

Communication to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

1. Asociación Verdegaia

II. Party concerned

2. Spain

III. Facts of the communication

3. The San Finx mine is a paradigmatic case of environmentally non-compliant mining operation in Europe. Since 2016, it has been subject of 14 written questions, priority questions and major interpellations at the European Parliament (E-004299-16, E-004301-16, E-006615-16, E-008694-16, E-008989-16, E-009298-16, E-000007-17, E-001604-17, E-003731-18, E-005046-18, E-001731-19, E-003447/2021, G-001001/2021, P-005504/2021), in addition to dozens of parliamentary interventions in Spain. Background on the environmental infringements at this mine site have been documented in ACCC communication ACCC/C/2017/153, which refers to breaches in terms of access to environmental information and lack of public participation (the 2009 mine project and restoration plan were not subjected to an environmental impact assessment or any other form of public participation). This communication, however specifically addresses non-compliance by Spain in terms of providing access to judicial remedies to address the multiple environmental infringements present at the San Finx mine under Article 9 of the Aarhus Convention. With this communication, the ACCC is urged to act promptly given the ongoing nature of environmental damage at the site, continuing failure of the Spanish judicial system in addressing continuous heavy metal pollution in the face of administrative neglect, and previous ACCC decisions against Spain under Article 9.

4. Verdegaia filed a complaint in December 2016 before the Special Prosecutor's Office for the Environment and Urban Planning of A Coruña regarding apparently criminal acts relating to the San Finx Mine (A Coruña), which encompassed:

- a. illegal discharges of mine waste water into the environment with concentrations of heavy metals above maximum allowable concentrations;
- b. illegal failure to submit mining projects to an environmental impact assessment procedure and public participation;
- c. exclusion of environmental liabilities from the exploitation project and restoration plan, particularly of two mining waste deposits built and maintained by successive mining operators, as stated in the various work plans up to 2000 and the 1999 "Inventory of [Mine] Dams and Dumps in the Autonomous Community of Galicia".

5. Verdegaia's original complaint gave rise to the Prosecutor's Investigation Proceedings 246/2016, which concluded with a criminal complaint of 3/7/2017 by the Prosecutor presented before the No. 2 Court of Preliminary Investigation of Noia regarding several allegedly criminal conducts of **prevarication by public officials**: a) for failing to subject the mine projects to an environmental impact assessment, b) for lack of control and omission of sanction in waste water discharges from the mine; and c) failure to include the mining dams within the scope of responsibility of the mine.

6. On 27/07/2017 the Court opened Preliminary Proceedings (DPA) no. 223/2017, following the criminal complaint filed by the Prosecutor's Office. On 9/02/2019, the Court ordered to receive a statement as an accused person of the then Director General of Energy and Mines of the Galician Government (*Xunta de Galicia*) for an alleged crime of **environmental prevarication**. It is important to note how these proceedings did not address the alleged crimes of environmental damage (heavy metal pollution) or those responsible for such crimes (the mining company and its directors). On 24/04/2019, the lawyer of the Xunta de Galicia, representing the said Director General, lodged an appeal for reform against the Court Order of 09/02/2018, alleging that the maximum period for judicial investigation of proceedings of 6 months had elapsed. The Court dismissed the appeal, and this dismissal was appealed before the Provincial Court of A Coruña which, by Order of 19/07/2019, upheld the appeal filed by the lawyer for the Xunta de Galicia, declaring the nullity of the Noia Court's Order of 09/02/2019.

7. On 20/11/2019, the Public Prosecutor's Office requested clarification of the Order of the Provincial Court of A Coruña of 19/07/2019 (**Document no. 1**). The Public Prosecutor's Office pointed out that the criterion followed by the Provincial Court would result in "*that it would be impossible to prosecute an offender once the period of art 324 [of the Criminal Code] had elapsed, even if the criminal acts were not time-barred*". This clarification was rejected by Order of 02/01/2020 of the same Provincial Court.

