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DE MEDIO AMBIENTE
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SECRETARÍA GENERAL
TÉCNICA

SUBDIRECCIÓN GENERAL DE
INFORMÁCIÓN AL
CIUDADANO,
DOCUMENTACIÓN Y
PUBLICACIONES

PUNTO FOCAL NACIONAL
DEL CONVENIO DE AARHUS

Spain's comments concerning the Draft Findings and Recommendations of the Compliance Committee with regard to communication ACCC/C/2009/36

Pursuant to paragraph 34 of the annex to decision I/7, the Spanish National Focal Point would like to submit the following remarks for consideration.

1.- Considerations on the main findings with regard to non-compliance

1.1.- Considerations concerning the alleged infringements of the right to access to information.

The CC finds that there was a violation of art. 4.2 of the convention, as far as the public authorities allegedly did not respond or delayed the response to the communicant's request for environmental information. In this point, it has to be acknowledged that Spanish authorities handle every year thousands of requests for environmental information, which are overall processed in a fair and timely manner. One particular case of delay or unfair refusal may of course happen, in the light of the heavy workload put on the shoulders of administrative bodies, and for such cases the Convention itself seems to assume that a refusal or delay in providing information is a perfectly possible outcome. In that case the interested party must have the right to a review procedure (art. 9.1), something that has not even put into question.

Regarding the CC's finding contained in paragraph 65, in relation to paragraph 55, it must be said that in this particular case (Balboa oil refinery), the communicant sent a request of information to a public authority (Assistant General Director of Environmental Assessment, Ministry of Environment and Rural and Marine Affairs) that did not hold the information at that moment. At this point, the Assistant General Director of Environmental Assessment fully complied with the provisions of article 4.5 of the Aarhus Convention as he informed the communicant of the public authority (Ministry of Industry) to which it was possible to apply for the information requested. Apparently no further request was sent to this authority.

In relation to the request sent to the General Director of Environmental Quality and Assessment, Government of Extremadura, it must be stressed that this authority did refer to a website, www.juntaex.es (and its linked website, www.extemambienta.es), where sufficient and relevant information, according to article 6.6 of the Convention, were available. (see Annex 13 of the Communication)

1.2.- Considerations concerning the alleged infringements of the right of participation in environmental decision-making.

The CC believes that there was an infringement of art. 4.1(b), in connection with art. 6.6 of the Convention, since the competent authorities allegedly avoided facilitating requested information. Furthermore, it is said that there was also a violation of art. 6, 3-6, because the Spanish authorities apparently set inhibitive conditions for public participation in environmental decision-making.

This claim is in no way supported by the file and by the facts: the public participation procedure was open to every one, the information was made accessible to anyone who wanted to accede to it. The fact that the communicant participated, although -in his view- in a restricted way, is the best demonstration that there was actually such participation.

On the other hand, the time limit for public participation that is provided by the applicable law (domestic rule on Environmental Impact Assessment, Royal Legislative Decree 1/2008) is thirty days. In this particular case, no reasonable arguments has been presented supporting the view that

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thirty days is not enough, or that it rendered the participation useless or void, but only general references to the "volume" or the "complexity" of the project. What is more, that domestic legal situation fully complies with the Convention, since this international instrument does not establish any clear deadline on this aspect.

The communicant says that there were three computers on the site for checking the information, "one of which did not function" (which means that there were two fully operational computers). The communicant complains that they had to travel to get the information, whereas the Convention does not recognises a duty for public administration to bring information into someone's house, but to allow the access of it. In this case, it is clear that the information was made accessible. Besides, as it has been explained *supra,* sufficient and relevant information according to article 6.6 were available at the Junta de Extremadura webpage.

The communicant cannot ground the alleged infringement of the Convention on any "objective" reason or on any "defective" feature of the legal scheme for participation, but only on the sole "subjective" aspect that it lacked enough operational resources to process the information made available in the average and regular time-limit, as provided for by the applicable law.

