ASOCIACIÓN

PETÓN DO LOBO

December 14, 2018

Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe, Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland
E-mail: aarhus.compliance@unece.org

Re: Comments on the Party concerned's response of 28/08/2018 (ACCC/C/2017/153)

Dear Ms. Fiona Marshal,

We are writing to you on behalf of the Asociación Autonómica e Ambiental Petón do Lobo and the Asociación Amigos y Amigas de los Bosques "O Ouriel do Anllóns" following your November 16, 2018 letter inviting us to submit any comments to the Party concerned's response of 28 August 2018 by December 14, 2018. Our comments are structured in the sections below.

In our comments we expose how the claims made by the Party as grounds for inadmissibility are either false or, at least, incomplete. We particularly expose how the Party seeks to denaturalize environmental information and to deprive those seeking access to environmental from the basic domestic remedies available for any other kind of information held by the Public Administrations. It has done so not only in the case presented by the communicants, but also systematically, recently passing specific regulations (Instruction 6/2018, of August 3) curtailing access rights to environmental information. False claims include the abusive nature (when in fact the documents had been requested by a court summoning and provided to the Judge in advance), the omission of the fact that the requested documents were originally in digital format, and false statements regarding the context of absence of public participation regarding the approval of the San Finx and Santa Comba 2009 mine development and restoration projects.

We hope our comments may facilitate the determination of admissibility of our original communication by the Committee at its next meeting. We can also provide additional supporting documentation for the facts expressed in our comments below.

Yours faithfully,

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Ismael Antonio López Pérez, President
Asociación Autonómica e Ambiental Petón do Lobo

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Ana Martina Varela Velo, President
Asoc. Amigos/as de los Bosques "O Ouriol do Anllóns"

COMMENTS ON SPAIN'S RESPONSE 28/08/2018 REGARDING COMMUNICATION ACCC/C/2017/153

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Clarifications about the legitimacy of the communicants and our requests

In its response, the Party refers to the communicants as an "associative conglomerate" (§53, §112), presenting them as responsible for no less than the "**collapse of the administration**" (§112). Neither part of this assertion is true.

Distinct identity and operation of the communicants. "Petón do Lobo" is a nonprofit association established in 2000, registered as a regional environmental association in Galicia and incorporated to the Galician Registry of Environmental Organizations, that is dependent of the Galician Regional Ministry of the Environment. Its headquarters are in Corcoesto (province of A Coruña) and has been active in the opposition to a mega-mining gold project in the same locality. As a distinct entity in its formation, registration, purpose, and operations, "Amigos y Amigas de los Bosques O Ouriol do Anllons" is a nonprofit association created 16 years afterwards, in 2016, and registered at the Spanish National Association Registry (Spanish Ministry of the Interior) with the statutory goals of defending the environment and conserving nature. Its headquarters are in Silleda (province of Pontevedra) and its goal is the protection of native forests across Spain. Both associations jointly presented the communication leading to the present procedure ACCC/C/2017/153.

Throughout the response, the Party constantly seeks to disqualify and delegitimise the communicants in ways that are totally inappropriate in this proceeding. For example, in §59 the Party argues that the two entities (and a third one which is not part of this claim) "form a single association" (which, being false as evidenced by public information [1] constitutes a false declaration on a public document). This is constantly repeated: "materially the same association or associative group" (§62), etc. The communicant associations emerged from distinct local environmental struggles but have often worked together, in spite of their different geographical scopes (one being limited to the Autonomous Community of Galicia and the other having a National scope) and statutory goals. While "Petón do Lobo" gained notoriety by opposing environmental degradation caused by mining in the Corcoesto area, "Ouriol do Anllóns" was initially concerned with protecting native forests and was key in stopping the destruction of the Catasós Forest, in the proximities of Silleda. In both cases (Corcoesto mine and high voltage line over Catasós), each organization played a significant role in the administrative and judicial decisions denying the projects, while it was the same Directorate General of Energy and Mines who was responsible for the decision-making processes, perhaps explaining the manifested aversion. Like many organizations, we find some occasions to cooperate for legitimate reasons, and other conditions in which we act differently for legitimate reasons.

"Petón do Lobo" and "Ouriol do Anllóns" have indeed appeared jointly and with many other organizations in a number of administrative procedures, public events and statements,

[1] This could have easily been corroborated by the Party, as both the Galician Registry of Associations (http://www.xunta.es/rexistros/RexistroRAS.jsp) and the Spanish National Registry (http://www.interior.gob.es/web/servicios-al-ciudadano/asociaciones/consulta-del-fichero-de-denominaciones) are open to unrestricted public access.

demonstrations, etc., which have often collided with the views and decisions taken by the Directorate General of Energy and Mines. We understand this is typical of environmental organizations throughout the world without necessarily leading to such disqualifications or visceral aversion regarding legitimate social stakeholders. Mr. Ismael Antonio López Pérez has received correspondence regarding the cases dealt with in the claim to simplify their administration and avoid the 'collapse of the associations' which have many other on-going activities. This is seen as meriting constant reference throughout the Party's response for no apparent reason (§71, etc.). The Party even claims (§72) "the coincidence in the composition of their boards of directors", which is arithmetically impossible as "Petón do Lobo's board is made up of 7 individuals while "Ouriol do Anllóns" has only 3 board members. But even if this were true, the communicants do not understand what relevance this could possibly have in relation to the basic facts presented in this claim, particularly considering the freedom of association enshrined by the Spanish Constitution, European Convention on Human Rights and Universal Declaration of Human Rights. The falsehood and deliberate confusion regarding the legitimacy of the communicants deserves no further comment on our side.

Reasonable burden of the requests. The communicants' requests address serious public health, environmental, and economic issues created by the mines' water, soil, and air pollution and other destruction and waste. The information requests were neither frivolous, as the comments on public participation will evidence, nor excessively burdensome.

The claim that the information requests made by the communicants could have led to the collapse of the Galician Regional Administration that has 150,000 civil servants (not counting external contractors and other employees) at its service and an annual budget of 10.000.000.000 euros is extravagant and with no factual basis. In fact, the "collapse" mentioned in §112 refers to the Santa Comba mining concession files, which, as it will be stated below, were never provided; out of the 100 pages provided, 70 were already in digital format. In spite of this fact, the Party argues that the communicants have acted in "coordination with individuals and collectives" (§58) to present "generic requests". Although the specifics of such a claim are not presented, the Party refers to the "San Rafael" copper mining project ("Touro Project") in §119-121, about which indeed dozens of associations and public bodies (unrelated to the communicants) have denounced continuous breaches in the right to access to public information. The "collapse of the [Mining] administration" has less to do with actual requests, but with the difficulties the Administration faces in the attempt to conceal its apparent wrongdoings.

Galicia's Ombudsman initiated in May 2018 by its own motion an investigation into the Directorate-General of Energy and Mines' failure to provide proper access to crucial environmental information. The investigation was prompted by no less than 40 associations[2] (!), including a dozen fishermen's public corporations with no relation to any of the communicants or other Galician environmental NGOs. Different individuals and organizations appeared dozens of times to be routinely humiliated (as it will be explained below) and the full digital copy of the administrative file of the Touro project was systematically denied to all those requesting the information, in spite of the existence of a full copy produced following a Criminal summoning of Spain's Public Prosecutor in November 2017. At the same time, the Party even denied access to the file to sectorial organizations (such as the Galician Environmental Federation) that were to issue required reports on the project requested by the Administration itself in the context of

[2] https://elpais.com/ccaa/2018/05/03/galicia/1525368087_580496.html

the environmental impact assessment procedure of the "Update of the San Rafael mining concession project and restoration plan". (All opponents were denied a copy of the files of what supposedly was being "updated".)

Page 8 of Annex 6 of the Party's response characterizes the communicants' reiteration of a request for the full digital copy of the files as "intransigence". The Party accuses the requester of "showing its indifference for the impact" on the work of the Directorate-General and also alleges that "it pressured the Administration in many ways (politically, in the media, through claims, complaints, etc.) to contribute to sending the erroneous message that access to the requested information is being denied". Again, the Party provides no evidence for such statements, while asserting "to put on record" the "attitude and the disproportionate and deliberate nature of its demands". Such language is incompatible with the principles and duty of neutrality of the public administration.

The Party's claims illustrate how the resolutions produced by the Directorate-General are not aimed at their nominal recipients, but rather the intended audience is the ACCC, as well as the Galician Ombudsman, the Galician Commission for Transparency, the Spanish Public Prosecutor, and the Criminal Courts reviewing the relevant administrative proceedings and the behaviours of the civil servants and public authorities. Additionally, these statements reflect the aversion that the Administration constantly displays towards the communicants. Curiously, "Petón do Lobo" is only acknowledged in positive terms in §228 regarding its appearance "as a co-defendant [of the Directorate-General of Energy and Mines] and has supported the legality of the denial" of the Corcoesto gold mine development (in reference to PO 7382/2014, Mineira de Corcoesto S.L vs. Galician Regional Government, quoted in page 3 of our February 15, 2018 response). This statement omits that one of the most controversial aspects of that process was the claim by Mineira de Corcoesto S.L. that the prospector was asked to pay a 1,5 million euros bribe to the Director-General of Energy and Mines Mr. Ángel Bernardo Tahoces, the Regional Minister for the Environment Mr. Agustín Hernández and the President of Galicia Mr. Alberto Núñez Feijóo in order to receive a permit. Further documentation on this case and bribery and corruption accusations by this specific mining corporation can be found at the United Nations Conference on Trade and Development (UNCTAD) file for PCA Case No. 2016-26.[3]

Correction of the Party's claims on information so-far received by the communicants

1. Inventory of Abandoned Mines, Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips and minor associated documents

As stated in our February 15, 2018 communication and subsequent statement, at that earlier point the communicants had received none of the information requested a year earlier. The information request on 20/04/2017 relative to an Inventory of Abandoned Mines and an Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips (as well as connected documentation) was delivered to the communicant in 2 DVDs on **12/07/2018** together with a notice sent by Mr. Ángel Bernardo Tahoces, Director-General of Energy and Mines, on **06/07/2018**. It took more than a year to finally obtain the requested information. A month before,

[3] https://investmentpolicyhub.unctad.org/ISDS/Details/836 Also see: https://www.eldiario.es/galicia/politica/multinacional-recrudece-venganza-Xunta-publicos_0_752075198.html

on **05/06/2018,** the communication included as Annex 6 in the Party's response was received by the communicant. The communication requested the communicant to pay DVD copying fees, without indication of the amount or data size, which caused additional delay. On 11/06/2018 a communication was sent together with the transfer receipt of 4,08 euros (which is the administrative fee for up to 1 Gigabyte of data). On 22/06/2018 Mr. Bernardo Tahoces indicated that the DVDs include a total of 6,7 Gigabytes, and that therefore the communicant must pay 16,32 euros, with the transfer receipt of the additional 12,24 euros being sent on 29/06/2018. The omission from the Director General's communication of the amount to be paid is seen by the communicants as yet another deliberate dilatory action.

As Annex 6 explained, the bulk of the information was the "practically 11,000 pages" of the Inventory of Abandoned Mine and the Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips. The remaining documents were minor, consisting of a few pages only. Annex 6 gave detailed information of the physical characteristics of the documents and stated that "the scanning and preparation of the documentation requested by you in digital format affected the performance of the specific functions of the mining administration (…) were interrupted or delayed". In contrast, the Party's response presented this as "**collapse of the administration**" (§112) as a consequence of meeting the request of this communicant. Annex 6 ended, amidst a number of pejorative references to the communicant, stating that the administration has "transposed the format of the information by scanning it in its entirety" as a consequence of the intransigence, indifference to disrupting the work of the Administration and disproportionality of the communicant. **All of the above as well as connected claims and statements made in the Party's response are utterly false.**

In fact, the diligence of the Directorate-General of Energy and Mines in producing full digital copies of the two principal documents (the Inventory of Abandoned Mine and the Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips) is not a consequence of deference towards the communicants, but of a Criminal Court summoning issued on **31/01/2018** by the Judge of Noia's N.º 2 Criminal Court of First Instance and Instruction in relation to criminal investigation proceedings 223/2017 that address the San Finx, Santa Comba and other mining operations. On **19/06/2018** Mr. Ángel Bernardo Tahoces, Director General of Energy and Mines, **sent a communication to the referred court together with 2 DVDs including these documents in digital format**. The communication sent to the Court is in fact coincidental in many aspects (including the description, labelling and letter identification of the files), problems encountered with the operation of the original CD-ROMs, etc. to that sent to the communicant, but of course no pejorative qualifications or accusations of causing disruption or collapse of the administration are made to the Judge of criminal instruction. This reveals that:

- **a)** while the Directorate-General of Energy and Mines did nothing in between our **20/04/2017** request and **January 2018** to create a digital copy of the requested information, only after the **31/01/2018** Criminal Court summoning did the Directorate-General take the necessary steps to create the copy, and following the Court's requirement as part of its criminal investigation procedure;
- **b) by the time the Directorate-General provided a digital copy to the communicants (06/07/2018) a digital copy of essentially the same information (the said 12,000 pages) had already been made and sent to the Judge**;
- **c)** all claims and accusations made in the Party's response, its Annex 6 and similar communications on the communicants responsibility or role in the alleged "collapse of

the administration" (§112) do not hold to the truth, as in fact the Administration was compelled to produce such a copy by a Criminal Court summoning as part of a criminal investigation and not the communicants' requests or even the uncontested resolution of the Commission of Transparency of Galicia.

d) the said "collapse" attributed to the communicants is obviously a gross exaggeration made exclusively to try to delegitimise the communicants' claims at the ACCC, as the mere scanning of 12,000 pages (which was done by an external copying service) cannot lead to the paralysation of the administration.

2. Full administrative file of the "Santa Comba" group of mining concessions

The information request on 13/02/2017 relative to the full administrative files of the "Santa Comba" group of mining concessions, however, has so-far **not been fulfilled**. A communication sent by Mr. Ángel Bernardo Tahoces on 27/08/2018 to the communicants enclosed a document identified as "A) Environmental Impact Study of the Santa Comba Mining Group", as well as a number of administrative resolutions and reports that were requested by the communicants in a separate request made on 28/02/2017 (this contradicts §115 of the Response that states that "the complaining associations have not collected the information"). However, as it has been clearly presented, the Resolution 55/2017 of the Commission of Transparency of Galicia fully upheld the communicants' claim and exclusively referred to our **13/02/2017** request for the full administrative file of the said group of mining concessions. It is evident that the Party thus continues to fail to comply. In addition to this, this instance clearly demonstrates the intentional breach of rights of access regarding the communicants in ways that evidence explicit and intentional discrimination in comparison to the same or similar requests made by other parties.

Roughly at the same time that "Petón do Lobo" made its second 28/02/2017 request of certain specific documents included in the administrative file of the Santa Comba mining group, another organization, Verdegaia, made another request for essentially the same documents. As **ANNEX 1** to this communication evidenced, the Galician Regional Ministry of Economy, Employment and Industry (Coruña Territorial Delegation) received this request by Verdegaia on **01/03/2017**. **On 17/03/2017, just two weeks later (!!)**, the Chief of the Section of Mines of the Coruña Delegation Mr. Francisco Germán Tuñas Rodríguez **sent a communication to the requesting organization stating that the copies of the documents (that included all those requested by Petón do Lobo, except one) could be collected in the offices of the Delegation on 24/03/2017**. The communication stated, however, that "**We inform you that we cannot provide you with copies of the requested Environmental Impact Study and Declaration as they are not part of the administrative file**" (this contradicts claims made in the Party's response, §210). Verdegaia paid roughly 10 euros for physical photocopies of 100 pages (including 72 pages plus additional pages with pictures and maps of a document so-called "Environmental Impact Study" and 30 pages of the resolutions and reports). A fee of 0,10 euros per page, applicable to individually certified official copies only, was applied, although only normal photocopies were provided and that digital copies of at least the most bulky information (the so-called Environmental Impact Study) already existed. **The version of this document provided to Petón do Lobo in 27/08/2018 was not a scanned document but an original PDF file that had never been in paper format.**

However, the Party's response evidences a completely different treatment of an identical request that was instead presented by the communicants (§66 and following). Instead of forwarding the request to the Coruña Delegation who held the requested documents (§64), the Directorate General halted both procedures to provide the mining concession's holder a period to oppose the requested access. On 06/03/2017 the first 13/02/2017 request was sent to the concession holder, while the second 28/02/2017 was sent only on 03/05/2017 (months later), in both cases receiving responses from the mining company stating its full opposition that any document was provided to the communicants (the Party has not yet provided these documents to the file of the current ACCC procedure). Several conclusions can be drawn:

a) by submitting the 13/02/2017 and the 28/02/2017 requests separately to the concession holder, the Administration **acknowledged that these were two separate requests** (with different organizations formulating the requests), which contradicts the repeated statement of the Party that "the second specifies the first" (§63; §102; §103);

b) the discrimination and arbitrary conduct of the Administration against the claimants is evident: by the time the Directorate General sent the 28/02/2017 request to the concession holder for opposition (this occurred on 03/05/2017!), Verdegaia, who had made an identical request at the same time, had already received the actual copies of the requested documents; **it would take another 16 months for the Administration to provide to Petón do Lobo its copy of essentially the same information.**

c) halting the access procedure and time for concluding its resolution, and the opportunity offered to the concession holders to oppose the access is in itself a breach of the Aarhus convention. **Neither the Aarhus Convention, nor EU directives 2003/4/CE and 2003/35/CE and Spanish Act 27/2006 transposing them provides for the existence of such possibility of suspending the procedure to allow opposition to the request by a third party. The Aarhus framework explicitly provides a 1 month time frame to respond, which can in exceptional circumstances be extended to 2 months**.