8. In response to the two previous Orders of the Provincial Court, on 27/05/2020 the No. 2 Court of Preliminary Investigation of Noia issued an Order of provisional dismissal of Preliminary Proceedings no. 223/2017 (**Document no. 2**).

9. In view of these developments, on 05/12/2019 Verdegaiia filed a new criminal complaint directly before the Court of Noia including new facts allegedly constituting crimes, new documentary support and evidence, description of the alleged offences and identification of the alleged offenders, among which were the mine directors and the mining company itself for crimes against the environment (illegal waste water discharges), as well as several officials of the Government's mining department and the Director General for Mines and Energy (on grounds of falsehood in public documents, environmental prevarication and criminal group).

10. As a result of this complaint, on 13/12/2019 the No. 2 Court of Preliminary Investigation of Noia opened new Preliminary Proceedings DPA No. 370/2019. But by Ruling of 27/01/2020, the same Court limited these new Proceedings 370/2019 to the investigation of the crime of **falsehood in public documents**. The Court excluded the investigation of the **crimes against the environment by the mining company, prevarication and criminal group**. This ruling rests on the incorrect logic that these had been investigated in the DPA223/2017, despite the fact that those earlier proceedings referred only to crimes of prevarication.

11. On 03/02/2020 Verdegaiia filed an appeal for reform against the Ruling of 27/01/2020, supplemented by a writ of 04/02/2020, requesting to extend the object of the proceedings to all the alleged offences. The Court dismissed the appeal for reform by Order of 10/07/2020, limiting proceedings 370/2019 to "*an alleged offence of forgery of documents*" (**Document no. 3**).

12. On 20/07/2020, Verdegaiia lodged an appeal before the Provincial Court of A Coruña, alleging infringement of the fundamental right to effective judicial protection and requesting the revocation of the appealed order and the extension of the investigation proceedings to the facts and persons denounced. The Provincial Court dismissed Verdegaiia's appeal by Order of 4/02/2021 (**Document no. 4**). After requesting clarification of the Order on 22/02/2021, the Court issued an Order on 30/03/2021 rejecting it (**Document no. 5**).

13. Against the Order of 04/02/2021 of the Provincial Court of A Coruña, which prevented the investigation of the offences against the environment, prevarication and criminal group, an appeal was filed before the Constitutional Court on 17/03/2021. This appeal was declared inadmissible by decision of 29/06/2021 (**Document no. 6**) on the grounds that the appeal lacked “*constitutional significance*”, and was notified on 07/07/2021.

14. As a result of these judicial decisions, *de facto* impunity has been generated with regard to the alleged crimes against the environment (illegal mine waste water discharge on a continuous basis until today), administrative and/or environmental prevarication (lack of sanctions, lack of environmental assessment and omission of waste dams from the scope of responsibility of the mining concessionaire) and criminal group (of officials and authorities with alleged criminal intent), as their investigation is excluded from both proceedings DPA 223/2017 and the DPA 370/2019).

15. This impunity occurs without there being an identity of facts, subjects and legal grounds between both processes. On the one hand, DPA 223/2017 have been dismissed and the Court has refused to reopen them by Order of 10/12/2021, despite the new facts, different actors of the criminal acts and different types of offences. At the same time, only the offence of falsehood of a public document was being investigated in DPA 370/2019, and later referred to a different Court in Santiago de Compostela due to court jurisdiction (the crime of falsehood had taken place in Santiago, and not in Noia). The No. 3 Court of Instruction of Santiago opened proceedings DPA 2226/2021 limited to the alleged crime of falsehood, but has so-far failed to receive a statement as an accused person of the same former Director General of Energy and Mines, leading to the stall of the procedure.

16. In view of the continuity of the polluting discharges and the Provincial Court Order of 04/02/2021, which effectively prevented the investigation of the crimes of pollution in proceedings DPA 370/2019, Verdegaiia requested the reopening of the DPA 223/2017 on 22/02/2021. Said reopening was denied by Order of 10/12/2021 of the Investigating Court of Noia (**Document no. 7**), arguing, based on the previous Orders of the Provincial Court, that the **ongoing continuous discharges are not “new facts”**. Verdegaiia again appealed this Order to the Provincial Court, that ruled in 01/07/2022 in appeal procedure RT 116/22 once again dismissing Verdegaiia’s claims.

