Communicant intervention on the Communication to the Aarhus Convention Compliance Committee concerning compliance by Spain with the provisions of the Convention in connection with decision-making on a residential development project in the city of Murcia, Spain
(Ref. ACCC/C/2008/24)

23rd Meeting of the Aarhus Convention Compliance Committee, Geneva March-April 2009

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Good morning,

Members of the Committee, assisting public, fellow communicants. We would like to use our minutes to speak about the Aarhus legal framework in Spain; summarize the most relevant facts; mention major violations of the Aarhus Convention in this case and, finally, suggest recommendations to the Committee.

I will provide (have already provided) a copy of this intervention to the Committee.

1. Aarhus legal framework in Spain

To begin, I would like to describe the Aarhus legal framework in Spain.

Accordingly to article 96(1) of Spanish Constitution since its entry into force, the Aarhus Convention is directly applicable, imposing obligations upon the government of Spain. All administrative bodies, including the judiciary, must comply with it.

As a member of the European Union, existing legal framework was also amended by direct effect of the following community legislation: **Directive 2003/4/EC of 28 January 2003** on public access to environmental information, and **Directive 2003/35/EC of 26 May 2003** providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

Despite the Aarhus Convention was directly applicable, on 18 July 2006, the government of Spain enacted **Act 27/2006** regulating the rights of access to environmental information, public participation, and access to justice in environmental matters.

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Table of dates of application of different Aarhus related legislation:

Legal instrument	In force since
Directive 2003/4/CE	February 14 2005
Aarhus Convention	**March 29 2005**
Directive 2003/35/CE	June 25 2005
- Act 27/2006 - Title IV and 1st additional disposition (access to justice provisions)	July 20 2006 October 19 2006

2. Summary of most relevant facts

Secondly, I would like to focus on the most relevant facts in the communication.

On 24 October 2003 the Official Journal of the Murcia Region published the ***urban agreement*** between Murcia City Council and the company *Joven Futura* that obliged the local authority to re-classify certain part of a special protected land into "residential lands" This agreement was made without involving any public participation. The adoption of a number of subsequent administrative decisions followed this *urban agreement* as indicated below:

- On 24 June 2005 approval of modification no. 50 to 2001 Murcia City General Plan adopting a new classification for the affected land as a residential land

- On 24 November 2005 approval of Land Slot Plan ZA-Ed 3

- On 5 April 2006 approval of the Urbanization project UA1 of the Land Slot Plan ZA – Ed 3

Despite Community and national requirements for conducting an EIA procedure to adopt each of the decisions mentioned above, **no EIA was conducted**.

All administrative decisions mentioned above were challenged through the administrative procedure and, afterwards, before the courts. **This communication involves, so far, four ongoing administrative court proceedings, two criminal and one constitutional**. Each administrative

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lawsuit was accompanied by a request to the courts to suspend application of the decisions, which were all denied.

On 21 December 2007 the Murcia High Court (Administrative Chamber, Section One) rejected the appeal filed by the communicant against the lower court's decision denying suspension of the final approval of the Urbanisation Project UA1 of the Land Slot Plan ZA-Ed3. Besides, it imposed all costs to the Association in application of the loser's pays principle: 2,148 Euro.

The urbanization was already finished in October 2008. At the end, it was composed of 1,329 apartments that are already inhabited by their owners.

Association Senda de Granada Oeste Neighbours had been a leading non-governmental organization trying to participate in the decision-making process.

3. Major violations of the Aarhus Convention

Moving now into the next point, in our opinion, major **failures to comply with the Aarhus Convention include**:

Regarding, **access to information [article 4, paragraphs 1, 2, 7 and 8]**

The local government blocked the Association's access to information:

- requests for accessing to environmental information related to the different decision making processes involved in this Communication were **systematically ignored** (art. 4 (1) and 4 (7)), and

- in addition, in those few situations when access was granted it was always done **out of the time limit of one month** (art. 4(2)) and **charged with unreasonable amounts** (art. 4(8)). The **copying charge was 2.05 EURO per page in 2008** as reflected in the fee chart attached as Annex 4 to the communication. The 2009 Fees Chart sets out that the copying charge applicable is **2.15 EURO**.

