

# COMPLIANCE BY SPAIN WITH ITS OBLIGATIONS UNDER THE CONVENTION

## Findings adopted by the Compliance Committee on 18 December 2009<sup>1</sup>

### I. INTRODUCTION

1. On 13 May 2008, the Spanish non-governmental organization (NGO) Association for Environmental Justice (Asociación para la Justicia Ambiental (AJA)) submitted a communication to the Compliance Committee on behalf of itself and the Association of Senda de Granada Oeste Neighbors (hereinafter collectively the communicant),<sup>2</sup> alleging non-compliance by Spain with article 4, paragraph 8, article 6, paragraphs 1 (a), 2 (a), 2 (b), 4 and 6, and article 9, paragraphs 2, 3, 4, and 5, of the Aarhus Convention. The communicant included supporting documents as annexes to the communication.
2. The communicant first alleges that responses to information requests were excessively delayed and argues that by imposing a fee for environmental information related to decision-making on a residential development project in the city of Murcia, Spain, the Party concerned failed to comply with article 4, paragraph 8, and article 6, paragraph 6, of the Convention.
3. The communicant next alleges that proper public participation was not provided for in the context of the decision-making processes concerning the land use planning for and the implementation of the urbanization project in a residential area, and also concerning the decision of the City of Murcia to allocate special lands for that purpose. This constitutes, according to the communicant, failure of the Party concerned to comply with article 6, paragraphs 1 (a), 2 (a), 2 (b) and 4, of the Convention.
4. The communicant finally claims that the Party concerned was in non-compliance with article 9 of the Convention. It alleges that the refusal by the courts to suspend administrative decisions that lacked an environmental impact assessment (EIA), as well as the length of the related judicial review procedure, were not in compliance with article 9, paragraph 4. The communicant furthermore claims that imposing high court costs on a non-profit organization, while there were no assistance mechanisms available to offset such costs, constituted a failure by the Party concerned to comply with the requirements of article 9, paragraphs 2, 3, 4 and 5.
5. On 6 June 2008, the Committee notified the Party concerned, through the designated national focal point, that it would make a preliminary determination on the admissibility of the case at the Committee's twentieth meeting (8 – 10 June 2008) in Riga, Latvia, and invited the Party concerned to attend the scheduled discussion. No reply was received from the Party concerned. At its

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

<sup>2</sup> According to the communication (paragraph 25) most of the facts refer to the actions by AJA or the Association of Senda de Granada Oeste Neighbors. The Committee does not make a distinction in its findings between the AJA and the Association of Senda de Granada Oeste Neighbours and treats them collectively as the communicant.

twentieth meeting, the Committee determined on a preliminary basis that the communication was admissible. It also requested the communicant to present some clarifications and additional information, in particular regarding the timing of the events referred to in the communication and the use of domestic remedies. The clarification was sent by the communicant to the secretariat on 28 August 2008.

6. The communication was officially forwarded by the secretariat to the Party concerned, through its designated national focal point, on 7 August 2008, asking for a response within five months. No reply was received from the Party concerned. On 12 January 2009, the secretariat notified the Party concerned that the Committee would discuss the communication at its twenty-third meeting (31 March – 3 April 2009) and invited the Party concerned to send its representative(s) to the meeting. No reply was received from the Party concerned.

7. The Committee discussed the communication at its twenty-third meeting (31 March – 3 April 2009) with the participation of representatives of the communicant. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned did not respond to the invitation to participate in the meeting and was not represented at it.

8. On 25 June 2009, the Party concerned sent comments in the form of a “report” in the Spanish language; and on 29 June 2009, one day before the Committee’s twenty-fourth meeting (30 June – 3 July 2009), it provided the English translation of the report (hereinafter the 25 June 2009 report). The report was forwarded to the communicant the same day that it was received and the communicant responded to the report on 1 July 2009. In spite of the very late arrival of the comments by the Party concerned, the Committee decided to take them into account, to the extent possible, because it acknowledged that this was the first time that the Party concerned had provided substantive comments on the case.

9. On 23 September 2009, the communicant submitted additional information to the Committee, with regard to a Decision of the Constitutional Court of Spain of 9 September 2009.