17. The conjunction of judicial decisions has created a situation which is in breach of the right to adequate and effective remedies and review procedures as part of access to environmental justice (Art. 9 Aarhus Convention) and is also a violation of the right to effective judicial protection (Art. 6 ECHR) by preventing the investigation of the reported environmental offences. This has been achieved through the joint effect of the following judicial decisions:

- a. Provisional dismissal and non-reopening of DPA 223/2017, the subject matter of which was limited to the investigation of a single offence of prevarication of only one investigated person, and whose provisional dismissal derived exclusively from not being able to validly take a statement from the only investigated person within the investigation period (not due to the absence of facts of criminal appearance attributed to the investigated person).
- b. The exclusion from the investigation of the offences against the environment, criminal group and miscellaneous crimes of prevarication of DPA 370/2019, under the false premise that they had been investigated in DPA 223/2017. These DPA 223/2017 had already been provisionally dismissed and not reopened; and the alleged offences denounced therein were limited to specific and exclusive acts of prevarication.
- c. The refusal to open procedure DPA 223/2017 at the Court of Noia to investigate crimes associated to ongoing heavy metal pollution, which have also been barred from investigation in procedure DPA 370/2019.

18. In this way, on the basis that DPA 223/2017 were related to a specific mine (the San Finx mine) and were provisionally dismissed, actors within the Spanish judicial system are preventing the investigation of other alleged crimes by the mere fact that they are related to the same mine. This includes, for various officials and authorities other than the former Director General, as well as for the mine's operating company and its mine directors, including the following allegedly criminal acts and conduct, all of which are not covered by the DPA 223/2017 or DPA 370/2019:

- a. Discharging water with high concentrations of hazardous and priority hazardous substances (cadmium, copper and zinc) on a continuous and intensified basis at specific times, evading the mandatory authorisation of the Hydraulic Authority, which the mining company lacks;
- b. Allowing such discharges and silencing the mining company's infringements;
- c. Belonging to a criminal group organised to commit crimes;
- d. Continuing to prevent the submission of mining activity to the mandatory environmental assessment procedure (as documented in communication ACCC/C/2017/153);
- e. Excluding mining waste dams from the scope of the mining project and restoration obligations;
- f. Avoiding and preventing the restoration of legality and the control of waste facilities;

19. The final result of the set of judicial decisions is an impediment to access to effective judicial protection by **creating a space of impunity for criminal acts for which the legal period of investigation has been exceeded despite the fact that they are not time-barred, as well as creating and extending this impunity for new crimes and for continuing crimes that have never been investigated.** This effect has already been noted by the Public Prosecutor's Office in its appeal for clarification before the Provincial Court on 20/11/2019 (see **Document No. 1**).

20. At present, discharges of industrial wastewater from the San Finx mine continue 24h a day, 365 days a year, with concentrations of heavy metals that far exceed the Environmental Quality Standards (RD 817/2015 and Directive 2008/105/EC), lacking treatment and authorisation and in violation of the Community and national obligation to prevent further deterioration of surface waters (Directive 2000/60/EC). These discharges have been occurring continuously in the mining operation, both by forced dewatering by pumping (at least until 2020) and by gravity discharge through the drainage galleries, as well as due to water in contact with the tailings and waste deposits. The illegal discharges involve the permanent injection of heavy metals into the adjacent river, which exceeds the maximum values for hazardous and priority hazardous substances (cadmium, copper and zinc) in a large part of its course, causing serious damage to the balance of natural systems as defined in art. 325 of the Spanish Criminal Code. Evidence for this is clear and has led to the consideration of the state of the said river as "worst" in the 2021-2027 Water Plan for the Costal Galicia zone due to chemical pollution from the mine. The approximate volume of discharges by gravity is 50,000 litres/hour, regardless of the fact that the mining operation is in temporary suspension. Even during the suspension, forced (pumped) drainage of flooded levels was maintained (including in the context of a EU-funded Horizon 2020 project "NEXT"), and measures to prevent drainage by gravity were not taken. The discharges affect not only the river system, but also, continuously and cumulatively, the Muros-Noia estuary, with its important shellfish banks which provide economic sustenance for more than 1,500 families, and the "Esteiro do Tambre" Site of Community Importance (Natura 2000 network).

