

# Communication to the Aarhus Convention Compliance Committee

## I. Information on correspondent submitting the communication

### 1. **Fundação Montescola**

Froxán n.º 5, Lousame 15212, A Corunha, Galiza (Kingdom of Spain)  
(+34) 622312831 | [info@montescola.org](mailto:info@montescola.org)

Contact person authorized to represent the organization: Xoan Evans Pin, Director

## II. Party concerned

2. Portugal

## III. Facts of the communication

3. *Fundação Montescola* is a non-profit NGO established through notary deed on 24/12/2018. Its main goal is the “defence of the environment” as stated in the Decision published in the Official State Gazette of 06/07/2020.<sup>1</sup>
4. In May 2020 Savannah Lithium Limitada (subsidiary of Savannah Resources) delivered to the Portuguese Environment Agency (APA) an Environmental Impact Study and associated documentation for the “Mina do Barroso” (C-100). The Barroso mine project foresees the open pit exploitation of a number of contiguous lithium deposits, the largest of which will be 600 by 500 meters and 150 meters deep, extracting 27 million tons of rock. Although the nearest homes are just 200 meters away from the granted area, the local population of Covas do Barroso has repeatedly requested in writing but been denied information on the ongoing environmental procedures and foreseen impacts. The project lies within a UN-FAO designated Globally Important Agricultural Heritage Systems Site.
5. On 07/01/2021 Montescola made an environmental information request to APA requesting a copy of “*a) Documents of the 2020 Environmental Impact Study (EIS), with all the additional documentation required by APA and other Administrations; b) 2020 Mine Exploitation Plan; and c) reports and requisitions issued by the Administration in regards to the documentation presented by Savannah Lithium Limitada*”. The rationale behind the request was: **a)** that the 30 day public consultation that would eventually be called to examine some of the requested documents would be insufficient to consider very complex technical projects for which external independent assessment would be sought by Montescola; **b)** that during the public consultation particularly important documents generated during the EIA process (including reports highlighting deficiencies of the project and its documentation) would not be made public, and thus could not be used by claimants in that process; and **c)** that several Portuguese citizens and residents had attempted to gain access to this same information without success, generating uncertainty and frustration. The local municipality also requested but was not provided this information.

---

<sup>1</sup> [https://www.boe.es/diario\\_boe/txt.php?lang=en&id=BOE-A-2020-7340](https://www.boe.es/diario_boe/txt.php?lang=en&id=BOE-A-2020-7340)

6. The Portuguese transposition Law of the Aarhus Convention provisions on access to environmental information (Law no. 26/2016 of 22 August 2016, **ANNEX 1**<sup>2</sup>) establishes that:

*1 – Within a time limit of ten days, the entity to which a request for access to an administrative document has been addressed must:*

- a) Communicate the date, place and manner on and in which consultation can be undertaken, if requested;*
- b) Issue the reproduction or certificate that has been requested;*
- c) Communicate in writing the reasons for wholly or partially refusing access to the document, as well as what guarantees are available to the applicant in terms of the ability to bring an administrative or litigious appeal against that decision, namely by lodging a complaint with CADA and by issuing a judicial summons to the entity to which the request was made;*
- d) Inform that it does not possess the document, and if it knows which entity does hold it, send the request to the latter and inform the applicant accordingly;*
- e) Set out any doubts it has about the decision it is required to take to CADA, in order for the latter entity to issue an opinion.*

(CADA refers to Portugal’s Commission on Access to Administrative Documents, an independent administrative entity that operates under the aegis of the Portuguese Parliament.) APA only issued a response on 08/03/2021, **50 days after the legal time limit had expired**. This is in breach of the Aarhus Convention, Article 4, para. 2 and para. 7.

