



Economic and Social Council

Distr.: General
8 February 2011

Original: English

Economic Commission for Europe

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

Compliance Committee

Twenty-eighth meeting
Geneva, 15–18 June 2010

Report of the Compliance Committee on its Twenty-eighth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/36 concerning compliance by Spain

Adopted by the Compliance Committee on 18 June 2010

I. Introduction

1. On 2 March 2009, the Spanish non-governmental organization (NGO) “Plataforma Contra la Contaminación del Almendralejo” (hereinafter the communicant) submitted a communication to the Committee alleging the failure by Spain to comply with its obligations under article 3, paragraph 8, article 4, paragraphs 1 and 2, article 6, paragraphs 4 and 5, and article 9, paragraphs 1 and 5, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges a general failure of the Party concerned to implement several provisions of the Convention. In particular, the communicant alleges that by failing to ensure that public authorities provide environmental information upon request in a timely manner and without the need to state an interest, the Party concerned is not in compliance with article 4, paragraphs 1 and 2, of the Convention; that by failing to ensure that its public authorities allocate sufficient time for public consultations on complex projects and provide appropriate access to project documentation, the Party concerned is not in compliance with article 6, paragraphs 4 and 5, of the Convention; and that by excluding small NGOs from

legal aid for bringing cases to the courts, the Party concerned is not in compliance with article 9, paragraphs 1 and 5, of the Convention. The communication presents a number of cases to support the allegations of non-compliance. Finally, the communicant alleges non-compliance with article 3, paragraph 8, of the Convention, because its members have been publicly insulted and harassed by the Mayor of Almendralejo in the mass media.

3. At its twenty-third meeting (31 March–3 April 2009), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 7 May 2009. On 16 June 2009, the secretariat sent a letter to the Party concerned with a number of questions raised by the Committee members regarding the communication.

5. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting (15–18 December 2009).

6. On 4 November 2009, the Party concerned addressed the questions raised by the Committee and, by letter dated 27 November 2009, it sent additional comments and commented on the allegations contained in the communication.

7. The Committee discussed the communication at its twenty-sixth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 13 January, 3 February and 3 March 2010 and the communicant submitted information on 24 January, 21 February and 5 March 2010. The Committee prepared draft findings at its twenty-seventh meeting (16–19 March 2010), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 28 April 2010. Both were invited to provide comments by 26 May 2010.

8. The Party concerned and the communicant provided comments on 28 May 2010 and 6 May 2010, respectively.

9. At its twenty-eighth meeting (15–18 June 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, evidence and issues¹

National legal framework

10. Law 27/2006 of 18 July 2006 is the main piece of legislation transposing the Aarhus Convention into domestic law in Spain.

11. Access to information is covered by Law 27/2006 and also by a number of other legal instruments, including, *inter alia*, Law 30/1992 on the legal system of public administration and the common administrative procedure; Law 11/2007 on electronic access by citizens to public services; and Law 37/2007 on reuse of public sector

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

information. In addition, Royal Legislative Decree 1/2008 on environmental impact assessment (EIA) ensures that the public is informed about the availability of information gathered in the context of an environmental impact study. Finally, Law 16/2002 on integrated pollution prevention and control (IPPC) also provides for the rights of the public to access information in the matters it regulates. Law 30/1992 (article 37.7) requires that sometimes the physical presence of the requester, or her/his legal representative, is required in order to obtain information in cases of large and complex records.

12. Permits for the carrying out of certain activities are granted by the local authorities (councils) in whose area the activity takes place. In general, according to the 1978 Constitution, extensive administrative and legislative competences are allocated to the Autonomous Communities (*juntas*). According to the relevant national and European Union (EU) legislation, the competent body of the Autonomous Community drafts a report on the activity (unless otherwise provided by the local legislation), and if it forms a negative opinion regarding the activity the local authorities do not issue the licence.

13. Public participation is provided for by Law 27/2006, and also by EIA and IPPC relevant legislation (Royal Legislative Decree 1/2008, in conjunction with Law 30/1992, and Law 16/2002).