The Party's Response (§64) acknowledges that "The whole documentation referred to a site is in the provincial peripheral bodies (in this case Territorial Authority of A Coruña), which are the organs controlling the sites and reviewing the files". Instead of forwarding the request to the Administration unit holding the information (which was hierarchically dependent on the Directorate General of Energy and Mines), the Directorate General withheld the request and decided to process it directly (§65), in spite of not having the requested information. This is in breach of Article 4 paragraph 5 of the Aarhus Convention regarding the standard of informing the applicant "as promptly as possible", which also applies to the case of a public authority that does not hold the environmental information requested; such response should inform the applicant of the public authority that the respondent believes could supply the requested information or notify the applicant that the request is transferred to that authority. As stated above, this did not happen, contributing to the present controversy.

The communicants filed an appeal to the CTG in April 2018 urging it to enforce its prior resolutions, not initiating a new claim. The Directorate General's 27/02/2018 Resolution did not refer to our request for a full digital copy of the Santa Comba concessions files (considering that the CTG Resolution exclusively referred to this original request), but only to some documents (those that had already been provided to Verdegaia a year before!). In fact, as stated in that appeal and acknowledged by the Party's response in §81, the communicants were able to see the copies provided by the mining administration to Verdegaia in 24/03/2017, less than a month

after they had requested them. This is the reason that the communicants, having verified preliminary documental evidence of lack of compliance with public participation and environmental impact assessment and on site evidence of heavy metal pollution, only insisted in their original 13/02/2017 request for the full administrative file of the mining concessions and not the limited request. It must be set clear that the communicants' use of domestic remedy (the CTG) addressed exclusively this initial request of 13/02/2017 and not any subsequent requests and the Resolution of the CTG also addressed exclusively this particular request. It is the Party and not the communicants that has insistently attempted to mix up the original request of 13/02/2017 and the separate request made on 28/02/2017.

Therefore, although at this point the information regarding Instance 2 of the original communication (Inventory of Abandoned Mines and an Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips) has now been delivered to the communicant by the Party, the Administration has failed to provide the requested copy of the full administrative file of the Santa Comba Mining Group.

Correcting claims of inadmissibility regarding failure to use other remedies

Several claims in the Party's response seek the determination of the inadmissibility of the communication on the basis of several perceived failures in the way the communicants used available remedies prior to the presentation of the communication before the ACCC. Because of the diverse nature of these claims, they need to be addressed separately:

1. The Party's claim that the remedy used did not apply to requests for environmental information

This claim had already been made by the Representative of Spain in the March 12, 2018 appearance before the ACCC. It was then implied that the claims presented before the Commission of Transparency of Galicia were not a relevant use of domestic remedies, stating that Law 19/2013 of Transparency, Access of the Information and Good Governance indicates that "*In matters for which there is a specific legal framework on access to information, said specific legislation shall prevail, this Act being applicable in a supplementary capacity*". This constitutes the second point of the First Additional Provision of this law. However, the next point of the same First Additional Provision clearly states that Law 19/2013 of Transparency will be fully applicable to access to environmental information in those issues not foreseen in their specific rules ("*3. When not provided for in the respective regulations, the Act shall apply to access to environmental information and information for reuse*."). The Spanish Council of Transparency and the Regional Commissions of Transparency, created by their respective laws following Law 19/2003, were not contemplated in Spanish Law 27/2006 (which transposed the Aarhus Convention). Nor did Spanish Law 27/2006 create for environmental information another procedure comparable to the Spanish Council of Transparency and the Regional Commissions of Transparency. Accordingly, the First Additional Provision made them fully competent to act as a national remedy in cases of access to environmental information.

This is relevant considering the continuing difficulties in using Spanish judicial remedies, as several decisions by the ACCC regarding Spain have concluded. In the case involving Almendralejo, the ACCC noted that "the powers of the Ombudsperson under the Spanish

system seem to be rather limited" and decided to consider the complaint. After finding noncompliance, the ACCC recommended that Spain: "Develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for central, local and regional authorities responsible for Aarhus-related issues, including provincial commissions granting free legal aid, and for judges, prosecutors and lawyers; and to develop an awareness-raising programme on Aarhus rights for the public" (ACCC/C/2009/36). In a complaint involving a request for information in Catalonia, Spain asserted that the complainant did not use all available domestic remedies to challenge the permit. However, the ACCC decided that the complaint was admissible and cited Spain's failure to remedy the financial barriers to access to justice to a small nongovernmental organization (NGO) noted in connection with the decision involving Almendralejo (ACCC/C/2014/99). New developments in Galicia evidence absolute lack of compliance with such recommendation and the overall Aarhus Convention framework.

Law 19/2013, being more recent than Law 27/2006, created a national Council on Transparency (to address matters of the Spanish central administration and of those autonomous communities without a decentralized Commission of Transparency) and allowed for the creation of regional devolved Commissions of Transparency. Galicia created such a Commission by Law 1/2016 of Transparency and Good Governance. By the general and broad definition of public information presented in both the Spanish Law 19/2013 and the Galician Law 1/2016, it is evident that all environmental information in possession of the Public Administration has the dual nature of "public information" and "environmental information". As Law 27/2006 did not provide for the creation of Councils or Commissions of Transparency that provide an easy and free remedy to citizens and organizations in matters of access to information held by Administrations, as an alternative to costly and inaccessible judicial alternative procedure (usually involving years of litigation and thousands of euros in judicial expenses), this remedy must also be applicable to cases of environmental information held by the Administration on the basis of point 3 of the First Additional Provision of Law 19/2013.

Certainly, the Party's commitments under the Aarhus Convention allow for no less access to environmental information. The opposite, as the Party wishes to imply, would mean a blunt case of negative discrimination regarding access to environmental information in contrast with any other possible kind of public information that could be held by the Administration. If this view was to prevail, while any citizen or organization requesting access to information held by the administration that pertains to any possible matters except from the environment would have, in addition to the costly and extremely slow judicial remedies the possibility of using a fast, efficient and free remedy (the Commission of Transparency), anybody requesting information that can be labelled as "environmental" would be deprived of this remedy.

The Party states (§92-95 and again §145-148) that

- **a)** on the one hand, by using the Commission of Transparency as a remedy (instead of the long process of judicial litigation) the communicants have failed to use the appropriate domestic remedy; and
- **b)** on the other hand, the fact that a remedy not exclusively conceived for environmental information (but public information in general) was used, automatically removes the information requested (regardless of its actual nature) from the scope of environmental information, and therefore outside of the scope of the Aarhus Convention and the ACCC mandate.

The communicants are in fact very much concerned with how the preliminary admissibility of this communication by the ACCC has had a backlash effect in this regards within Galicia. While in 2017 the Commission of Transparency of Galicia admitted all relevant claims regarding public information (regardless of the specific nature, environmental or not, of the documentation), after the ACCC decision the Commission of Transparency of Galicia, and pressured by the Directorate General of Energy and Mines through its insistence on this stance, has systematically rejected claims regarding environmental information as being inadmissible. This particularly affects requests relating to mining operations, which are now routinely disregarded through the following statement used repetitively in dozens of recent resolutions:

> "…we must conclude that the request, dealing with matters that undoubtedly must be included within the scope of environmental information according to article 2 of the said Law [2]7/2006, must be processed through the procedure established in the said law, including the procedure for appeal, thus making this Commission incompetent for dealing with this matter, considering the environmental nature of the requested information" (from RSCTG 67/2018).

Although the Commission of Transparency, as part of the Galician Ombudsman, is formally an independent body which responds to the Galician Parliament, the pressure exercised by the ruling majority over the institution is publicly known, and illustrated by this shift which causes great concern. **It is hoped that as part of its deliberations regarding this case, the ACCC addresses the question of the attempts by the Party to restrict the use of domestic remedies available in Spain to defend the right of access to public information in cases were environmental information is at stake, and that would be negatively discriminated against, thus having less options for appeal, less rights and protection and being forced to instead use slow and costly judicial alternatives.**

2. The prescribed remedy according to the Party: years of litigation

The Party alleged that requests for environmental information cannot be subject to appeal through the general mechanisms set for all forms of public information. Instead, the Party argues that access requests for environmental information must use exclusively administrative appeals (filed with the same authority), which are systematically disregarded or responded through "negative administrative silence", and in practice leaving the only option of initiating legal action at Court for contentious Administrative Proceedings. The average cost for such court action is between 1,000-1,500 euros and according to the 2015 statistics of the Spanish General Council of the Judiciary the average time lapse for a contentious Administrative proceeding is ONE YEAR.[4] Furthermore, the Spanish Contentious Administrative Proceedings are characterized by an unbalanced regime of fees and proceedings cost[5]: while the complainants have to pay their own fees and expenses and half of the common fees and expenses in all cases except if they fully and entirely win the case; in the later scenario the Administration losing entirely the case benefits from a limitation of the fees and costs. This in

[4] http://www.expansion.com/juridico/actualidad-tendencias/2016/05/20/5739e8d0468aeb26418b4603.html

[5] Spanish Act 29/1998 on contentious-administrative jurisdiction, Articles 139 and 93.4. Hundreds of papers have been written on subject. The result of the particular unbalance regime of fees and cost has a clear result: a strong deterrence effect, especially for those claims not related to economic rights of the potential plaintiff.

practice means that complainants usually lose in all cases in economic terms, even if they fully win the case.

This is well known by the Party when insisting on referring the communicants to the Contentious-Administrative Proceedings. This is precisely why the more recent laws on access to public information created the Council of Transparency and Commission of Transparency to empower citizens and organizations by offering an alternative form of appeal which is faster and does not involve high costs. It must be noted that even if the Aarhus framework is supposed to provide access to free justice in environmental cases, in practical terms this is not operational in most parts of Spain. Environmental organizations are often denied the right to free justice and threatened with having to pay high judicial costs in case the final rulings do not uphold their demands.

In our February communication we provided a case example of the application of the prescribed remedy according to the Party's view. On November 22, 2017, the Contentious Administrative Chamber of the High Court of Justice of Galicia issued its Judgment TSJG 600/2017, relative to procedure 7363/2015. In this case, an applicant demanded in **2012** from the Mines Section of the Coruña Territorial Delegation copies of environmental information regarding the administrative files of the mining concessions of the Corcoesto gold mining project. The relevance of the documents was that they allegedly indicated that the mining concessions in question were expired, and therefore the attempt of reviving them was void. The Department of Mines refused access and this expiration could not be demonstrated in the period the mining project was subjected to public information. The mining project in question was brought down on other grounds, but it took five years of administrative and judicial litigation until a firm judgment granting access to the requested information was obtained. However, and even though the Judgment became firm on February 2, 2018 (**ANNEX 2**), it took an additional seven months for the Administration to effectively provide the copies after the sentence, six years after the initial request, and at a time when the information was absolutely irrelevant as the project's permit had been denied and the mining concessions had been publicly declared expired. Throughout the process the Party took every possible dilatory measure, in breach of the Law. It delayed its response to the 2012 request for 5 months, and after the requester made an administrative appeal to the same Administration (the procedure that the Party suggests was prescriptive in the present ACCC procedure), it took **26 months** to issue a (negative) resolution. It took 5 years since the use of the administrative appeal process for a court sentence to be issued.[6]

Although it had not done so in this instance, in other occasions the Administration has appealed the rulings of the High Court of Justice of Galicia to the Supreme Court purely as a dilatory measure, meaning that it may take almost a decade for a final ruling to be reached, and of course most claimants will be disenfranchised from directly participating due to increasing costs of the procedures. As already explained, only rarely do the Contentious Administrative courts impose on the losing Administration the costs of the judicial process, and therefore the claimants must almost always bare the full expense of their judicial actions.

Obviously, this domestic judicial process for obtaining environmental information is in breach of the Party's responsibilities under the Aarhus Convention and prior ACCC decisions. Now, in this proceeding, the Party asserts that this inadequate judicial process is the prescribed remedy that claims against the denial of access to environmental information should follow, exclusively.

[6] https://www.eldiario.es/galicia/movimientos_sociales/Corcoesto_0_712878791.html

This effectively makes the requested information irrelevant in most cases, both to allow public participation in cases of projects for which an environmental impact assessment is being processed and to challenge in courts previous administrative decisions that have been processed without due guarantees. The first is the case of the recent Touro copper project ("San Rafael"), where the digital copy of the administrative file of the concession was denied to all those requesting it, including bodies that were to issue prescribed reports requested by the mining administration itself, although nominally the project was supposed to be an "Update" of previous projects of which documentation was not made publicly available. Similar cases are those of the San Finx and Santa Comba mines, but also other operations with significant environmental impact, such as Monte Neme.

3. Denial of environmental nature of the information requested

The Party also directly challenges that the requested information (or at least most of it) "**cannot be classified as environmental**" (§168 and §98). How could this be? As discussed above, the Party argued that because the requested information was environmental information the Commission of Transparency was not an appropriate domestic remedy and, therefore, a cause of inadmissibility. Nevertheless, in a self-contradictory manner, the Party asserted that since the Commission of Transparency accepted and issued resolutions fully upholding the claims, then this somehow implied that the requested information would qualify as "public information" [in general] therefore losing its "status" as environmental information and thus, again, falling in a cause of inadmissibility.

In addition to this contradiction, this assertion is clearly wrong and the ACCC must rule to protect access to this environmental information.

According to the Party an inventory of sites degraded by mining and that can potentially generate acid mine drainage is not to be classified as environmental information. Each of the thousands of files that make up the inventory specifically quantifies the external risks to the environment ("*por espacio natural*") and indicates the presence of waters running out from the abandoned mining works. This information can indicate the existence of acid mine drainage that pollutes waters and land. The fact that on the basis of this inventory a "General Collaboration Agreement between the Regional Ministry of Economy and Industry, the Regional Ministry of the Environment, Territory and Infrastructures and the Galician Association of Excavators for securing the shafts of abandoned mining works and the restoration of the degraded natural areas" (2010) further contradicts the claim of the Party. Similarly, how can an environmental risk assessment of the "Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips", issued after the Doñana mine tailings dam failure environmental disaster, not be qualified as clearly environmental information? Page 2 of the said document states as objective of the study the "inspection of the [mining] dams and waste dumps to assess their suitability, conservation state, **environmental impact** and security".

In relation to the Santa Comba mining concessions administrative files, the Party claims that "transfers between companies or technical issues of facilities and machinery" (§98) are not environmental in nature, even as it has been in the resolutions of such documents (as it is the case in the 2008 and 2009 transfer resolutions of the San Finx and Santa Comba mines) were the obligation to subject projects to environmental impact assessment has been established. Failure to access these concession transfer files would completely hide these crucial

environmental obligations. In fact, in §98 the Party implies that to resolve a single request of access, the communicants should use certain remedies to challenge the failure to provide copies of certain documents (which the Party identifies as being environmental information) while other remedies should be used in relation to the rest of the files. For the overwhelming majority of the files, although not identified or described, the Party summarily rejects as being environmental information.

On the contrary, the vast majority of information within the administrative files of the mining concessions (including, and particularly, the annual work plans, technical issues of potentially polluting facilities, etc.) certainly falls within the scope of environmental information. However, the Directorate General of Energy and Mines is systematically applying an unjustifiably restrictive view on what is to be considered as environmental information. This has been seen over the past year following diverse requests that were denied on this basis, and that has now been systematized in the Instruction 6/2018, of August 3, of the Directorate General of Energy and Mines, on the access of public information regarding mines, signed by Mr. Ángel Bernardo Tahoces and published in the Official Diary of Galicia of 20/08/2018 (**ANNEX 3**).

Instruction 6/2018 is in its whole a blunt breach of the Aarhus Convention. Article 28 of the Instruction is paradigmatic by limiting the understanding of environmental information **exclusively** to:

- The Environmental Impact Study.
- The Environmental Declaration issued by the environmental body and the specific documentation of the processing of such declaration.
- The Restoration Plan of areas affected by mining activities.
- The environmental monitoring reports.

All other information contained in mining files, according to the internal regulation recently passed by the Party, is not to be considered as environmental information. This characterization appears to contradict the new stance of the Commission of Transparency of Galicia (page 4 of the Party's submission) that declares the inadmissibility of complaints regarding the administrative files of mining concessions on the basis of "the environmental nature of the information requested".

