and the Habitats Directive (loser pays) - a not unlikely scenario) it was unclear which costs rule would apply, and how costs would be calculated. Such uncertainty itself impacts negatively on accessing justice.

Mindful of certain criticisms of the position, the government recently made further changes to its costs rules by way of the Environment (Miscellaneous Provisions) Act 2011. Amongst other things, the Act introduced a new subsection (2A) to s.50B, providing for an applicant in judicial review proceedings to be awarded his or her costs in largely unspecified circumstances. Some

commentators argue that the addition of this new subsection means that applicants for judicial review in EIA, SEA and IPPC cases now have the 'best of both worlds', since the 'each side bears its own costs' rule will apply if the applicant loses, while the 'loser pays' rule may apply if the applicant wins. Such commentators argue that, while the circumstances in which an applicant will receive his or her costs are not specified in the new subsection, in accordance with general principles of EU law, the need to avoid prohibitive expense, etc., the new subsection will likely be applied by the Irish courts to mean that, in practice, successful applicants for judicial review in EIA, SEA and IPPC cases will receive their costs. This remains to be seen.

Problems of course persist with s.50B, even as amended in 2011. We still have one costs rule for actions for judicial review in respect of the EIA, SEA and IPPC directives (each side bears its own costs if the applicant loses; possibility of applicant receiving his or her costs if the applicant wins), and another costs rule (loser pays) for all other actions for judicial review, including actions in respect of legislation transposing all EU environmental directives other than the EIA, SEA and IPPC directives.

In addition to the changes described above in respect of actions for judicial review, the Environment (Miscellaneous Provisions) Act 2011 has introduced changes to the costs rules where a person brings civil proceedings seeking to: (a) ensure compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in section 3(4) of the legislation, or (b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent, and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.

In such cases, the new costs rules mirror those which apply in respect of actions for judicial review regarding the EIA, SEA or IPPC directives. In other words, the 'each side bears its own costs' rule applies as a general principle, but if the applicant wins, the applicant has the chance of having his or her costs paid by the other side.

The central problem we have identified regarding these changes is that they cover the situation where, for example, someone fails to comply with conditions attached to certain permits, licences, etc. However, the changes do not alter the costs rules where one is challenging the fact that an activity is being carried on without a permit or licence. To take an example, if someone has planning permission to extract peat but is not complying with conditions attached to that permission (an uncommon situation), proceedings can be brought and the new costs

rules will apply. But if the situation is instead that a person is extracting peat without planning permission (a very common scenario), if a challenge is brought the old 'loser pays' costs rule will continue to apply, with attendant prohibitive expense issues.

From the above account, we trust it is clear that the absence of a cross-cutting EU directive on access to justice has contributed to a most unsatisfactory situation in Ireland. The best long-term way to deal with such issues – in a coordinated manner, and benefiting from the experiences and ideas of all the EU's Member States - would be to revive and support the European Commission's proposed directive on access to justice in environmental matters. We would urge Ireland to support this proposed directive and to make the negotiation and adoption of this instrument a priority during the Irish Presidency of the Council of the EU, from January to June 2013.

2. Access to justice

Pending the adoption of a cross-cutting EU directive on access to justice, Ireland should amend its national laws and practices to ensure that accessing justice in environmental matters is no longer prohibitively expensive. Some of the key problems are highlighted above.

3. Promoting Principle 10 globally

The UNECE region is the only region with a legally binding instrument on access rights. However, there are several ways in which Ireland could and should help to support the global spread of Principle 10 of the Rio Declaration.

First, Ireland should help to make acceding to the Aarhus Convention easier for countries from outside the UNECE region. In practical terms, this will require Ireland in future to support calls for Article 19(3) of the Convention to be amended. Article 19(3) provides that non-UNECE states which are members of the UN may accede to the Convention "upon approval by the Meeting of the Parties". This creates a two-tier system, with UNECE countries free to join the Convention, but non-UNECE countries requiring approval. NGOs called for this provision to be amended (by removing the requirement for MOP approval) at the fourth MOP to the Convention in summer 2011, but the EU's Member States did not support the call. Pending such a change to the Convention, Ireland should do everything in its power to support accession by countries from outside the UNECE region. In that regard, we understand that Mongolia has expressed an interest in acceding; Mongolia's current interest represents a significant opportunity to promote the spread of Principle 10, but it is an opportunity which may prove time-limited. We would therefore urge the government to support speedy accession by countries which express an interest in such accession.

Second, and in addition: at Rio+20, Ireland should pursue every opportunity to promote Principle 10 of the Rio Declaration globally. Brazil - the host country of Rio+20 - has called for the setting in motion of a negotiating process at Rio+20, leading to a global convention that will ensure the implementation of Principle 10 of the Rio Declaration.[5] Ireland should throw its weight behind this proposal, and should do everything it can to ensure that this proposal is on the final agenda for the summit. In parallel, Ireland should support other initiatives at Rio+20 which seek to promote Principle 10. These include, for example, Chile's call for a regional Principle 10 convention for the Latin American region.[6] This proposal has the support of ECLAC, the Latin American equivalent of the UNECE.[7]

Each of these three approaches (promote accession to the Aarhus convention; support calls for a global Principle 10 convention; support calls for regional conventions) should be progressed in parallel.

In support of the above, we are attaching a paper written and presented by Jeremy Wates (head of the European Environmental Bureau) on the international options for moving Principle 10 forward at Rio+20.

Signatures
Organisations + logo

[5] See P8.D of the Submission by Brazil to the Preparatory Process Rio+20 Conference, Brasilia, November 1, 2011: http://www.uncsd2012.org/rio20/content/documents/BRAZIL%20Submission%20%20English%201.11.11doc.pdf
[6] See para 28 of Chile's Submission to the Preparatory Process, November 1, 2011: http://www.uncsd2012.org/rio20/content/documents/549ChileEnglish.pdf
[7] See page 221 of 'Sustainable development in Latin America and the Caribbean 20 years on from the Earth Summit: progress, gaps and strategic guidelines: http://www.eclac.org/rio20/noticias/paginas/9/43799/REV.Rio+20-Sustainable_development.pdf.