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Compliance Committee

Seventieth meeting
Geneva, 12–16 April 2021
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2014/122 concerning compliance by Spain

Adopted by the Compliance Committee on 17 December 2020

I. Introduction

1. On 12 December 2014, the non-governmental organization (NGO) International Institute for Law and the Environment (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure by Spain to comply with article 6 of the Convention in relation to the updating of integrated environmental permits.

2. Specifically, the communicant alleges that the Party concerned violated article 6 (2) and (10) of the Convention by failing to provide for public participation regarding the reconsideration and updating of permits for existing installations or installations with pending permit applications in order to comply with the requirements of the Industrial Emissions Directive (IED).[1]

3. At its forty-eighth meeting (Geneva, 24–27 March 2015), the Compliance Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7[2] of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 June 2015 for its response.

[1] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), *Official Journal of the European Union*, L 334 (2010), pp. 17–119.

[2] ECE/MP.PP/2/Add.8.

5. The Party concerned provided its response to the communication on 27 November 2015.

6. On 1 December 2017, the communicant provided additional information.

7. The Committee held a hearing to discuss the substance of the communication at its fifty-ninth meeting (Geneva, 11–15 December 2017), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee requested additional information from the Party concerned and invited it to respond in writing after the meeting.[3]

8. The Party concerned provided additional information on 14 December 2017.

9. By letter of 15 January 2018, the Committee requested further information from the Party concerned. The Party concerned sent its reply on 8 February 2018 though, due to a technical issue, this reached the secretariat only on 7 March 2018.

10. On 18 May 2020, the Committee sent a question to the Party concerned and communicant for their written reply. The communicant replied on 1 June 2020 and the Party concerned on 2 June 2020. On 8 June 2020, the Party concerned sent comments on the communicant's reply.

11. On 14 July 2020, the Committee requested additional information from the communicant, which submitted the requested information on 27 July 2020.

12. The Committee completed its draft findings through its electronic decision-making procedure on 21 August 2020. 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 the communicant on 26 August 2020. Both were invited to provide comments by 7 October 2020.

13. On 6 October 2020, the Party concerned provided comments on the draft findings and, on 8 October 2020, the communicant indicated that it had no comments.

14. At its virtual meeting on 17 December 2020, the Committee proceeded to finalize and adopt its findings in closed session, taking account of the comments received. The Committee agreed that they should be published as a pre-session document for its seventieth meeting (Geneva, 12–16 April 2021).

II. Summary of facts, evidence and issues[4]

A. Legal framework and relevant case law

European Union legislation

Adoption of the IED

15. Upon its adoption on 24 November 2010, the IED repealed and replaced a series of European Union directives, including the 2008 Directive on Integrated Pollution Prevention and Control.[5]

[3] ECE/MP.PP/C.1/2017/23, para. 29.

[4] 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.

[5] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, *Official Journal of the European Union*, L 24 (2008), pp. 8–29; and the communication, p. 1.

Transposition in the European Union member States and transitional provisions

16. Article 80 (1) of the IED requires that European Union member States transpose specific provisions of the IED by 7 January 2013 and apply those provisions from that same date.[6]

17. Article 82 (1) of the IED provides for the updating of permits for existing installations or permits applied for by 7 January 2013 for installations to be put into operation by 7 January 2014. It provides that:

> In relation to installations carrying out [certain activities listed in the Directive] which are in operation and hold a permit before 7 January 2013 or the operators of which have submitted a complete application for a permit before that date, provided that those installations are put into operation no later than 7 January 2014, member States shall apply the laws, regulations and administrative provisions adopted in accordance with article 80 (1) from 7 January 2014 with the exception of chapter III and annex V.[7]

18. In relation to large combustion plants, the transitional provision in article 82 (3) sets a deadline of 1 January 2016.[8]

Legislation of the Party concerned

19. At the time of the updates of the integrated environmental permits at issue in this case, the IED was implemented in the law of the Party concerned by Law 5/2013 of 11 June 2013,[9] which amended Law 16/2002 of 1 July 2002 on Integrated Prevention and Pollution Control.[10] In addition, Royal Decree 815/2013 of 18 October 2013 developed and implemented Law 16/2002.[11]

20. Most of the industrial activities listed in annex I to Law 16/2002 and Royal Decree 815/2013 are the same as those listed in annex I to the Convention.[12]

21. The reviewing of permits, as regulated in articles 16 and 25 of Law 16/2002, as amended by Law 5/2013, and Royal Decree 815/2013, included a public participation procedure.[13]

22. Law 5/2013 introduced transitional provisions into Law 16/2002 in order to transpose article 82 (1) of the IED into the latter law (see para. 17 above).[14]

23. Law 16/2002 and its amendments were consolidated through Royal Legislative Decree 1/2016 of 16 December 2016, which, on entering into force on 1 January 2017, repealed and replaced Law 16/2002. The wording of the first transitional provision of Royal Legislative Decree 1/2016 is identical to that of the first transitional provision of Law 16/2002.[15]

Updates of permits under the first transitional provision

24. The first transitional provision of Law 16/2002 related to the updating of permits for operating facilities authorized prior to 13 June 2013 and for facilities that had applied for the

[6] Communication, annex 1, p. 49.
[7] Ibid.
[8] Ibid., p. 50.
[9] Communication, pp. 1 and 2; and Party's response to the communication, p. 1.
[10] Communication, pp. 1 and 2.
[11] Ibid., p. 2.
[12] Ibid.
[13] Ibid., p. 7; and Party's response to the communication, p. 2.
[14] Communication, p. 3.
[15] Communicant's statement for hearing at Committee's fifty-ninth meeting, 14 December 2017, footnote 2; and Party's letter enclosing translated legal provisions, 7 March 2018, p. 3.