Accordingly, the alleged violation of art. 6.6. and 4.1(b) must be dismissed.

1.3.- Considerations concerning the alleged infringements of the right of access to justice in environmental matters.

The CC finds that Spain violated the right of access to justice (art. 9, par. 4 and of the Convention) on several grounds. First, the Party allegedly failed to provide appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO. Second, Spain is supposed to have failed to provide for fair and equitable remedies. Third, the country would have maintained a system that would lead to prohibitive expenses in litigation.

These three charges have been deeply and thoroughly counter argued in the observations produced by Spain during the procedure.

It is clear that, in Spain, it is possible to litigate freely, provided the interested person fulfils certain criteria, like in any other country. The fact that in this case the ONG was denied the right to "justicia gratuita" (cost-free litigation) because it did not fulfil the criteria laid down in the applicable legislation does not mean that the system does not work or that is goes against the convention. In this particular case, the CC considers that the current Spanish system is contradictory "*by setting high financial requirements to an entity to qualify as public utility entity and thus enable it to receive free legal aid"*, while the truth is that, according to Article 32 of Organic Law 1/2002 (22 March 2002) regulating the right of association, the only requirement of a financial nature to become a public utility entity is that the members of its representative bodies will not receive any retribution from public funds or subventions.

In reality, the Spanish system is very much advanced that what the Convention requires. The Convention does not order the contracting parties to set a system of financial mechanisms of a precise type, but that they "shall consider the establishment" of such mechanisms. Well, Spain has not only "considered" that, but it has actually established a fully operational system that benefits thousands of applicants every year.

On the other hand, it is also said the Spanish system of dual representation stands in violation of article 9.4 of the Convention. Here again, the CC is forcing the clear meaning of the Convention. What is more, it is contradictory, as it will be explained.

First of all, it should be recalled what the Convention exactly states at art. 9.4:"…the procedures…shall provide adequate and effective remedies…and be *fair, equitable, timely and not prohibitively expensive"* (emphasis added). It is clear that at this point, the Convention should be interpreted in the sense that it bounds a sovereign, contracting party to provide for a general framework, of statutory nature, in order to secure the likely exercises of the rights that are enshrined in the said international treaty.

In this context, the Convention does not forbid *dual procedural representation,* but just a litigation that is prohibitively expensive. In this respect, the expenses of court cases cannot be predicted in advance because they are the result of a set of factors, such as the complexity of the case, the number and nature of expert witnesses, the evidence produced, the likely occurrence of appeals, etc. So, no litigation system may be defined as "prohibitively expensive" in general terms. On the other hand, "double" representation in court (as it has been mistakenly identified, since there is only one "representation", the one performed by the "procurador", while the "abogado" is the defender) does not mean "expensive" *per se*. "Sole" representation could be more expensive (for instance, in the case of protracted or complex litigation) than *double* or *dual* representation: the number of intervening lawyers is not what makes a case expensive, but the very nature, complexity and length of the lawsuit.

Summing up, nothing in the wording nor in the spirit of the Convention allows understanding that the traditional -and justified on the public interest- system of *dual* representation (which is confined to higher, appellate courts) constitutes a frontal infringement of the loose and broad terms of art. 9.4 of the Convention.

1.4.- Considerations concerning the alleged infringements of article 3.8 of the Convention.

Art. 3.8 of the Convention states that "persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement".

In the light of the considerations that have been made *supra*, this provision has to be interpreted within the limits of a sound interpretation of regular international treaties. From this perspective, it is clear that the communicant was "insulted" in the local press, which might constitute a case of criminal offense, and the communicant could have gone to the criminal courts to obtain the reasonable redress under the law. But this could also be considered a case of genuine harassment as an offensive behavior intended to intimidate or to prevent from exercising the communicant's rights under the Aarhus Convention and the national Law.