14. Law 27/2006, in conjunction with Law 30/1992 (art. 20 et seq.), provides for the rights of the public regarding access to justice in the case of breach of environmental legislation: the acts and omissions of a public authority can be challenged by initiating administrative and judicial (civil and criminal) procedures. Also, legal entities which by their statute have the objective of protecting the environment have the right to bring judicial action, as long as they have been legally constituted for at least two years before bringing proceedings and have been carrying out the purposes specified in their statutes in the territory affected by the administrative action or omission.

15. According to Law 1/1996, in order to receive financial aid, non-profit entities, including NGOs, have to be recognized as “public utility associations”, as defined in article 32 of Organic Law 1/2002 of 22 March. Specifically, to obtain financial aid NGOs have to comply with the following requirements, inter alia: their statutory objectives must tend to promote the public interest (including family, human rights and the environment); they must have adequate staff, equipment and organization to ensure compliance with their statutory objectives; and they have to have been effectively fulfilling their statutory purposes for two years. In addition, according to Royal Decree 1740 of 19 December 2003 on procedures applicable for the declaration of an entity as a public utility/interest entity, interested entities must provide details on their human and financial resources (art. 2, paras. 4 (f) and (g), respectively).²

16. In terms of legal representation, article 23.2 of Law 29/1998 requires that parties to a court case on appeal, which will be heard by two or more judges, must have two lawyers, one “procurador” and one “abogado”. This requirement is not applicable when the case is initially brought to a first instance court, where it is heard by one judge.

17. Finally, the Spanish Constitution (art. 54) provides for the institution of the Ombudsperson (Defensor del Pueblo),³ under the high commissioner of the Parliament, with the mandate to defend the basic rights of citizens and to supervise the activities of

² “4. La memoria de actividades deberá referirse pormenorizadamente a los siguientes extremos: ...
(f) Los medios personales de que disponga la entidad, con expresión de la plantilla de personal;
(g) Los medios materiales y recursos con los que cuenta la entidad, con especial referencia a las subvenciones públicas y su aplicación.”

³ Further information on the Spanish Ombudsperson is available at: <http://www.defensordelpueblo.es/>.

public administration. Its mandate is further regulated mainly by Organic Law 3/1981. The Ombudsperson performs its functions autonomously. After it has received a complaint which it considers admissible, the Ombudsperson examines the case. The public authority against which the complaint has been submitted may be required to respond in writing. Depending on the outcome of its investigation, the Ombudsperson makes recommendations to the authority. If the latter, within a reasonable period of time, has not taken any action to implement the Ombudsperson's recommendations or fails to notify the Ombudsperson why it has not been able to do so, the Ombudsperson may inform the authority supervising the authority concerned. In case of continuous non-compliance, the Ombudsperson includes the case in its annual report or in a special report to the Parliament.⁴

Facts

18. Almendralejo is a city of approximately 30,000 inhabitants in the autonomous community (*junta*) of Extremadura. The communicant describes a trend towards increasingly polluting industrial activity in Extremadura, including, inter alia, the construction of an oil refinery in the area of Sierra de San Jorge and three thermal power stations in the area of Alange-Mérida. The communicant provides some general information on its efforts to access information held by the local authorities, including concerning waste disposal activities, but its communication focuses on alleged non-compliance by the Party concerned with regard to two projects, the Vinibasa distillery and the oil refinery project in the area.

Waste disposal

19. The communicant says that it submitted several requests for access to information held by the local authorities concerning the operation of a waste treatment plant and, in particular, its compliance with the Municipal Regulation on Waste Disposal and Treatment.

20. Specifically, the communicant claims that it submitted a first request on 2 June 2005, and reiterated the same request on 23 June 2005. The authorities responded to both requests — initial and reiterated — on 26 October 2005, five months after the submission of the initial request. On 21 September 2007, the communicant submitted a new request for information (annex 1 to the communication). The Mayor responded on 21 November 2007, and attached a response from the technical matters division of the municipality. The request of the communicant was denied on the grounds that there was no motivation and no purpose for such a request and that only city councillors had the right of access requested by the communicant (annex 2 to the communication).