necessary authorizations and would start operation before 13 June 2014.[16] Updates of permits in accordance with this transitional provision were not subject to public participation.[17]

25. The preamble of Law 5/2013 stated that:

> To guarantee the adequate transposition of [the IED], … an update procedure for permits already granted is established as a transitional provision; through this procedure the competent authority shall check ex officio through a brief procedure the adequacy of the permits with the new [IED]. The deadline to update the permits is 7 January 2014. After the update of the existing permits, these shall be reviewed following the new conditions for its review as incorporated by this Law.[18]

26. Permits for large combustion plants were required to be updated by a later deadline of 31 December 2016.[19]

27. The first transitional provision of Law 16/2002 provided that:

> 1. The competent authority responsible for granting integrated environmental permits shall undertake the necessary actions to update said permits according to the provisions of [the IED], doing so before 7 January 2014.
>
> Subsequently, reviews shall be performed pursuant to articles 25.2 and 25.3 of this law ...
>
> 2. Pursuant to paragraph one of this Transitional Provision, any permits in force shall be considered to be updated when they contain explicit provisions concerning:
>
> a. Incidents and accidents, specifically regarding the obligations of the operators with respect to notifying the competent authority and the application of measures, even complementary measures, to limit the environmental consequences and to prevent other potential accidents or incidents;
>
> b. Breach of the conditions of integrated environmental permits;
>
> c. In the case of waste generation, application of the waste hierarchy established in article 4.1.b);
>
> d. If applicable, the report mentioned in article 12.1.f) of this law, which must be taken into account when closing the installation;
>
> e. The measures to be taken under other than normal operating conditions;
>
> f. If applicable, the monitoring requirements concerning soil and groundwater;
>
> g. The following, if the permit is for an incineration or co-incineration installation:
>
> i. The waste processed by the installation, enumerated in accordance with the European List of Waste; and
>
> ii. The emission limit values determined by regulations for this type of installations.
>
> These permits shall be published in the Official Gazette of the corresponding Autonomous Community, recording their compliance with [the IED].
>
> The general public has the right to access the update to integrated environmental permits, pursuant to Law 27/2006, of 18 July.
>
> 3. Permits that, on the date that this law enters into force, do not include the aforementioned provisions must be updated before 7 January 2014. The competent authority shall require that the operator provides evidence of their compliance with

[16] Communication, p. 3.
[17] Ibid., p. 5; and Party's response to the communication, p. 2.
[18] Communication, p. 4.
[19] Party's response to the communication, p. 4.

said provisions, which are necessary for the permit to be updated. Following this procedure, the updated integrated environmental permit shall be published in the Official Gazette of the Autonomous Community [concerned].

4. All facilities whose permits have been updated in accordance with the preceding paragraphs shall be subject to an inspection plan determined by regulations.[20]

28. Article 12.1.f of Law 16/2002, which transposed article 22 (2) of the IED, required a baseline report to be prepared before starting an activity or before the update of a permit, when the activity involved the use, production and emission of hazardous substances, taking into consideration the possibility of groundwater and soil contamination at the site of the facility.[21]

B. Facts

29. More than 6,000 permits were updated pursuant to the first transitional provision of Law 16/2002.[22] No public participation occurred with respect to any of these updating procedures.[23]

C. Substantive issues

Applicability of article 6 (1)

30. The communicant submits that the activities covered by Law 16/2002 are subject to article 6 (1) (a) of the Convention because annex 1 to both Law 16/2002 and Royal Decree 815/2013 list, in almost identical form, the activities listed in annex I of the Convention.[24]

31. The Party concerned does not comment on whether the activities covered by the Law 16/2002 fall under article 6 (1) (a) of the Convention.

Article 6 (2)

32. The communicant states that, while public participation should have been provided before the public authorities took the decisions updating the permits, the permits were only made available to the public by publication in the official gazette of the relevant Autonomous Community once they had been already been adopted, thereby breaching article 6 (2).[25]

33. The Party concerned does not comment on the communicant's allegations concerning article 6 (2).

Article 6 (10)

34. The communicant alleges that the first transitional provision of Law 16/2002 is not consistent with article 6 (10), because the public concerned, including NGOs such as the communicant, were automatically excluded from participating in the procedures to update existing permits pursuant to that provision. It submits that this is to be contrasted with the review of permits under articles 16 and 25 of Law 16/2002 and article 16.4 of Royal Decree 815/2013, which do include a public participation procedure.[26]

35. The communicant alleges that the updating of existing permits under the first transitional provision falls under article 6 (10) of the Convention. It claims that, in accordance with *The Aarhus Convention: An Implementation Guide*,[27] public participation is to be

[20] Party's letter enclosing translated legal provisions, 7 March 2018, pp. 3 and 4.
[21] Communication, p. 5.
[22] Reply by the Party concerned to a question from the Committee at the hearing at the fifth-ninth meeting (Geneva, 11–15 December 2017).
[23] Communication, p. 8.
[24] Ibid., p. 9.
[25] Ibid.
[26] Ibid., p. 7.
[27] United Nations publication, Sales No. E.13.II.E.3, p. 124.