10. In accordance with paragraph 34 of the annex to decision I/7, the Committee prepared draft findings and recommendations at its twenty-fourth and twenty-fifth meetings (30 June – 3 July 2009 and 22-25 September respectively). These were forwarded to the Party concerned and the communicant on 13 November 2009 with an invitation to provide comments, if any, by 4 December 2009.

11. The Party concerned and the communicant provided comments on 11 December 2009. The Party concerned provided additional remarks on 15 December 2009 and the communicant on 17 December 2009.

12. At its twenty-sixth meeting (15-18 December 2009), the Committee more or less completed the preparation of its findings in closed session, taking account of the comments received. Further to the letter of the Party concerned dated 13 January 2010 expressing Spain’s agreement that the Committee’s recommendations would enhance the application of the Convention in Spain, the Committee used its electronic decision-making procedure to finalize and adopt its findings, and

agreed that they should be published as an official document. It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. SUMMARY OF THE FACTS, EVIDENCE, AND ISSUES<sup>3</sup>

### Chronology of plans, projects and lawsuits

13. In February 2003, a private company, Joven Futura (Future Youth), made a proposal to the Murcia City Council to start negotiations about the development of a residential area near the city of Murcia covering 92,000 square meters to construct houses for young families. The proposal also envisaged the conclusion of an agreement between the company and the Murcia City Council to enable urbanization of the land concerned near the city of Murcia. The agreement would include an obligation for the City Council to take the steps necessary to reclassify part of the lands, where the houses would be constructed, from “non-residential” to “residential”.

14. In July 2003, the Murcia City Council approved the agreement and later the regional government also approved it. On 8 October 2003, the Convenio de modificación del planeamiento urbanístico para desarrollar actuaciones de vivienda protegida (or Agreement for the modification of the urban planning for the development of apartment buildings) was signed by the Autonomous Community of the Region of Murcia (Comunidad Autónoma de la Región de Murcia), represented by its advisor in charge of Public Works, Housing, and Transportation; by the City Council of Murcia (Ayuntamiento de Murcia), represented by its Mayor; and by the company Joven Futura (Sociedad Cooperativa Limitada Joven Futura), represented by its president. On 24 October 2003, the agreement was published in the Official Journal of the Murcia Region.<sup>4</sup> Among others, the agreement included the following legal obligations for the City Council: to adopt a modification to the urban plan, to re-classify a land slot of 110,000 square meters and to approve a project of urbanization for the area. The agreement also committed the Regional Government to approve the planning steps and to incorporate the area into the building zone (“City General Plan”) of the city of the Murcia. The land would become the property of Joven Futura for the construction of approximately 733 apartments.

15. As mentioned above, at the time of the conclusion of the agreement, the lands in question were classified as non-residential by the Murcia City General Plan, last revised on 31 January 2001. This latest revision of the City General Plan had been subject to an EIA before its adoption, as required by national and European Community (EC) law. The EIA verified the historical, cultural, environmental, scientific and archeological values of the lands, in order to classify some of them as non-residential. Such non-residential lands are subject to a special protection regime that is incompatible with urbanization.

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<sup>3</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>4</sup> Boletín Oficial de la Región de Murcia, Número: 247, Viernes, 24 de octubre de 2003, page 17232, published on the Internet at:

<http://www.carm.es/borm/documento;jsessionid=B4CC75A56585C1C6B48BA94983254CC7?obj=bol&id=15069>  
(last seen on 14 September 2009).

16. The land slots allocated for the project are located within the area of Huerta Tradicional (traditional garden). Those lands were under special protection under the City General Plan and were classified as non-residential because their conservation was considered to be essential for the quality of the environment of the metropolitan area of the valley.

17. In May 2004, the Urbanization Unit of the municipality submitted to the City Council a formal draft “Modification” to the City General Plan for the new residential zone, known as ZM-Ed3, Espinardo, accompanied by documents called “Environmental Accident Study” developed by the company, and by a draft EIA study for the creation of the urban zone ZM-Ed3, Espinardo. The last of these documents follows the requirements stipulated in Spanish legislation to develop an EIA for modifications introduced on city plans. The Environmental Accident Study claimed that the land proposed for re-classification “has no special significance as a garden.”

18. On 24 June 2004, the Murcia City Council decided to initiate the procedure regarding Modification No. 50 to the City General Plan for the establishment of the residential zone ZM-Ed3, Espinardo. The notice was published on 22 July 2004 in the Murcia Region Official Journal and set one month for public comments.

