Comments by the communicant: Instituto Internacional de Derecho y Medio Ambiente (IIDMA- International Institute for Law and the Environment) on the draft findings and recommendations of the Aarhus Convention Compliance Committee in relation to communication ACCC/C/2014/121

Law at the service of the environment

Madrid, 17 January 2020.

Following your letter of 2 December 2019, IIDMA hereby submits its comments to the draft findings and recommendations of 1 December 2019.

General remarks

We would like to emphasise that we overall agree and are satisfied with the draft findings and the recommendation to the Party concerned included in para 118.

Points of discrepancy with the draft findings

At the same time, we believe that the section of the draft findings on the "Extent of obligations on the Party concerned in relation to article 6" (paras 82-88) is based on an incorrect reading of the provisions in the Industrial Emissions Directive (IED), specifically paragraphs 85 to 88. We therefore kindly request that the draft findings be amended on this point. The detailed reasons for this are the following:

1. Paragraph 85, citing article 20(2), concludes that the fact that the IED does not require the obtention of a permit[1] for a non-substantial change has as a result that European Union Law. does not apply. Therefore, the Party concerned has not assumed any obligation under the Convention with respect to such kind of changes.
2. That interpretation leads to the conclusion in paragraph 86 that the IED imposes no obligations (presumably, with respect to updating/obtaining a permit), and therefore the Party concerned has not assumed Convention obligations, with respect to changes that are of a non-substantial nature.
3. As a consequence of that interpretation, the draft findings consider that non-substantial changes of installations and other decisions under the IED related to issues such as time extension of operation, extension of capacities or other modifications of permit conditions which do not meet the requirements of article 24 (1)(b) of the IED are not a

[1] Article 3(7) of the IED defines "permit" as "*a written authorisation to operate all or part of an installation or combustion plant, waste incineration plant or waste co-incineration plant".*

matter to be scrutinized under the Convention obligations (see para 88). As a result, the Committee has only considered our allegations on non-compliance by the concerned Party regarding the publication of new BAT conclusions and developments in the BATs, operational safety requirements and compliance with new or revised environmental quality standards.

We respectfully disagree with that line of reasoning based on article 20 of the IED which establishes:

1. *Member States shall take the necessary measures to ensure that the operator informs the competent authority of any planned change in the nature or functioning, or an extension of the installation which may have consequences for the environment. Where appropriate, the competent authority shall update the permit.*
2. *Member States shall take the necessary measures to ensure that no substantial change planned by the operator is made without a permit granted in accordance with this Directive.*

   The application for a permit and the decision by the competent authority shall cover those parts of the installation and those details listed in Article 12 which may be affected by the substantial change.
3. *Any change in the nature or functioning or an extension of an installation shall be deemed to be substantial if the change or extension in itself reaches the capacity thresholds set out in Annex I.*

It is under Art. 20 (1) that non-substantial changes such as time extension of operation, extension of capacities or other modifications enter into play. European Union Law, that is the IED, requires where appropriate, the update of the permit. As highlighted, the core of our communication is precisely on those cases of lack of public participation when the permit is reconsidered and updated.

We would like to note that Art 20 (1) provides that all changes "in nature or functioning or extension" which may have consequences for the environment may, where appropriate, require the permit to be updated. This is not restricted to changes which may have negative consequences but includes positive consequences. Meanwhile, Art 20(2) establishes that all changes "in nature or functioning or extension" that have negative consequences for the environment require a permit update[2].

This means that in some cases Art 20(1) and (2) are cumulative - if there are negative consequences for the environment- whereas in others they are alternative, when there are positive consequences for the environment. If consequences are positive, obligation is on the authorities to determine whether a permit update is appropriate. In doing so, they would likely have to consider whether the change considers a matter already regulated by a permit, or a matter which should, in accordance with some other IED provision, be regulated by the permit. Where the matter is or should be so regulated, the IED considers an update to be appropriate – and so the Aarhus Convention is applicable.