By narrowly restricting "environmental information", the Party widely exceeds the bounds of "restrictive interpretation" for exclusions from the Aarhus Convention, and openly and illegally breaches the provisions of the Aarhus Convention and its national law. According to the Aarhus Implementation Guide (p. 53), the definition of environmental information in Article 2, paragraph 3 of the Convention "certainly includes decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment as well". The Aarhus Implementation Guide states that the standard of "affecting or likely to affect the elements of the environment" in defining environmental information extends the scope of "environmental information" to documents and data that may not be labelled as "environmental".

Also, the Party ignores and violates previous ACCC findings that the Aarhus Convention is concerned with mining information and permitting. In a complaint against Romania, the ACCC found that mining falls within the scope of environmental information as an activity affecting or likely to affect soil, landscape, and natural sites. The decision found that "licences and other mining-related information requested, including the 'quantities of non-ferrous ore' that were

entitled to be extracted under those licences, are clearly 'environmental information'" (ACCC/C/2012/69).

In another breach of the Aarhus Convention, Instruction 6/2018 blocks the one month time frame to provide information in response to requests to allow the opposition of concession holders Mining companies have been systematically asserting the denial of access on the basis not only that the information contained in the files has no environmental nature whatsoever, but also that it is protected by commercial and industrial confidentiality. Regarding the possibility of opposition by the mining concession holder, in ACCC/C/2007/21 involving the European Community, the ACCC interpreted claims of exemption based on "the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest". The ACCC found that

> *this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified…. [T]he Convention … requires interpreting exemptions in a restrictive way, taking into account the public interest served by disclosure. Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.*

Consistently with the mandate to interpret grounds for refusal narrowly, the Convention (Article 4 paragraph 6) provides that if information exempted from disclosure can be separated out, then public authorities shall make available the remainder of the information requested. "Moreover, the analysis of what was to be exempted and what disclosed should have been on a document-by-document basis…. [T]he Committee finds that, by failing to ensure that the non-confidential portion of the information is made available, the Party concerned fails to comply with article 4, paragraph 6, of the Convention." (Romania ACCC/C/2012/69, paras. 60, 63, 68).

In spite of the previous ACCC decisions, in §54-55 the Party claims that the communicants should have directed their requests not to the mining administration that effectively holds the information that is requested, but to the "Environmental Information Service" based at the Regional Ministry of the Environment, that DOES NOT hold the requested information. This contradicts the claim that the information is not environmental in nature. It is also worth noticing that the Response is the first time that the Administration has argued that it should be the Regional Ministry of the Environment who should handle access requests related to documentation exclusively held by the mining administration.

Under this problematic Instruction 6/2018, authorities also demand that the fee for document copying must be paid at the moment of the request, regardless of the fact that requesters cannot possibly know what fee is to paid as they do not know the number of pages of a document or its possible volume in Gigabytes at the moment of request, or even if the requested environmental information actually exists or is available. This provision, again in contravention of the Aarhus Convention and national laws, is yet another attempt to obstruct and dissuade requests, that would subsequently have to initiate slow and lengthy procedures to retrieve their fees in case of a negative response.

The ACCC must find the complaint admissible and promptly issue a decision remedying this serious breach of the Aarhus Convention by requesting the urgent repeal of Instruction 6/2018 adopted by Mr. Ángel Bernardo Tahoces as Director General of Energy and Mines. It must be

noted that no other department of the Galician Regional Administration has ever attempted to issue Instructions of this kind, reinterpreting the nature and scope of the Aarhus convention.

4. Existence of firm resolutions of the Commission of Transparency of Galicia

In 2017, the CTG processed both our claims for mining information with normality and reached final resolutions fully upholding our claims. In the said resolutions, the CTG made no mention that it was not competent on the basis of the public information being environmental in nature. Other 2017 resolutions by the CTG regarding environmental information involving mining operations were resolved positively without any such consideration being made (for example, RSCTG 008/17 regarding a mine in Ourense, and RSCTG 0082/17 regarding a mine in Lugo). Nevertheless, the Party argues that it does not have to comply with these resolutions, in spite of not having filed a judicial appeal against them in the appropriate moment of the process.

The Party now claims the "incompetence of the CTG on environmental information" (§24). It correctly states that AT PRESENT "The CTG systematically disregards all claims made in procedures for access to environmental information, given that it is not competent in the matter".

The sudden and worrying radical change of stance by the CTG, disregarding any claim of information that can possibly be considered as environmental in nature is, in the communicants' view, connected with the current ACCC procedure (and the decision of preliminary admissibility in particular). Yet, this cannot affect the CTG's previous resolutions, which are binding and firm, as they were not contested by the Directorate General of Energy and Mines at the courts of appeal. The Party could have challenged the CTG Resolutions concerning this procedure (as well as others) on the grounds now stated in its Response, but it did not so. Instead, the Party pressured the CTG not to declare admissible any further claims. The Party has been effective in this regards and the CTG has *de facto* ceased to be a viable remedy for challenging lack of compliance regarding access to environmental information in Galicia. The ACCC must find the complaint admissible and promptly issue a decision remedying this serious breach of the Aarhus Convention.

5. No complaint against additional communications by the Party

The Party states that (§149) the communicants did not present a claim before the CTG or otherwise assert disagreement with the communication of 15/12/2017 about making the information available. The said communication (which we included as Annex 6 in our February communication) only allowed onsite access to the requested information. This arrangement was never requested by the communicant (that had requested a digital copy) and thus did not comply with the resolution of the CTG, which upheld the original request. In fact, it is untrue that the communication of 15/12/2017 was not contested by the communicants.

On 27/02/2018 a communication by the communicants was sent to the Regional Minister of Economy, Employment and Industry (Annex 1 to our March 2017 statement to the ACCC) specifically demanding the digital copies of the files. Appeals were also made to the CTG so that it would enforce its two previous resolutions regarding both instances. The Party attempts to present such appeals of enforcement of earlier CTG resolutions (§113) as an indication that "the administrative channel is not exhausted". In fact, the CTGs' resolutions exhausted the

administrative channel being firm resolutions that were at no point challenged by the Administration. However, the Administration, instead of complying with the CTGs' decisions, tried to force the communicants into accepting an onsite physical access to the files as a surrogate to their original request: the full digital copy of the documents being requested.

6. Communication to ACCC before resolution by Commission of Transparency issued

The Party expressed in §89 and §144 as a cause of inadmissibility the fact that the communication was presented before the ACCC before the resolution of the Commission of Transparency was issued. As we prepared to file our communication to the ACCC demonstrating numerous instances in which we exhausted prior procedures and remedies under the laws and regulations of the Party and Galicia, one additional proceeding appeared to deserve inclusion. We filed a request for resolution by the Commission of Transparency on 29/05/2017 regarding the Santa Comba files while "Ouriol do Anllóns" and on 29/05/2017 regarding the inventories and mine tailings dams and tips risk assessment. In both cases more than one month elapsed without resolution, which we had assumed to be the period for resolution, as it is the case for administrative reconsideration appeals. However, it must be pointed out that the respective resolutions of the Commission of Transparency were issued beyond the period actually established by its own regulation: Resolution 55/2017 regarding the full administrative files of the Santa Comba Mining group was issued on 08/11/2017, just as resolution 54/2017 regarding the inventories and mine tailings dams and tips risk assessment; **more than five months after the initial claim was made, when the maximum time allowance established by law was three months**. Considering that the earliest request had been made almost nine months earlier, and that the resolution, in spite of upholding the claims of the communicants and not being contested by the administration, had no immediate result in terms of access to the requested information, as indicated above, we request that the reason referred by the Party is not deemed to cause inadmissibility. Certainly, informing the ACCC about this proceeding as another illustration of refusals to provide requested information and long delays cannot undermine the fact that the Party did not comply with numerous final decisions by the CTG.

In any case, it must be noted that, prior to the existence of the CTG (created in 2016), the communicants had been exposed to continuous non-compliance through lack of access to environmental information and inadequate national remedies, regarding the same instances. The communicant had filed on **06/08/2015** a request to the Directorate General of Energy and Mines for access to the administrative file of the change of concession holders and the **restoration project** of the San Finx Mines. On 11/09/2015, already a month after the initial request was received, the Directorate General sent the request to the concession holder, to allow it to manifest its opposition to the request and suspending the time to resolve the request for 15 days. On 09/10/2015 the concession holder submitted a communication requesting that the request of access be fully denied. **On 25/05/2016, 9 months and 19 days after** the communicant's initial request, Mr. Ángel Bernardo Tahoces issued a resolution (**ANNEX 4**) **denying access to the mine's restoration plan "for lacking the consent of the concession holder"** arguing that providing the communicant with a copy of the mine's Restoration Plan, that was approved by the administration without public participation process, would be a breach of the concession holder's industrial and intellectual property rights (a 170 word "summary" of the restoration plan was sent). Only 10 pages of the administrative file of the change of concessions

was sent, excluding the report on the economic viability of the new concession holder. It took until 2017 for the mining Administration to reconsider its stance, acknowledging in a report sent to the Galician Ombudsman (but not to the communicants) that they would provide a copy of the restoration project if the administrative copying fees were paid (**ANNEX 5**, p. 8). This instance represents a clear violation of the Aarhus Convention, supported by previous ACCC decisions. The ACCC addressed disclosures of environmental impact assessments (EIA) and related documentation in ACCC/C/2005/15 against Romania. In rejecting a claim for exemption based on intellectual property rights, the ACCC concluded that it "doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure."

The Party's Efforts to Evade its Aarhus Convention Obligations by Offering Inadequate Time for On-Site Access to Physical Records under Conditions of Obstruction and Intimidation

The Party's response repeatedly claims that the communicants' failure to appear when offered to review the documents in the offices of the Administration proves the disruptive and abusive nature of the communicants' requests. The Party even claims (§152) that "the information was not a real objective for the association and therefore it has no basis no maintain its claim before the Committee, so that, it is also considered that it should be denied". In other words, the fact that the communicants rejected the opportunity to view part of the information (of which a digital copy was requested) on the terms proposed by the Party (but not on the terms of the initial request or the terms of the resolution issued by the CTG) is also argued as grounds to declare the inadmissibility of the communication. The relevance of the requested information to address serious environmental impacts of the said activities will appear clear in our comments to the matter of lack of public participation.

In relation to the Santa Comba files, the Party's response states in §82 that the Coruña Territorial Delegation that held the requested documents made the documents available to the communicants on 31/05/2018 (**over a year after the 13/02/2017 request**) by placing the 30 filing cases (holding some 12,000 pages) in a room in their offices. As stated on §117, the communicants were "granted a period of fifteen days during which they may appear at the Territorial Authority as many times as they deem necessary (…) with the advice of the civil servant staff if needed". Allegedly, this was done so that the communicants could "identify files and documents of their interest" (§83), although since the very first request the communicants had requested the "full administrative file". In spite of communications by the communicants to the Regional Minister with oversight over the mines administration insisting on its specific request, on 03/08/2018 the Administration "**declares the applicants withdrawn for failing to comply with the request made to identify the requested information**" (§86, 118). This conclusion is certified in the Party's response.

The communicants, both from the personal experience of its members and detailed accounts of members of other organizations and private citizens, know perfectly well what it means to "appear" at the offices of the Mining administration to "access" information. The continuing situation has been publicly denounced and taken directly to the Galician Ombudsman by

dozens of different organizations and public corporations, including the fisheries organizations of Illa de Arousa, Rianxo, Ogrobe, A Probra do Caramiñal, Cambados, Vilanova de Arousa and Cabo de Cruz as well as the Regulating Council of the Denomination of Origin of Galician Mussels (representing tens of thousands of fishermen and mussel producers), who have repeatedly demanded the resignation of the Head of the Coruña Territorial Delegation.[7]

The "access" process is a humiliating experience aimed exclusively at wearing out the requesters and making them quit. The process is usually managed in Coruña by the Chief of the Section of Mines, Mr. Francisco Germán Tuñas Rodríguez. The appearing person (usually no more than one person is allowed to be present) sits in front of the civil servant at a table. Only the civil servant is allowed to open the files and pass pages, one by one. The civil servant pretends to be reading each page before allowing the appearing person to see the page by his or herself, but it is evident all the time that in fact the civil servant is in fact not reading the page, just wasting time. It can take up to a minute for each single page to be "cleared" (allegedly to avoid disclosure of personal data) and therefore it takes many hours to go through a few folders contained in a filing cabinet. Not only does the civil servant not even try to act as if he is actually reading the pages, but when the requester actually gets the opportunity to see the page by his or herself, he or she is exposed to hearing the constant comments of the civil servant regarding the hopelessness of any effort to stop the mine in question and how opponents are causing the loss of jobs and prosperity for all. No pictures of documents are allowed to be taken on site. Pages or documents are to be singled out individually for copying, in each occasion, and a formal written request with the payment of copying fees made in every time, while obtaining the copies becomes a new battle of attrition that can take up to months. If at some point the requester reaches a document that the civil servant deems inappropriate for viewing, an elaborate shell game or disappearing act commences, so that the requester may not identify the document in question. Alternatively, after a document has been viewed and singled out for copying, the public servant may indicate that it cannot be copied as it may contain intellectual or industrial secrets. Add to this that access must occur in morning office hours, meaning that requesters need to get a day away from work to travel some 250 km (distance from Silleda, for example) to become exposed to the "access procedure".

It would literally take years, under this regime, for the communicants to be able to access the 30 filing cabinets of the Santa Comba concessions files, assuming the individual members appearing would endure the whole process. While the Party intended to impress the ACCC and others by its long-delayed "grant" of 15 days for the communicants' document review, in fact the offered review arrangement would do virtually nothing to make the requested documents available and would clearly violate the Party's obligations under the CTG ruling and Aarhus Convention. Under these circumstances, it would be unrealistic that the communicants would accede to participate in such a satire that was evidently set up exclusively to generate a "declaration of appearance", signed by the communicants, that would state that the communicants had indeed had access to the files. It must also be noted that in some occasions the civil servant has demanded the requester to sign such a declaration stating that the information had been made available in advance, before the shell game commenced.

This experience is not at all unique to the members of the communicants' NGOs but rather generalized, contrary to what is stated in §112. The communicants can request testimony for

[7] https://galicia.economiadigital.es/politica-y-sociedad/mina-touro-valedora-pobo_553136_102.html

the ACCC from different organizations and private citizens (and in at least one account, a Member of Parliament) who witnessed such a situation, particularly during the last year in relation to the Touro copper mining project where this strategy has been systematically used to discourage document review.

In relation to the second instance, regarding the mine inventories, the communicants were informed on 15/12/2017 of "the availability of the documentations in the DGEM offices, in the available formats". Contrary to the Santa Comba files referred above, where only 15 days were granted, in this case "No limit of consultation days is established" and the documentation was kept "at the disposal of the association for two months" (§133), in spite of the fact that according to the Party, both sets of documents had approximately the same number of pages (12,000). As §164 acknowledges, this documentation was not placed at the disposal of the communicants alone, but also for another environmental NGO, which, unlike the communicants, did attempt to access the information in 27/12/2017. The communicants learned of what the representatives of this other NGO were exposed to in their appearance, and decided to insist on their initial request of a digital copy of the said documents.

During 27/12/2017 the NGO representatives were unable to open the digital inventories of the Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips. Although the document has some physical items, its basic information was contained on a CD-ROM while no paper version of the relevant data existed. This included the crucial files of mining tailings dams, including those of the San Finx mine, which will be discussed when addressing the last section of the Party's response. The NGO representatives were first not allowed to test the CD-ROM on their personal computer (after much insistence they could finally do so) and were forbidden to copy the files from the CD into their computer, preventing them from attempting to solve the technical issues that prevented access externally. However, the digital copy provided months later to the communicants did include the digital files for each of the dams and waste tips, illustrating how the problem was, at least partially, solvable. On the other hand, the digital (CD-ROMs) version of Inventory of Abandoned Mines had disappeared from their cases that accompanied the physical volumes, so the requesters were unable to even test its operability, leaving the requesters only with the option of consulting the physical volumes. However, the analysis of the information contained in the volumes would take weeks of dedication, making it futile to have access to them for a few hours in the offices of the mining administration.

In the 27/12/2017 appearance session, the NGO members were constantly scrutinized by three civil servants that observed with attention exactly what volumes and information the requesters were consulting with special attention and taking notes. Moreover, the appearance lasted approximately 4 hours, of which 2 hours were spent on the actual attempt to accessing CDs and checking and numbering the physical volumes, and another tense 2 hours were spent on the controversial "declaration of appearance" in which heated debates took place as the civil servants wanted to have the requesters sign a document stating they had had full access to all the requested information, without acknowledging that the data was inaccessible or missing from the files presented. The Party should be able to produce the copy of the declaration of appearance as it was finally issued. Significantly, the civil servant responsible for the 'negotiation' of the subsequent drafts and the handling of the appearance, Ms. María del Carmen Rodríguez Andrade, did not sign the declaration with the other two civil servants that provided oversight of the session. Ms. Rodríguez Andrade has recently replaced Ms. Míjares Coto, who was referred to both in our original communication and subsequent responses, as

Subdirector General of Mining Resources, and is currently responsible for the management of this ACCC process.