Regardless these considerations, the Government of Spain deeply regrets such unacceptable, though isolated, behaviours. As I did in my speech at the 25th Session of the CC, I wish to express again our profound respect for the institutions and individuals exercising their civil rights in relation to environmental protection, as recognized by the Spanish Constitution and the Aarhus Convention, along with our rejection of any act, omission or attitude that could restrict these rights.

2.- Considerations on recommendations

Taking into account the Committee's consideration that the implementation of recommendations will help the next Meeting of the Parties to concentrate more on progress achieved than on outstanding problems, I would like to submit the following comments from a constructive point of view.

2.1.- Recommendations on access to information an public participation.

The Committee recommends the Government of Spain to take the necessary measures and arrangements to ensure that information requests be answered as soon as possible, at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months from the date of the request; and that related legislation be reviewed to provide for an easy and specific procedure to be followed, in the event of a lack of response to a request.

Article 10.2.c) of the Law 27/2006, regulating the rights of access to information, public participation and access to justice in environmental matters, establishes a deadline of one month after the reception of the request or two months if the complexity and volume of the request justify it. In the event of a lack of response, the silence is to be considered positive in accordance with general silence procedure as regulated in Article 43 of Law 30/1992 on Common Administrative Procedure. Therefore, the lack of notification within the resolution allows the applicant to understand that his or her request has been estimated by positive silence, with three major consequences: first, for all purposes, the silence is considered an administrative act that put an end to the procedure (Art.

43.3), second, the public authority can not ignore the positive sense of silence, for the further administrative decision may be issued only being confirmatory (art. 43.4.a) and, lastly, the act produced by silence may be invoked to both the administration and any other person or entity, public or private (art.43.5)

As we can see, these rules are perfectly in line with the provisions of the Aarhus Convention and therefore, despite the particular application of domestic Spanish legislation that may have been relevant in a particular case, from a legislative point of view the reproaches are unfounded.

Having said that, it has to be acknowledged that Spanish authorities handle every year thousands of requests for environmental information, which are overall processed in a fair and timely manner. But it may of course happen a case of delay or unfair refusal, sometimes due to the heavy workload put on the shoulders of administrative bodies, sometimes for other reasons. In this context, the Ministry of Environment and Rural and Marine Affairs is now developing a number of initiatives to provide training and information on the Aarhus Convention within the scope of its activity, in line with similar activities carried out by some Autonomous Communities. There is also intention to extend these activities to the local scope, mainly through the collaboration with the Spanish Federation of Provinces and Municipalities. The Ministry is also preparing an internal instruction to be circulated among all public authorities of the Ministry itself and of its autonomous bodies and will give training courses for civil servants specifically on Aarhus issues (courses on environmental legislation including special lectures on Aarhus issues has already been given during the last years)

Regarding public participation, the CC recommends the government of Spain to establish clear requirements for the public to be informed of decision-making processes in an adequate, timely and effective manner, including informing public authorities that entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention.

Spain considers that these requirements are clearly established in our domestic laws and regulations, as it has been substantially proved during the procedure. But once again, in certain isolated cases it may occur that a legal system, which is perfectly in line with the Aarhus principles, is not put into practice as it should be. For this reason, it is of great importance to inform all public authorities of their obligations under the Aarhus Convention and the domestic law. In this context, Spain is making valuable efforts in training and informing activities, as it has been explained *supra*.

2.2.- Recommendations on access to justice.

The CC recommends to carry out a study on how article 9, paragraph 4, is being implemented by courts of appeal in Spain; and in case the study demonstrates that the general practice is not in line with the provision at issue, to take appropriate measures to align it to the Convention. It also recommends to examine the legal system regulating legal aid and requiring dual legal representation for the court of second instance and consider how the system may be changed to ensure that small NGOs have access to justice.

Regarding this particular recommendation, the Ministry of Environment and Rural and Marine Affairs is sending a copy of the draft findings and recommendations to the Ministry of Justice, who holds the competence to legislate on Procedural Law. This National Focal Point will timely inform the CC of the outcomes of this consultation.

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