21. In addition, on 17 January 2008, the communicant informed the Ministry of Environment about the problems caused by the waste disposal and treatment plant (annex 3 to the communication). On 17 March 2008, the Ministry responded that the concerns of the communicant regarding the behaviour of the authorities were beyond the Ministry's competence. The Ministry informed the communicant about its rights deriving from Law 27/2006 and advised it to refer the case to the courts (annex 4 to the communication).

Vinibasa distillery

22. The communicant provides information in his communication about activities relating to the wine distillery Vinibasa in the urban area of Almendralejo (a full chronology of the events can be found in annex 29 to the communication). According to the communicant, the plant had no permit to carry out some activities that put at risk the health

⁴ Organic Law 3/1981, article 30.

and the physical integrity of the population. Specifically, Vinibasa's proposals for a permit to introduce changes to its installations had been rejected by the relevant local authorities. As a result, the odours in the city were intolerable and the methane atmospheric concentration was very high. Also, according to the communicant, there were 2 million litres of alcohol and 25 million tons of used *orujo* (strong alcoholic liquor distilled from grape or herbs pressings) stored in the facilities of Vinibasa. The local authorities never intervened, despite the complaints submitted by the local population.

23. The communicant reported Vinibasa's activities to "El Servicio de Protección de la Naturaleza" (SEPRONA), the national environmental authority. SEPRONA verified the facts and, on 27 November 2007, reported to the responsible authorities: (a) the Guadiana Hydrographic Confederation (CHG) for violation of the Water Law; (b) the Directorate-General for Environmental Assessment and Quality (Section of Non-hazardous Waste of the Autonomous Community of Extremadura) for violation of the Waste Law; (c) the Directorate-General of Agricultural Development of Extremadura for violation of Royal Decree 1310/1990 regulating the use of the waste mud in the agricultural sector; and (d) the Director General of Industrial Planning for violation of Law 38/1972 on the Protection of the Atmospheric Environment.

24. On 4 December 2007, the communicant sent a letter to CHG (at the Ministry of Environment), requesting information on the measures it took after SEPRONA reported the violations by Vinibasa. The communicant did not receive any response. On 18 February 2008 the communicant requested a review of this request before the Minister of Environment. On 11 April 2008, the Secretary General of CHG replied to the communicant that fact-finding was being carried out to determine whether a violation of article 116 of the Water Law had taken place and that the communicant would be informed of the results. On 1 August 2008, the communicant wrote to CHG enquiring about the development of the case (annex 6 to the communication). The communicant claims that it has received no reply from the authorities.

25. The Directorate-General of Agricultural Development of the Autonomous Community of Extremadura also responded that a disciplinary record could not be opened, because the company using the waste mud was located in Andalusia. The Directorate-General of Industrial Planning, Energy and Mining refused access to the file on the grounds that the communicant "could not be considered as an interested person".

26. The communicant decided to produce a report on possible emissions of dioxins and furans. On 11 December 2006 the communicant submitted its report and supporting bibliography to the Directorate-General of Consumer Affairs and Community Health of the Autonomous Community of Extremadura.

27. On 27 February 2007, the communicant was invited to a meeting with the Head of the Food Security and Environmental Health and the Head of the Epidemiology Service, as well as with an administrative officer of the latter. They had examined the documentation submitted by the communicant and agreed that there was a need to investigate the matter. The Head of the Epidemiology Service agreed to carry out a study on the possible effects on citizens' health caused by the emissions from the incineration. Also, the Food Security and Environmental Health Service committed to request the Directorate-General of Environment to carry out a full analysis of the emissions by Vinibasa.

28. The first study was carried out as agreed and confirmed the communicant's previous report. The Head of the Food Security and Environmental Health Service had also invited the "Servicio Ambiental de Racionalización de Actividades" to conduct the second study at issue (annex 7 to the communication), but it has never been conducted.

29. The communicant also claims that due to its action undertaken against Vinibasa, the Mayor of Almendralejo accused the members of the association (communicant) in the mass

media as “new inquisitors”, “manipulators” and “ignorant”, and said that “they only try to promote scandal in the city, looking for publicity with unfounded accusations” (annexes 8–10 to the communication).