The Party's obstruction, intimidation, and inadequate provision of procedures for examining physical files prove the wisdom of the strong preference under the Aarhus Convention for providing records in digital, electronic form when so requested. Directive 2003/35/EC, Article 3 paragraph 4, states that "public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means." Similarly, the ACCC repeatedly referred to the benefits of providing requested information in electronic form. See Belarus ACCC/C/2009/44; Romania ACCC/C/2012/69, paras. 55-56; Ukraine ACCC/C/2004/3 and ACCC/S/2004/1. The ACCC should find this communication admissible and use this proceeding to order the Party to end its repeated denial of timely, digital access to important environmental information.

The Party denied access to digital, electronic records, even for files previously existing in digital format and voluminous information

From the previous, it is evident that, at least at the point of their creation, both the Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips and the Inventory of Abandoned Mines were available fully in a digital format. In fact, both documents were intended primarily to be used as digital databases and not as paper files. The inventory of the Urgent Risk Assessment (which is the key information of the document) **is available only as a digital database** contained in a CD-ROM. Both being important documents regarding the security of both persons and the environment and that were the result of the investment of a large amount of public funding into large scale inventorying, it is difficult to understand why the Administration did not keep the files in good condition and operational order over the years, particularly as they have never been replaced by updated inventories of similar scope and detail.

As stated in our appeal to the Regional Minister responsible for the Mining Administration, our primary interest was to have access to the information in the digital databases that allow easy access and analysis, in fact allowing functionalities that the scanned PDF volumes cannot replace. The communicants hold no responsibility for the Directorate General's failure to conserve the digital files of the inventories operational. When Mr. Ángel Bernardo Tahoces assumed office in 2009, the files were likely still operative, and could have been transferred to more modern database systems, particularly as the Inventory of Abandoned Mines has been the object of repeated requests for access by multiple requesters over the last decade. The Directorate General's decision to scan the 23 volumes of the Inventory of Abandoned Mines, conveyed to the communicants in its 5/6/2018 resolution (Annex 6 of the Party's response) was not made to satisfy the communicants' request, but rather because of the Criminal Court order received by the Administration months before regarding the same documents. As previously stated, the Directorate General only provided the communicants with the digital version of the documents after it had sent it to the Court processing the criminal investigation in Noia. The files (including the 12,000 scanned pages) already existed in digital format by the time they were provided to the communicants. None of this is mentioned in the Party's response.

This is particularly relevant to the statement in §153 of the Response, that argues that the communicants' request "must have been considered abusive and inadmissible" due to the "huge volume, transposition need, impact on administrative operations, etc.", claiming that "the Administration has acted beyond what is legally required". In fact, the Administration only searched for the files in December 2017, after the resolution of the CTG, many months after the original request that was fully ignored, and only produced the digital copies after it was summoned to do so by the Judge instructing a criminal investigation case related to the San Finx and Santa Comba mines. The Administration could have initially, within the one month period, provided simply an actual copy of the CD-ROMs that contained the original digital version of the inventories, and provided reasonable access to technical specifications if necessary to facilitate their use. If the Party had so complied with its obligations under the Aarhus Convention, the communicants could have obtained technical support services that could have retrieved the original databases, without needing any scanning of physical paper volumes to be made. However, the Administration decided not to provide copies of the original CD-ROMs and, in fact, to this date, **original digital information has not been provided at all**.

It must also be pointed that the Aarhus Convention requires public authorities to provide requested information, without an excuse for voluminous information. The methods of providing voluminous information include electronic access and scanning, with a preference for the form in the request. A public authority could justify an additional month to respond to a voluminous request, but this did not happen:

> *"[I]nformation within the scope of article 4 should be provided regardless of its volume. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention." (Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 Mar. 2005, para. 33)*

The fact that other information, such as that of the Santa Comba mines, are kept (allegedly) mostly in paper cannot serve a reason to refuse to provide the information electronically or by scanning. The Directive 2003/4/EC, Article 3 paragraph 4, states that "public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means." In the case of the Inventories and Risk Assessment, that was originally developed in electronic format, the Authorities failed in their responsibility to maintain information in electronic format (possibly losing important information that may longer be retrievable). Therefore, the burdens of long-delayed, subsequent efforts to digitalize information that was originally already in electronic format cannot be attributed to the communicants' intransigency. Even with the volume of information in question (roughly 12,000 pages for the inventories and risk assessment and another 12,000 pages for the Santa Comba files), a simple check with external document digitalization services indicates that this is nothing extraordinary at all, and that such services are usually completed within hours or days. In fact, the communicants have received in other instances large volumes of digitalized/scanned files from other Departments of the Galician Regional Administration of comparable size in compliance with the one month time frame and without any claim of "collapse of the administration"

(primarily because this service is always provided by external contractors, as the Party acknowledges was also the case here).

In relation to other similar cases, the ACCC found:

> *"[I]t is not sufficient to respond to a request for information from the public … by simply providing access to examine the information free of charge. Article 4, paragraph 1, expressly requires the applicant to be provided with copies of the actual documentation…. [E]ven if an electronic version did not initially exist, given the authority's statement that it had received other requests for the same information, an efficient approach may have been for the authority to have the requested pages scanned, and then it would have been able to meet both the requests of the communicants and other similar requests without much additional effort." (ACCC/C/2012/69 involving Romania)*

The Inventory of Abandoned Mines has been requested in several occasions in past years, and even used in previous court proceedings. Both this document and the Risk Assessment were requested at the same time not only by the communicants but also by another environmental NGO and by the Judiciary. The Administration, in our view, should have by its own motion proceeded to either restoring and updating the original electronic databases to a usable and operational system or to digitalize the original paper version. Such reasonable conduct would have been in line with cited Article 3 paragraph 4, of Directive 2003/4/EC.

Finally, contradictions must be noted in the Party's response in relation to the Santa Comba files. The Party argues that "the vast majority of the documentation is in paper format" thus requiring transposition (§86). This is in contradiction to what is stated in page 2 of Annex 8 to the Party's response that specifically refers that the Mining Administration was submitting to the Environmental Administration a "**Digital copy of the mining plan, the restoration plan, and the environmental impact study**". In fact, the document so-called "Environmental Impact Study" that was finally provided to the communicants on 27/08/2018 was not a scanned document, it was an original electronic PDF document. However, when this same document was provided to Verdegaia in March 2017 as a photocopy, it could have been provided electronically instead, as the file was already available in that format. The Administration is arbitrarily using the argument of huge volume and transposition need to deny and delay access, as well as to place a greater financial burden on those requesting access to information. Moreover, the Administration of mines has been arbitrarily applying the 0,10 euro fee per page (that corresponds to official certified copies –this is, individually signed and sealed by an authorised civil servant that states it is a true copy of the original) for simple photocopies. The difference is notorious: while physical photocopying in paper of the roughly 12,000 pages of the Santa Comba files would have cost **1,200 euros**; the scanned fee would represent between **4 and 16 euros** depending on the electronic file size. Paradoxically, the effort of photocopying to paper or scanning to a digital file is exactly the same, implying that the Administration's emphasis on paper copies is more about dissuasion on the basis of the application of abusive copying fees. In fact, as Annex 8 of the Party's response evidences, some of the most important and voluminous information is indeed already available in digital format (the three quoted documents probably represent between 500-1000 pages, taking those of other similar mines as comparison, while it has been compulsory to present Annual Work Plans for the last decade in digital format, meaning several thousand pages more).

The Party's withholding of environmental information has prevented effective public participation in decisions to license heavily polluting mines

As stated in the original communication, the communicants' request to access environmental information connected to the San Finx and Santa Comba mines was caused by strong evidence of heavy metal pollution coming from both mines. The environmental damages result from the prior approvals of mining developing projects that failed to address such problems. The Party is well aware that the communicants have made every possible effort in its reach to gain access to documentation regarding these projects and that the Party, in turn, has made every possible effort to deprive the communicants from crucial environmental information that would allow them to formulate a legal case against the administrative decisions regarding both mines.[8]

Partial access to key documents regarding the San Finx projects was only made possible when such documents were incorporated in the administrative files of other bodies of the same Administration, particularly the Galician Water Authority. As this small window of opportunity applied only to the San Finxa case, the communicants have extremely limited information on the Santa Comba mine. For example, they have not yet had access to a copy of the Mining Development Project or the Restoration Project of 2009 or the previous Annual Work Plans, and without such basic information they are unable to adequately challenge the claims made by the Party regarding the Santa Comba mine. While the Department of Mines of the Galician Government has made every possible effort to prevent access to all public information in its hands, other bodies have acted in the completely opposite way. For example, the Water Authority attended dozens of requests of digitalizing full administrative files, including thousands of pages, always within the 1 month limit established by the Aarhus Convention and with full diligence and respect for those making requests. The water discharge permit process of the San Finx mine quoted by the Party in §223 has almost **4,000 pages**.

It is of special concern that the Party, although mentioning the Resolutions of 30/12/2008 (§177, 204, regarding San Finx) and of 25/03/2009 (§180, 204, regarding Santa Comba), failed to provide certified translations of these resolutions. The "Resolution of transmission of mining rights" of the San Finx Mining Group in favour of Incremento Grupo Inversor S.L. was issued in 30/12/08 by the then Director General of Industry, Energy and Mines, Mr. Anxo R. Calvo Silvosa, and the Deputy Director General of Mineral Resources Mr. José Antonio Domínguez Varela. The transmission was issued on the **condition** that the concession holder would submit within a maximum period of three months, an updated mining development project and restoration project: "**Submit, within a maximum period of three months, an Environmental Impact study of the said project, in accordance to Royal Legislative Decree 1/2008, of 11 January, which approves the revised text of the Law on Environmental Impact Assessment of Projects**". As it will be further discussed below, an environmental impact assessment would necessarily encompass the legally prescribed public participation process as well as require reports from different area departments or bodies. None of this ever happened in spite of the

[8] The previous request for environmental information regarding the San Finx mines, on 06/08/2015, was followed by the refusal of the Directorate General of Energy and Mines to grant access in a resolution (**ANNEX 4**) that was only issued on **25/05/2016, 9 months and 19 days after** the communicant's initial request, as mentioned in section "6. Communication to ACCC before resolution by Commission of Transparency issued" above.

firm resolution of 30/12/08, never appealed by the concession holder, with clear conditions in relation to the prescribed environmental procedure.

The "Report on the mining development project of the concessions included in the San Finx Mining Group in the municipality of Lousame", signed on 29.06.2009 by Mr. Iglesias Suárez (currently the Head of the Service of Energy and Mines in the Coruña Territorial Delegation) stated that "the new concession holder must present an updated mining development project, as well as an updated restoration plan of the areas affected by the mine **and an environmental study of the project**". The Report quoted the obligations under Royal Decree 975/2009, of June 12, on the management of waste from extractive industries and the protection and rehabilitation of areas affected by mining activities (replaced RD 2994/82), and that this included the fulfilment of the environmental impact assessment procedure as a prerequisite to authorizing restoration plans (art. 4.3.e). By "updated", the Resolution refers to an earlier draft of the same documents, submitted in 2008, as the mine had no development project, restoration project or environmental impact assessment prior to its closure in 1990.

Regardless of all this, in "Resolution of 28 December 2009 approving the development, restoration and improvement of concentration facilities projects of the San Finx Mining Group" the new Director General of Energy and Mines, Mr. Ángel Bernardo Tahoces, omitted all reference to the condition of submitting an environmental impact study imposed by the firm Resolution of 30 December 2008. **All mention regarding the condition of subjecting the projects to environmental procedure vanished, without any legal change taking place regarding environmental assessment regulations, and in open violation of applicable Laws and the Aarhus Convention**. Also in violation of national legislation, Royal Legislative Decree 1/2008, of 11 January, which approved the revised text of the Law on Evaluation of Environmental Impact of Projects (in force until 12.12.2013) reinstated the obligation exactly in the same terms as the preceding RD Leg 1302/86. In fact, the previous concession holders of the San Finx Mining Group had already been required on several occasions prior to the Resolution of 28.12.2009 to comply with such norms by presenting an Environmental Impact Study.

The Party's false description of the approvals for, operations of, and environmental harms from the San Finx Mines

The Administration approved fragmented projects (including the "Santa Comba" 2009 project and the "San Juan" project in A Gudiña, Ourense, in 2010) that allowed for the processing in San Finx of ores from mines across the region and the dumping in its mining waste dumps of the waste materials from ore processing. This fact is in sharp contrast with the claim made in the Party's response (§207) that "it is not a project for a new activity, nor is it a substantial modification of the existing one but an update for the resumption of said activity".

San Finx, historically, processed the ores from its own mineral deposits,[9] and not ores from mines from across the region (A Gudiña is 280 km away). The Party omitted the environmental

[9] The "San Finx Mining Group" ("Grupo Minero San Finx") is made up of 21 mining concessions and their extensions, the oldest having been granted in 1883 and being in force until 2066. The uninterrupted force and transmissions of the concessions is in sharp contrast with prolonged periods of inactivity and abandonment, in which the Administration did not initiate the legally prescribed expiry procedures

assessment process on the basis that there are "no new areas affected" (§208) and that the perimeter remains the same as in 1982, but this is false. Critical installations (such as the mine tailings dams) that were acknowledged by the Administration as late as 2000, were omitted from both the mining development and restoration projects, and underground mining works have advanced considerable distances, currently being just 200 meters away from populated villages without any assessment of subsidence risk or underground water pollution.

It is historically false that clandestine mining had any relevance in terms of scale in the San Finx groups of concessions, contrary to what the Party's seeks to imply in §45, likely in an attempt to minimize the responsibilities of subsequent concession holders.[10] This has been refuted by expert reports included in the water discharge authorization file. As in any mine of such dimensions, the San Finx Mine has generated enormous environmental damages. To-date these have mostly been ignored by both concession holders and the Administration itself. Heavy metal contamination in the San Fins river, 7 km from the "Esteiro do Traba" Site of Community Importance (SCI) and mussel production areas, mostly due to acid mine drainage, pile leachate and the presence and abandonment of the mining tailings dam, represent a 'chemical time bomb'. Mining operations came to a standstill in 1990. Prior to that, in 1987, the Public Prosecutor of the Regional Court of Coruña initiated criminal proceedings against the concession holders on the basis of alleged environmental crimes. In 1988 preliminary criminal investigation proceedings were initiated in the Noia Criminal Court of Instruction and several reports were issued as part of the said process. One report signed on 12 September 1991 by Mr. Ramón Giménez de Azcárate, engineer at the Coruña provincial delegation of the Galician Regional Ministry of Agriculture, Farming and Forests, on the basis of water analyses, said that "a high accumulation of metals in the silts of the dam is inferred, and these will be incorporated to the stream during overflows". It continued by stating that: "The presence of metals in the water and periodic clouding during episodes of strong rains undoubtedly alter the river ecosystem, between the said dam and the mouth of the river in the Traba river, over three kilometres apart, which is also evidenced by the failure of several salmonid repopulations carried out by this Administration". None of the measures prescribed by the Administration engineer were carried out by the concession holders or the Administration, particularly the removal of the sludge from the mining tailings dam and its transportation to a controlled industrial waste facility. The situation continues, possibly worsened, up to today.

Apart from these criminal proceedings (which were not concluded due to the paralysation of the mine and the death of its owner in 1990), on 27 October 1995 the 711 Command of the

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(particularly during the 1990-2009 time lapse). This situation is systemic and generalized in Galicia's Administration and particularly in the province of A Coruña, where the Administration ignores its obligations to act of its own motion in relation to the expiration of mining rights, even when called on by third parties. Currently and since 2015 the San Finx mining concessions are held by Tungsten San Finx S.L. commercial company, singly held by its parent company Valoriza Minería S.L., which is part of the SACYR S.A. corporation. Other related commercial companies participate in the venture, particularly Tungsten San Juan S.L. and European Tungsten Company S.L., that seek to use the ore processing plant and waste piles to process ores extracted in other mines across the region.

[10] The official mining production of the San Finx Mining Group between 1887 and 1943, a period when the mines were held by British owners, was 5.672 tons of tin and tungsten concentrates. This production implied the extraction of roughly 2 million tons of ores that produced enormous waste piles. Production peaks occurred in 1900, 1908, 1924-1931, 1934-1943 and 1950-1953 (disaggregated production data is unknown for the period after 1943), continuing on a regular basis until 1990 and with interruptions between 2009 and the present.