Focusing now on **public Participation [article 6, paragraphs 1 (a), 2 (a) and (b), 3, 4, 6, and 8]**

Applicability of art 6

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Firstly, article 6 is applicable to this case.

Accordingly to Community and Spanish national law an Environmental Impact Assessment should be conducted for the approval of the Modification no. 50 to Murcia City General Plan, the Land Slot Plan and the Urbanization Project (Directive 97/11/EC, Spanish Royal Decree 1302/1986, and Murcia Regional Act 1/2001)

Therefore, these decisions fall under paragraph 20 of the Annex I list of activities referred to in article 6 (1) (a). In Spain an early and effective public participation in environmental decision making can only happen applying EIA legislation. If no environmental study is made the public will not have access to relevant information evaluating environmental and health risks.

Although public participation did not take place within a due EIA procedure, the public did have legal opportunity to participate on the grounds of Spanish administrative law. However this participation did not meet Aarhus Convention requirements, as we will show now.

Substance of violations of article 6 standards

The key violations of article 6 standards included the following:

- *Urban agreements* are the starting point for subsequent decisions on land planning and urban development. Therefore, they are the early stage when public participation should take place, because at that moment is when all options are open and therefore, effective public participation can take place (art. 6(4))

- the public concerned was not informed early in the decision-making process in an adequate, timely and effective manner of the proposed activity and the application on which a decision would be taken (art. 6 (2) (a));

- neither was always informed about the nature of the possible decision or the draft decision (art. 6 (2) (b));

- public participation was not provided at a time when all options were open and effective public participation could take place (article 6 (4));

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- time-frames of one month or 20 days for consulting available information and submitting comments, surprisingly clashing with summer and Christmas Holiday Season cannot be considered as reasonable time-frames (art. 6(3). (See additional documents no. 3(1), 3(2) and 3(3));

- the public did not always have access to all information relevant to decision-making as required in article 6 (6) of the Convention; and

- neither due account was always taken of the outcome of the public participation procedure in all the decisions (art. 6 (8)).

Finally, I would like to speak about violations regarding **access to Justice and adoption of precautionary measures [article 9 paragraphs 2, 3, 4 and 5]**

First, timeliness

The Association exercising rights established by paragraphs 2 and 3 of article 9 became involved in four ongoing administrative court proceedings, two criminal and one constitutional. Final court decisions are expected not before 2- 5 years from now, depending on the specific court proceeding. Bearing in mind that the urbanisation project was finished in October 2008 an obvious conclusion is that access to justice is not timely at all (art 9 (4)).

According to the findings and recommendations of the Committee in the case ACCC/C/2005/17 regarding compliance by the European Community:

> "56. ... [I]f there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question..."

Second, adequate and effective remedies

All the requests for a preliminary suspension of the decisions challenged were rejected. Moreover, the court took eight months to issue a decision on whether to apply suspension sought for the Urbanisation Project. The appeal against that decision took another eight months to be decided. Even if granted, the suspension would be meaningless since it would happen eleven

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months after the decision was taken and construction works were already in process. Therefore, adequate and effective remedies were not available in this case (art. 9 (4)). Finally, no matter what final decisions will be taken by the courts, the damage caused is already irreparable, as the development is finished.

Third, costs of access to justice

The association found access to justice, "prohibitively expensive." The Association already has to pay 2148 Euros, after its appeal requesting a preliminary suspension was rejected. In addition, the Association must pay all different lawyers and experts fees involved in this case. A budget prepared by a lawyer from Murcia accordingly with Murcia Bar's fees criteria shows that the Association would have to pay 12,777.4 Euro lawyers' fees for four of the ongoing court proceedings (Document no. 4 of the additional documentation). Bearing in mind the average monthly household budget in Murcia (2,337 Euro) these costs are "prohibitively expensive" (art. 9(4)).

