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24 January 2010

Communication to the Aarhus Convention Compliance Committee concerning compliance by Spain with provisions of the Convention in connection with access to information, public participation in decision-making and access to justice in the Extremaduran Community (Ref. ACCC/C/2009/36)

Answers to questions submitted by Mr. Jeremy Wates, Secretary of the Compliance Committee of the Aarhus Convention, on behalf of the Committee dated 15 January 2010.

Annex - Questions raised by the Committee

Question:

1. Since the Convention has been partially transposed by the EU Directive on EIA,¹ please respond to the following questions.

According to Article 6, paragraph 3, of the EIA Directive:

"Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
- (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article."

Please explain which provisions of the applicable Spanish law transpose the provisions of this article of the EIA Directive that aims to ensure in the public participation procedure the possibility to consult the documentation relating to the decision-making, as required by article 6, paragraph 6, of the Aarhus Convention.

Answer:

We believe that these provisions have not been properly transposed into Spanish legislation.

Question:

2. Does the Spanish law on EIA require an application for a permit (development consent) and EIA studies to be submitted by the developer in electronic form or only in paper copies?

Answer:

National law does not specify exactly the format in which the developer must submit the project. However, if projects are not submitted in electronic form (CD or DVD) it is not possible to produce a real and effective public participation as established in the Aarhus Convention.

At this point, it is noteworthy that the Junta de Extremadura (regional autonomous government), is of our own opinion, as it establishes the following:

“Contents of the integrated permit application” must comply with:

To comply with the provisions of Article 17 of Law 16/2002 and Article 9 of Royal Decree 1 / 2008 of 11 January, approving the revised text of the Law on Environmental Impact Assessment project, the number of copies and format of the documentation is as follows:

- Three hard copies of all documentation.
- **1 copy of all documentation in electronic format on CD.**
- **4 copies of the Environmental Impact Assessment in electronic format, on CD**, in case the project has to undergo environmental impact assessment under the rules in force.

It seems clear that, although no specific reference to the Aarhus Convention, the administration itself admits that to comply with the provisions of Law 16/2002 and Royal Decree 1 / 2008, the developer must submit the project electronically. (Annex 31)

Question:

3. Please explain which provisions of the applicable Spanish law relate to the form in which the requested information may be provided; in particular whether the law provides for the public to make copies themselves (like taking photos) and/or to request the provision of the information in digital form (such as DVD).

Answer:

Law 27/2006 of 18 July, which regulates the rights of access to information, public participation and access to justice in environmental matters (incorporated Directives 2003/4/EC and 2003 / 35/CE). Sets:

Article 11. Form or format of information.

1. When requesting that environmental information is provided in a particular form or format, public authorities have to satisfy the request unless there are any of the circumstances set out below:

- a. That information has already been disseminated pursuant to the provisions of Chapter I of this Title, in another form or format, which is easily accessible by the applicant. In this case, the public authority shall inform the applicant where he can access that information, or returned in the format available.
- b. That the public authority considers reasonably available to the applicant in another form or format, appropriately justified.

2. To this end, public authorities shall endeavor to maintain environmental information held by, or in other subjects on their behalf, in forms or formats that are readily reproducible and accessible by computer telecommunications or other electronic means.

3. When the public authority resolves not to provide information, partly or wholly, in the form or format requested, shall notify the applicant of the grounds for such refusal in within one month of receipt of the application in the register of public authority to settle, letting him know the form or forms in which, if any, could provide the information requested and indicating the appeals against the refusal as provided in Article 20.

Question:

4. Please specify the public requirements for provision of legal aid (for NGOs and generally).

Answer:

General requirements.

In Spain Legal Aid is regulated by **Law 1 / 1996 of 10 January**.

Article 1. Purpose of the Act

This Law is aimed at determining the content of the right to legal aid referred to in Article 119 of the Constitution and regulate the procedure for recognition and effectiveness.

Article 2. Personal scope of application.

On the terms and to the extent provided in this Act and the treaties and conventions on the subject to which Spain is party shall be entitled to legal aid:

- a. Spanish citizens, nationals of other Member States of the European Union and foreigners living in Spain, where insufficient means to litigate.
- b. The managing and Common Services, Social Security, in any case.
- c. The following legal when insufficient means to litigate:
 1. **Associations of public utility**, under Article 32 of Organic Law 1 / 2002 of 22 March, regulating the Right of Association.
 2. Foundations registered in the corresponding Public Registry.
- d. Social order in the court, in addition, workers and beneficiaries of the Social Security system, for a legal defence to legal actions for the effectiveness of labour rights in bankruptcy proceeding.