7. On 08/03/2021 Montescola received an email response from the Secretariat of the Department of Environmental Assessment of APA with a decision from the Director of Environmental Assessment of APA. The decision argued that part of the requested documents would eventually be publicly released as part of the Environmental Impact Assessment 30-day public consultation process and that it is was at that point that Montescola would be notified. The response noted that “*the environmental impact assessment (EIA) procedure in question (EIA No. 3353 concerning the Barroso Mine expansion project), is still in progress (...) the Evaluation Committee (...) continues with its technical appraisal, while the EIA authority, for its part, will promote the publicity and dissemination of the EIA procedure, initiating the public consultation (...). For the purpose of consultation and public participation, the documentation submitted by the proponent is expected to be made available [during public consultations]*”. Use of national remedies to contest this decision is presented below. The Aarhus Convention, Article 4 does not allow this ground for withholding *any* much less *all* of the requested information held by an agency, and the APA’s failure to provide the requested information is in breach of Article 4, para. 1.
8. In the face of APA’s refusal to provide the information, Montescola submitted a written request for information with the Directorate General of Geology and Energy (DGEG), which held the same information, making on 14/03/2021 an essentially identical request as that made to APA in 07/01/2021.
9. On 19/03/2021 Montescola received an email response from the Secretariat of the Directorate of Geological Resources Promotion and Strategy Services (DSEF-RG) simply stating that: “*In response to your email of 14/3/2021 that deserved our best attention, we inform that you should consult directly the website of the Portuguese Environment Agency at [www.apambiente.pt](http://www.apambiente.pt)*,”

---

<sup>2</sup> [https://www.parlamento.pt/sites/EN/Parliament/Documents/Lei26\\_2016.en.pdf](https://www.parlamento.pt/sites/EN/Parliament/Documents/Lei26_2016.en.pdf)

*where you will find the information made available under the environmental procedure.*” Such a response was not only inaccurate (the information was not available in APA’s website) but in breach of Law no. 26/2016 of 22 August 2016, article 15, para. 1, letter d). Use of national remedies to contest this decision is presented below. This failure to provide information held by the agency is in breach of the Aarhus Convention, Article 4, para. 1.

10. Also on 14/03/2021 Montescola submitted a written request for information with the Norte Regional Coordination and Development Commission (CCDR-N) covering the same documents as the request sent to DGEG.
11. On 22/03/2021 the Director of Environmental Services of CCDR-N issued a response indicating that due to “*difficulties in our document management system for exporting documents, and the large volume of documents that are part of the said process (...) it is noticed that the information requested by you will be sent by April 16, 2021*”.
12. However, on 08/04/2021, as the send-by-date was approaching, CCDR-N sent a new communication indicating that the earlier 22/03/2021 response had been a mistake and that access to the requested documents could not be allowed based on the same argument provided by APA: access would happen during public consultations. As in the case of APA, CCDR-N’s claim for withholding *all* of the requested information in its possession is not allowed under the Aarhus Convention, and CCDR-N’s action is in breach of Article 4, para. 1.
13. On 21/03/2021 Montescola made an additional request to the APA to be acknowledged as an “interested party” to the EIA procedure (CPA, Articles 65 and 68), on the basis of the “diffuse interest” of environmental protection. Article 83 CPA explicitly acknowledges the right of “interested parties” in a given procedure to have access to its documents, and such access was reiterated on that basis in this new 21/03/2021 request. No response has been received. As in the case of Montescola’s information request to APA submitted on 07/01/2021, APA has again exceeded the time limit for responding provided under Portuguese law and the Aarhus Convention.
14. On 22/03/2021 Montescola made a request to Savannah Resources of the same documents on the basis of the company’s stated “commitment to communities and stakeholders is to act with integrity, transparency and honesty at all times” and Guiding principle of “promoting transparency”. Savannah responded on 26/03/2021 but failed to provide the information.
15. On 19/04/2021 a communication was received from APA’s Director of Communication and Environmental Citizenship stating that the 30-day public consultation would begin on 22/04/2021. In response, Montescola reiterated APA’s obligation to provide the environmental information requested on 07/01/2021. No response is received.
16. On 22/04/2021 the APA uploaded 493 digital files with a size of 2,8 Gigabytes containing 5,268 pages, 2,103 graphics and another 56 elements.<sup>3</sup> At least five folders containing responses to deficiencies in the documents presented by Savannah Resources were withheld by error or deliberately, and could not be downloaded (including Annex III-3 on waste dumps; Annex III on water consumption; Annex II-24 on chemical reagents; Annex VI on soils; and Annex I on climate). Other documents previously referred to by Savannah, including a “Compensation Measures Report” on impacts on Iberian wolf populations (*Canis lupus signatus*), were also not made available. Most importantly, the documents made available did not include any of the administrative documents referred to in Montescola’s 07/01/2021 request c), which remain

---

<sup>3</sup> <https://siaia.apambiente.pt/AIA.aspx?ID=3353>

important to assess project deficiencies and impacts noted by the Administration and also to verify if the administrative procedure has been carried out following applicable laws. All of these decisions to withhold documents that Montescola previously requested were contrary to commitments made by APA in its response on 08/03/2021 and by CCDR-N in its response on 08/04/2021, stating that the requested documents would be released in the EIA 30-day public consultation process. The limitations in releasing documents on 22/04/2021 constitute further breaches of Portuguese law and the Aarhus Convention.