19. Despite the existence of the draft EIA study on the urban zone ZM-Ed3 submitted in May 2004, on 24 September 2004 the Environmental Quality Office adopted a resolution saying that no EIA was needed for the proposed modification of the City General Plan. The resolution was based on a decision taken at an extraordinary session of the EIA Commission on 23 September 2004, which stipulated that the lands in question should “abandon their non-urbanizable” condition because of their low agricultural and environmental values as well as low profitability. The same rationale had been stated in 2003 in the agreement signed by the City of Murcia and the Regional Government.

20. On 28 April 2005, the City Council adopted Modification No. 50 to the City General Plan, re-classifying the lands in question as “residential” and allowing higher density of construction than in the draft decision of 24 June 2004. Final approval of Modification No. 50 by the regional authority followed on 24 June 2005 on the condition that several deficiencies would be corrected by the City Council. On 20 October 2005, the communicant filed an administrative lawsuit seeking judicial review of the approval and requesting interim injunctive relief. The request for interim injunctive relief was denied. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least two more years for the Court to issue a decision on the merits.

21. In the meantime, the procedure for the adoption of the Land Slot Plan ZA -Ed 3 (“Plan Parcial”) setting out details for the future development in the area (residential construction) was initiated on 11 May 2005. On 25 August 2005, the proposal was published in the Official Journal providing one month for the public to submit comments. The Land Slot Plan ZA - Ed 3 was approved on 24 November 2005. On 26 February 2006, the communicant filed an administrative lawsuit seeking judicial review of the approval of the Land Slot Plan ZA – Ed 3 and requesting interim injunctive relief. The request for interim injunctive relief was denied. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least three years for the Court to issue a decision on the merits.

22. Meanwhile, on 7 December 2005, the city initiated the process to approve the construction project with the official name Urbanization Project UA1 of the Land Slot Plan ZA – Ed 3. It published the official notice of the proposal in the Official Journal on 22 December 2005 and a public commenting period of 20 days was provided. During this period, the public could access the file consisting of about 1,000 pages, containing plans related to the construction of 23 buildings.

23. The Urbanization Project UA1 was approved by a resolution of the City Council on 5 April 2006. Information about the approval was published in the Official Journal on 3 May 2006. No EIA study was conducted for this project approval. On 3 July 2006, the communicant filed an administrative lawsuit seeking judicial review of the approval of the Urbanization Project UA1 and requesting interim injunctive relief. The request for interim injunctive relief was refused. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least one additional year for the Court to issue a decision on the merits.

24. Apart from the aforementioned administrative lawsuits, the communicant also initiated a procedure at the Constitutional Court and a number of criminal proceedings relating to breach of official duties. On 15 September 2009, the Constitutional Court of Spain rejected the communicant's appeal on procedural grounds that no constitutional issues were raised.

#### **Access to information – costs and response deadlines**

25. Since 2004, the communicant filed several requests for information concerning the agreement between the Murcia City Council and Joven Futura. The requests were based on Spanish legislation granting access to environmental information. In particular, the communicant refers to two requests, one in 2005 on the proposal for Modification No. 50, and one in 2006 on the Urbanization Project UA1 of the Land Slot Plan ZA – Ed 3, briefly described below. The communicant included supporting documents to demonstrate that in one instance the City imposed a charge of 2.05 Euro per page as a condition to provide copies of documents.<sup>5</sup>

26. On 17 February 2005, the communicant requested access to the administrative records involving the proposed Modification No. 50, namely a copy of the adaptation of the City General Plan, which included the proposal for Modification No. 50, as well as documents related to studies and official reports of the Murcia City Council and other relevant authorities. The request was reiterated on 24 June 2005. According to the communicant, access was granted on 28 June 2005, almost four months after the submission of the request and only after the charge of 67.68 Euro for approximately 30 pages had been paid. The information was released after the approval of the Modification No. 50 to the 2001 Murcia City General Plan had already been concluded in April 2005.