Environmental Protection Service (SEPRONA), Spanish Military Police, issued a report regarding a serious contamination episode in the San Fins river that explained how the washing away of the mining waste "permanently aggradate the said stream, creating a layer of sludge over the riverbed that produces negative effects on the stream vegetation (absent in part of the length of the river) and that of the river banks, negatively impacting the quality of the fluvial habitat and, as a consequence, in that of the animal populations existing in the area". The report was submitted to the provincial head of Environmental Protection of the Galician Administration, that in turn forwarded it to the Galician Department of Mines. Soon after the commercial exploitation of aggregates from the waste piles ceased and the mine was fully abandoned without any measures being taken by the Administration to prevent or minimize constant contamination due to acid mine drainage from the waste piles and the mine drainage adits.

Between 2001 and 2009 the concession holder did not present its annual Work Plans, but the mining Administration did not declare the expiration of the concessions as prescribed by the 1973 Mines Act. In 2001 the Administration notified the concession holder of its duty to "submit, within a maximum period of three months, a Restoration Plan, adapted to the reality of the mining operation and following the requirements of Royal Decree 2994/1982 on the restoration of the natural areas affected by open pit mines", as well as the annual work plan. None of this ever happened, without further consequence. In 2003 the request of a work plan was reiterated, but a work plan was never received, without consequences. On 25.10.2004 the mining engineer of the Section of Mines of Coruña, Mr. Bernardo Morán Pérez issued a report on the "Situation of the mining concessions of the San Finx Mining Group", after consulting the administrative files and carrying out a field visit. The report indicates that:

> *"it follows that that the state of these concessions is of inactivity (there is temporary paralyzation of authorizations for years 1990, 91, 94 and 96, but not subsequent), with only facility conservation and control tasks being carried out. Such state has been on-going since 1990 as a consequence of the fall of tin and tungsten prices. The concession holder has not presented work plans since 2000. Considering such background, the following is reported: the concession holder must be required to submit within one month a project that establishes the safety measures to guarantee the safety of the paralyzed mining works, in accordance to article 169 of the General Regulation of Basic Mining Safety Norms and ITC.MIE.S.M.13.0.0l of the Regulation, to be sent and approved by this Provincial Delegation. The concession holder must also present within a maximum period of three months a Restoration Plan adapted to the reality of the mining operation and following the requirements of Royal Decree 2994/1982 on the restoration of the natural areas affected by open pit mines that had already been demanded on 21 September 2001".*

None of these documents were submitted in spite of a formal requirement by the head of the Provincial Delegation, without further consequence.

In 2008 a change in the concession holder of the Mining Group occurred, falling under the ownership of Incremento Grupo Inversor SL, commercial company that reinitiated mining operations, between 2009 and 2012, soon after filing for bankruptcy. In 2009, as it will be explained in detail, the mining Administration approved a Mining Development Project and a Restoration Project, lacking the legally compulsory environmental impact and public participation procedures. In such circumstances, and also lacking a mine waste water discharge authorization of any kind, mining operations were resumed, with considerable production

outputs in 2011 and 2012. While the Restoration Project (not subjected to environmental assessment or public participation) intentionally left out some of the most important environmental damages and threats, such as the two mine tailings dams, some of the previous mining waste piles and the problem of heavy metal pollution, the Mining Development Project did not include any single measure to address the treatment of acid mine drainage coming from the mine drainage adits and waste piles leachate. In 2015 another commercial company, Tungsten San Finx S.L., acquired the concessions and assumed all the rights and obligations of a concession holder, including the development and restoration projects approved in 2009.

Correction of the Party's claims regarding non-use of internal remedies

In §197-199 the Party argues that the communicants have not used any domestic remedy to address the lack of public participation and related matters of pollution and risks associated with the abandoned mine tailings dams in San Finx. The Party claims that the 23/09/2011 (Santa Comba) and 28/12/2009 (San Finx) resolutions were not subject to administrative appeals or a request for an ex officio review. The Party omits how it concealed these resolutions for many years as well as the fact that the communicants later filed a complaint.

Administrative appeals would have to be filed within one month of the issuing of the resolution, while extraordinary revision appeals are to be filed within 4 years of the issuing of the resolution. The 28/12/2009 and the 23/09/2011 resolutions were not made public and only the issuing Administration and the concession holder had knowledge of their existence. This was made possible by omitting the process of environmental impact assessment that includes a process of public participation. By omitting this process, not only the public but also other sectorial bodies within the Administration were deprived from knowing about the approval of such projects. The Director General of Energy and Mines to the Galician Ombudsman in relation to procedure C.6.Q/22180/17 (**ANNEX 5**, p. 6), relative to a claim made by the communicants in relation to the San Finx mine, specifically stated: "The Association did not present **in the appropriate moment of the procedure** an administrative claim, following the regulatory framework of the common administrative process of Public Administrations, nor request of revision of the legal acts that it is questioning." This in fact did not happen in the appropriate moment of the procedure because the existence of such resolutions was unknown, precisely because of the lack of public participation process. The Galician Ombudsman, in a response to the mining administration quoted in the same document (p. 8) concluded that the fact of not having filed administrative claims "**does not exclude the possibility of presenting claims** [at the Ombudsman], **which is a legal and statutory right**".

In fact, the Party's claim of non-use of internal remedies (§197-199) is openly contradicted in §221 were the Party acknowledges that "**Petón do Lobo filed a complaint about the alleged contamination before the mining authority on 14.03.2016**". The Party does not include the text of our March 2016 complaint, which referred not only to contamination, but does submitt a report (Annex 10 of the Party's response) issued by the mining administration in response.[11]

[11] The report is extremely biased and full of pejorative comments regarding the communicant's claims, which will be dealt with separately and in detail below, following the Party's decision to send such report to ACCC. The Party's response emphasizes such comments by attributing (§222) "inconsistency and lack of technical rigour" to our complaint. It must be highlighted that the Party not only did not initiate any ex

The facts noted directly to the Directorate General of Energy and Mines were also submitted in 2016 to the institution of the Galician Ombudsman, another relevant national remedy that was duly used by the communicant. The claim presented by Petón do Lobo initiated procedure C.6.Q/454/16, a procedure which the Directorate General is well aware of following its continuing efforts to have it closed (together with related procedure C.6.Q/22180/17), manifested by derogatory communications that are part of the file. The Directorate General systematically failed to comply with the requests from the Ombudsman to provide requested reports in due time, to the point that the Ombudsman had to warn the Mining Administration that it would be declared hostile and that lack of response is considered a criminal offence (**ANNEX 5**, p. 9). When the Directorate General finally complied and responded to the Ombudsman, it did so by questioning the rigor of the Ombudsman institution ("*parece impropia do rigor que se lle presume*") and issuing veiled threats to the communicant: "**We explicitly warn that we take good note of the statements made and that we do not accept baseless assessment opinions that personally question the acts made by the civil servants of the mining administration in carrying out their duties**" (in questioning the neutrality of the Report included as Annex 10 of the Party's response).

Correction of the Party's claims regarding exclusion from subjective scope of the Aarhus Convention

In §183-192 the Party argues that the San Finx and Santa Comba mining operations are not included in the annex I of the Aarhus Convention. However, the Aarhus Convention explicitly includes within its scope "*Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.*" (Annex I(20).

RD-Leg. 1/2008, of January 11, which approves the consolidated text of the Environmental Impact Assessment (EIA) Law of projects (and which was in force until 12/12/13), reiterated exactly the same terms as its previous RD Leg 1302/86 in Annex I that lists the activities that must undergo environmental impact assessment in the case of:

> *"B. Underground mining in developments where any of the following circumstances occur:*
> ***1. That its paragenesis can, by oxidation, hydration or dissolution, produce acidic or alkaline waters that give rise to changes in the pH or release metallic or non-metallic ions that can cause an alteration of the natural environment.***
> *(…)*
> ***3. Those mines that are less than 1 kilometre (measured in plane) away from urban nuclei, which can induce subsidence risks.***
> ***In all cases, all facilities and structures necessary for the treatment of the mineral, temporary or residual deposits of mine sterile or mineral exploitation (debris, dams and water or sterile rafts, crushing or mineralogical plants, etc.) are included.). "***

officio review on the basis of our 14/03/2016 claim, but responded (in that report) with a degree of aggressiveness and disrespect which, although already characteristic of the mining authorities in Galicia, is unseen in the rest of the Administration and in our view incompatible with the principles and duty of neutrality of the public administration.

Therefore, both San Finx and Santa Comba mines, as well as their ore processing facilities, had to be subjected to EIA because both mines produce acid mine drainage releasing heavy metals into the environment, and in the case of San Finx, at least, also because the mines are less than 1 km away from a number of villages, with subsidence risks. The mining operations in San Finx, at the point in which they were temporarily suspended in December 2017, were driving underground works less than 200 meters away from inhabited houses of the village of Gandarela, where blasts produced trembling of houses and cracks and fear existed that underground waters supplying the community's water supply could be affected. It must be noted that the underground drive had never in the mine's history reached such proximities to the homes of villages and therefore, it is evidence that the affected surface (even if the affection is caused by underground works) is continuously being expanded.

Correction of the Party's claims regarding the existence of "pre-existing projects" and no need to subject projects to environmental impact assessment

In §186-188 the Party argues that "pre-existing projects" existed in both the San Finx and Santa Comba mining operations and that the 2009 projects were simply updates or modifications. Because the Party has systematically failed to provide access to the administrative files of the concessions, the communicant has so-far not been able to verify this claim. This has also been the case in other mining projects initiated in the Coruña province, were new projects have been generically designated "Update of the mining development project, restoration project and environmental impact study" (for example, in Touro) but without granting copies to the opponents to the projects that are supposedly being updated. Significantly, during the process of public participation of the Touro project, the mining administration denied copy of the administrative files even to sectorial organizations that had been requested to issue a report (i.e., the Galician Environmental Federation).

As mentioned above, the Resolutions of 30/12/2008 (§177, 204, regarding San Finx) and of 25/03/2009 (§180, 204, regarding Santa Comba) were issued with the condition of submitting within a maximum period of three months, an updated mining development project and restoration project: "**Submit, within a maximum period of three months, an Environmental Impact study of the said project, in accordance to Royal Legislative Decree 1/2008, of 11 January, which approves the revised text of the Law on Evaluation of Environmental Impact of Projects**". By updated project, the Resolution refers not to historical mining development projects, but in fact to the draft Mining Development Project and Restoration Project presented by the same concession holder less than a year before, on February 2008. These projects were informed by the Administration and reports pointed to several faults that needed to be corrected. In fact, the 2009 San Finx projects are simply and literally an updated version of the February 2008 projects, that were never approved, being simple drafts. **There is no previous existing project as such for the San Finx mining concessions**; the Party cannot credibly claim the annual work plans submitted until 2000 and that systematically include the mine tailings dams can be understood as "projects". The communicant is unable to comment on the facts regarding the Santa Comba mines, as it has had zero access to the administrative files of that group of concessions.

Subsequent claims by the Party in its response regarding that an environmental impact assessment was unnecessary are inconsistent with the facts: The 30/12/2008 resolution explicitly demanded the application of the **Royal Legislative Decree 1/2008, of 11 January,**

which approves the revised text of the Law on Environmental Impact Assessment of Projects. In spite of this, the Party simply states in §214 that "**the project was not referred to the environmental body, since it was not necessary**, in virtue of the above regulations and the decisions of the environmental body in other cases, of which the one carried out for Santa Comba is an example". How can the Santa Comba case be an example, as the communication by the environmental body was issued on 01/09/2011, two years after the Mining Administration approved the San Finx projects? The Party fails to provide any precedent to support this claim. Although the communicant has not enough evidence to comment on the Santa Comba case, the claims made by the Party in §208 are extremely problematic. The mining administration indeed sent the Santa Comba documents to the Environmental Regional Ministry, but in fact there is no administrative file of the processing of such request. Only two documents exist, the request included by the Party as Annex 8 that was signed on August 18, 2011 by Ms María José Míjares Coto and a one paragraph communication signed by the Secretary General for Environmenal Quality and Assessment Mr. Justo de Benito Basanta on September 1, 2011 (Annex 9 of the Party's response). This document that the Party claims to be a waiver for the environmental impact assessment and connected process of public participation IS NOT A REPORT, but rather a **120 word letter** personally signed by Mr. Benito Basanta. No single civil servant at the Regional Ministry for the Environment examined the documentation and no single report sustaining the view expressed by Mr. Benito Basanta in his September 1, 2011 communication was issued by competent civil servants. Assuming that the files arrived at the Regional Ministry for the Environment on August 22 (it could have been later), it took less than a week for the Ministry to issue such statement. It is virtually impossible that the Environmental body could have examined the documentation in a week or less prior to reaching such decision, particularly in August which is when most civil servants at the department were on holiday. Mr. Benito Basanta, who is personally and individually responsible for the claims made on his September 1 letter without any supporting report being issued by any public servant, was later posted in a diplomatic position in Paris.

The repetitive claims made by the Party in its Response regarding the projects approved in 2009 for San Finx and in 2011 for Santa Comba merit detailed dissection. In San Finx, the 30/12/2008 resolution explicitly demanded the application of the **Royal Legislative Decree 1/2008, of 11 January, which approves the revised text of the Law on Environmental Impact Assessment of Projects**. The already quoted 29/06/2009 Report on the newly presented projects also referred to the Royal Decree 975/2009 on waste management in the extractive industries and on the protection and rehabilitation of the space affected by mining activities (which repeals RD 2994/82), and which included complying with the environmental assessment procedures to be able to authorize restoration plans (Article 4.3 .e).

In the "Resolution of December 28, 2009 of approval of the projects of mine development, restoration and improvement of the treatment facilities of the San Finx Mining Group", the Director-General of Energy and Mines, Mr. Ángel Bernardo Tahoces, suppresses from the "Antecedents" the mention of the condition of presenting an Environmental Impact Study within three months imposed by the Resolution of December 30, 2008. He only expressed that the authorization of transmission of mining rights was "conditioned to the presentation of the updated mining development and restoration projects", which is false. All mention of the condition of the environmental impact study disappeared altogether, **without any legislative change taking place** in relation to environmental impact legislation.[12] At the same time, insofar

[12] The RD-Leg. 1/2008, of January 11, which approved the revised text of the Environmental Impact Assessment Law of projects (which was in force until 12/12/13) reiterated exactly the same terms as its

as RD 975/09 established the transitional application of the previous legislation for the projects in process at the time of its application, Order of April 26, 2000, that approves the Complementary Technical Instruction 08.02.01 of chapter XII of the General Regulations for Basic Mineral Safety Regulations "Sludge deposits in extractive industries treatment processes" (later repealed by Royal Decree 975/2009) should have also been applied. And, according to the same, the two mining tailings dams should have been restored by the mining company or, alternatively, comply with all the obligations (bonds, registration books, stability studies, etc.) provided in the Order of April 26, 2000. Such requirements have, in any case, also been incorporated into the text of RD 975/09, so the Mining Administration had no excuse then, and even less excuse today, to refrain from applying it in San Finx or to claim, as it does in its Response and annexed reports, that it is not responsible for the mining tailings dams.

The provision of the Order of April 26, 2000 and Royal Decree 975/2009 regarding mining tailings dams evidence the falsity of the Party's statements made in §225 and Annexes 10 and 12. The Party claims that the competent body over the mine tailings dam is the Wather Authority and not the mining administration. The December 28, 2009 resolution by Mr. Bernardo Tahoces, as well as the associated report of Mr. Iglesias Suárez, have grave implications, as they attempt to exonerate the mining concession holders from their responsibilities over the mining tailings dams as well as other environmental damages and threats of the San Finx mines.

Regarding the Environmental Impact Regulation, it must be clarified that RD-Leg. 1/2008, of January 11, approving the consolidated text of the Environmental Impact Assessment Law, a regulation that was in force at the time of the projects submitted to the Mining Administration for San Finx (Project of Improvement of ore processing facilities, Mine Development Project and Restoration Project). Both this RD-Leg and the previous RD Leg 1302/86 and also now the regulations currently in force required that "PROJECTS, public and private, consisting in the realization of works, facilities or any other activity included in Annex I must undergo an environmental impact assessment in the manner provided for in this law", and therefore all projects of both the San Finx and Santa Comba instances were to be subjected to EIA.

RD-Leg. 1/2008 also indicated that the division of projects of the same nature and carried out in the same physical space will not prevent the application of the thresholds established in this annex. Although the San Finx Restoration Project, approved in 2009, and still in force, literally states that "all the areas affected today are prior to 1982, that is to say, the perimeters of exploitation today are the same that existed in 1982" the restoration project excludes the mining tailings dams and has no provision for their restoration or for the treatment of acid water effluents from the mine after the closure, or during the exploitation. Furthermore, the perimeter being the same for more than 18 years (from 1982 to 2000), and of course before 1982, the successive mining concession holders assumed mining tailings dams nº 1 and nº 2 as part of the exploitation infrastructures, therefore within the perimeter of the areas affected by the mining developments, perfectly identified in the various documentation that the Party is well aware of, having produced it originally.