17. On 29/04/2021 Montescola received a communication from the of Environmental Assessment of APA stating that, in relation to our environmental information requests, the documents of the EIA of the Mina do Barroso project were available at APA's website. In response, Montescola reiterated APA's obligation to provide all of the environmental information requested on 07/01/2021. No response has been received.

#### **IV. Provisions of the Convention with which non-compliance is alleged**

18. The following provisions have been breached in view of the communicant:
  - Article 4, para. 1.
  - Article 4, para. 2 and para. 7.
  - Article 4, para. 3 (c)
  - Article 6, para. 3 and para. 4.

#### **V. Nature of alleged non-compliance**

19. **Article 4, para. 1**, as Portuguese authorities have ultimately failed to provide access to all the requested environmental information, particularly that of section c) of its request: "*reports and requisitions issued by the Administration in regards to the documentation presented by Savannah Lithium Limitada*". Such documents are critical to determine the deficiencies and support the issues so far detected or omitted by Portuguese authorities within the EIA procedure. Some of these documents were actually referred to as being attached to documents made available on 22/04/2021 for public consultations, but were suppressed from the versions that appeared in APA's website. For example, in p. 1 of the "*Aditamento ao EIA*" it is mentioned that on 04/08/2020 the Evaluation Commission made a request to Savannah Lithium for further elements that should appear as "Annex I" (but was eliminated from the PDF). Article 14 of Decree-Law No. 151-B/2013 establishing the legal regime of environmental impact assessment, states that the Evaluation Commission may request reports that are to be included in the procedure, but those have not been made available either.

A Regarding requests (a) and (b), it is relevant to note that Montescola requested the original versions (as indicated in footnote) presented by Savannah Lithium following Article 14, para. 1 of Decree-Law No. 151-B/2013, to allow comparison between the initial projects and those finally made available during the public consultation. Also in relation to requests (a) and (b), it must be noted that documents made openly available do not include all the documents of the EIA procedure that should be made available for consultations.

In addition, 5 folders with amendments and corrections made by Savannah Lithium on the basis of deficiencies and issues detected by Portuguese Authorities were listed on 22/04/2021 but not made available for download. As this communication was being prepared for submission, on 02/05/2021, such critical documents were still not available even though such absence had

already been noticed in the Portuguese press<sup>4</sup> and was known to APA. Files included:

- *EIA Annexes - Annex I Climate and climate alterations*
- *EIA Annexes - Annex VI – Soils*
- *EIA Annexes - Annex III – Water resources*
- *Project - Annex II - 24 – Flocculating agents*
- *Project - Annex III - 1 –Barroso Mine – Parametres – Waste dumps*

Other documents that should have been made available in the public consultation phase but were not include reports on potential impacts and compensation measures on Iberian wolf (*Canis lupus signatus*) populations, a protected species under the Bern Convention, as referred in a communication by Savannah Resources on 01/06/2020 regarding a “Compensation Measures Report”. It is believed that APA launched public consultations before all documents required to be submitted by Savannah had actually been handed in to the Administration.

20. **Article 4, para. 2 and para. 7**, as APA only issued a response on 08/03/2021, 50 days after the legal time limit had expired. The refusal did not provide information on access to the review procedures provided for (see para. above) and did not state any valid reasons (see below). APA’s failure to respond to the 21/03/2021 request constitutes an additional breach of the time limit.
21. Regarding **Article 4, para. 3 (c)**, as APA, DGEG and CCDR-N made an unfounded interpretation of the concept of “material in the course of completion” as an alleged basis to refuse timely access, referencing in their decisions Article 6, para. 3 of Law no. 26/2016 of 22 August 2016, that states “*Access to administrative documents involved in preparing a decision or contained in cases or proceedings that have not been concluded may be deferred until the decision is taken, the case or proceedings is or are closed or a year has passed since they were drawn up, depending on which event occurs first*”.