21. In the absence of the required discharge permit, mine directors and mining company were denounced by Verdegaiia as being allegedly responsible for ongoing and deliberate pollution. Between 2015 and January 2022 the mine was operated by Spanish company Valoriza Minería (a division of the SACYR group) and since January 2022 it is fully owned by the Australian ASX-listed company Rafaella Resources Ltd. through its subsidiary Biscay Minerals Pty Ltd. The entire mining operation continues to lack an environmental impact assessment and a water discharge permit as of the date of

filing of this communication. The mining company has still not taken responsibility for various environmental liabilities, in particular the two mining dams built in the riverbed near the mine to collect the mine's tailings and waste washed away from the waste piles, which are in a ruinous state and could cause a catastrophe if they were to break due to the considerable volume of mining waste they store. All of this is well known to various public officials and authorities who each day allow this situation to continue, thanks to the impunity generated by the Spanish criminal justice system.

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

22. Provisions breached in view of the communicant: *Article 9, para. 3 and 4.*

V. Nature of alleged non-compliance

23. Verdegaia has been denied access to environmental justice through various court orders, with regard to the possibility of investigating certain alleged criminal acts, particularly environmental crimes consisting of continuous illegal dumping of waste water and ongoing environmental prevarication. The ACCC decided against Spain under Article 9 in ACCC/C/2008/24 (Spain)¹ and ACCC/C/2009/36 (Spain). (Compilation of CC findings, 2021: pages 224 and 390.) In ACCC/C/2011/63 (Austria), 13 January 2014, para. 64, the ACCC also has stated that:

“[A]ccess to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences.”

24. The infringement of access to effective judicial protection is the result of preventing the investigation of alleged offences. Court orders have justified the refusal to investigate alleged offences in DPA 223/2017, that were dismissed, or DPA 370/2019. The dismissal of DPA 223/2017 derived from the failure to take the statement in time of the only person under investigation for certain offences of prevarication in relation to the San Finx mine. The alleged ongoing crimes whose investigation is

¹ *“In communication ACCC/C/2008/24 (Spain), the communicant had first approached the Spanish court to request the suspension of a land allotment plan and modification. The court held that the request was too early and reversed the application on the ground that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely the land allotment plan and modification which had not been suspended. On appeal, the court endorsed this judgement and did not suspend the decision. In its findings, the Compliance Committee held that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, **the Committee found that the Party concerned was in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief....”***

“The Committee held that since no timely, adequate or effective remedies were available, the Party concerned was in non-compliance with article 9, paragraph 4. The Committee referred to its findings in ACCC/C/2006/17 (European Community), where it had held that: If there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question....”

([Aarhus Implementation Guide](#), p. 201, 203)

denied refer to other potential defendants, to different conducts, to new (and currently ongoing) facts, all of them still to be investigated. In fact, the only connection with the said DPA 223/2017 is that they are related to the same mining operation, **resulting in a general impunity for crimes related to the San Finx mine, as the relevant courts have refused to investigate them.**

25. As a result, there has been no proper investigation of heavy metal discharges denounced by the communicant, which are continuous, well-documented and correspond to mine drainage with levels of heavy metals exceeding the legal maximum allowable concentrations. The actions of the judicial bodies have prevented effective judicial protection as well as the prosecution of environmental crimes and the cessation and reparation of the damage caused, violating the effective judicial protection of this entity whose primary statutory purpose is the defence and protection of the environment. This happens at the same time as Administrations have failed to issue Administrative sanctions or impose environmental guarantees or measures in relation to the mine. As an example, in spite of ongoing polluting discharges, the mining company has never been fined, nor has an administrative sanctioning procedure been initiated. After years of illegal wastewater discharge since the mine reopened in 2009, only in 2016 did the mine request a wastewater discharge permit. Authorities have kept the discharge permit procedure open since then (almost 7 years) without issuing a decision, an excuse to avoid imposing sanctions.