The evolution of the mine tailings dams can be visually appreciated in the series of aerial photographs presented below dating from 1945, 6 years after the construction of the larger mine tailings dam (dam n.º 2) to 2009. The smaller dam is just meters away from the waste dump:

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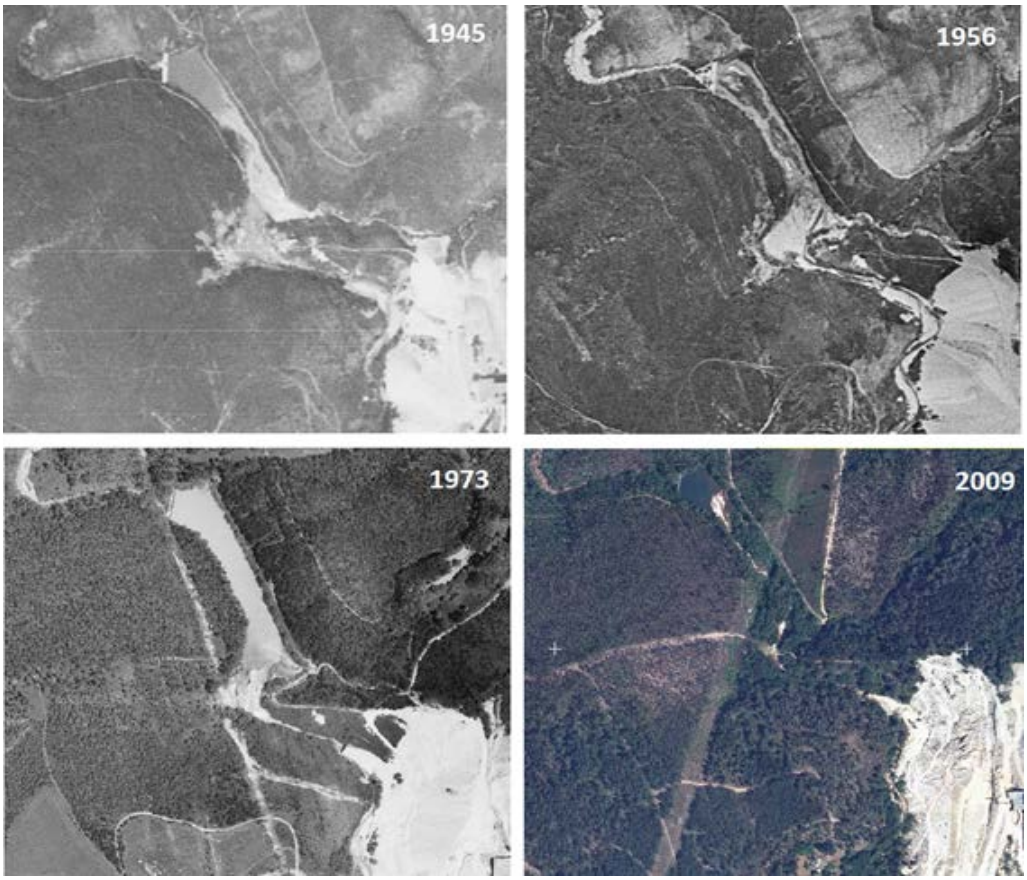
previous RD Leg 1302/86; both have range of law and therefore of application independently and additionally to the royal decrees 975/09 and 2994/1982.



Article 3 of RD 2994/82 requires that the Restoration Plan contain a "Study of the environmental impact of exploitation on the natural resources of the area and measures planned for its protection." In contrast, the Restoration Plan approved in 2009 does not even include a document called "Environmental Impact Study". So that not only the RD-Leg 1/2008 was breached but also RD 2994/82. Additionally, under the terms of RD-Leg 1/2008, such an Environmental Impact Study **had to be subject to the planned environmental processing, and therefore the mere submission by a mining-holder of a document called "Study of Environmental Impact" (which was not even done in San Finx), with the approval of the Mining Authority, is void.** This is precisely the great difference (and motivation) derived from the non-compliance of the obligatory environmental process: **the absence of public scrutiny**. RD-Leg 1/2008 established (and now Law 21/2013) that "Projects that have to undergo environmental impact assessment should include an environmental impact study, whose scope and level of detail will be determined by the environmental body" (the Regional Ministry of the Environment).The Mining Authority is the substantive body, not the environmental body. **In 2009, the Mining body, as acknowledged by the Party in its Response (§214) did not even care to send the San Finx projects to the environmental body,** supplanting and overriding it in open breach of national legislation and the Aarhus Convention in regards to public participation.

Additionally, "For the determination of the amplitude and level of detail of the environmental impact study, the environmental body will consult the public administrations concerned about the initial document of the project. The consultation may be extended to other natural or legal persons, public or private, linked to the protection of the environment", which in Galicia includes the Galician Environmentalist Federation. In addition,

"The substantive body shall submit the study of environmental impact referred to in article 7, within the procedure applicable to the authorization or implementation of the project to which it corresponds, and in conjunction with it, ***to the process of public information*** *and other reports that are established therein. Said procedure will be evaluated in those stages of the procedure in which all the options related to the determination of the content, the extension and the definition of the project subject to authorization and subjected to environmental impact assessment will be still open, and will last no less than 30 days This public information process should also be evacuated by the substantive body in relation to projects that require Integrated Environmental Authorization in accordance with Law 16/2002 of July 1, on integrated pollution prevention and control."*

The absence of this procedure is sanctioned as follows: "If the substantive body has not submitted an environmental impact study to the process of public information, within the period set by the autonomous community, the file will be closed".

Viewing RD 2994/82 and the RD-Leg. 1/2008 together, the only way that the fulfilment of the first could result in the fulfilment of the second, with the rank of law, would be with the integrated submission of the projects to the environmental process envisaged in the RD-Leg. 1/2008 (specific legislation and of greater rank, with respect to the rules in game). The approved Restoration Plan does not include all sections of RD 2994/82, and in particular, it does not include an Environmental Impact Study in accordance with current legislation. The mining concession holder has avoided having to submit from 2009 until now the corresponding Annual Environmental Report within the Work Plan. The environmental report should have been derived from the Environmental Impact Statement, but that statement was non-existent because the Projects were not subjected to that process and the environmental body never learned that the projects had been approved by the Mining Administration. At the same time, the Restoration Project was only examined by the mining authority, subtracting the authority in the matter that corresponds to the environmental authority alone, which would be in charge of determining the depth and scope of the same**, as well as the remaining sectorial organisms and the society in general who was entitled to participate in the public information procedure**. In particular, this process excluded the people of the affected area that would not have ignored the omission of the mining tailings dams and other grave omissions. The most visible practical consequences of this were the exclusion of mining tailings dams from the scope of restoration, as well as the spillage of acidic waters from the mine to river basin from 2009 without any treatment; which has resulted in the spillage of hundreds of thousands of cubic meters of acid drainage with concentrations of cadmium, copper and zinc that far exceed legally maximum limits.

Regarding §189, the interpretation of article 7.2c of Law 21/2013 is incorrect. Law 21/2013 states in its Article 1: "This law establishes the basis for environmental assessment of plans, programs and projects that may have significant effects on the environment". A project "means any action which involves the execution or exploitation of a work, a construction, or installation, as well as the dismantling or demolition or any intervention in the natural environment or landscape, including destined to the exploitation or the use of the natural resources or the soil and the subsoil as well as of the marine waters." As for a substantial modification to a project, Article 7.2.c requires an environmental procedure even if the initial project was previously subjected to the EIA procedure. **But this article does not exclude the need for an EIA for any initial project**. On the contrary, Article 9 declares the lack of validity of any administrative act made without the prior EIA, without prejudice to the corresponding sanctions:

1. Plans, programs and projects falling within the scope of this law shall be subject to an environmental assessment prior to their adoption, approval, authorization or, where appropriate, in the case of projects, before submission of a responsible declaration or a prior communication referred to in article 71 bis of Law 30/1992, of November 26, on the Legal Regime of Public Administrations and Common Administrative Procedure.

Acts of adoption, approval or authorization of plans, programs and projects that, being included in the scope of this law, have not been subjected to an environmental assessment, will be fully void without prejudice to any sanctions that may be applicable match.

2. When access to an activity or exercise requires a responsible declaration or prior notification and in accordance with this law, requires an environmental impact assessment, the responsible declaration or the prior communication can not be submitted until such evaluation has been completed of environmental impact by the environmental body and published in the Official State Gazette or corresponding official journal and such report is adopted by a subsequent resolution adopted by the substantive body.

The responsible declaration or prior communication regarding a project will not be valid and effective for all purposes if it should have been submitted to an environmental assessment would not have been, without prejudice to the sanctions that, if appropriate.

If the Party claims, as in §190, that projects of activities that are subject to environmental impact assessment procedure in accordance with Law 21/2014 and its precedents can somehow be exempted from the environmental procedure on grounds that the activity is supposedly coincidental with activities carried out historically on the same site where previous projects existed; or when projects as such are presented for the first time, having historically lacked a project and/or environmental procedure; and that said situation is legal; and that such application operates in areas other than mining; then the Party should clearly present evidence of where such situations have occurred in Galicia or Spain. The Party, in view of its claims (§214) that is has repeatedly failed to inform the environmental body of projects of such scope being approved by the Mining Administration, on the basis of "custom", should be requested to provide a detailed list with the specific circumstances of all instances where, as in San Finx, the Party failed to submit the projects and/or to inform the environmental body on such projects; or as in Santa Comba, where after having done so, the environmental body deemed that mining projects were not subject to environmental impacts assessment in terms similar to that instance.

Correction of the Party's claim that mining tailings dams are not competence of the mining administration and that they were not authorized by the mining authority

In §225 the Party claims that the mining tailings dams of the San Finx mines are not the competence of the Mining Administration, but rather that of the Water Authority, and includes a report from 05/12/2017 (Annex 12) that, among other claims, states "that regarding these dams there is no authorisation from the mining authority and they do not fulfil any function related to the mineral-mining process". **Both claims are utterly false.**

In 1928 and 1939, respectively, the concession holders built two mine tailings dams, over the riverbed of the San Fins River, to serve as settling pools for solids and embankments for mining sludge. These two dams appeared in the Annual Work Plans for the mine until the year 2000 (and therefore were fully authorized and known by the mining administration), when the

concession holder ceased to submit such documents, at the same time that a norm regulating such dams came into force.[13] After the disasters of Aznalcóllar, in Spain, and Baia Mare, in Romania, such regulations put in place strict measures in relation to the design, operation, control and closure of mining waste deposits, including embankments, dams and piles.

Although the dams are present in numerous historical documentation as well as, at least, in the 1983, 1996, 1998, 1999 and 2000 Annual Work Plans, and, most notably to this ACCC procedure, in the 1999 Urgent Risk Assessment of Deposits of Mining Tailings and Mining Waste Tips, **the two mining tailings dams completely disappear in the Development and Restoration Projects approved in 2009**, together with some of the existing mining waste piles. This absence seeks to release the concession holder from environmental responsibilities for hundreds of thousands of cubic meters of accumulated mining waste posing great danger to the environment and public health. It must be noted that the largest of the dams was the site of the so-called "1960 catastrophe" or "disaster", when a dam damper failure released thousands of cubic meters of mining sludge down river, covering lands downstream from the dam and rendering them sterile; also that as far back as 1991 the Galician Administration had prescribed the withdrawal of mining waste held by the dams and its transfer to a polluting waste facility.

As a consequence of the actions taken by the communicants, the Galician Water Administration has looked into this issue in the face of the passivity of the Mining Administration, requesting a number of reports to determine the state of the mine tailings dams. One such report of June 2017 concluded: "In the case of dam no. 2, almost completely clogged, situated downstream and with greater height, **the washing of materials could produce an important environmental impact in the event of dam failure**". This is in sharp contrast with the claims made by the Party through Annexes 10 and 12 of its Response that suggest, that no risk exists. In spite of this critical hazard, today the Party continues to fail to force the concession holder of the San Finx mines to adopt measures for the restoration of the area affected by the dams, or to carry out such measures directly on a subsidiary basis. This leads not only to the breach of Directive 2006/21/EC but also puts at risk the whole productive activity of the Noia Estuary, particularly mussel gathering, that takes place less than 7 km downstream. Importantly, this failure threatens the health and safety of the populations in the proximities of the river. As a consequence of the false statements made by the Mining Administration, hiding from other bodies of the Administration the nature of the tailings dams and their prior inclusion the Annual Work Plans of 1983-2000 as well as the 1999 Urgent Risk Assessment of Mine Tailings Dams, the Water Administration has initiated an "ownership inquiry procedure" in which the Mine Administration has displayed a peculiar form of amnesia regarding the reasons for the construction and use of the mining tailings dam, in an attempt of relieving itself and the mine concession holder of any responsibility for these critical infrastructures.

All these details are perfectly well known to the Party, and there is even a detailed 1940 document, known by the Mining Administration, on the "Development of the San Finx Tin and Tungsten Mines" written by Manuel Peón Martínez (a year after the construction of the larger

[13] Order of 23 April 2000 that approves Additional Technical Instruction 08.02.01 of Chapter 12 of the General Regulation of Basic Mining Safety Norms 'Sludge Containment in the treatment processes of extractive industries'", remaining in force until the passing of Royal Decree 975/2009, of June 12, on the management of waste from extractive industries and the protection and rehabilitation of areas affected by mining activities, transposing Directive 2006/21/EC.

dam, or dam no. 2) that in pages 32 and 33 (Chapter 6 “Processing”, section “a) Mineral concentration plant”) explains in detail the technical and construction characteristics of the dams:

> *“Water clarification of turbid waters from the ore washing plant is carried out through the process of settling. In 1924 and 1925 three settling pools were built to capture the waste gravel and sands suspended in the water from the washing plant, so that it can be discharged into the river properly clarified. Later, in 1928, a wall-dam 4 meters high is built, transversally closing a glen and generating a dam with 4,200 cubic meters capacity, as an addition to the clarification system, and enabling the settling of sands that were not withheld in the previous pools.*
>
> *With the goal of completing this clarification system, recently, in 1939, another water settling deposit was designed and built, taking advantage of a natural gorge of the terrain and forming a dam through a weir in which the waters suffer a sufficient decrease of speed so that settling takes place with the intended outcomes, so that water may be used for different public purposes. The capacity of the dam is 8.400 cubic meters. This deposit captures sands and sludge –mostly sludge– that spill from the previous pools, and considering the respectable volume of the said dam, waters almost come to stillness, favourably allowing the sedimentary action of suspended materials through a long stretch and during enough time to achieve clarification. As the volume of water to be clarified is 34 cubic meters per hour, it takes some 10 days to fill up the dam. It is also know that the volume of sludge and sands suspended in the water is 0,83% and considering that the ore washing plants work at full load 24 hours a day and 300 days a year, the volume of sediment will be 2,000 cubic meters per year and thus it will take 4 years for the dam to be clogged. Clearance of the dam must be carried out every four years and in such way we achieve the total capture of the sands and impurities present in the waters making them available in good condition for public use.”*

The 1940 evidence should be considered in the light of §225 of the Party’s response, when claiming that the mine tailings dams “do not fulfil any function related to the mineral-mining process”. The continuity and abandonment of the dams and non-compliance with National and EU regulation regarding mining waste management has led to continuing degradation and pollution of surrounding areas, a fact well known to the Administration. An environmental report issued on 27/10/2010 by the Environmental Department of the Galician Administration stated that **“the mine has severely altered the restricted waters area, the river access easement, embankment and riverbed of the San Finx Mines River, mainly due to the creation of a waste pile and its washing away, completely clogging the riverbed as it passes by the pile”.** The report indicated that the mine “caused the total disappearance of the river’s icthyofauna and most water macrophages, as no other industrial discharge capable of such damage reaches the river. Alias, the tributaries of this river that are not affected by the mine have icthyofauna”. The report concludes that **“the reopening of the mine will lead to a worsening of the affected area and will preclude the natural regeneration of the area**”. It is understandable that the Mine Administration did not wish to submit the 2009 projects to the environmental body considering the likelihood that its scrutiny would become problematic for both the concession holder and in light of previous omission by the Administration itself.

This stands in sharp contrast with §221-222 of the Party’s response, as well as the report attached in Annex 10, which instead claims the “lack of technical rigour” of the communicants.

The concession holders' failure to send the required annual work plans after 2000 is coincident with the entry into force, in May 2000, of the Order of April 26, 2000 which approves Complementary Technical Instruction 08.02.01 of chapter XII of the General Regulation of Basic Norms of Mining Safety "Sludge deposits in processes of treatment of extractive industries".[14] The Order states that.