Oil refinery in Sierra de San Jorge

30. In addition, the communicant alleges that the public is not informed about and is not given the opportunity to participate in the decision-making for the projects currently being implemented in Extremadura.

31. On 3 June 2008, there was an announcement in the Official Bulletin of the province of Badajoz (issue 105) about the display and presentation to the public of the oil refinery project in Sierra de San Jorge. Accordingly “for a period of 30 days starting one day following the publication day of the announcement, any interested party can examine the Basic Project and the environmental impact study, as well as the papers relating to the Request for Integrated Environmental Authorization (only for the refinery) in the field of Industry and Energy of the Subdelegation of the Badajoz Government in Avda. The papers relating to the Request for Integrated Environmental Authorization will also be available during this period at the Directorate-General for Environmental Assessment and Quality, the Commission of Industry, Energy and Environment (Autonomous Community of Extremadura)”.

32. On 16 June 2008, the communicant sent a letter to the Directorate-General for Environmental Assessment and Quality within the Ministry of Environment and Rural and Marine Affairs (MARM), and complained that the set conditions, described in the announcement, did not allow for studying all the documentation (annex 11 to the communication). In particular, the communicant complained in its letter that the amount of EIA documentation was very large to be inspected within the set deadline of 30 days; it requested that the EIA documentation be sent to the communicant, preferably in CD-ROM/DVD form, and that the deadline be extended to five months. On 16 July 2008, the Assistant General Director of Environmental Evaluation replied to the communicant that the public information phase of the project at issue had been completed and that he did not have the EIA documentation. He referred the communicant to a directorate at the Ministry of Industry.

33. On the same date (16 June 2008), the communicant sent a similar letter to the Directorate-General for Environmental Assessment and Quality within the Commission of Industry, Energy and Environment of Extremadura. On 9 July 2008, the General Director replied reiterating the existing conditions for the public to access the environmental impact study (annex 13 to the communication), as detailed in the announcement, including the requirement that the requester be physically present before the designated authorities. The communicant adds that it was prohibited from making copies of the project document, taking photos or burning a CD-ROM or DVD with the relevant information.

34. Consequently, the communicant sent a letter to the same authority pointing to the fact that these conditions impeded it from participating in an effective manner and asking the authority to include the complaint in the project authorization. The communicant claims that there were at least 8,000 comments expressed against the project by the local population.

Substantive issues

35. The communicant alleges a general failure by Spain to comply with its obligations under the Convention. In its view, even if the regulatory framework were sufficient, there is no effective implementation. In the case of Vinibasa, the public authorities did not take any effective action (see also annexes 23–28 to the communication, with newspaper excerpts).

This is supported by a further case concerning the wine by-products industry, submitted by the communicant on 11 November 2009 (annexes 17–22 to the communication).

36. The communicant alleges that the Mayor of Almendralejo falsely accused the members of the association in the media because of the actions taken against the projects, and that this constitutes non-compliance by the Party concerned with article 3, paragraph 8, of the Convention. In response, the Party concerned states that any coercive or retaliatory behaviour, including by public administration officials, against citizens exercising their civil and political rights, including activists, contravenes the fundamental constitutional rights and constitutes a crime (art. 169 et seq. and 542 of the Spanish Penal Code).

37. The communicant further alleges that the relevant authorities either responded with great delay to its request for information (i.e., five months after the submission of the request), or else they ignored its requests or denied access to the requested information. Hence, according to the communicant, the Party concerned was not in compliance with article 4, paragraph 2, of the Convention. In addition, the communicant alleges that by requesting an interest to be stated in its request and refusing to provide information in the form requested, the Party concerned was not in compliance with article 4, paragraph 1.

38. The Party concerned argues that existing Spanish legislation protects in an adequate and comprehensive manner the rights of the public for access to information. Spanish administrative authorities at the central and regional level, and especially the citizens' information offices, process a large number of citizens' queries concerning the environment; they respond by phone, by mail, by e-mail or in person. Citizens are informed about the status of their requests and they may obtain copies of the documents requested in person (especially for very large documentation), by phone, fax, mail, or e-mail. The authorities also inform the citizens about their rights to public participation and access to justice. Charges of a reasonable amount may apply for copies of some documents, as provided by law. According to Law 27/2006, the in situ consultation of any public lists or registers or environmental information in general or the copying of up to 20 pages (A4 format) is free of charge. Photocopies can be made at the Government Documentation Centres. It also states that the relevant authorities reported that the communicant had never been denied access to information.