26. In its Orders of February 2021 and July 2022, the Provincial Court of A Coruña closes the circle of extinction (and preclusion) of criminal liability by confirming the impossibility of investigating any criminal acts related to the San Finx Mines once the provisional dismissal of the DPA 223/2017 has been ordered and with the only exception of falsification of a public document that was allowed to be investigated in the DPA 370/2019. This was confirmed by the Order of the Court of Noia of 10/12/2021 that denies the reopening of the DPA 223/2017 by considering that the continuous discharges are not “new facts”, confirmed by Provincial Court Order of July 2022, creating perpetual impunity.

27. In this way, what the appealed orders achieve is a transformation of the period of investigation into a limitation period for various crimes of environmental prevarication and against the environment. Some of these crimes are subject to statutory limitation periods of up to 15 years. In addition, a space of environmental impunity has been created around the San Finx Mine. This space of impunity means that because DPA 223/2017 were provisionally dismissed after failing to complete the investigation of alleged crimes of corruption related to environmental approvals of mining projects approved in 2009, over a decade ago, Courts are sustaining that unrelated heavy metals pollution that continues to take place at this instant cannot be investigated. The failure to investigate these facts contributes to the hazard that this situation of serious and permanent pollution continues today and is perpetuated. Denying the *ad liminem* investigation of facts as serious as the existence of continuous discharges with high concentrations of priority hazardous substances, such as cadmium, which are not related to environmental prevarication (to cite some of the crimes denounced) is evidence of the violation of effective judicial protection that is being denounced.

VI. Use of domestic remedies

28. Against the Ruling of the Court of First Instance and Preliminary Investigation No. 2 of Noia of 27/01/2020, an **APPEAL FOR REFORM** was lodged before the same Court on 03/02/2020, supplemented in 04/02/2020, within the Abbreviated Proceedings DPA No. 370/2019. By Order of 10/07/2020, the Court of First Instance and Preliminary Investigation No. 2 of Noia dismissed the Appeal for Reform.

29. An **APPEAL** was lodged against the Order of 10/07/2020 of the Court of First Instance and Preliminary Investigation No. 2 of Noia before the Provincial Court of A Coruña on 20/07/2020. By Order No. 126/2021 of 04/02/2021 in procedure RT 72/2021, the Provincial Court of A Coruña

dismissed the APPEAL. A request for clarification was made on 22/02/2021, which was also denied by Order of 30/03/2021 of the same Provincial Court of A Coruña. Verdegaiia also lodged an appeal before the Provincial Court of A Coruña against the Order of 10/12/2021 of the Court of First Instance and Preliminary Investigation No. 2 of Noia refusing to reopening DPA 223/2017, after the request made by Verdegaiia on 22/02/2021. The Provincial Court of A Coruña dismissed the appeal in 01/07/2022.

30. Against the Order of 04/02/2021 of the Provincial Court of A Coruña, a **CONSTITUTIONAL APPEAL** as lodged before the Spanish Constitutional Court on 17/03/2021. By Decision of 29/06/2021 (**Document no. 6**) concerning Appeal No. 1575-2021 E, the Spanish Constitutional Court decided not to admit this appeal. The decision by the Constitutional Court used a template and did not provide any reasoning on why the appeal had no constitutional significance. It also stated that preceding judicial remedies were not exhausted, which was untrue (the decision mentioned the annulment of proceedings action, which was unwarranted in the said proceedings).