guaranteed in all cases when the public authority reconsiders or updates operating conditions for article 6 activities.[28] It claims that the Implementation Guide clearly states that article 6 (10): "is triggered in the case of subsequent administrative procedures".[29] It submits that the updates under the first transitional provision were not "automatic" but rather entailed the addition of new conditions to the permit that can be understood as a review or adaptation of its operating conditions.[30]

36. The communicant submits that the nature, implications and significance of the operating conditions that were to be included through the permit update required the participation of the public concerned.[31]

37. The communicant refers in that regard to the Committee's findings on communication ACC/C/2009/43 (Armenia),[32] submitting that the updates at issue in the present case were, as in that case, "not a mere formality."[33] It further submits that the Committee's findings on communication ACCC/C/2009/41 (Slovakia)[34] support its claim that Parties do not enjoy full discretion as to whether it is appropriate to provide for public participation and that the term "where appropriate" has to be interpreted in the light of the Convention's goals.[35] It submits that the term "mutatis mutandis" implies that when comparing two or more cases or situations, necessary alterations may be introduced while not affecting the main point at issue. It notes that, according to the Implementation Guide, this term means "with the necessary changes".[36]

38. The Party concerned concedes that the updating procedures under the first transitional provision were not automatic updates.[37] It contends, however, that these updates were neither reconsiderations nor updates of the permit conditions ("reviews" and "adaptations" in the terminology of the Party concerned), but an updating of the permits by means of an addition of some provisions and minimum content.[38] The Party concerned states that: "The provision did not modify any technical condition of the permit already established, [such] as the emission limit values …, monitoring requirements or conditions for the minimization of long-distance or transboundary pollution."[39] It submits that the updates are thus distinguishable from the "revision of a permit", which may occur because the particularities of an installation change, such as in the case of an extension of its capacity, or of the entry into force of the Best Available Technology (BAT) Conclusion Document for the sector, and for which public participation is provided.[40]

39. The Party concerned claims that the cases in which public participation is "appropriate", and therefore required, for updates are already laid down in article 24 of the IED. It submits that updates under the first transitional provision of Law 16/2002 do not fall into this category, and that the IED does not foresee a public participation process for such updates.[41]

[28] Communication, pp. 10 and 11.
[29] Communicant's opening statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, para. 8.
[30] Ibid., para. 3.
[31] Communication, p. 8.
[32] ECE/MP.PP/2011/11/Add. 1, paras. 51 and 58.
[33] Communication, pp. 9 and 10; and communicant's opening statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, para. 4.
[34] ECE/MP.PP/2011/11/Add.3, paras. 53 and 55–57.
[35] Communication, pp. 9 and 10.
[36] Communicant's opening statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, para. 9, citing *The Aarhus Convention: An Implementation Guide*, second edition, p. 159.
[37] Party's response to the communication, p. 2.
[38] Party's statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, p. 4.
[39] Ibid.
[40] Party's response to the communication, p. 2.
[41] Ibid., and Party's statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, p. 5.

40. The Party concerned further asserts that article 24 of the IED has been adequately transposed into its domestic system.[42] It emphasizes that the European Commission provided no comments in relation to an improper transposition of the IED, including with respect to this transitional provision, when the Party concerned submitted the legislation designed for the transposition of the IED to the Commission.[43] Accordingly, the Party concerned submits that public participation in accordance with the Convention is guaranteed.[44]

41. The Party concerned states that the first transitional provision of Law 16/2002 was created in order to fulfil the obligations of the transitional provisions in article 82 of the IED (see para. 17 above) and to: (a) simplify the administrative burden of competent authorities; and (b) harmonize its legislation in the light of the different levels of environmental protection developed within the different autonomous communities at the time.[45] It adds that the first transitional provision thus enabled integrated permits to increase environmental protection and to be in line with the basic obligations of the IED.[46]

42. With respect to which provision of the IED each subparagraph of the first transitional provision transposes, the Party concerned states that:

(a) Subparagraph (a) of the first transitional provision transposes article 7 of the IED regarding measures to be taken in the event of an incident or accident significantly affecting the environment;

(b) Subparagraph (b) transposes article 8 of the IED concerning measures to be taken in the event of a breach of permit conditions;

(c) Subparagraph (c) transposes article 11 (1) (e) of the IED, which, inter alia, relates to taking the necessary measures to provide that installations are operated in accordance with the application of the waste hierarchy;

(d) Subparagraph (d) transposes article 11 (1) (h) of the IED, which requires that: "the necessary measures are taken upon definitive cessation of activities to avoid any risk of pollution and return the site of operation to the satisfactory state";

(e) Subparagraph (e) transposes article 14 (1) (f) of the IED, which requires that permits include: "measures relating to conditions other than normal operating conditions such as start-up and shutdown operations, leaks, malfunctions, momentary stoppages and definitive cessation of operations";

(f) Subparagraph (f) transposes article 14 (1) (b) and (e) of the IED, which require that permits include appropriate requirements for the regular maintenance and surveillance of measures taken to prevent emissions to soil and groundwater;

(g) Subparagraph (g) transposes article 45 (1) (a) of the IED, which imposes special permit conditions for waste incineration plants and waste co-incineration plants.[47]

43. The communicant concurs with the position of the Party concerned in relation to subparagraphs (a), (b), (e), (f) and (g) above. In its view, however, subparagraph (c) of the first transitional provision in fact transposes article 12 (1) (h) of the IED, which requires permit applications to include measures for the prevention, preparation for reuse, recycling and recovery of waste generated by the installation. Likewise, it submits that subparagraph (d) of the first transitional provision transposes article 12 (1) (e) of the IED, which requires that permit applications include, where applicable, a baseline report in accordance with article 22 (2) of the IED.[48]

[42] Party's response to the communication, pp. 2 and 3; and Party's letter enclosing translated legal provisions, 7 March 2018, p. 2.