The application of such a provision in this case is contrary to Portuguese law, as CADA (see remedies below) stated in its Report 102/2021 on 24/03/2021, concluding that “*public consultations or transboundary consultations do not constitute restrictions to the right of access to environmental information and cannot limit the exercise of the right to access what was requested.*” This assertion is also contrary to the ACCC’s previous findings and general interpretations. In its 28/03/2014 Decision on case ACCC/C/2010/51 ACCC stated that:

*85. The Convention does not define the “material in the course of completion”. The Committee considers that the phrase “material in the course of completion” relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared. (...)*  
*The obligation under article 4 to make available environmental information to the public upon request is not limited to matters being subject to public participation procedures and — unless legitimate reasons for refusal are being applied according to appropriate procedures — covers all environmental information which is held by public authorities, not least the information which public authorities themselves, in press releases or elsewhere, reveal that they hold.*

The Aarhus Convention: An Implementation Guide (2<sup>nd</sup> edition 2014), further states in page 85:

*it is clear that the expression “in the course of completion” relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.*

---

<sup>4</sup> <https://www.publico.pt/2021/04/29/local/noticia/mina-barroso-fundacao-galega-avancou-tribunal-1960492>

*A request for access to raw environmental data **cannot be refused on the grounds that it is “material in the course of completion” to be made publicly available only after processing or correction factors have been applied.** (...)*

*Other articles of the Convention also give some guidance as to how Parties might interpret “in the course of completion”. Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. **Thus, drafts of documents such as permits, EIAs, policies, programmes, plans and executive regulations that are open for comment under the Convention would not be “materials in the course of completion” under this exception.** (...)*

22. **Article 6, para. 3 and para. 4**, and on the basis of the interdependent nature of the Convention’s provisions on access to environmental information and public participation, failure by APA, DGEG and CCDR-N to provide timely access to requested information, and continuing failure to provide access to all requested information, has severely impaired the “public to prepare and participate effectively during the environmental decision-making” and also impeded “early public participation” given the volume and complexity of the documents that were to be object of public consultation. In *The Aarhus Convention: An Implementation Guide*, p. 144, it is specifically stated that States should guarantee that “**waiting for a request to be met within the time limits set out in article 4 does not undermine the public’s ability to take part in the public participation process**”. In the present case it seems Portuguese authorities have deliberately undermined such ability by preventing access to critical environmental information in a timely manner and continue to withhold crucial information even weeks into the 30-day public consultation process.
23. Montescola repeatedly referred in all its communications and appeals that in this particular case, and as it had already been announced as early as December 2020 that the documents would exceed 6.000 pages,<sup>5</sup> the regular 30 day period for consultations would not be enough for analysing such a large volume of complex information and requesting external independent reports. This was the main reason for Montescola’s early request in 07/01/2021, as CADA (see remedies below) stated in its Report No. 102/2021 on 24/03/2021 (page 2, para. 3).

## **VI. Use of domestic remedies**

1. Complaints **to the Commission for Access to Administrative Documents – CADA**. Article 16 of Law no. 26/2016 of 22 August 2016 established a right to file a complaint and obtain independent review in case of failure of the Administration to provide access to environmental information: “*1 – Within a time limit of twenty days and in cases of the absence of a response by the end of the time limit provided for in the previous Article, denial, partial fulfilment of a request or another decision restricting access to administrative documents, applicants may lodge a complaint with CADA.*” On 02/02/2021, after the limit to respond to the 07/01/2021 request to APA had expired, Montescola filed a complaint before CADA.

The complaint led to process 67/2021 that was completed by the issuing of CADA’s Report 102/2021 on 24/03/2021. The report concluded that in absence of restrictions, “*the requested documents are public and freely accessible*” and that “*public consultations or transboundary consultations do not constitute restrictions to the right of access to environmental information and cannot limit the exercise of the right to access what was requested*”. CADA determined that access should be provided.

---

<sup>5</sup> <https://24.sapo.pt/atualidade/artigos/uma-oportunidade-um-desafio-ou-um-problema-o-litio-e-tudo-isso>

The same Article 16 of Law no. 26/2016 establishes in para. 5 that “*Within a time limit of ten days following receipt of the report referred to in the previous paragraph, the entity to which the request was made shall communicate its final substantiated decision to the applicant.*” However, APA did not issue any further notice on the request until 29/04/2021 and did not provide the requested information.

Separate complaints to CADA were filed on 19/03/2021 against the refusal by the DSEF-RG to provide access to the environmental information requested by Montescola on 14/03/2021 and, following the shift in the decision at the CCDR-N, on 08/04/2021.

2. **Hierarchical (administrative) appeals** – CPA, Articles 193 ff. allow challengers to decisions to address a claim to the hierarchical superior of the agency that performed the act. On 10/03/2021 Montescola challenged the decision issued by APA on 08/03/2021. Within the 30-day time limit established in CPA, Article 198º, no decision was received from APA.