39. The Party concerned also points out that every year the Spanish authorities handle thousands of requests for environmental information, which are generally all processed in a fair and timely manner. However, due to that heavy workload, a case of delay or unfair refusal may occur in the normal course of events and that, in its view, the Convention seems to assume that a refusal or delay in providing information is a perfectly possible outcome.

40. Furthermore, the Party concerned argues that under Spanish administrative law (art. 43 of Law 30/1992 of the Common Administrative Procedure) the lack of response from the administration to a request for information is positive silence.

41. The Party concerned also refers to Law 11/2007 (22 June 2007) on electronic access by citizens to public services; and Law 37/2007 (16 November 2007) on reuse of public sector information, and the great effort of the authorities to have most information available online. In general, the public is encouraged to use the Internet, especially for large amounts of information ("sabria" application on www.mma.es with information on EIA documentation or www.chguadiana.es). For instance, most information on EIA-related project documentation is available at databases administered by MARM and by the environmental affairs departments of the autonomous communities. Therefore the Party concerned denies that the communicant was refused access to information.

42. The communicant alleges that the Vinibasa distillery carried out activities without a permit. In response to this allegation, the Party concerned refers to the report of the

Almendralejo City Council and the report of CHG, both dated 15 September 2009 (and annexed to the response of the Party concerned of 4 November 2009). The City Council report, among others, refers to the applicable regulations and states that local authorities strictly comply with the procedures to grant permits. The CHG report states that, between 2003 and 2007, CHG took 10 disciplinary measures against the Almendralejo City Council for water law violations and accordingly imposed penalties (ranging from 200 to 240,000 euros); and that the last inspection of Vinibasa conducted by the CHG Water Quality Department on 3 July 2009 confirmed that the facility was operating in compliance with water legislation. The Party concerned also says that Vinibasa has permanently closed its facilities.

43. With regard to the other main allegation at issue, the communicant alleges that the conditions set for the public to participate in the decision-making for the oil refinery project in Sierra de San Jorge were restrictive: in its oral submissions the communicant stated that the information was accessible in the village of Merida, approximately 30 kilometres away, and for the pipeline component of the project, approximately 200 kilometres from Almendralejo; that the public could only access the information, which exceeded 1,000 pages, through three computers on the site, one of which did not function; and that the information was not allowed to be copied in a digital form from the computers despite the communicant's request. For these reasons, in the view of the communicant, the Party concerned did not allow for early and effective public participation and was not in compliance with article 6, paragraph 4, of the Convention.

44. In response to the allegations of the communicant concerning the oil refinery, the Party concerned claims that the EIA procedure for the project "Construction of an Oil Refinery in Extremadura (Balboa) in the municipality of Mainona Saints Badaloz" is managed by the Directorate-General for Environmental Assessment and Quality of MARM. The project involves the refinery itself and all the facilities and infrastructure necessary for its operation, including a number of pipelines for waste and natural gas, energy lines, etc. The Party concerned argues that the EIA process for the project has not been completed yet. In fact, according to the Party concerned, the public information procedure has already taken place (organized by the Ministry of Industry, Tourism and Trade) in the provinces of Badajoz, Seville and Huelva and that on 20 October 2008, the results of the procedure were submitted to the Directorate-General for Environmental Assessment and Quality for the preparation of the environmental impact study.

45. With regard to public participation, in general, the Party concerned refers to the applicable legislation and argues that the central Government and the autonomous communities strongly encourage the exercise of public participation rights at an early stage by publishing all information on the Internet and by notifying associations, organizations and stakeholders. For instance, in the case of the oil refinery project, the "non-technical summary" and the "synthesis document" of the environmental impact study were available to the public on the Internet. The Party concerned states that, in practice, the environmental impact study takes into account the public information outcome and a project is authorized only after due consideration of the views expressed by the public during the EIA process. Since the entry into force of Law 27/2006, plans and programmes by MARM support public participation and all relevant information, including the so called "Aarhus report", are published. Also, the Party concerned states that projects affecting the environment and health are extensively regulated by Spanish and EC legislation (e.g., EIA and IPPC Directives).