[43] Party's response to the communication, p. 2; and Party's statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, p. 4.

[44] Party's response to the communication, p. 2.

[45] Party's statement at the hearing at the Committee's fifty-ninth meeting, 14 December 2017, p. 4.

[46] Ibid.

[47] Party's reply to Committee's question, 2 June 2020.

[48] Communicant's reply to Committee's question, 1 June 2020.

Case studies

44. To support its allegations that no public participation took place with respect to permits updated under the first transitional provision of Law 16/2002 and to show that public participation would have been "appropriate" in accordance with article 6 (10) of the Convention, the communicant refers to three case studies, as summarized below.[49]

Case study 1 – Pontevedra chlorine production facility

45. The communicant's first case study concerns a chlorine and derivates production facility in Pontevedra that was granted an environmental permit in 2008, renewed in 2011. The facility uses mercury in its production of chlorine, a technique that had to be withdrawn by 11 December 2017, in accordance with the provisions of the IED and the European Union Mercury Regulation.[50] The facility is located on public domain land and operates under an administrative concession that was due to end in July 2018. By a resolution of 17 December 2013, the Secretary General on Environmental Quality and Assessment of the Autonomous Community of Galicia updated the environmental permit on the basis of the first transitional provision of Law 16/2002.[51] In addition to applying the first transitional provision, the update modified other conditions of the permit, specifically: (a) a condition that established 6 January 2014 as the end date of the validity of the permit was withdrawn; (b) 31 December 2016 was established as the date to initiate the procedure to close and dismantle the facility; and (c) an annex was added to the permit with further conditions related to accidents and incidents, failing to comply with the permit's other conditions, implementation of the waste hierarchy, conditions in the event of anomalous functioning and conditions for the definitive cessation of the activity.[52]

46. The communicant submits that the Pontevedra chlorine production facility is an activity listed under paragraph 4 (a) of annex I to the Convention.[53] The communicant points out that, in addition to applying the first transitional provision of Law 16/2002, the update resulted in the change of a number of the permits conditions (see para. 45 above).[54] The communicant further submits that, even though the baseline report required under paragraph 2 (d) of the first transitional provision of Law 16/2002 indicated the presence of mercury and hydrocarbons above reference levels in groundwater and soil, the updated permit only included very broad and general conditions copied from other updated permits, rather than specific requirements concerning this contamination. The communicant submits that, given the dimension of the identified pollution, public participation in the procedure updating the permit would have contributed to ensuring that the public concerned had access to relevant information regarding the inclusion of stricter conditions in the updated permit.[55]

47. The Party concerned does not deny that the public had no opportunity to participate in the decision-making on the permit update for the Pontevedra plant adopted on 17 December 2013. It submits, however, that the Pontevedra facility's permit was subject to a further updating process in 2017 in order to take into account developments in the BAT conclusions for the production of chlor-alkali. It states that the 2017 review coincided with the deadline for the cessation of chlorine production at the facility and the permit conditions on soil and groundwater monitoring were accordingly updated to adapt them to the dismantling procedure. It submits that the 2017 update included a public participation procedure meeting the requirements of the Convention.[56]

[49] Additional information from the communicant, 1 December 2017, p. 1.

[50] Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008, *Official Journal of the European Union*, L 137 (2017), pp. 1–21.

[51] Additional information from the communicant, 1 December 2017, p. 2.

[52] Ibid.; and permit update for the Pontevedra chlorine production facility, provided by the communicant on 27 July 2020, p. 5.

[53] Additional information from the communicant, 1 December 2017, p. 2.

[54] Ibid., p. 3.

[55] Ibid.

[56] Party's comments on the Committee's draft findings, 6 October 2020, paras. 6–11.

Case study 2 - Soto de Ribera combustion plant

48. The communicant's second case study relates to the Sota de Ribera combustion plant in the Autonomous Community of Asturias.[57] By a resolution of 16 July 2015, the Regional Ministry of Development, Land Planning and Environment of the Principality of Asturias updated the permit of the combustion plant.

49. The communicant submits that the Sota de Ribera plant falls under part 1 of annex I to the Convention, as it is "a combustion installation with a heat input of 50 [megawatts] or more."[58]

50. The communicant further submits that, despite the clear requirement in paragraph 2 (e) of the first transitional provision that the permit be updated to include measures to be applied in the event of anomalous operating conditions, the phrasing of the resolution updating the permit was unclear as to whether the operator was actually required at the time the permit update was granted to have in place a plan concerning the measures to be applied in such events. The communicant submits that such plans are intended to avoid or minimize damage to the environment and people's health in the event of anomalous functioning of the plant. Given this, the communicant claims that public participation in the updating procedure was needed in order to ensure that the public concerned had access to this information that was relevant for the decision-making and to guarantee that such a plan was, in fact, in place prior to the update of the permit. It further submits that the baseline report annexed to the updated permit indicated the presence of petroleum hydrocarbons above the threshold permitted under the law of the Party concerned, thus requiring an evaluation of environmental risks. The communicant asserts that the public concerned should thus have been informed of the potential risk to human health and had access to this documentation prior to the granting of the permit.[59]

