Questions to the Fons Defensa Ambiental concerning communication to the Aarhus Convention Compliance Committee concerning Spain

1. It seems that the merit of the allegations concerning non compliance of Spain with article 6 of the Convention is that there was no information available to the public, that the permitting procedure, concerning the cement plant operations in Santa Margarida, specifically related to a change (substitution) of combustible (fuel) used for the operations. Please clarify if you allege that such information has not been available in the public notice published in the Official Bulletin of Generalitat of Catalonia in 18 March 2010, but could have been found in the documents related to the application at the Environmental and Housing Department of the Generalitat of Catalonia, or if such information has not been available at all before the permit had been issued.

   Answer:

   The point is that the activity requested and authorised by the environmental permit at the cemment plant was the use of urban solid waste (CDR) and dried sewage sludge (EDAR) as a combustible, which is a kind of waste treatment (to incinerate waste in a cemment plant). However, during the public information process had nothing to do with it. The public was not informed about this new waste treatment activity. The only activity which was submitted to public information by the communication notice (which was issued in the Oficial Bulletin of Generalitat of Catalonia) was clearly another different task: cement production. Verbatim:"a project of cement production and the rock extraction done by the UNILAND company". Therefore, what is alleged here is that there was not a proper public information and participation process since there is not a coherence between the permit originally required and finally issued (waste management) with the information and public participation process (cement production and rock extraction). The activiyy of wsate incineration in a cement plant is a new one which creates a risk for the environment and health and hence, normally there is a social alarm and citizen campaign against it. The activity of cement production is an ordinary one which this cement plant has already been carrying on during the last years and logically did not arose concerns among the neighbors. For that reason, here it is affirmed that there was not a proper public information and participation process for the new activity (waste management). Finally, the announcement of the new activity was only issued at last when the permit for waste management was already granted by the Administration to the cement plant. Only then a member Environmental NGO Col·lectiu Bosc Verd had access to the information. By then, any participation about this new waste management activity was already too late and worthless.

2. With regard to your allegations concerning non compliance of Spain with article 9, paragraph 2 of the Convention, please clarify whether and why you consider the counselor of Land and Sustainability Department of the Generalitat of Catalonia to be an independent and impartial body established by law in the sense of the above provision of the Convention.

   Answer: Counselor of Land and Sustainability Department of the Generalitat of Catalonia is not an independent and impartial body established by law. The reason is that he is part of the executive, a member of the Catalan Government and in any case an independent

body. He can be equated to a minister of this Departament in the Catalan Government. Only he rejected the NGO Col·lectiu Bosc Verd and 16 neighbors "absolute nullity"adminstrative actions for most important violations (in Spanish, "acción de nulidad"). He rejected as well their administrative appeals (administrative review procedure, in Spanish "recurso de reposición").

3. Please substitute in more detail your reasons for not using domestic remedies, specifically challenging the decisions of the counselor of Land and Sustainability Department of the Generalitat of Catalonia before a court of law. In particular, please specify why you claim that the judicial review procedure would be prohibitively expensive for the public concerned (neighbors and local NGO) and why it would, in your opinion, take most probably at least eight years.

Answer:

3.1 We used indeed all domestic remedies before going to court: "absolute nullity"adminstrative actions, administrative appeals and Catalan Ombudsman.

3.2 Here it is argued that courts proceedings in this case are prohibitively expensive in Spain and we subjoin the following reasons and evidence (court fees, fee shifting, cost of lawyers and techniques:

There are studies which demonstrate that courts costs are prohibitively expensive in environmental matters in Spain:

- ✓ SANCHIS MORENO, Fe; SALAZAR ORTUÑO, Eduardo y RUIZ MACÍA, Ginés, *Democracia ambiental y acceso a la justicia. La aplicación del Convenio de Aarhus en España*, Madrid, Asociación para la Justicia Ambiental y Fundación Biodiversidad, 2009, págs. 64-75 [http://www.aja-ambiental.org/archivo/aja_esp.pdf]
- ✓ MORENO MOLINA, Angel-Manuel, " Study on aspects of access to justice in relation to EU environmental law – the situation in Spain", en DARPÖ, Jan, Effective Justice?, 2012, págs. 22-19 [http://ec.europa.eu/environment/aarhus/access_studies.htm]