Similarly the right to legal aid is granted to workers and recipients of Social Security disputes on this matter come before the contentious-administrative.

- e. In the contentious-administrative as well as in the prior administrative proceedings, foreign nationals who have insufficient resources for litigation will be entitled to legal aid and free advocacy and representation in proceedings which may lead to denial of entry into Spain, repatriation or expulsion from Spanish territory, and all asylum procedure.

Article 3. Basic requirements.

1. Shall be entitled to free legal assistance to those individuals whose resources and income, computed annually for all concepts and per family unit, not exceeding twice the minimum wage in force at the time of the request.
2. Household arrangements constitute the following:
 - a. The composed of the spouses not legally separated and, if any, minor children except those who may be emancipated.
 - b. The formed by the parent and children who meet the requirements referred to above rule.
3. The financial means may, however, be individually assessed when the applicant demonstrates the existence of conflicting family interests in the proceedings for which assistance is requested.
4. The right to free legal assistance may only be recognized to those who litigate in defence of rights or interests of their own.
5. In the case of paragraph 2 of Article 6 is not necessary that the detained or imprisoned prior showing lack of resources, without prejudice to that if not recognized after the right to legal aid, it must pay the lawyer fees earned by its intervention.

Victims of gender violence, including the victims of terrorism, don't need to prove lack of resources previously credited when applying for specialist free legal defence, if any, provided to them immediately, without prejudice if they are not recognized with after the right to it, have to be paid to the Advocate, and Attorney when taking action, the fees earned.

6. In the case of legal persons referred to in paragraph c of the previous article, this means that there are insufficient financial resources to litigate, when their tax base in the corporation tax is lower than the amount equal to three times the minimum wage calculated annually.

Specific for NGO

Law 27/2006 of 18 July, which regulates the rights of access to information, public participation and access to justice in environmental matters (incorporated Directives 2003/4/EC and 2003 / 35/CE).

Stated in Article 23. Legitimate

1. They are entitled to take public action regulated in Article 22 any person non-profit legal basis for compliance with the following requirements:

- a. That they have in their statutes as purpose accredited environmental protection in general or any of its elements in particular.
- b. That they had been legally constituted at least two years before bringing proceedings and to come exercise actively the activities necessary to achieve the purposes specified in its statutes.
- c. That under its statutes to develop operations within a territory that is affected by the action, or where appropriate, administrative omission.

2. Legal persons non-profit to those in the preceding paragraph shall be entitled to legal aid **as provided in Act 1 / 1996 of 10 January, the Free Legal Assistance.**

Law 1 / 1996 of 10 January, the Free Legal Assistance.

Stated in Article 2. Personal scope of application.

On the terms and to the extent provided in this Act and the treaties and conventions on the subject to which Spain is party shall be entitled to legal aid:

- a. Spanish citizens, nationals of other Member States of the European Union and foreigners living in Spain, where insufficient means to litigate.
- b. The managing and Common Services, Social Security, in any case.
- c. The following legal when insufficient means to litigate:
 1. **Associations of public utility**, under Article 32 of **Organic Law 1/ 2002 of 22 March**, regulating the Right of Association.
 2. Foundations listed in public records.

The Organic Law / 2002 of 22 March regulating the right of association, referred to in the previous section provides:

Article 32. Associations of public utility.

1. At the initiative of their respective associations, may be declared of public utility to those associations that comply with the following requirement:

d) Which have the adequate staff and equipment and well-placed to ensure compliance with the statutory objectives.

The procedure to obtain the declaration of public utility is contained **in Royal Decree 1740/2003 of 19 December on procedures relating to public utility associations, which establishes:**

Article 2. Application for public utility.

4. The activities report must cover the following points in detail:

- f. The personal resources available to the entity, with an expression of the staffing.
- g. The material and resources that the entity has, with special reference to government subsidies and implementation.

Article 3. Procedure for declaration of public utility association.

- 2. Interior Minister shall have jurisdiction to resolve the application for public utility, upon instruction of the procedure by one of the bodies referred to in the preceding paragraph and under the procedure established in the following paragraphs.
- 9. After a period of six months from receipt of the application in the register of the body responsible for the instruction of the procedure, **without having notified special resolution, is concerned rejected the application for public utility.**

The Ministry of Interior of the Government of Spain provides on its website the following information regarding the declaration of public.