On 19/03/2021 a separate hierarchical appeal was filed against the 14/03/2021 decision by DGEG. Following this appeal, on 24/03/2021 an email was received from the DSEF-RG at 10:11 stating that the appeal would be dealt with by the Adjunct Secretary of State for Energy. Later on the same day, at 20:27 a second email was received stating that the appeal would be decided not by the Adjunct Secretary of State, but by the same Director of Services sending both emails. In the first email, the Director repeated the same argument used by APA, stating that access could not be granted as the documents were part of procedures “in the course of completion”. Finally, the decision on the appeal was signed by the Director-General of Energy and Geology on 29/03/2021 denying access to the requested information on the same grounds.

3. **Use of judicial remedies.** On 27/04/2021 Montescola initiated a “summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance” action (“*intimação da entidade administrativa a prestar informações, permitir a consulta de documentos ou passagem de certidões*” – CPTA, Articles 104 ff.). The costs for such an action exceeds 1,000 Euros. Montescola could not contest the refusals of access by DGEG and CCDR-N, as well as APA’s failure to acknowledge Montescola as an interested party, as the cost of four different judicial procedures is prohibitive.

Montescola’s decision to initiate judicial action once the public consultation already started aimed primarily at preventing the repetition of such a situation in future cases through the generation of applicable precedent. However, such judicial action likely will not provide a timely decision to redress the ongoing situation in which Portuguese authorities prevented the access to such voluminous information during the 3 months prior to the public consultation, thus weakening the position and preparation of civil society to fully engage in the consultation. Given the length of judicial processes, a final judicial decision will likely only arrive after this public consultation ended. This case specifically aims at gaining access to documents not made available in the public consultation. Along with a decision supporting timely public access to environmental information, the disclosed documents will be helpful to the public in other applications by Savannah Resources or for similar mining projects.

4. **Criminal claim at the Public Prosecutor.** Montescola believed that failure to provide access to environmental information on the basis of unsound grounds could amount to a crime of malfeasance by the public officials involved (Article 369 of the Criminal Code). On this basis, on 10/03/2021 Montescola presented a criminal claim at the Central Department of Criminal Investigation and Action of the Portuguese Public Prosecutor against the two APA officials

listed in the 08/03/2021 communication. This led to procedure 375/21, terminated on 12/03/2021 as the Prosecutor determined that “the facts reported do not constitute a crime”.

Based on new evidence following inaction of APA officials in relation to the report issued by CADA as well as refusals by DGEF and CCDR-N to provide the same information in spite of explicit warnings issued by Montescola that failure to comply could amount to criminal behavior, a new criminal claim was presented at the Public Prosecutor on 10/04/2021. This claim led to criminal procedure 572/21. On 22/04/2021 a notice was received from the Prosecutor’s office indicating that the report “*had been referred to the competent entity*”.

## **VII. Use of other international procedures**

5. **European Parliament’s Committee on Petitions (PETI) and European Commission.** The facts represent a breach of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. For this reason, a Petition (Article 227 TFEU) with the title “Infringement of the right of access to environmental information related to the Barroso Mine, Portugal” was filed at the European Parliament on 11/03/2021. The submission led to opening Petition 277/2021. On the same grounds, a formal Complaint was presented on 11/03/2021 directly to the European Commission. However, the European Commission has not initiated any action (EU Pilot, Action Plan or infringement) against Portugal for its non-compliance.

On 30/04/2021, Montescola wrote a letter to European Commissioner Thierry Breton and Mr. Peter Handley, Acting Director for Sustainable Industry and Mobility in the European Commission's Directorate-General for the Internal Market. Both are featured as speakers in the High level conference on “Green Mining” organized by the Portuguese Ministry for the Environment and Climate Action on 05/05/2021, while the public consultation of the “Mina do Barroso” will be ongoing. For one of its sessions, the CEO of Savannah Resources was invited to explain “*How does Savannah look at their performance in the area of social and environmental responsibility?*”, which is considered as a breach of the Administration’s neutrality principle. In the letter, the EU officials were requested to cancel their participation.

## **VIII. Confidentiality**

6. None of the information contained in this communication will be kept confidential.

## **IX. Supporting documentation**

7. As relevant quotes from decisions, review procedures and correspondence have been included or mentioned, only the official translation of Law no. 26/2016 of 22 August 2016 (obtained from the Portuguese parliament’s website) is attached. Full translations of any of the decisions or correspondence will be provided at request.

## **X. Signature**

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.