The very draft findings in paragraph 100 refer to a previous communication ACCC/C/2014/104 (Netherlands) in which an extension of a duration of an installation, in that case of a nuclear power plant was the matter. The draft findings cite paragraph 71 of the findings in that case "*the*

[2] The IED understands "substantial change" as "a change in the nature or functioning, or an extension, of an installation or combustion plant, waste incineration plant or waste co-incineration plant **which may have significant negative effects on human health or the environment**" (article 3 (9) IED).

Committee found that " except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of durations to be subject to the provisions of article 6"". Paragraph 65 of findings on the Netherlands states: *"(…) The Committee considers that the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly,* ***any change to the permitted duration of an activity, be it*** *a reduction or* ***an extension, is a reconsideration or update of that activity's operating conditions****. It follows that any decision permitting the nuclear power plant to operate beyond 2014 amounted to an update of the operating conditions"*. Paragraph 66 continues: "*Based on the above, the Committee considers that the decision of 18 March 2013, by amending the licence to extend the design lifetime of the nuclear power plant until 31 December 2033, updated the operating conditions of the plant.* ***Accordingly, under article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, mutatis mutandis, and where appropriate to that decision".*** Therefore, a time extension of operation was previously considered by the Aarhus Convention Compliance Committee to be under the scope of Article 6 (10) of the Aarhus Convention.

In light of the above, we conclude that under EU Law the Party concerned has assumed obligations to implement the Convention with respect to any changes which are of a non-substantial nature as per Article 20 (1) of the IED. As a consequence, we consider that the final findings should review the matter excluded from the draft findings related "to non-substantial changes of installations and decisions such as time extension of operation, extension of capacities or other modifications of permit conditions, which do not meet the requirements 24 (1) (b)". In fact, we contend in our communication that restricting public participation to the cases in article 24 (b), (c) and (d) is very restrictive and not in line with article 6(10) of the Aarhus Convention. For this reason, we do not agree with excluding those situations from examination by the Committee.

Therefore, following the arguments in the draft findings we fully agree that "(…) *it is not the actual outcome of the reconsideration or the update that is determinative of whether public participation should be carried out. Rather in line with the Committee's findings on communication ACCC/C/2006/17 (European Community), the key criterion is whether the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity. (…) Likewise, it is immaterial that, if the operating conditions are updated the updated conditions could in some respects have a beneficial effect on the environment, human health and safety. The crucial point is whether reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity*" (Para 102). And we believe that time extension of operation, extension of capacities or other modifications might be capable of changing the activity's basic parameters and/or might affect significant environmental aspects of the activity.

Request for review of the draft findings and recommendations

Taking into consideration the points of discrepancy above, we respectfully request the Aarhus Convention Compliance Committee to reconsider the finding regarding the exclusion of review of non-substantial changes of installations and decisions such as in cases of time extension of operation, extension of capacities or other modifications referred as reached in paragraph 88 of the draft findings.

We accordingly request that the draft findings be altered stating that:

- non-substantial changes to an installation fall under the scope of the IED based on Article 20(1), wherever a permit is updated due to this being "appropriate" in the sense of the provision;
- accordingly, the EU has assumed obligations under the Aarhus Convention under Article 6(10) of the Convention in relation to such permit updates;
- where there is a permit update under Article 20(1) IED changing the basic parameters of the activity public participation meeting the requirements of article 6 (2)-(9) is "appropriate", and thus required under the Convention;
- by putting in place a legal framework that does not envisage any possibility for public participation in relation to permit updates under article 20(1) of the IED, the Party concerned fails to comply with article 6(10) of the Convention.

We further request that the Committee's recommendations in paragraph 118 be altered to state:

"The Committee pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and [noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7,] recommends that the Party concerned put in a place a legally binding framework to ensure that, when a public authority in a Member State of the Party concerned reconsiders or updates permit conditions pursuant to national laws implementing article**s 20(1) and** 21(3), (4), and (5)(b) and (c) of the IED, or the corresponding provisions of any legislation that supersedes the IED, the provisions of article 6(2)-(9) will be applied, *mutatis mutandis* and where appropriate, bearing in mind the objectives of the Convention."

Thank you for your consideration,

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