46. The communicant alleges that, by denying free legal aid, the Party concerned made access to justice impossible for the communicant because of lack of resources and that it therefore failed to comply with article 9, paragraphs 1 and 5 of the Convention. The communicant argues that it is a small NGO with an extremely limited budget

(approximately 150 euros), and is heavily dependent on the voluntary contributions of its members. The communicant further explains that, because of its financial situation, it cannot be declared as a public utility/interest entity and thus cannot benefit from free legal aid. In addition, the communicant claims that the requirement of Spanish legislation for dual representation for cases on appeal (see para. 16 above) poses difficulties for individuals and entities with limited financial resources to pursue justice. In general, the communicant alleges that Law 1/1996 is outdated and should be amended to allow for small NGOs to benefit from legal aid.

47. The Party concerned claims that the existing system of legal aid is in compliance with article 9, paragraph 5, of the Convention. It asserts that the only financial requirement for NGOs, including small ones, is that members of NGO representative bodies do not receive public funds. The Party concerned believes that, not only has it considered the establishment of such financial assistance mechanisms, as provided by the Aarhus Convention, but it has a fully operational system to this effect. Also, on the requirement for dual legal representation, the Party concerned stresses that the rule of dual representation applies only to higher courts composed of more than one judge; and that, in any event, before pursuing judicial remedies, the public concerned have the possibility to seek review by the administrative authorities, which is entirely free of charge and does not require any legal representation or assistance.

48. On a final point, the Party concerned, in its letter dated 27 November 2009, stresses that according to the Spanish Constitution the activities carried out by the Almendralejo authorities are the sole responsibility of those authorities and that the central Government cooperates with them.

Use of domestic remedies

49. The communicant claims that recourse to justice was attempted twice, but its applications for free legal aid, as prescribed in Law 1/1996, were denied. Specifically, the first request for legal aid submitted by the communicant to the relevant authorities on 2 December 2008 was denied and the communicant appealed this decision before the court in Almendralejo. The Court, in its decision of 4 December 2008, rejected the appeal on the grounds that the legal requirements for provision of legal aid according to Law 1/1996 in conjunction with Law 27/2006 were not fulfilled (annex 15 to the communication). The second request was submitted to the relevant authorities and rejected on 29 July 2008. The communicant appealed against this decision of the authorities before the administrative court in Merida, which turned down the appeal on 23 December on the grounds that the organization could not derive any rights prescribed in Law 1/1996 and that the decision of the authorities on free legal aid did not infringe any constitutional rights of the organization (annex 16 to the communication).

50. The communicant also reported the Vinibasa case and the three thermal power stations to the Ombudsperson in Spain, who, in his letter dated 16 April 2009, said that investigations would start (annex 30 to the communication). The Ombudsperson did not find that the problem stemmed from a lack of public participation; however, he found there was serious pollution and inadequate administrative supervision (Annex 30).

III. Consideration and evaluation by the Committee

51. The Aarhus Convention was signed by Spain on 25 June 1998, ratified on 29 December 2004, published in the Spanish Official Journal on 16 February 2005 and entered into force for Spain on 29 March 2005. As mentioned above, on 18 July 2006, the

Government of Spain enacted Law 27/2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters.

52. The Committee notes that it is an obligation for the Government to ensure that all public authorities, central or regional, apply the provisions of the Convention and the relevant legislation.

53. The Committee recalls that in some cases it had decided to suspend consideration of a communication, pending decision by the national ombudsman (see, e.g., ACCC/C/2008/28 Denmark). The Committee, after having taken into account the diversity of the national legal systems and that the powers of the Ombudsperson under the Spanish system seem to be rather limited, decides to consider the present communication.