Application for declaration of public utility

Prerequisites:

- The Organic Law 1/2002 of 22 March regulating the right of association (BOE no. 73, 26/03/2002), provides in Article 32.1.e) that for an association to be deemed public utility, must meet the following requirement: that is incorporated and registered in the Register for at least the two years immediately preceding the filing.
- **The analysis of annual accounts is essential to assess, among other requirements, if the entity has adequate staff and equipment and an appropriate organization to ensure compliance with the statutory objectives** (Article 32.1 d) of the Organic Law 1 / 2002). Therefore you must consider that entities applying for the declaration of public utility and who have negative equity (debts exceed assets) violate the above legal requirement.

Documents:

The documentation submitted for the declaration of public utility is:

- Application or request made by the representative of the entity, which contains both data identifying the applicant as the entity it represents, the description of the accompanying documentation, the request made, instead, date and signature of applicant.

The application should contain, in addition, clearly and succinctly the reasons for the request, report justifying the objectives of the association to be considered as serving the public, with special reference to activities of general interest, in accordance with those set forth in Article 32.1.a of Organic Law 1 / 2002 of 22 March, regulating the Right of Association.

- **Report of activities** of the association for the preceding **two fiscal year** on which the application is filed. This report shall be signed by members of the board or body representative of the entity and shall cover in detail the particulars set forth in Article 2.4 of Royal Decree 1740/2003 of 19 December on procedures for public utility associations.
- **Annual accounts of the past two years ended**, understanding the balance sheet, income statement and the financial reports. These documents must be signed by members of the board or representative body.
- **Certification from the State Tax Administration Agency** in establishing that is up to date in meeting tax obligations and debts, which are not recorded with the state of nature in period tax executive.
- **Certified Treasury for Social Security** of being current in their obligations to the Social Security.
- **Certified copy**, if necessary, discharge in the relevant section of the Tax on Economic Activities.
- **Certification according the organ of the association** which is responsible for requesting the declaration of public.

Reference:

<http://www.mir.es/SGACAVT/asociaciones/utilidadpublica/documentos.html>

But not only throughout the procedure, also the head of the Tax and Accounting Management Foundation and Social Participation, D. Miguel Angel Diaz Miron (www.asociaciones.org), informs us "... currently the most important cause for refusal of this qualification by the Ministry of Interior is the NO having the personnel and material resources and the appropriate organization to ensure compliance with the statutory objectives".

The wording of paragraph d) of Article 32.1 of Organic Law / 2002 of 22 March regulating the right of association implies a broad discretion for the Administration to establish whether, in the

applicant, the adequacy of resources and the adequacy of organizational, which becomes in practice that is the Ministry of the Interior who decides capriciously which association is declared of public utility.

Our association has not requested the status of public utility because we do not meet the requirements of **Article 2 of Royal Decree 1740/2003 of 19 December on procedures relating to public utility associations.**

We can get some undeniable idea of the difficulties that has an association to be declared of public utility, considering that throughout the autonomous community of Andalusia there are only 126 of which only 2 are related to the environment. The autonomous community of Andalusia is the most populous community of Spain with 8,285,692 inhabitants.

If it is difficult for us and to try to exercise our duty to participate in caring for the environment, much more is to do all the bureaucracy needed to be declared "public utility".

Question:

5. What is the time frame and what are the competences of the ombudsman under Spanish legislation?

Answer:

The figure of the Ombudsman in Spain is regulated by **Organic Law 3 / 1981 of 6 April, the Ombudsman**, which provides:

CHAPTER II. FIELD OF COMPETENCE.

Initiation and research content

Article 9.

1. The Ombudsman may initiate and pursue its own initiative or on application, any research aimed at establishing the acts and decisions of public administration and its agents in relation to citizens, in light of the provisions of Article 103 1 of the Constitution and respect for the rights contained in Title I.

2. The Ombudsman's powers extend to the activities of Ministers, administrative authorities, officials and any person acting in the service of public administrations.

Article 12.

1. The Ombudsman may, in any case, ex officio or upon request by, monitoring the activity itself of the Autonomous Region in the areas of responsibility defined by this Law.
2. For the purposes of the provisions above, similar bodies of the autonomous communities coordinate their functions with those of the Ombudsman and this may require cooperation.

Article 13.