VII. Use of other international procedures

31. An application was lodged before the **EUROPEAN COURT OF HUMAN RIGHTS** on 27/12/2021, claiming violation of Art. 6(1) of the European Convention on Human Rights. This led to Case No. 3476/22 (Asociación Verdegaiia against Spain). On 05/05/2022 the Secretariat of the ECHR conveyed the decision of the Court to reject the application (**Document no. 8**). The decision used a template and did not provide any reasoning on why the application “*did not reveal any appearance of a violation of the rights and freedoms set forth in the Convention or its Protocols*” [French in the original], contrary to previous decisions by the ECHR on similar cases).

32. ECHR Ruling of 2/11/2004, case 58438/00, considered that the absence of an investigation of the facts generates impunity by depriving the "reasonable possibility of clarifying the alleged facts" in the face of the "absence of a thorough and effective investigation into the defensible allegations of the applicants". And in this case it is related to Art. 6, paragraph 1 of the ECHR, as has been repeatedly reaffirmed by the judgments of the ECHR in the sense that the right of access must be "concrete and effective", through the "clear and concrete possibility of challenging an act which constitutes an interference with their rights" (ECHR, 4/12/1995, case 23805/94, paragraph 36-38). In the case at hand, the prosecution of public crimes, including alleged crimes against the environment, for which there have been no judicial investigation proceedings, is being prevented without any legal basis. It is also evident how an innovative interpretation of procedural rules aims to deprive the communicant of the right of access to a court, which violates this right (ECHR of 29/03/2011, case 50084/06, para. 71).

33. In the past, unlike with the communicant's case, the ECHR has concluded that in no way can purely procedural reasons, such as the time limit for investigation, affect the statute of limitations for criminal offences for the purpose of continuing or initiating new criminal investigations (ECHR decision of 12/11/2019, case 57849/12, paras 43-45). In this case, the dismissal was not even due to a lack of evidence or criminal evidence, but due to an error arising from the fact that the order to take a statement was issued after the end of the investigation period. This error meant that the former Director General of Mines did not even have the procedural status of a defendant, and has not even been tried, nor has an acquittal or conviction or equivalent decision been handed down, but merely a provisional decision derived from a formal defect. As it has been mentioned, these judicial decisions have *de facto* established impunity for any and all facts relating to a mining operation in relation to which continuous damage to the environment is taking place. This is legally absurd as it converts investigation periods into limitation periods, contrary to the doctrine on the interpretation of the principle of *non bis in idem* of the ECHR (rulings of 10/02/2009, C14939/03; 15/11/2016, C24130/11 and 29758/11), in violation of the right to effective judicial protection and access to justice in environmental matters.

VIII. Confidentiality

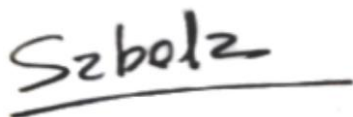
34. None of the information contained in this communication will be kept confidential. Names have been redacted in judicial decisions, in compliance with Spanish law. Non-redacted versions can only be provided by the Spanish judicial authorities.

IX. Supporting documentation

- 1) Request of clarification of the Order of the Provincial Court of A Coruña of 19/07/2019 made by the Public Prosecutor on 20/11/2019.
- 2) Order of provisional dismissal of Preliminary Proceedings no. 223/2017 issued by the No. 2 Court of Preliminary Investigation of Noia on 27/05/2020.
- 3) Order dismissing the appeal for reform issued by the No. 2 Court of Preliminary Investigation of Noia on 10/07/2020.
- 4) Order dismissing Verdegaia's appeal issued by the by the Provincial Court of A Coruña on 4/02/2021.
- 5) Order rejecting Verdegaia's request for clarification, issued by the by the Provincial Court of A Coruña on 30/03/2021.
- 6) Decision declaring Verdegaia's constitutional appeal inadmissible issued by the Spanish Constitutional Court on 29/06/2021.
- 7) Order rejecting the reopening of the DPA 223/2017 issued by the No. 2 Court of Preliminary Investigation of Noia on 10/12/2021.
- 8) *Décision, Affaire Asociación Verdegaia c. Espagne (Requête n° 3476/22) introduite le 27 décembre 2021* (April 28, 2022) [Original in French]

X. Signature

On behalf of Asociación Verdegaia,



Sabela Iglesias Garrido