Access to information without stating an interest (art. 4, para. 1 (a))

54. The communicant provided information evidencing that in several instances it was denied access to information because the authorities said it did not have a sufficient interest to justify obtaining information (see paras. 20 and 25 above), which was denied by the Party concerned. However, the Committee has looked at the replies of the authorities provided by the communicant in its written submissions and concludes that they confirm the allegations of the communicant. Hence, the Committee finds that the public authorities failed to make the requested information available without an interest having to be stated and that the Party concerned therefore failed to comply with article 4, paragraph 1.

Access to information within one month (art. 4, para. 2)

55. The communicant provided evidence that on several occasions public authorities did not respond to its requests for access to information (see para. 24 above); or replied with great delay, i.e. in different instances five, two and four months, respectively, after the request (see paras. 20, 21 and 24 above). The Committee acknowledges that in several instances the public authorities did respond to the requests of the communicant within one month from the date of the request, and sometimes they required the physical presence of the communicant (see, e.g., paras. 32 and 33).

56. Although the Convention does not envisage a heavy workload as a justification for not meeting the deadlines for provision of environmental information or as one of the exceptions indicated by the Convention, nevertheless the Committee appreciates that in certain circumstances a temporarily heavy workload may cause some delays. In no circumstances, however, can it justify lack of any response at all to requests for information or providing it later than two months after the request.

57. The Committee is also of the opinion that, while in many instances, in particular where enjoyment of certain rights depends upon prior agreement of the public authorities, the silence of public authorities may be considered as “tacit agreement” and therefore an acceptable legal technique, the concept of “positive silence” cannot be applied in relation to access to information. The right to information can be fulfilled only if public authorities actively respond to the request and provide information within the time and form required. Even establishment of a system which assumes that the basic form of provision of information is by putting all the available information on publicly accessible websites does not mean that Parties are not obliged to ensure that any request for information should be individually responded to by public authorities, at least by referring them to the appropriate website.

58. Furthermore, the Committee would like to underline that article 4, paragraph 7, of the Convention specifically prohibits a Party from using the concept of “positive silence” for information requests. It provides that a “refusal of a request shall be in writing if the request was in writing [...] A refusal shall state the reasons for the refusal [...]”.

59. Therefore, the Committee finds that in most cases under consideration in the present communication, the Spanish authorities failed to make the information available as required by article 4, paragraph 2, of the Convention.

Access to information in the form requested (art. 4, para. 1 (b), in conjunction with art. 6, para. 6)

60. In the case of the oil refinery project, the Committee notes that the public authorities made the information available only in one location and that the physical presence of the requester was necessary (to access the data in the computers); that they did not allow for the digital copying of the information available on the computers in Merida; that they did not provide the information to the communicant in the form requested; and that they did not refer to any website or database where all this information would be available without charge to the communicant.

61. The Party concerned considers that having two fully operational computers at the location and posting the information on the website to be “sufficient and relevant” for article 6 purposes and that there is no need that the information be “brought to somebody’s house”. The Committee recognizes that article 6, paragraph 6, refers to giving “access for examination” of the information that is relevant to decision-making, but the Committee notes that article 4, paragraph 1, requires that “copies” of environmental information be provided. In the Committee’s view “copies” does, in fact, require that the whole documentation be close to the place of residence of the requester or entirely in electronic form, if the requester lives in another town or city. For these reasons, the Committee finds that the Party concerned failed to comply with article 6, paragraph 6, and article 4, paragraph 1 (b), of the Convention.

Reasonable timeframes and access to information (art. 6, paras. 3 and 6)

62. The Committee notes that public participation in decision-making for a specific project is inhibited when the conditions described by the communicant in the case of the oil refinery project are set by the public authorities. The Committee finds that, by requiring the public to relocate 30 or 200 kilometres, by allowing access to thousands of pages of documentation from only two computers without permitting copies to be made on CD-ROM or DVD, and by, in these circumstances, setting a time frame of one month for the public to examine all this documentation on the spot, the Spanish authorities failed to provide for effective public participation and thus to comply with article 6, paragraphs 6 and 3, respectively, of the Convention.

Anti-harassment (art. 3, para. 8)

63. The communicant alleged that it was insulted and harassed by local authorities in the mass media. The communicant provided copies of press articles in support of its allegation (see para. 29 above and annexes 8–10 to the communication). Also, the communicant stressed the weight such insults may have for the individual in a small community, compared to bigger cities, to the extent that the private life of the individual is seriously attacked and his/her job may be jeopardized. The Party concerned in general stated that such behaviour from the public authorities constitutes a criminal act, but did not specifically respond to the allegations.