When the Ombudsman receives complaints regarding the operation of the Administration of Justice, the Attorney should be directed to investigate this reality and take appropriate action under the Act, or of transporting them to the General Council of the Judiciary, by type of claim concerned, all without prejudice to the reference in his general report to Parliament can make to the issue.

Article 18.

1. Declared the complaint, the Ombudsman will promote timely and informal preliminary investigation to clarify the assumptions of the same. **In any case will find the substance of the request to the Agency or from the Administrative Unit in order that by his boss, not later than fifteen days, submit written report.** Such a term can be extended if circumstances so dictate the opinion of the Ombudsman.

Question:

6. Has the ombudsman been notified that the Compliance Committee is considering the communication? If yes, what is his or her reaction?

Answer:

As the Committee knows, our association sent an exact copy of the communication at hand. The reason for it is literally "**Complaint of breach of the basic principles of the Aarhus Convention by the Spanish state**". In addition, the complaint ends up asking: "**I REQUEST TO THE OMBUDSMAN, taking on of this application with the documents accompanying it, will deign to accept the complaint by the same formula against the Spanish State by the repeated failure of the Convention Aarhus ...**" (Annex 32)

Although the matter of the complaint is clearly defined: "breach of the Aarhus Convention", the Ombudsman informed our association: "The Ombudsman must begin by distinguishing the cases you presented, which do not coincide in nature or state Progress. Due to their lengthy exposure in each case we had to find you claim, besides the general, which is clearer, **that the Spanish State does not adequately apply the basic principles of the Aarhus Convention.** Above all, we feel that is more effective, as we infer from the complaint, to adhere to the requirements of Law 27/2006, as rightly you yourself make, a law that is not properly to transpose the Convention but European law, but this is not what matters now. We also make clear that the Ombudsman cannot get to hear generic issues but rather the thread of concrete irregularities that you are in the regular task of the Association".

As you can see, the Ombudsman decided to reject our complaint by the repeated failure of the Aarhus Convention and check only the breach of the Law 27/2006. (Annex 33)

Before this background, our association wants the Committee to be aware of the Ombudsman is **not** investigating breaches of the Aarhus Convention that we denounce. Therefore, we have not reported to the Ombudsman that Compliance Committee is considering the case.

Question:

7. What is the time frame for the ombudsman to issue his or her recommendations on the Vinibasa case?

Answer:

Organic Law 3 / 1981 of 6 April, the Ombudsman provides:

Article 18.

1. Declared the complaint, the Ombudsman will promote timely and informal preliminary investigation to clarify the assumptions of the same. In any case will find the substance of the request to the agency or administrative unit from so that by his boss, **not later than fifteen days**, submit written report.

Such a term can be extended if circumstances so dictate the opinion of the Ombudsman.

2. The refusal or neglect of the officer or his superiors responsible to send the requested initial report will be considered by the Ombudsman as hostile and numbing of their duties, making it public immediately and stressing such qualification in its annual or special, in its case to Parliament.

Our association believes that the Commission can draw certain conclusions, it is best to make a chronology of events:

- On 18 February 2009, the Platform sends complaint to the Ombudsman. (Annex 32)
- On 24 February 2009, we received confirmation of receipt of the complaint. (Annex 34)
- On 16 April 2009, the Ombudsman refers in writing in which he communicates his decision of not to accept the complaint for breach of the Aarhus Convention, and decide he would only investigate the breach of the Law 27/2006. (Annex 33)

- On 25 June 2009, the Ombudsman reports: "*Regarding the complaint that is brought before this Institution, and due to the delay in receiving the reports requested of the competent authorities, for the same date as may be requested referred urgently.*" (Annex 35)
- On 3 September 2009, the Ombudsman reports: "*Regarding the complaint that is brought before this Institution, have received the required reports to the President of the Junta de Extremadura and the City of Almendralejo. However, unfortunately the Guadiana Hydrographic Confederation persists in its failure to send the requested information. Given this attitude, this institution has been forced to recall once more on that body in its duty to cooperate in the rapid clarification of the situation you raised in your complaint.*" (Annex 36)
- So far we have not received any further communication.

Admitting our limitations, as none of the members of the association I represent is a lawyer; I hope that the answers have been sufficiently explanatory. If the Committee has any doubt, I would be happy to try to clear it.

In Almendralejo, on 24 January 2010

A handwritten signature in blue ink on a light yellow background. The signature is stylized and appears to read 'Félix Lorenzo Donoso'.

Félix Lorenzo Donoso
President of the Platform Against the Contamination of Almendralejo