51. The Party concerned did not comment on the communicant's second case study.

Case study 3 - Bunol cement production plant

52. The communicant's third case study concerns a resolution of 16 December 2013 of the Director General for Environmental Quality of the Autonomous Community of Valencia, which updated the permit of a cement production installation located less than 2 km from the municipality of Bunol. On 10 November 2014, the resolution was itself amended to include an update of permit conditions relating to emission limit values.[60]

53. The communicant submits that the activity in its third case study meets the thresholds established in paragraph 3 (1) of annex I to the Convention for cement production, and the provisions regarding waste management in paragraph 5 (1) and (2) of that annex.[61]

54. The communicant states that section 2 (g) of the first transitional provision required an update of the permit conditions regarding emission limit values by 7 January 2014, but in the case of the Bunol cement plant this update was only included in the amendment of 10 November 2014, making it 10 months late.[62] It submits that this delay led to higher nitrogen oxides emissions in that period, with likely negative effects on the environment and the health of the local population. It claims that public participation could have contributed to prevent this omission in the original update of 16 December 2013.[63] The communicant alleges that the 10 November 2014 amendment also granted the operator a temporary derogation to comply with the emission limit values for nitrogen oxide from November 2014 to August 2015 to enable the testing of emerging techniques in the plant. The communicant submits that this is the maximum period allowed under the IED. The communicant claims that public participation concerning this amendment could have contributed to more information on the

[57] Additional information from the communicant, 1 December 2017, p. 4.
[58] Ibid.
[59] Ibid., pp. 4 and 5.
[60] Ibid., pp. 5 and 6.
[61] Ibid., p. 5.
[62] Ibid.
[63] Ibid., pp. 5 and 6.

derogation request procedure and helped evaluate the conditions under which the derogation was granted, such as the period of its duration.[64]

55. The Party concerned does not comment on the communicant's third case study.

Public participation in the preparation of Law 5/2013

56. The Party concerned states that it provided for public participation in the preparations leading to the adoption of Law 5/2013. It claims that the draft bill was made available online for one month between 9 May and 9 June 2011 and that comments were received, compiled and examined.[65]

57. The Party concerned concedes that the text of the bill at that stage did not include any transitional provisions. It submits, however, that the aspects related to the revision and update of permits were already included in article 25 of the draft bill made publicly available on the Ministry's website, as well as in article 26 of the subsequent version of the draft bill sent to an advisory council. The Party concerned submits that, while the drafting differed from the final version of the first transitional provision, the content of the draft bills already set a transitional period, and in later versions of the draft bill, this text was included in the first transitional provision. It submits that article 26 (1) of the draft bill set a transitional period due to the fact that the bill's content refers to a concrete fact, i.e. permits granted before Law 5/2013 entered into force, and to a precise period of time, i.e. before 7 January 2014 (or 31 December 2016 for large combustion plants). The Party concerned states that no submissions were received from the communicant concerning article 26 (1) of the draft bill during the commenting process.[66]

Article 3 (1)

58. The communicant claims that, by adopting the first transitional provision, the Party concerned did not: "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", as required by article 3 (1) of the Convention.[67]

59. The Party concerned does not comment on the communicant's allegation concerning article 3 (1).

D. Domestic remedies

60. The communicant alleges that, in accordance with article 25 of Law 29/1998 of 13 July 1998 on the Administrative Judicial Review Procedure, the public can only challenge administrative acts and omissions, as well as regulations and normative acts not having the status of a "law" before the administrative courts. The communicant submits that because the procedure for updating permits was introduced by way of Law 5/2013, administrative judicial review was not possible. Moreover, the communicant submits that laws can only be challenged before the Constitutional Court when they contravene the Constitution of the Party concerned, and by specified individuals and bodies, which do not include the communicants. It submits there were accordingly no domestic remedies available.[68]

61. The Party concerned did not comment on the admissibility of the communication.

[64] Ibid., p. 6.
[65] Party's response to the communication, p. 3.
[66] Ibid., p. 4.
[67] Communicant's opening statement delivered at the Committee's fifty-ninth meeting, 14 December 2017, para. 11.
[68] Communication, p. 11.

III. Consideration and evaluation by the Committee

62. Spain deposited its instruments of ratification on 29 December 2004 and the Convention entered into force for Spain on 29 March 2005.

Admissibility

63. The communicant submits that no domestic remedies were available with respect to the matters addressed in its communication, and the Party concerned has not challenged the communication's admissibility. The Committee finds the communication to be admissible.

Scope of consideration

64. The Committee notes that, since 1 January 2017, integrated environmental permits are regulated in the Party concerned by Royal Legislative Decree 1/2016, which upon its entry into force on that date replaced and repealed Law 16/2002. The first transitional provision of Royal Legislative Decree 1/2016, on the updating of integrated environmental permits, is identical to the first transitional provision of Law 16/2002. However, at the time of the permit updates at issue in this case the applicable law was still Law 16/2002, since the updating of integrated environmental permits under the first transitional provision was required to be completed by 7 January 2014, and 31 December 2016 in the case of large combustion plants. The Committee will thus refer to the first transitional provision of Law 16/2002 throughout these findings.

65. The Party concerned contends that the communicant did not submit comments during the public consultation process on article 26 (1) of the then-draft Law 5/2013 (see para. 57 above). The Committee makes it clear that whether the communicant submitted comments during the preparation of draft legislation is entirely irrelevant to whether or not the Party concerned complies with its obligations under the Convention with respect to decision-making on specific activities carried out under that legislation once enacted.[69]

66. At the hearing to discuss the substance of the communication, the communicant introduced a new allegation that, through its adoption of the first transitional provision, the Party concerned had failed to comply with article 3 (1) of the Convention.[70] Since the allegation was only raised at the hearing for the first time, the Party concerned did not have a proper opportunity to prepare its reply to this allegation. The Committee will thus not consider this allegation further in this case.