> *"For the purposes of this regulation a sludge deposit, or simply deposit, any facility integrated in a process of treatment of extractive industries and constituted by a natural or artificial structure of containment and an accumulation of deposited materials in the form of sludge within the natural or artificial containment structure. One of the functions performed by these deposits is the separation of liquids and solids from the sludge. Sludge deposits are subdivided into tailings dams and tailings ponds. The dams are those reservoirs that, because they are located in whole or in part above the boundary of the surrounding land, require a dam structure for the containment of the deposited sludge. Tailings ponds are all those deposits that, because they are located entirely below the boundary of the surrounding land, do not require a dam structure for the containment of the deposited sludge."*

This Complementary Technical Instruction established the requirements that deposits must comply with throughout their life, from the project phase to the maintenance and control after its closure. "For the purposes of this standard, Abandonment: Definitive cessation of utilization work of a sludge deposit ". It also established a series of detailed requirements[15] for the

[14] This regulation was in force until June 14, 2009 when it was derogated by Royal Decree 975/2009, of June 12, on the management of waste from the extractive industries and protection and rehabilitation of the space affected by mining activities; a Royal Decree which is cited as being applicable at the moment of approval of the 2009 San Finx Development and Restoration Projects.

[15] *Sludge deposits to which authorization has been granted or which are in operation at the entry into force of this standard shall be subject to the following provisions: **1.** Since the entry into force of this rule, the provisions of Article 8 (Occupational Health and Safety Measures) will apply; **2.** Since the entry into force of this rule, the owner of a sludge deposit will open a Registry Book of the facility in which all relevant incidents will be reflected, in accordance with the provisions in section 6.2.3 of the article 6; **3.** Within three months of the entry into force of this standard, the holder of a sludge deposit shall submit to the mining authority, for approval as appropriate, the classification of the deposit in accordance with Article 4. (Classification of sludge deposits), it will request from it the fixing of the amount of the insurance policy, and will proceed to its subscription, in accordance with the provisions of article 12; **4.** Within six months of the entry into force of this standard, the owner of a sludge deposit shall draw up the Operation Manual, in accordance with the provisions in section 6.2.3 of the article; **5.** Within one year of the entry into force of this standard, the owner of a sludge deposit shall submit to the mining authority, for its approval, if necessary, structural safety standards in accordance with Article 7; **6.** Within one year of the entry into force of this standard, the owner of a class 1 or category A or B sludge shall draw up an emergency plan in accordance with Article 7; **7.** The Preliminary Draft Abandonment and Closing referred to in Article 9 shall apply within a period of two years from the entry into force of this rule, unless it is necessary to carry out the Abandon Project; **8.** The provisions of Article 11 (Bond) shall apply when the owner submits to the mining authority the Definitive Project for Abandonment and Closing of the Sludge Deposit; **9.** Within a period of two years from the entry into force of this standard class 1 and 2 deposits and categories A and B, and within three years the remaining deposits will present a Study-Report, equivalent to the design project referred to in Article 6 (Memory), descriptive of the characteristics of the deposit, ensuring its stability and security. If, as a consequence of the study, it is necessary, the owner shall submit to the mining authority a project to adapt the deposit to the provisions of this standard. This adaptation must be carried out in the term that establishes the mining authority that in no case will be more than five years; **10.** In the case of deposits abandoned prior to the entry into force of this provision, the Ministry of Industry and Energy, in collaboration with the Autonomous Communities within the scope*

projection, installation, operation, maintenance, closure, and restoration of dams for extractive activities; as well as the need to have the corresponding insurance policy. It coincides with the entry into force of this norm and the cessation of the submission of Annual Work Plans by the mining concession holder in the year 2000. As previously stated, the dams were included in the Annual Work Plan approved for the year 2000 and all previous Annual Work Plans.

From this Order and subsequent legislation, it is clear that the Mining Authority was and continues to be fully responsible for the said mining tailings dams. Nonetheless, despite the fact that the mine tailings dams are registered in the last Annual Work Plan approved in 2000, none of these obligations were imposed on the concession holder. The aforementioned Royal Decree 975/2009, dated June 12, on the management of waste from the extractive industries and the protection and rehabilitation of the area affected by mining activities did not change the regulations, nor the obligations of the mining owner. On the contrary: it enlarged them, and for the closure of the installation of mining waste dams required the presentation of the corresponding project (article 34). However, since this norm came into force, the Administration of Mines did not adopt any measure in relation to the dams.

As the Party's response and the Reports included as Annexes 10 and 12 illustrate, the Party continues in its attempt to exonerate the concession holders from their responsibility (and the Administration itself) over the mine tailings dams. After finding this communication admissible, the ACCC should decide that information and decision processes regarding mine tailings dams are subject to the Aarhus Convention.

A crucial document: the 1999 Risk Assessment and Inventory of Tailings Dams, subject of the communicants' request to the Party

In its Response (§168) the Party argues that the information contained in the inventories "cannot be classified as environmental" because it "focuses on the assessment of security risks". Additionally, in §225 the Party claims, in relation to the mining dams that appear in the 1999 Risk Assessment and Inventory of Tailings Dams that "regarding these dams there is no authorisation from the mining authority and that they do not fulfil any function related to the mineral-mining process". This argument is repeated and augmented in two reports included as Annexe 10 and Annex 12 by the Party in its response. Besides the factual basis referred to in the previous section (particularly the 1983 to 2000 Annual Work Plans), the communicant wishes to state how the 1999 Risk Assessment and Inventory of Tailings Dams, central to this controversy, are crucial documents in settling the nature and environmental impact of the dams.

By means of Resolution of June 21, 1999, which gives publicity to the award decisions of various public procurement files (published in the Official Gazette of Galicia n.º 131 of July 9,

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of its powers, shall draw up an inventory of these deposits within three years. In addition to the basic data on the deposit, this inventory will include a risk assessment and an opinion on the current status of the deposit in relation to personal safety, geotechnical stability, pollutant processes, etc., and the definition of corrective measures to be applied for its adaptation to the present norm; ***11.*** *In sludge deposits belonging to active mining developments abandoned prior to the entry into force of this standard that, as a result of the inventory, corrective measures are required, the corresponding actions shall be carried out by the holders of the exploitation rights.*

1999), a consulting contract is made public with file number 8/99, awarded to Norcontrol SA on May 24, 1999 by the negotiated procedure without publicity due to urgency. The object of the contract is to "carry out a study of the situation in which are the mining tailings dams and mining waste deposits of the Autonomous Community of Galicia" and its tender base budget: six million four hundred thousand pesetas (6,400,000 pesetas). The assessment work is carried out in May 1999 and delivered to the Directorate General of Industry of the Department of Industry and Commerce in a document under the title "Study for the recognition of urgency and risk assessment of rafts and debris from the Autonomous Community of Galicia". It is important to point out that the then Director General of Energy and Mines, Mr. Ramón Ordás Badía, appears as co-responsible for the Direction and Coordination of the study while Mr. Joaquín Eulalio Ruiz Mora, who was Technical Director of the San Finx Mines between 1996 and 2015, is part of the technical team that developed the document. This evidences how the inclusion of the two mine tailings dams in San Finx in the study was done with the acknowledgment of those responsible for the San Finx mines on behalf of the Mining Administration and the concession holder.

The work was carried out "based on the existing information in the corresponding Provincial Sections of Mines" in which, "in addition to the list of structures, information was obtained regarding existing projects, authorizations and existing requirements on the rafts and decks to recognize." The conclusions of the study indicate that "In all the provinces the inspection of the mining structures that are the object of the inventory is carried out, within the general inspections." The copy of the Study and Inventoru sent to the communicants on 07/06/2018 by the Director General of Energy and Mines, Mr. Ángel Bernardo Tahoces, after a request made on 04/26/2017, over a year before, includes under a reference 2038 a file corresponding to mining tailings dams n.º 1 and n.º 2 of the San Finx mines. In its description, it is indicated that this is of the type "valley", built with "compacted earth" and "concrete" and that the "number of dams" is "2" located one after the other.

The section "Problems observed" is left blank while in the **"Environmental Impact" section**, in the "Waters" section, the "high" impact and "low" impact marks are simultaneously checked. Also blank are the sections "Abandonment and current use" as well as the "Prescriptions" section. In "Remarks" it is indicated: "two dams exist in the river, [they] are made of concrete and do not pose any risk. The first is full of sediments while the second acts as a small dam." In "Risk estimation" the indication "null" appears. Next, an outline of the situation of the tailings dam is reproduced, in the middle of the riverbed, indicating that dam n.º 2 would have 10 meters of height and 5 of thickness, as well as a photograph of the same dam n.º 2.

The mine tailings dams and waste dumps inventory was carried out based on the existing information in the Territorial Delegations as well as on site visits. In the case of Coruña, administrative evidence of the existence and authorization was and is available through the Annual Work plans (at least, in those for the 1983-2000 period). The Study accompanying the inventory further states that this Mining Section was conducting inspection of these and other "mining structures." The Mining Administration had subsequently commissioned to the same firm that prepared the 1999 Study and Inventory a **2002 “Master Plan for the Rehabilitation of the San Finx Mine (Lousame-La Coruña)”,** prepared by a technical team including again Mr. Joaquín Eulalio Ruiz Mora as Technical Director of the San Finx Mine on behalf of the concession holder, **but also Mr. Rafael Recuna Carrasco**, engineer-civil servant of the General Directorate, acting on behalf of the Mining Administration. The 2002 document again included the two mining tailings dams as part of the San Finx installations. **Mr. Recuna**

Carrasco is author of the 2016 Report submitted by the Party in its Response as Annex 10, and that now claims to know nothing about the said tailings dams.

This important 1999 document evidences how the Party was fully aware of the existence of these mine tailings dams and how it was involved in their omission from the mine development and restoration projects approved in 2009 as stated in our comments above, but also the omission in the duty to monitor these infrastructures, and the requirement for the owners of the management or closure projects required in a mandatory way by vigorous legislation at any time. The attempt to conceal this document by the Party in the process leading to the current ACCC procedure is especially significant.

Factual evidence of mining pollution in the San Finx river basin and generalized non-compliance with the Kyiv Protocol on Pollutant Release and Transfer Registers

In its Response, the Party (§218-220) claims that "it is not possible that there is acid drainage due to the operations taking place" in the Santa Comba mine. The Party asks the ACCC to accept the purity of the environment because, as stated in the same paragraph, "**in the mines of the Santa Comba mining group there is no extractive activity since 1986**". Several reports and recent photos prove that the Party's assertion is false, and that hazardous pollution from the mines and tailings dams is occurring. More such documents should be provided in response to the communicants' requests.

Directive 2000/60/EC establishes a set of water quality objectives, initially set for the year 2015. These objectives are quantifiable through a set of parameters, including those set in the Environmental Quality Standards (EQS) that establish maximum allowable limits for certain hazardous substances and priority hazardous substances. Taking into account the analyses included in the 12 September 1991 Report, it is a fact that the Kingdom of Spain, through the Galician Regional Administration, possesses knowledge of the magnitude of the pollution resulting from the San Finx Mines' discharges. Twenty-four years later, considering the analyses dated on 23.06.2015 and sent by the concession holder itself to the Water Administration of Galicia, downstream from mining tailings dam No. 1 (X=513971 Y=4734167) Cadmium (a priority hazardous substance) levels of 7,47 µg/L exceed by **16 times** the maximum allowable concentration (EQS-MAC) for Cadmium and **93 times** the maximum allowable concentrations on annual average (EQS-AA), increasing by **311 times** in relation to the surface water values detected 1 km upstream, that fall under the detection limits. In the same place and date, Copper values (272 microgr/L) and Zinc values (253 microgr/L) also exceeded maximum allowable concentrations. **Even 1,5 km downstream (using the most recent analyses, taken by the Water Administration on 26/01/2017), Cadmium levels exceed 42,5 times the EQS-AA and 7,5 times the EQS-MAC; while for Copper they exceed 22,8 times the EQS-AA; and for Zinc 4 times the EQS-AA**.

The fall of pH connected to acid mine drainage implies the dissolution of heavy metals, including hazardous and priority hazardous substances such as Cadmium, Copper and Zinc (and occasionally Mercury). All acid mine drainage, either coming from mine drainage adits, from mining waste piles leaching or from the mine tailings dams, are discharged into surface waters without any authorization. Emissions from the Buenaventura Adit alone represent approximately 50.000 litres per hour. The Galician Administration has attempted to ignore the problem,

allowing between 2009 and the present time (and, certainly, prior to that, for decades), constant discharges without any kind of control, authorization or register; but always with actual knowledge of their on-going occurrence. Between 2015 and 2016 the Mining Administration unsuccessfully attempted to obviate once again the waste-water discharge authorization process, but a different department of the Regional Administration (the Water department), required that a discharge authorization procedure take place. **During the processing of the discharge authorization, the Director General of Energy and Mines, Mr. Ángel Bernardo Tahoces, exercised continuing pressure over the Water Authority seeking to by-pass the water discharge authorization procedure (which implied public participation), by euphemistically demanding that an ad hoc discharge permit be granted to the San Finx mines.** The Water Authority did not agree to the wishes of Mr. Tahoces, considering them illegal.

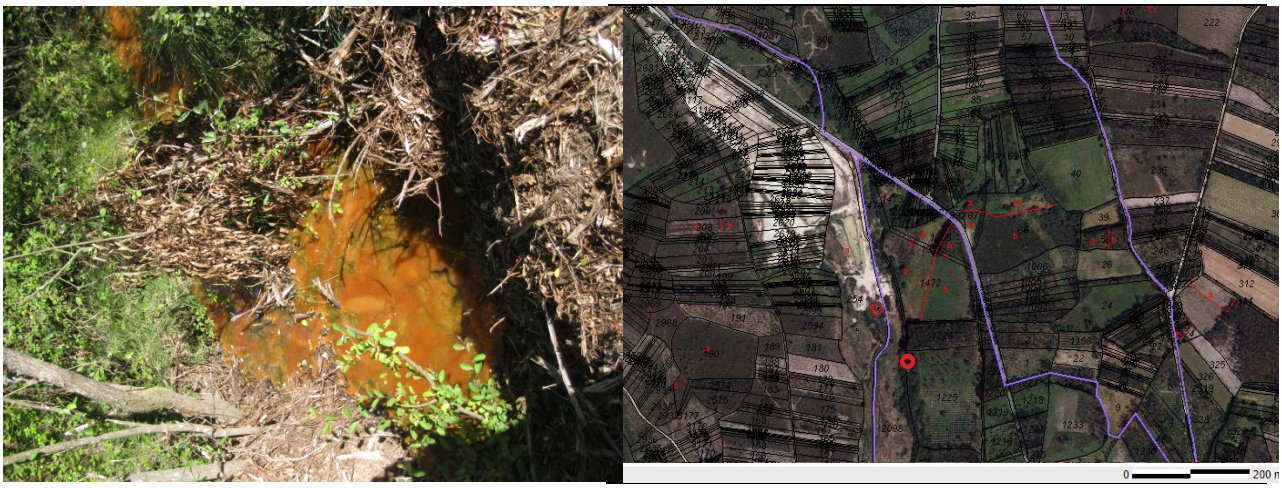
Within the context of this procedure and for the first time in the history of the San Finx Mining Group, the concession holder was subjected to a process of public participation in relation to its emissions. However, the documents made public refer exclusively to the discharge authorization request, and not the mine development proper or any other documentation from the mining authorities. In spite of this, and because the information made public included a number of water analyses, the degree and hazardousness of the discharges became known to the public. Two years later, however, and the Water Administration is yet to issue a resolution regarding the discharge authorization but has not forced the concession holder to adopt cautionary measures to stop heavy metal pollution. Acid mine drainage discharges into surface waters with heavy metals continue unpunished and unrestrained at a rate of at least 45 m3/h according the figures provided by the concession holder.

As acknowledged by scientific literature, heavy metals from the San Finx Mines end up being deposited in significant amounts in the Noia Estuary, a Site of Community Importance with very important mussel production 7 km downstream from the mines, producing adverse ecosystem effects as they pass through the river and preventing mussel gathering activities due to heavy metal sedimentation in large and extremely productive areas. Heavy metal levels in the sediments of the Noia Estuary (and especially in the Traba Estuary area) are unparalleled in other Galician estuaries while possible effects on public health remain unknown. It must be noted that by failing to declare such emissions the Party is also in non-compliance with the Pollutant Release and Transfer Register, on the basis of the Kyiv Protocol on Pollutant Release and Transfer Registers and related EU Directives. These instruments require that the Kingdom of Spain, as part to the protocol and a UE member state, must gather and make public information of industrial complexes with emissions to the atmosphere, water and ground of any of the pollutant substances that are included in Annex 2 of the Royal Decree 508/2007, which include Cadmium and its compounds, Copper and its compounds, and Zinc and its compounds, among others. The same Royal Decree 508/2007 established that underground mines and connected operations are subject to the established information requirements.