3.2.1 Court fees: In Spain Court fees for this kind of topics** are **5.070€ minimum

Fees for administrative court cases have even been increased further with the recent Spanish Act 10/2012, 20 November (entered into force on January 2013). There are two stages where these Spanish court fees are applied~~s~~:

Fix part	1/2003	1/2013	Increase
Judicial review ***Recurso contencioso-administrativo***	210	350	66,66%
Remedy of Appeal ***Recurso de apelación***	300	800	166,66%
Appeal to Supreme Court ***Recurso de casación***	600	1200	100,00%

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Variable part	1/2003	1/2013	Increase
De 0 a 1.000.000 €	0,5%	0,5%	0%
Rest	0,25%	0,25%	0%
Maximum	6.000€	10.000€	166,66%

If the amount involved is not determined, the amount is 18.000€ (art. 6.2 Spanish Act 10/2012) and then the total court fees are 5.070€. Most of environmental cases are undetermined amount because it's very diffcult to calculate the amount of the risk to environment

Indetermined amount	Fix part	Varaible part	Total
Judicial review ***Recurso contencioso-administrativo***	350€	900€	1.250€
Remedy of Appeal ***Recurso de apelación***	800€	900€	1.700€
Appeal to Supreme Court ***Recurso de casación***	1200€	900€	2.100€
TOTAL			5.070€

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These are the miminum court fees in this case. They could be increased if the cost of the project of the new activity is more than 18.000€ which it could be because this substantial chane of the activity.

With the previous legislation (Spanish Act 53/2002, 20 December 2002), almost all NGO and natural persons were exempted to pay any court fees. Before, NGOs such as Bosc Verd and 16 neighbours would not have to pay any court fees. But with the new legislation, only who has free justice are exempt. The fees for the neighbours and Bosc Verd would be unreasonable and at the end discouraging.

In Spain access to free justice is regulated by Spanish Act 1/1996.

Free justice for natural persons (neighbors) is only if the incomes before taxes are less than: 12.780,26€ (one person); 15.975,75€ (family till members); and 19.170,33€ (family more than 3 members). So these requirements are too strict, the minimum income required is too low. People with these incomes have high difficulties and problems to cover ordinary expenses. All this context had been intensly criticised by the academia. Specially considering that Gross domestic product in Spain is 24.400€ en 2012 (Eurostat http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00001&language=en).

Free justice for NGOs is only for associations which have been declared as public utility and their incomes are less than 22.365,42€. This is not the case of NGO Bosc Verd. After Spanish Act 27/2006, free access is also available for Environmental NGOs but it's discussed if the income limit is required.

Also free justice is not so much used in Spain for environmental cases because if applied lawyers cannot be choosen by the parts. They are designated by the Government and usually they do not have a minimum satisfactorily knowledge of environmental law.

At the end, what happens in Spain is that free justice is too complicated and almost inaccessible for both natural persons and NGOs.

3.2.2 Other Courts Costs (minimum 13.000€)

The main costs in Spain are lawyer's fees. It's very difficult to fix an import because it's free and there are only orientaive guidelines. It's told that 3.000€ is the minimum for a regular environmental case in the first instance. So in the present case which is not regular, lawyers fess are much more than 3.000€ and at least 6.000€. As Darpö study says:

"An individual lawyer, working independently, or a law firm may charge well above the orientative guidelines, according to his prestige, the difficulty of the case, the length of the proceeding, the eventual judicial appeals triggered by the case, and the market forces. In any case, a minimum of 3000€ has to be planned for a regular environmental litigation" (MORENO MOLINA, Angel-Manuel, " Study on aspects of access to justice in relation to EU environmental law – the situation in Spain", en DARPÖ, Jan, Effective Justice?, 2012, pág. 23 [http://ec.europa.eu/environment/aarhus/access_studies.htm])

Lawyer's fees for second instance (recurso de apelación) and to the Supreme Court (recurso de casación) may be 1.500€ minimun in each case. Then, total lawyer's fees are 9.000€ minimum.