67. The Committee notes that the communicant does not ask the Committee to make specific findings regarding its three case studies and the Committee will not do so. The Committee considers that the case studies may nonetheless inform its evaluation of the communicant's allegations, which are systemic in nature, as illustrative examples.

68. Lastly, the Committee considers the communicant's allegation regarding article 6 (2) not as a stand-alone issue, but rather in its examination of article 6 (10), as laid out below.

Applicability of article 6 (10)

Activities referred to in article 6 (1)

69. Article 6 (10) of the Convention only applies to activities subject to article 6 (1) of the Convention. The communicant submits that annex 1 to Law 16/2002 lists, in almost identical form, the activities listed in annex I to the Convention, and is thus subject to article 6 (1) (a) of the Convention. This does not appear to be disputed by the Party concerned. The Committee will thus examine the compliance of the Party concerned with respect to those activities in annex I of Law 16/2002 that fall under the scope of article 6 (1) of the Convention.

[69] See also ECE/MP.PP/C.1/2020/8, para. 106.

[70] Communicant's opening statement for hearing at the Committee's fifty-ninth meeting, 14 December 2017, para. 11.

Reconsideration or update of operating conditions

70. The Committee next considers whether the updating of permits carried out under the first transitional provision of Law 16/2002 should be seen as "reconsiderations or updates of the operating conditions" of the permitted activities within the meaning of article 6 (10) of the Convention.

71. Pursuant to paragraph 3 of the first transitional provision, permits that, on the date that the first transitional provision entered into force, did not address the matters listed in paragraph 2 of the first transitional provision were required to be updated before 7 January 2014. Permits for large combustion plants had to be updated by 31 December 2016.

72. The matters listed in paragraph 2 of the first transitional provision (see para. 27 above) are:

(a) Incidents and accidents, specifically regarding the obligations of the operators with respect to notifying the competent authority and the application of measures, even complementary measures, to limit the environmental consequences and to prevent other potential accidents or incidents;

(b) Breach of the conditions of integrated environmental permits;

(c) In the case of waste generation, application of the waste hierarchy established in article 4.1.b);

(d) If applicable, the report mentioned in article 12.1.f) of this law, which must be taken into account when closing the installation;

(e) The measures to be taken under other than normal operating conditions;

(f) If applicable, the monitoring requirements for soil and groundwater;

(g) The following, if the permit is for an incineration or co-incineration plant:

(i) The waste processed by the installation, enumerated in accordance with the European Waste List; and

(ii) The emission limit values determined by regulations for this type of installations.

73. Based on the explanation provided by the Party concerned (see para. 42 above), it appears to the Committee that all the matters listed in the second paragraph of the first transitional provision of Law 16/2002 constitute conditions for the activity's operation. On this point, the Committee notes that, for the purposes of article 6 (10), an activity's "operating conditions" include all the conditions in the permit and not just the technical or functioning conditions affecting the production process.[71] Pursuant to paragraph 1 of the first transitional provision, competent authorities were required to check the conditions of existing permits, to evaluate whether they already addressed the matters set out in paragraph 2 of the first transitional provision and, where they did not, to update the permits so that they indeed did so. The Committee makes clear that this process was thereby a reconsideration and, where applicable, an update within the meaning of article 6 (10).

74. The Party concerned was accordingly required by article 6 (10) of the Convention to ensure that the provisions of article 6 (2)–(9) were applied "mutatis mutandis" and "where appropriate" to the updating of existing permits under the first transitional provision of Law 16/2002. The Committee considers the meaning of these terms below.

Mutatis mutandis

75. As the Committee held in its findings on communications ACCC/C/2014/104 (Netherlands),[72] ACCC/C/2013/107 (Ireland),[73] and ACCC/C/2014/121 (European Union),[74] the reference in 6 (10) to "mutatis mutandis" simply means "with the necessary changes". In

[71] See Party's comments on Committee's draft findings, 6 October 2020, para. 5.

[72] ECE/MP.PP/C.1/2019/3, para. 70.

[73] ECE/MP.PP/C.1/2019/9, para. 82.

[74] ECE/MP.PP/C.1/2020/8, para. 96.

other words, when applying the provisions of paragraphs 2 to 9 of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority applies those paragraphs with the necessary changes.[75] Rather than conveying some discretion for the Parties on whether or not to apply these provisions, it refers to the changes necessary due to the nature of the given decision-making procedure.

Where appropriate

76. The Committee has previously found that the phrase "where appropriate" does not imply complete discretion for a Party to determine whether or not it was appropriate to provide for public participation.[76] Rather, the clause "where appropriate" introduces an objective criterion to be applied in line with the goals of the Convention, recognizing that: "access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns",[77] and "aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment".[78] Most importantly, the clause "where appropriate" does not preclude a review by the Committee on whether the Party concerned should have provided for public participation in the particular case.[79]

77. This does not mean that the Committee shares the communicant's view that public participation should be guaranteed in all cases where the public authority reconsiders or updates the operating conditions for activities listed in annex I to the Convention. The question is rather whether the Party concerned was within its margin of discretion as to what was "appropriate" when it decided not to provide for public participation with respect to the reconsideration and possible update of the permits' conditions.

