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15 January 2010

Mr. Juan Manuel García Bartolomé
National Focal Point for the Aarhus Convention
Head of Information Service - Technical General Secretariat
Ministry of the Environment and Rural and Marine Affairs
Paseo de la Infanta Isabel
E-28071 Madrid
Spain

Dear Mr. García Bartolomé,

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)


On behalf of the Aarhus Convention Compliance Committee, I would like to thank the participants in the discussion of the above referenced communication at the twenty-sixth Compliance Committee meeting (Geneva, 15-18 December 2009).

As agreed at the aforementioned meeting, in order to facilitate its consideration of the communication, the Compliance Committee has requested the secretariat to invite you to address a number of questions that are annexed to this letter. Meanwhile, on 14 January 2010 the secretariat received your answers to some questions raised by the curator Mr. Jendroska during the discussion of the communication at the twenty-sixth meeting. It notes that in your answers of 14 January 2010 you address questions 1, 2, 3 and in part 4 of the annex to this letter. Therefore you are invited to respond to questions 4 (in part, regarding legal aid in general and not only for NGOs), 5, 6, 7, and 8 at your earliest convenience, but no later than 31 January 2010.

Please also note that the Compliance Committee hopes to complete the preparation of its draft findings with regard to the above communication at its twenty-seventh meeting (Geneva, 16-19 March 2009), after which the draft findings will be circulated for comment to the parties concerned.

Please do not hesitate to contact the secretariat if you require any further information.

Yours sincerely,



Jeremy Wates

Secretary

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

CC Mr. Felix Lorenzo Donoso, President of the Platform against the Contamination of Almendralejo, Tino, Spain

Permanent Mission of Spain to the United Nations Office at Geneva and other International Organizations in Switzerland



Annex – Questions posed by the Committee

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.

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?

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).

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

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

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

7. In your answer of 27 November 2009 to the questions asked by the Secretariat, in section “One”, second paragraph, you state that:

“The National Government cooperate with the other levels of government in virtue of the constitutional principle of inter-administrative collaboration”.

According to article 3, paragraph 1, of the Aarhus Convention: “Each Party shall take the necessary legislative, regulatory and other measures [...] as well as proper enforcement measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”

¹ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment of 27 June 1985, as amended by Council Directive 97/11/EC of 3 March 1997; and Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

It is clear that Spain has different levels of government. Could you please provide details on how the principle of inter-administrative cooperation applies in matters relating to the Aarhus Convention? What exactly is the action taken by the central government to ensure that the provisions of the Convention apply to all levels of the government?

8. Article 9, paragraph 4, of the Aarhus Convention (with respect to access to justice), requests the Parties to provide adequate and effective remedies which are not prohibitively expensive. The Committee is informed that in Spain, in case of an appeal of an administrative court decision, the “loser pays” principle will apply at the appeal level, unless the appeal court finds circumstances to reason and decide differently.

The question of the Committee is: in case the party to the process is an authority out of the control of the Government of Spain, and if the outcome of a process is negative to a physical or legal person and the appeal court applies the “loser pays” principle, thus not taking into consideration the requirement of article 9, paragraph 4, that non-prohibitively expensive remedies should be provided, are there regulatory tools at the disposal of the Government to remedy this situation? According to the Spanish law on Free Legal Assistance, is it possible to cover the NGOs/citizen’s expenses at that stage of the procedure?

If the answer to the last question is “Yes” – what authority takes a decision, and on what considerations is a decision to be based?

If the answer is “No” – would you nevertheless consider that the Spanish legal system is in line with the requirements of article 9, paragraph 4? And if so, how would you justify this position?