However, neither the Spanish Register of Emissions and Pollutant Sources nor the European Pollutant Release and Transfer Register (E-PRTR) include any information regarding the emissions of polluting substances from the mining concessions held by Tungsten San Finx S.L. No emissions data from other mining operations with significant and verified emissions such as the Touro Copper mine (“San Rafael”), Santa Comba Mining Group or the Monte Neme Mines, is included. In fact, no emissions from any underground or open pit mine in Galicia are reported, evidencing the systematic and generalized character of the breach of Union and international

law by Galician authorities. As indicated for the San Finx case, the Administration has been aware, since at least 1991, of the results of emissions analyses. And since at least 2015 it has access to regular analyses that confirm emission values. In the waste water discharge authorization file DH.V15.54967 of the Galician Water Administration, analyses dating back to 23/06/2015 of effluents of one of the mine drainage adits ("Buenaventura") can be found, registering values of 0,0127 micrograms/L for Cadmium, 0,352 micrograms/L for Copper and 0,533 micrograms/L for Zinc. The same administrative file includes new analyses dated on 26/01/2017 with almost identical values. The EQS-AA maximum allowable concentration for Cadmium is 0,00008 micrograms/L, while the EQS maximum allowable concentrations for Copper are 0,005 micrograms/L and for Zinc 0,030 micrograms/L. The same series of analyses demonstrate the downstream impacts of these heavy metals, clearly exceeding the EQS for these heavy metals.

It is unconceivable that Party ignores that the production of acid mine drainage is independent from the fact that a mine is operational or abandoned. In fact, most acid mine drainage globally is product of abandoned mines which have not been restored. Although the communicant has not yet seen the 2009 Mining Development Project and the Restoration Project of the Santa Comba mines, it is likely that, considering the Party's response, they do not include any provision to prevent or minimize on-going or future release of acid mine drainage into the surrounding waters. On the other hand, the open acknowledgement that the Santa Comba mines have been closed since 1986 emphasizes our question of how can the concessions not been expired after almost 40 years of abandonment and how could the Administration claim that no environmental impact assessment be necessary when approving a mining project to develop the mine, when no previous project existed. The communicants have personally visited the Braña Ancha stream in the proximities of the Santa Comba mine in August 2017 where the waters coming out from the mining adits are discharged, and where clear evidence of heavy metal pollution is present (iron sulphurs totally cover the stream bed during long periods) although, unlike San Finx, no water analysis to examine heavy metal pollution was carried out, in spite of requests from the communicants to the Water Authority.



Picture taken by the communicants at the Braña Ancha stream in the proximities of the Santa Comba (Varilongo) Mine with visual evidence of acid mine drainage pollution. Red dot indicates picture location.

Heavy metal contamination from acid drainage is even visible from the air using Google Maps even several kilometres downstream from the emission source at the Santa Comba mines:

The degree of heavy metal pollution is perfectly known by the Party, which in §215-217 attempts to minimize a 2008 report by the competent mining engineer at the same Administration. Ms. María José Míjares Coto, on 23/09/2008, being the acting engineer of the same Provincial Delegation of A Coruña, in a Report on the Application for the Transmission of Domain of the Concessions of Operations belonging to the "Santa Comba Mining Group", said that the Santa Comba mine development project "**should be submitted to the environmental ruling contained in the legislation on environmental matters currently in force because it is an underground operation that by its paragenesis can produce acid or alkaline waters that they give rise to changes in the pH or release metal ions that suppose an alteration of the natural environment**"[16]. In §215 the Party mistranslates "dictamen" as "opinion" and omits the ending of the phrase: "that suppose an alteration of the natural environment".

The report, contrary to what is stated in §215, does not refer to hypothetical possibilities, but literally quotes RD-Leg. 1/2008, of January 11, which approves the consolidated text of the Environmental Impact Assessment Law of projects (and which was in force until 12/12/13):

> ***"B. Underground mining in developments where any of the following circumstances occur: 1. That its paragenesis can, by oxidation, hydration or dissolution, produce acidic or alkaline waters that give rise to changes in the pH or release metallic or non-metallic ions that suppose an alteration of the natural environment."***

[16] In the Spanish original document: "*debería someterse al dictamen ambiental previsto en la legislación sobre materia de medio ambiente actualmente en vigor por tratarse de una explotación subterránea que por su paragnesis puede producir aguas ácidas o alcalinas que den lugar a cambios en el pH o liberen iones metálicos que supongan una alteración del medio natural*."

Correction regarding Annex 10 submitted by the Party, a report regarding the complaint files on 14/03/2016 by the communicants

The documentation available to the Administration shows no doubt about the dates of construction of the mining tailings dams, whose purpose is to reduce the volume of solids dragged by river and the deposition of sludge. They were built and managed by successive concession holders. After 2008, the officials and authorities of the Mining Administration allowed the dams to be excluded from mandatory documentation such as the Annual Work Plans, the 2009 Mine Development Project and Restoration Project (as well as their previous 2008 versions). This was only achieved by omitting these projects to public participation and sectorial scrutiny through the legally prescribed environmental impact assessment.

Since the communicants started to present claims in early 2016 regarding the San Finx mine tailings dams, officials at the Coruña Territorial Delegation have issued reports emphasizing that the function of both mining dams was unknown to them, that the dams had no function of decantation of fine / sludge, and that the decanted solids are not sludge. All of this with the evident intention of justifying the environmental evasion, to exempt the concessionaire from the responsibility of both dams and to try to conceal a lack of application of the corresponding mining regulations to these dams. Among these reports, the report attached by the Party as Annex 10 stands out. It was issued in response to the complaint made on 14/03/2016 by the communicant and addressed to the General Directorate of Energy and Mines, informing about the situation of the mining dam in San Finx.[17] This report is of particular relevance insofar as it deviates from all the documents in possession of the Mining Administration that clearly demonstrate that the two mining dams are part of the mining operations, and even of prior documents signed by the same author, Mr. Recuna Carrasco, were both mine tailings dams were explicitly acknowledged as part of the San Finx mines' infrastructures.

In pages 1 and 2 a description of both dams is made, claiming that "I could not observe obvious deficiencies, **which, on the other hand, it is not my competency/under my responsibility**". How can a mining tailings dam that was included in the Annual Work Plans of the mine up to year 2000, when the concession holder ceased submitting the plans in open breach of the law, and that was included in the 1999 Inventory of tailings dams, be outside the responsibility of the mining engineer responsible for the Administrative supervision of the mine? The description of the dam of the Report of 15/04/2016 contrasts vividly not only with that made by the complainant association, which the report seeks to ridicule, but also with the technical reports on the dams made in 2017 by the Water Authority highlighting the derelict state of the dams and the important environmental risks that dam failure would imply. Mr. Recuna indicates:

> *1. Regarding the largest dam, on the visit I could not verify deficiencies in its condition. Access is not easy, and it is of big size, but in any case it is draining the excess of water through the infrastructure that the dam has designed for that function. There are no obstacles, no cracks. I could not see large pieces falling off, as stated in Ismael A. López Pérez's complaint.*

[17] On 23/03/2016 the Territorial Delegation of A Coruña received the complaint. Mr. Recuna Carrasco, acting as actuarial engineer, and Mr. Iglesias Suárez, as head of service of Mines, perform an inspection visit that leads to a report signed by both on 15/04/2016 under the heading "Report on the complaint filed on 14/03/2016 by Ismael A. López Pérez, on behalf of the Autonomous Association and Environmental Petón do Lobo, on the mining development of the San Finx Mining Group".

It then continues stating the dam does not contain mining sludge (the claim is made by visual observation, although the dam has 12 meters of accumulated mining waste) and that "the strong energy with which the water flows through the infrastructure is incompatible with the fact that it was used for the purpose of depositing sludge" (against all existing evidence since the construction of the dam in 1939). The known geological features of San Finx are also manipulated, claiming that the sulphurs are not relevant in the paragenesis of the mine (in an attempt to hide the production of acid mine drainage), and even if the richness in chalcopyrite in both waste dumps and veins has been studied in detail.[18] In the report issued after a visit to the dam (of which a photograph is reproduced below), Mr. Recuna indicates that "I was not able to observe manifestations of that fact [acid mine drainage] and the Claimant does not provide objective data or analysis supporting it" (p. 2). The first visual sight of the dam area evidences heavy metal precipitation which cannot possibly be attributed to facts other than acid mine drainage (photograph taken in 2017):

Acid mine drainage is euphemistically labelled as "water that comes naturally, with gravity, from the interior of the mine, as well as rainwater collected in the dump". It also manipulates through the argument that "it does not consider any discharge into the riverbed", referred exclusively to the ore processing plant, when it is well known that the emission of heavy metal contaminants in fact come out from drainage of the mine interior workings and the leachate occurring in the waste dumps. The report, addressing the mine tailings dams, states that "**The dam is no(t) currently related with the mining activity developed according to the [2009] approved projects. In all likelihood it had it in the past, but I lack data on it. In any case, it is work carried out on the bed of a stream, therefore its administrative authorisations, use, conservation, safety, water quality, etc. corresponds to the [water] basin organisation**".

[18] https://www.sciencedirect.com/science/article/pii/S0048969703002614

The emphasis with which Mr. Recuna Carrasco denies that sludge tailings dams are full of sludge ("The materials retained by the hydraulic work are not, in any case, sludge. The materials that are observed are granular and much coarser granulometry than the sludge ") is intended to justify their exclusion from the application of the Order of April 26, 2000 which approves the Complementary Technical Instruction 08.02.01 of Chapter XII of the General Regulation of Basic Mineral Safety Regulations on "Sludge Deposits in extractive industries treatment processes" and currently Royal Decree 975/2009, of June 12, on management of waste from the extractive industries and the protection and rehabilitation of the space affected by mining activities. However, regardless of granulometry, the legal definition of mining waste is that of a product generated in the process of treatment of extractive industries. Thus, the Mining Authority is responsible for the supervision and enforcement of the maintenance and management of the infrastructures that contain mining waste, namely mining tailings dams. While the concession holders have full responsibility for the dams themselves following article 2.2. of RD 975/09:

> *"The operating entity, owner or tenant of the original or transmitted mineral concessions, that carries out research and exploitation activities regulated by Law 22/1973, of July 21, of Mines, is obliged to carry out, with their own means, the rehabilitation works of the natural space affected by the mining work as well as its ancillary services and facilities, in the terms provided for in this royal decree. Likewise, it must address the management of mining waste that its activity generates focused on its reduction, treatment, recovery and disposal."*

In September 2017 the Water Authority produced a report on the "Visit to the Dams of San Fins", in which it indicates that **"although at the moment no notable differences are observed** [from the previous visit earlier that year]**, the roots of the existing vegetation on the dam could affect the structure in the medium term"** and that **"there are certain elements (fissures with leaks, presence of vegetation rooted in the structures) that recommend the periodic vigilance of its state of conservation"**, which contrasts with the condition indicated in the aforementioned Report by Mr. Recuna. All this evidences the bias of the report, particularly considering its author's prior personal involvement with the San Finx mine.[19]

Correction regarding Annex 12 submitted by the Party, a Report issued by the Mine Administration following repetitive requests from the Water Authority

In folio 1,478 of the file of discharge authorization (DH.V15.54967, before PROV-10020) is a communication of December 27, 2016 in which the Head of the Area of Waste of Galicia's Water Authority, Ms. Isabel Vila Vilariño demands that the Directorate General of Energy and Mines sends within the term of TEN (10) DAYS "in its capacity as the substantive body a report on the state of processing of the environmental assessment procedure and, where appropriate, the referral of the resolution dictated by the competent environmental body, or, failing that, **a certification that the procedure issued by the competent environmental body does not**

[19] Mr. Recuna Carrasco was the author, together with the then Mine Director of San Finx Mr. Joaquín Eulalio Ruiz Mora, of the "Basic Draft and a master plan for the rehabilitation of the San Finx mine", prepared in 2002 at the request of the Mining Administration, in which the two mine tailings dam were included within the facilities of the mine.

need to be processed", regarding the San Finx Mines. In view of the same file, the response of the "substantive body" took almost **1 YEAR** to be issued, in accordance with folios 2497-2499, which includes a report signed by the Head of the Energy and Mines Service of the Coruña Territorial Delegation Mr. Juan José Iglesias Suárez, dated 05/12/2017.

This is Annex 12 of the Party's response, which is also mentioned in §224, failing to explain the reason why the Mine Administration took almost a year to issue a report that was supposed to be sent to the Water Authority within 10 days.

The report, although failing to address and provide what the Water Authority requested, addresses various issues in an attempt to exempt the concessionaire from its environmental responsibility, through a number of false statements. Regarding the mining tailings dams, in page 2 it is stated that the administrative file "on this mining operation does not contain any reference to the mining authority's having granted a permit for these dams, which, furthermore, do not fulfil any function related to the mineral processing used in concentring the minerals". It further speculates that they could have been used for hydropower, which is absurd. As clearly stated in the "Exploitation of the mines of tin and Wolfran de San Finx" document of 1940 by Manuel Peón Martínez, mine tailings dams no. 1 and no. 2 were constructed, respectively, in 1928 and 1939 as decanting deposits of as part of the "clarification system" of the "mineral concentration workshop". As quoted above: "**This deposit captures sands and sludge – mostly sludge– that spill from the previous pools, and considering the respectable volume of the said dam, waters almost come to stillness, favourably allowing the sedimentary action of suspended materials through a long stretch and during enough time to achieve clarification. As the volume of water to be clarified is 34 cubic meters per hour, it takes some 10 days to fill up the dam**".

It is utterly false that the administrative file "on this mining operation does not contain any reference to the mining authority's having granted a permit for these dams". Mr. Iglesias Suárez, who was responsible for the oversight of the San Finx mine before being promoted to Head of the Service of Mines and Energy, is perfectly aware that the Annual Work Plans of 1983, 1996, 1998, 1999 and 2000 explicitly refer to both mining tailings dams. Contrary to what Mr. Iglesias Suárez states the Work Plans are in fact mining instruments and the authorization of their contents (informed or passed by positive administrative silence) is in fact an authorization on the part of the mining authority of the installations and actions that are contemplated in the said documents. In this regard, the aforementioned Annual Plan of Work of 1983 includes a "Report of the Mine's Technical Director" stating that:

> *We have sealed off the sluice that existed in **the dam in the river that originates a great reservoir for the decantation of suspended particles coming from our ore processing plant**, and that caused some **damage to the agricultural lands downstream**. After the dam the water circulates clean, so that the damage was extinguished and the complaints of the Agrarian Chamber ceased.*

In addition, all the Work Plans available until the year 2000 (after which year they ceased to be presented, in open breach of the law), included both mine tailings dams in their "WASTE DAMS AND PONDS" section. Therefore, Mr. Iglesias Suárez is not truthful when he says that there is no authorization from the Mining Administration regarding both facilities.

What is truly remarkable in the report is what it omits, hiding this information from the Water Authority in a tortuous manner, in an attempt to release the mine administration and the

concession holders from responsibility regarding the tailings dams and the mining waste they contain, as well as the potentially catastrophic environmental effects that dam failure entail.

Even more worrying is the fallacy presented in the report that intends to attribute the heavy metal contamination present in the mine with an alleged natural background level of heavy metals ("*even in the absence of any mining activity, the base values of the different mineral elements present in the waters surrounding the mine site are necessarily higher than those established as average levels in environmental quality standards*"). Without presenting any evidence on the existence of a natural background level, the civil servant intends to provide "carte blanche" to the concession holder to discharge into the river stream high levels of polluting heavy metals under the false argument that it is not the mine that is polluting, but the geological context. Previously, Mr. Felipe Macías in a report prepared for the concession holder, attempted to use this argument to exonerate the concession holder from building an adequate water treatment facility for acid mine drainage prior to discharge in the river. This argument has been fully refuted in the waste water discharge authorization process itself.

The report finally insists in a series of arguments that attempt to explain the lack of environmental impact assessment of the San Finx projects. In fact, the Mine Administration failed to provide any of the documents requested by the Water Authority: "the referral of the resolution dictated by the competent environmental body, or, failing that, a certification that the procedure issued by the competent environmental body does not need to be processed**". Mr. Iglesias Suárez cannot not refer to the resolution dictated by the competent environmental body because when Mr. Iglesias was personally responsible for the administrative oversight (in 2008/2009) of the process of approval of the San Finx mine development and restoration projects, he deliberately failed to submit these projects to the environmental body and, by doing so, made it impossible not only for the environmental body but for the public to participate in the environmental assessment process, in open breach of national legislation and the Aarhus Convention.** Simply speaking, there is no resolution dictated by the competent environmental body because such body fully ignores the existence of the 2009 San Finx projects. On the other hand, **Mr. Iglesias Suárez cannot obtain from the competent environmental body a certificate stating that the 2009 San Finx mine development and restoration projects did not have to be subjected to environmental impact assessment, because the environmental body is perfectly knowledgeable that it did have to be subjected**.

Instead, the Report is a nonsensical and confusing appeal to diverse legal regulations, that has already been refuted in this Comment. The Spanish Public Prossecutor viewed such facts and arguments (Mr. Iglesias Suárez was formally questioned by the Spanish Judicial Police on these facts) as containing the potential elements of criminal offence, and thus submitted the case to the Court of Instruction to continue the criminal investigation, which is currently on-going.

The ACCC must find the complaint admissible and promptly issue a decision remedying this serious breach of the Aarhus Convention in terms of breaches in the right to public participation.