78. The Committee considers that, when determining whether it will be "appropriate", and thus required, to provide for public participation meeting the requirements of article 6 (2)–(9) when a public authority reconsiders or updates the operating conditions of an activity subject to article 6, some kind of significance test, to be applied to each such decision-making procedure in question, is the most appropriate way to understand the requirements of the Convention.[80]

79. The Committee recalls that in its findings on communication ACCC/C/2006/17 (European Community), it found that:

> If…there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the [activity's] basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.[81]

80. As it made clear in its findings on communication ACCC/C/2014/121 (European Union),[82] the Committee considers the above finding pertinent to the case of a reconsideration or update of an activity's operating conditions also. Specifically, if the reconsideration or update of an activity's operating conditions is capable of significantly changing the basic parameters of the activity or will address significant environmental aspects of the activity not already covered by the permitting decision, and no public participation process meeting the

[75] ECE/MP.PP/C.1/2019/3, para. 70; and *The Aarhus Convention: An Implementation Guide*, second edition, p. 159.

[76] ECE/MP.PP/2011/11/Add.3, para. 55; ECE/MP.PP/C.1/2019/3, para. 71; and ECE/MP.PP/C.1/2020/8, para. 97.

[77] Convention, ninth preambular paragraph.

[78] Ibid., tenth preambular paragraph; and ECE/MP.PP/2011/11/Add.3, para. 56.

[79] ECE/MP.PP/2011/11/Add.3, para. 56; and ECE/MP.PP/C.1/2020/8, para. 97.

[80] ECE/MP.PP/2008/5/Add.10, para. 43; and ECE/MP.PP/C.1/2020/8, para. 99.

[81] ECE/MP.PP/2008/5/Add.10, para. 43.

[82] ECE/MP.PP/C.1/2020/8, para. 101.

requirements of the Convention is foreseen, this would not meet the requirements of the Convention.

81. The Committee's findings on communication ACCC/C/2014/104 (Netherlands) provide further guidance as to how the words "as appropriate" in article 6 (10) should be applied in practice. In those findings, which concerned a reconsideration and update of the duration of a nuclear power plant, the 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 duration to be subject to the provisions of article 6".[83] The Committee considers that a similar test should be applied whenever a public authority reconsiders or updates an activity's operating conditions.[84]

82. Accordingly, and as the Committee held in its findings on communication ACCC/C/2014/121 (European Union),[85] when a public authority reconsiders or updates the operating conditions for an activity subject to article 6 of the Convention, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate" and thus required. It would be for a Party to demonstrate to the Committee that any possible change in the activity's parameters would neither be capable of significantly changing the basic parameters of the activity nor address significant environmental aspects of the activity.

83. In its findings on ACCC/C/2014/121 (European Union), the Committee also made clear that it is not the actual outcome of the reconsideration or the update that is determinative of whether public participation should be carried out.[86] 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. In this regard, the scope of when public participation is to be considered "appropriate" must be even more limited if the update of the operating conditions may itself have a significant effect on the environment.[87] However, it is not decisive whether the operating conditions of the activity will indeed ultimately be updated or will in fact have significant environmental effects. 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 the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity.[88]

Whether public participation in the update of permits under the first transitional provision was "appropriate" and thus required

84. With the above case law in mind, the Committee examines below whether it was indeed appropriate, and thus required, to have provided for public participation in the permit updates described in the communicant's case studies. If public participation would have been appropriate for any of the permit updates described in those examples, then the fact that the Party concerned did not make any provision at all for public participation in the updating process carried out under the first transitional provision would amount to non-compliance with article 6 (10) of the Convention.

85. With respect to the communicant's first case study, the Committee notes that a chlorine production facility is an activity listed in paragraph 4 (b) (i) of annex I to the Convention. The Pontevedra chlorine production facility is thus an activity subject to the requirements of article 6 of the Convention, including article 6 (10).

[83] ECE/MP.PP/C.1/2019/3, para. 71.
[84] ECE/MP.PP/C.1/2020/8, para. 102.
[85] Ibid., para. 103.
[86] Ibid., para. 104.
[87] ECE/MP.PP/C.1/2017/17, para. 85; and ECE/MP.PP/C.1/2019/3, para. 71.
[88] ECE/MP.PP/C.1/2020/8, para. 104.

86. The Committee observes that, during its 2013 update, two types of updates were made to the permit conditions of the Pontevedra chlorine production facility:

(a) Updates in order to implement the requirements in paragraph 2 of the first transitional provision;

(b) Other updates to the permit's condition made at the same time as the updates made to implement the first transitional provision.

The Committee examines each of these below.

Updates to implement the requirements of the first transitional provision

87. As noted in paragraph 73 above, the Committee considers that any reconsideration or update of a permit to address the matters listed in paragraph 2 of the first transitional provision is an update within the meaning of article 6 (10) of the Convention.

88. As is evident from the fifth and seventh clauses of the permit update for the Pontevedra chlorine production facility,[89] in order to meet the requirements of paragraph 2 of the first transitional provision, an annex was added to the facility's permit inserting new conditions related to accidents and incidents, a failure to comply with the conditions in the environmental permit, the implementation of the waste hierarchy, conditions in the event of anomalous functioning and conditions for the definitive cessation of the activity.[90]

89. Paragraph 2 (f) of the first transitional provision required permits to be updated to include: "if applicable, the monitoring requirements for soil and groundwater". The communicant states that the baseline report for the Pontevedra plant required under paragraph 2 (d) of the first transitional provision identified levels of mercury and hydrocarbons in the groundwater and soil above the reference levels. This has not been refuted by the Party concerned. Paragraph 2 (f) thus required the public authority to decide what, if any, monitoring requirements for soil and groundwater should be inserted into the permit in the light of the elevated levels of mercury identified in the baseline report.