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<sup>5</sup> Annexes 3 and 4 to the communication. Relating to Annex 4, the tariff in force during 2008 was implemented by City Council agreement of 25 October 2007 (published in the Murcia Regional Official Bulletin on 24 December 2007); the charge of 2.05 Euro per page is established (see information published on the Internet at: <http://www.carm.es/borm/documento?obj=anu&id=330104>, last seen on 14 March 2009). The tariff in force during 2007 was published in the Murcia Regional Official Bulletin of 22 December 2006; the charge of 2 Euro per page was established. The communicant complains about it also, for instance in annexes III of the clarification (see information published on the Internet at: <http://www.carm.es/borm/documento?obj=anu&id=309655>, last seen on 14 March 2009).

27. On 29 September 2006, the communicant submitted a request for information to the Urban Planning Department for the documentation relating to the construction authorization, including the construction project. On 19 December 2006, the representative of the communicant received a telephone call from the authorities asking him to appear in person and answer some questions with regard to the request. On 26 December 2006, the said representative appeared at the offices of the Urban Planning Department. On 2 March 2007, the communicant repeated its request; on 9 March and 27 March 2007, members of the communicant appeared in person at the offices of the authority, but the file was not available. On 30 March 2007, access to some of the information was granted and access to review the files was granted on 17 April 2007, almost 7 months after the submission of the initial request. However, not all relevant information requested by the communicant had been reproduced. The Department copied 34 pages out of the 600 pages of the file and requested the communicant to pay a total charge of 68 Euro (for 2 Euro per page). Also, the information provided did not include copies of ten plans (an additional 65.10 Euro per plan was necessary). The communicant decided it could not afford to pay the required amount of approximately 1,200 Euro for the entire file and requested the authority to provide the information in electronic format (compact disc - CD), which would cost 13 Euro. The local authority rejected the communicant's request to obtain the information in electronic format on a CD, and according to the communicant, it did not provide any reasons.

28. The Government of Spain in its 25 June 2009 report to the Committee did not specifically address the above facts but generally rejected allegations about access to information, saying that "at no time was any impediment or restriction placed on access by this association or any other interested party to the dossiers requested, saving the possible limitations imposed by the complicated handling process undergone by the respective files [...]".

29. The communicant considers the charge of 2.05 Euro per page to exceed the "reasonable amount" under article 4, paragraph 8, and the refusal to provide the information in the form requested (CD) as contrary to article 4, paragraph 1 (b). The Party concerned in its 25 June 2009 report maintains that the existing scheme for fees is in compliance with article 4, paragraph 8, of the Convention authorizing each party to charge a "reasonable amount" for supplying information; in its view the fee schedule constitutes a "reasonable amount" and is further supported by an economic study conducted before the adoption of the scheme. The Party concerned informed the Committee, however, that the "Murcia City Council Planning Department has considered it appropriate to submit the question to the Municipal Tax Office so that it may present a review of the amount of the fee in question with a view to the coming budgetary year or so that it may set a new fee for the cases of the issue of copies of documents subject to the Aarhus Convention."

30. The communicant, in its comments on the views of the Party concerned cited above maintains that by setting a fee of 2.15 Euro (according to the 2009 fees chart) for copies of information contained in a planning process, when the Murcia Council have set fees of 0.15 Euro for copies of information relating to many other areas and when copies can be ordered in a shop for 0.03 Euro per page, the Party concerned intended to avoid access to information and public participation. Furthermore, the communicant alleges that the additional provision of Act 27/2006 of 18 July 2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters was not applied and copies of documents up to 20 pages were not provided free of charge. Also, the communicant informs the Committee that the

communicant's repeated requests to receive the information in electronic form were constantly ignored.

### **Public Participation**

31. Arguments are made concerning compliance with the Convention of procedures related to:
  - a) the agreement between the Murcia City Council and Joven Futura in 2003;
  - b) the screening decision of the Environmental Quality Office in September 2004;
  - c) the approval of Modification No. 50 to the Murcia City General Plan in April 2005;
  - d) the approval of the Land Slot Plan ZA-Ed3 in November 2005;
  - e) the approval of the Urbanization Project UA1 of the Land Slot Plan ZA-Ed3 in April 2006.
32. The communicant maintains that the three approvals mentioned above under letters c), d) and e) have 'a permitting nature' in relation to projects covered by article 6 of the Aarhus Convention. Moreover, according to the communicant, applicable Spanish laws require the carrying out of an EIA procedure for all the steps; hence these three approvals fall within the ambit of paragraph 20 of the annex I to the Convention and therefore under article 6, paragraph 1 (a), or alternatively within the ambit of article 6, paragraph 1 (b).
33. Furthermore, the communicant maintains that the 2003 agreement between the Murcia City Council and Joven Futura (under letter a) above) as well as the screening decision (under letter b) above) are parts of the decision-making process leading to approval of the Modification No. 50 to the Murcia City General Plan and therefore they both also fall within the ambit of article 6.
34. The Party concerned in its 25 June 2009 report to the Committee generally questions the application of article 6 to the above processes, but does not specifically address the allegations of the communicant.