At the time when the court proceedings were initiated no appropriate assistance mechanisms to remove or reduce financial barriers to access to justice were available (art. 9(5)).

We have to conclude that effective access to justice has been denied in this case.

4. Suggestion on recommendations

Finally, we kindly suggest to the AACC to issue the following recommendations accordingly to Decision I/7 paragraph 37(d):

- To allocate appropriate budgets including sufficient funds and trained personnel to comply with Aarhus Convention obligations at central, regional and local level.

With regard to raising awareness and capacity building

- To develop a regular capacity building programme about Aarhus rights addressed to all different kinds of central, local and regional authorities and personnel responsible for and working with Aarhus related issues.

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- To develop an awareness raising campaign for the public on Aarhus rights and on how to effectively exercise them.

Turning now into access to information

- To adopt adequate legislative measures to assure that only reasonable costs are charged when the public is granted with access to environmental information at central, regional and local level, i.e.: costs should be equivalent to the average cost of a photocopy or to the cost or purchasing a CD or a DVD disk.

- To make sure that authorities at all levels understand that information related to urban development falls under the definition of environmental information as lay down by article 2(3) of the Aarhus Convention.

- To adopt and implement practical arrangements to make sure that information requests are answered as soon as possible, at the latest within one month, and never ignored.

- To make sure that the public gets assistance from the authorities when requesting access to environmental information.

Next, focusing on public participation

- To make sure that article 6 is fully applied to *urban agreement*, as those are the early stage of subsequent decisions on land planning and urban development.

- To make sure that EIA procedures are only exempted on those situations legally established and allowing always the public to challenge their substantive and procedural legality accordingly to article 9 (2) of the Convention

- To make EIA decisions publicly accessible, especially those decisions that exempt the application of EIA procedures.

- To adopt practical arrangements to ensure effective exercise of public participation rights by:

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i. establishing sufficient time frames, i.e.: avoiding 20 days or 1 month time frame for these type of decisions and always avoiding that they clash with any Holiday season;

ii. providing access to information on due time so public participation can take place; and

iii. taking comments received into account, i.e.: making references to them within the content of the decision and reasoning why they were not accepted.

- To adopt practical arrangements to make sure that public participation becomes real and effective in local urban decision-making processes.

- To allow public participation within EIA Committees or similar bodies making decisions about which projects will be subject or not to EIA, and establishing the scope of the EIA.

Access to Justice

- To approve effective access to justice provisions that comply with all requirements laid down by article 9 of the Aarhus Convention and that specifically provide for:

i. timely access to justice regarding access to environmental information, i.e.: a time frame to issue a court decision lower than 6 months since the request was made;

ii. timely access to justice regarding public participation in environmental decision-making, i.e.: courts decision should be issued before the appealed decision is executed; otherwise, an automatic suspension or a similar sort of precautionary measure should be applied to allow effectiveness;

iii. the adoption of precautionary measures that truly take into account the economic loss of the developer or producer as well as the environmental lost at stake, and therefore make appropriate assessments of interests involved;

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iv. timely adoption of precautionary measures, i.e.: issued before the challenged decision is executed or begins to be executed.

- To develop a regular capacity building programme on Aarhus rights addressed to all different types of judges and prosecutors.

- To develop Aarhus training courses for lawyers that should be mandatory for those lawyers providing free access to justice accordingly to Spanish Act 27/2006.

- To adopt necessary practical arrangements to make sure that implementation of free access to justice provisions approved by Spanish Act 27/2006 are applied in practice and used efficiently in Aarhus related cases, i.e.:

  i. instructing provincial commissions responsible for granting free access on the application of access to justice provisions of Act 2//2006;

  ii. providing for lawyers with knowledge and experience on environmental law;

  iii. creating a body of environmental experts available for advising the judiciary on environmental cases (administrative, civil and criminal);

  iv. avoiding the application of the looser-pays principle whenever the public accesses environmental justice to protect the public interest, especially in cases of malfunction of the public authorities.

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