90. In this regard, the Committee notes that clause 6 of the permit update for the Pontevedra chlorine production facility states that: "In order to comply with article 12.1.f), both the content of the integrated environmental permit and all the available information on soil and groundwater related to this installation were analysed, and the information is considered sufficient".[91] The Committee considers that clause 6 confirms that the public authority considered whether, in the light of the outcomes of the baseline report, additional monitoring requirements for soil and groundwater should be inserted into the permit and it decided that nothing further was required.

91. Mercury is a highly toxic heavy metal. The level of mercury released by an activity, and the possibility of any resulting soil and groundwater contamination, is thus a significant environmental aspect of that activity. In deciding what, if any, monitoring requirements should be inserted into the permit under paragraph 2 (f) of the first transitional provision in the light of the elevated levels of mercury identified in the baseline report, the public authority thus had to address a significant environmental aspect of the Pontevedra chlorine production facility.

92. On this point, in its findings on ACCC/C/2014/121 (European Union), the Committee held that, if the reconsideration or update of an activity's operating conditions would either be capable of significantly changing the basic parameters of the activity or would address significant environmental aspects of the activity not already covered by the permitting decision, and no public participation process meeting the requirements of the Convention was foreseen, this would not meet the requirements of the Convention. In those findings, the Committee also made clear that it is not the actual outcome of the reconsideration or the update that is determinative of whether public participation should be carried out. Likewise,

[89] Permit update for the Pontevedra chlorine production facility, provided by the communicant on 27 July 2020, pp. 2 and 3.

[90] Ibid., pp. 4–6.

[91] Ibid., p. 3.

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.[92]

93. In line with the above findings, the Committee considers that since the 2013 update of the permit for the Pontevedra plant under paragraph 2 (f) of the first transitional provision required the public authority to address a significant environmental aspect of the plant's activity, namely the elevated level of mercury and the possibility of resulting soil and groundwater contamination, it was appropriate, and thus required, for the public authority to provide for public participation in that update.

94. The fact that, in 2017, the permit for the Pontevedra plant would again be updated, this time to take into account developments in the BAT conclusions, in no way alters the fact that, at the time the public authority carried out the 2013 update, it was appropriate, and thus required, for it to provide for public participation.

Other updates to the permit for the Pontevedra plant made at the same time

95. At the same time as updating the Pontevedra plant's permit to meet the requirements of the first transitional provision, the competent public authority deleted the condition in the permit setting 6 January 2014 as the end date of the activity, and inserted a new condition establishing 31 December 2016 as the date to initiate the procedure to close and dismantle the facility, 31 August 2017 as the cessation date for the production of liquid chlorine and 31 October 2017 for the production of hydrochloric acid and sodium hypochlorite.[93]

96. As noted in paragraph 81 above, in its findings on communication ACCC/C/2014/104 (Netherlands) the 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 duration to be subject to the provisions of article 6."[94] It is clear that the extension of an activity's permitted duration for more than two years is not just a minimal time. It was therefore appropriate, and thus required, to provide for public participation in the decision to extend the end date of the Pontevedra plant.

97. The fact that, in 2017, four years after the duration of the activity was extended without public participation, a public participation procedure was carried out regarding the updating of the permit to take into account developments in the BAT conclusions in no way changes the fact that public participation should have already been carried out prior to the decision to extend the duration of the permit in December 2013.

Concluding remarks regarding article 6 (10)

98. In the light of the above, the Committee concludes that at least in some cases, such as the 2013 update of the permit for the Pontevedra chlorine production facility examined in paragraphs 85–97 above, public participation was "appropriate" and thus required. Accordingly, by excluding any possibility for public participation in relation to reconsiderations and updates of permits under the first transitional provision of Law 16/2002, the Party concerned failed to comply with article 6 (10) of the Convention.

99. The Committee does not exclude that there may have been permits updated under the first transitional provision for which public participation under article 6 (2)–(9) of the Convention was not required. However, the Committee finds that, by putting in place a legal framework that did not envisage any possibility for public participation in relation to reconsiderations and updates under the first transitional provision of Law 16/2002, the Party concerned failed to comply with article 6 (10) of the Convention

100. The first transitional provision required all then-existing integrated environmental permits to be updated by 7 January 2014, and for large combustion plants, by 31 December 2016. The communicant has not alleged that any of those permits remain to be updated, albeit long after the first transitional provision's stipulated deadlines. The communicant likewise

[92] ECE/MP.PP/C.1/2020/8, paras. 101 and 104.

[93] Permit update for the Pontevedra chlorine production facility, provided by the communicant on 27 July 2020, p. 4.

[94] ECE/MP.PP/C.1/2019/3, para. 71.

does not allege that the reconsideration or updating of permits under any other provision of Law 16/2002 or Royal Legislative Decree 1/2016 fail to comply with article 6 (10) of the Convention. Bearing in mind these circumstances, the Committee refrains from making any recommendations in this case.

IV. Conclusions

101. The Committee finds that, by putting in place a legal framework that did not envisage any possibility for public participation in relation to reconsiderations and updates under the first transitional provision of Law 16/2002, the Party concerned failed to comply with article 6 (10) of the Convention. Bearing in mind the circumstances outlined in paragraph 100 above, the Committee refrains from making any recommendations in this case.