### **Public participation and EIA**

35. The communicant maintains that early and effective public participation in environmental decision making in Spain can happen only through EIA legislation, because of the procedures available and because "if no environmental study is made, the public cannot have access to reports and other documents evaluating environmental and health risks, which would enable the public to develop and express its own science-based opinion on the issue".
36. None of the approvals of the acts mentioned in paragraph 31 c), d), and e) above was subject to EIA procedures, which, according to the communicant, was in contravention of the applicable laws. The screening decision that an EIA for Modification No. 50 was not necessary was taken through an "emergency" procedure and did not provide for public participation. Given the role of the EIA in providing information for decision-making (para. 35 above), the screening decision not to require an EIA limited, according to the communicant, the effectiveness of public participation. The communicant challenged the screening decision in court for lack of impartiality and of sufficient legal and scientific arguments. The communicant argues that the screening decision related to Modification No. 50 was not in compliance with the requirement of article 6, paragraph 1 (a).

37. The Party concerned in its 25 June 2009 report to the Committee maintains that, as confirmed by the courts, all screening procedures complied with the applicable laws and that the particular features of the planned activities did not necessitate the carrying out of an EIA.

### **Informing the public (notification) under article 6, paragraph 2**

38. According to the communicant, the public was not informed about plans to develop and sign the agreement between the City of Murcia and the developer Joven Futura in 2003. The public was informed about the conclusion of the agreement between the City Council and the developer through its publication in the Official Journal of Murcia Region in October 2003, after the agreement had been reached. The communicant also points out that the Murcia City Council Department released information about the Modification No. 50 to the 2001 Murcia City General Plan only after the approval had taken place in 2005. As a result, according to the communicant, the public, including the owners of plots of land affected by the construction, were not properly informed in the decision-making on the Modification No. 50, as required by article 6, paragraph 2, of the Convention and did not have any opportunity to participate.

39. The communicant further maintains that the draft decision on Modification No. 50 to the 2001 City General Plan underwent major changes in 2004 at the request of the developer after the public comment period was closed, and that the final approval took place in 2005 without a new opportunity for the public concerned to comment on the changes. Specifically, the public was not informed about the change in the decision on the density of construction that took place after the closing of the public comment period. Thus, the communicant alleges that in relation to Modification No. 50, the public concerned was not informed in an adequate, timely and effective manner of the proposed activity and the application on which a decision would be taken and of the nature of the possible decision, as required by article 6 paragraphs 2 (a) and 2 (b) respectively.

40. The Party concerned in its 25 June 2009 report to the Committee does not specifically address the above allegations and maintains that all planning procedures complied with the applicable laws.

### **Reasonable time frames for participation under article 6, paragraph 3**

41. The procedure for the approval of Land Slot Plan ZA-Ed 3 was initiated on 11 May 2005. On 25 August 2005, the proposal concerning the Land Slot Plan ZA-Ed 3 was published in the Official Journal providing one month for the public to submit comments. The communicant alleges that, given that the commenting period started during the summer holiday season and considering the time necessary to study the proposal and prepare sound comments on it, one month was an unreasonably short time frame for the public to effectively take part in the decision-making process.

42. The procedure for the approval of the Urbanization project UA1 of Land Slot Plan ZA – Ed 3 was initiated on 7 December 2005. The notice was published in the Official Journal on 22 December 2005, and a period of 20 days was provided for the public to access the file containing all relevant information and to submit comments. The relevant information consisted of more than



1,000 pages and a number of plans related to the construction of 23 buildings containing 1,390 apartments. Obtaining a full copy of the file took several days. Given that the comment period started during the Christmas holiday season and considering the size and content of the file as well as the time necessary to study it and prepare sound comments, the communicant alleges that 20 days was an unreasonably short time frame for the public to be informed and participate effectively in the decision-making process, and that this constituted a failure by the Party concerned to comply with article 6, paragraph 3.