64. The Committee finds that by insulting the communicant publicly in the local press and mass media for its interest in activities with potentially negative effects on the environment and health of the local population, the public authorities, and thus the Party concerned, failed to comply with article 3, paragraph 8, of the Convention.

Effective access to justice and not prohibitively expensive remedies (art. 9, paras. 4 and 5)

65. With regard to the requirements set by law for the provision of legal aid, the Committee examines the legal framework, provided both by the Party concerned and the communicant (see paras. 14-15 above) which, according to the communicant, impeded its efforts to seek justice in the courts.

66. The Committee notes that the present system of legal aid, as it applies to NGOs (see para. 15 above), appears to be very restrictive for small NGOs. The Committee considers that by setting high financial requirements for an entity to qualify as a public utility entity and thus enabling it to receive free legal aid, the current Spanish system is contradictory. Such a financial requirement challenges the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. The Committee finds that instituting a system on legal aid which excludes small NGOs from receiving legal aid provides sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. Thus, the Party concerned failed to comply with article 9, paragraph 5, of the Convention and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention.

67. In addition, with regard to the rule of dual representation (“abogado” and “procurador”; see para 16 above), for those seeking judicial review on appeal in Spain, the Party concerned did not oppose that this rule applies after the first instance (one judge). The Committee further notes that Spanish citizens therefore have to pay the fees for two lawyers after the first instance, and also the fees for the two lawyers of the winning party in the event that they lose their case (loser pays principle). The Committee observes that the Spanish system of compulsory dual representation may potentially entail prohibitive expenses for the public. However, the Committee does not have detailed information on how high the costs of the dual representation may be, while it recognizes that such costs may vary in the different regions of the country. The Committee therefore stresses that maintaining a system that would lead to prohibitive expenses would amount to non-compliance with article 9, paragraph 4, of the Convention.

IV. Conclusions and recommendations

68. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

69. The Committee finds that as a result of public authorities not making the requested information available unless an interest was stated on the part of the requester, the Party concerned failed to comply with article 4, paragraph 1, of the Convention (see para. 54 above).

70. The Committee finds that as a result of public authorities not responding or delaying response to requests for environmental information, and without notifying the requester that a one-month delay is needed along with reasons for that delay, the Party concerned was not in compliance with article 4, paragraph 2, of the Convention (see para. 59 above).

71. The Committee finds that the public authorities did not allow for access to information in the form requested, and did not provide copies, and as a result the Party

concerned failed to comply with article 4, paragraph 1 (b), in conjunction with article 6, paragraph 6, of the Convention (see para. 61 above).

72. The Committee also finds that public authorities set inhibitive conditions for public participation, and as a result the Party concerned failed to comply with article 6, paragraphs 3 and 6, of the Convention (see para. 62 above).

73. The Committee also finds that local authority officials insulted the communicant publicly in the local mass media for its interest in activities with potentially negative effects on the environment, and thus that the Party concerned failed to comply with article 3, paragraph 8 of the Convention (see para. 64 above).

74. Finally, the Committee finds that, by failing to consider providing appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO, the Party concerned failed to comply with article 9, paragraph 5, of the Convention, and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention (see para. 66 above); and also stresses that maintaining a system that would lead to prohibitive expenses would amount to non-compliance with article 9, paragraph 4, of the Convention (see para. 67 above).

B. Recommendations

75. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, 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 the Party concerned:

(a) To take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that the recommendations of the Committee in paragraph 119 (a) (ii) and (iii) of its findings for communication ACCC/C/2008/24 become effective;

(b) To ensure the implementation of recommendations of the Committee in paragraph 119 (a) (iv) of its findings for communication ACCC/C/2008/24;

(c) To change the legal system regulating legal aid in order to ensure that small NGOs have access to justice;

76. To examine the requirements for dual legal representation (“abogado” and “procurador”) for the court of second instance in the light of the observations of the Compliance Committee in paragraph 67 of the present document.