But also are important experts costs in environmental cases. In this case, the cost could be 2.000€ minimum The same study states:

"This item (*prueba pericial*) is also costly in environmental litigation, but it is extremely difficult to provide figures. In this case there are no minimum fees or honoraries, because the expertise may be very varied" (MORENO MOLINA, Angel-Manuel, " Study on aspects of access to justice in relation to EU environmental law – the situation in Spain", en DARPÖ, Jan, Effective Justice?, 2012, pág. 24 [http://ec.europa.eu/environment/aarhus/access_studies.htm])

Moreover, there are other costs: procurators (500€ minimum in every trhee instance, so 1.500€ in total, notaries or bonds for interim reliefs)

3.2.3 Fee shifting

This is another very important economic barrier to access to court. Spanish Act 37/2011 amended Spanish Act 29/1998 on Administrative courts in order to generalise the criteria loser pays. If the NGO Bosc Verd and citizen lose the case they have to pay a very

important amount to the other parties (Catalan Government, municipality and private company) for lawyers, experts and court fees.

As Darpö study says:

"Prima facie, the goal of the law is to combat judicial slowness and to reduce the duration of lawsuits in the administrative courts. In this sense, this new provision is supposed to discourage *frivolous* appeals. However, This new procedural rules, which are applicable to any administrative litigation, may have a clear impact in the domain of environmental protection since, as said above, administrative courts are those who usually control environmental agencies and departments. The new rules will in our view restrict the access to courts in environmental matters. In our view, this generalisation of the "loser-pays" principle is in contradiction with the letter and the spirit of the Aarhus convention and with the domestic legislation on the matter (Act 27/2006, of 18 July)." (MORENO MOLINA, Angel-Manuel, " Study on aspects of access to justice in relation to EU environmental law – the situation in Spain", pág. 27 en DARPÖ, Jan, Effective Justice?, 2012, pág. 24 [http://ec.europa.eu/environment/aarhus/access_studies.htm]).

3.2.3 Jurispudence

In Spain Administrative courts have been acquisenced to the Governmemnt regarding proceedings violations in the base of lack of participation requirements. It is very common to dismiss the action if there is not a substantive violation and there is only a procedural violation. For this reason, in the present case, there is a high risk of losing in front of the courts and therefore also an enormous risk that exorbitant fees would be imposed to the NGO and the neighbours.

This jurisprudence is comment by the spanish judge Dimitry Berberoff Ayuda in "Instrumentos que garantizan la participación ciudadana en materia de medio ambiente", *Estudios de derecho judicial*, Consejo General del Poder Judicial, ISSN 1137-3520, Nº. 65, 2004 (Instrumentos judiciales de fomento para la protección del medioambiente), pàg. 241-306

3.3 Long duration of proceedings

There are studies which demonstrate that environmental courts proccedings in Spain are exaggeratedly long (usually up to eight or more years):

- ✓ SANCHIS MORENO, Fe; SALAZAR ORTUÑO, Eduardo y RUIZ MACÍA, Ginés, *Democracia ambiental y acceso a la justicia. La aplicación del Convenio de Aarhus en España*, Madrid, Asociación para la Justicia Ambiental y Fundación Biodiversidad, 2009, págs. 59-62 [http://www.aja-ambiental.org/archivo/aja_esp.pdf]
- ✓ MORENO MOLINA, Angel-Manuel, " Study on aspects of access to justice in relation to EU environmental law – the situation in Spain", en DARPÖ, Jan, Effective Justice?, 2012, págs. 18-19 [http://ec.europa.eu/environment/aarhus/access_studies.htm]

An example of it is the case of access to environmental information that was decided by the Supreme Court on 3 October 2006 and which ratified Superior Court Decision of Castilla y León of 31 March 2003 which allowed an appeal against an administrative act

which denied the a administrative request for environmental information which was enacted on 12 March 1997.