43. The Party concerned in its 25 June 2009 report to the Committee does not address specifically the above allegations and maintains that all planning procedures complied with the applicable laws.

#### **Early public participation when all options are open – article 6, paragraph 4**

44. According to the communicant, all decisions taken with regard to the whole project were triggered from the agreement between the City Council and Joven Futura. The public was informed about the conclusion of the agreement by the City Council through its publication in the Official Journal of Murcia Region (para. 38 above). According to the communicant, public participation opportunities came at a time when the city of Murcia had already assumed legal obligations towards the developer as to land and project decisions; thus, public participation was not provided at a time when all options were open and effective public participation could take place, and this constituted a failure to comply with article 6, paragraph 4, of the Convention.

45. The Party concerned in its 25 June 2009 report to the Committee does not specifically address the above allegations and generally maintains that all planning procedures complied with the applicable laws.

#### **Information to be made available - article 6, paragraph 6**

46. On 17 February 2005, the communicant requested access to a number of documents because in its view these records were necessary for its participation in subsequent processes (see paras. 25-30), and access was granted on 28 June 2005. In addition, according to the communicant, it had requested documents related to the decision-making process (at various stages the requests were related to land decisions or project decisions), and the City Council of Murcia imposed a charge of 2.05 Euro per page for copying. The communicant claims that these instances amount to a failure of the Party concerned to comply with article 6, paragraph 6.

47. The Party concerned in its 25 June 2009 report to the Committee does not specifically address the above allegations and generally maintains that all planning procedures complied with the applicable laws.

#### **Due account taken of the outcome of the public participation - article 6, paragraph 8**

48. From the start of the procedure regarding Modification No. 50 in 2004, the communicant claims that various affected persons notified the City Council about their concerns; over 2,000 people expressed their disagreement with the proposed re-classification of lands, including owners

of lands and houses. In addition, the communicant made numerous comments relating to the following key issues: the absence of an EIA; the legality of the agreement between the City Council and Joven Futura (since neither was owner of the lands subject to re-classification); and the landscape and environmental values of the lands protected by the City General Plan. According to the communicant, these comments were never answered or acknowledged by the City Council. The final approval of Modification No. 50 was made on 24 June 2005 by the regional authority on the condition that several deficiencies would be corrected by the City Council. The Modification was published in the Official Journal and specifically required that the City Council correct the deficiencies. Until now, according to the communicant, the City Council has not corrected the identified deficiencies, as requested by the regional authority, for the approval to become effective. Nevertheless, the Land Slot Plan and the Urbanization Project went forward and were subsequently approved, and the urbanization project is nearly complete.

49. With regard to the procedure related to Land Slot Plan ZA-Ed 3a in 2005, although the procedure was at the end of the summer holiday season, about 500 affected people submitted comments. Yet, according to the communicant, the comments were not duly taken into account, despite the fact that many individuals identified infringement of the requirements set by national law. Comments referred to the following key issues: that Modification No. 50 to the Murcia City General Plan should not yet be considered effective due to the fact that the conditions imposed by the regional authority had not been duly fulfilled; the failure to conduct an EIA; that the proposed density of buildings exceeded the limit allowance set by law; that not enough land had been set aside for public facilities; the lack of green areas and parks; and the lack of measures protecting against noise. Concerned members of the public also denounced the fact that local authorities failed to consider a report issued by the Water Authority stating that there would be insufficient water resources to supply 1,974 apartments and criticising the potential effect on and destruction of ancient water infrastructures located in the urbanization zone. Final approval was issued on 24 November 2005, as originally planned in the agreement of 2003.

50. With regard to the procedure related to the Urbanization Project UA1 of Land Slot Plan ZA – Ed 3, although the public comment period was during the Christmas holiday season and a period of only 20 days was provided for the public to access the file containing all relevant information and to submit comments, a number of people submitted comments. All comments, according to the communicant, were ignored by the public authority even though the comments identified severe breach of legal requirements, including the failure to conduct an EIA and the argument that the modification of the Murcia City General Plan was not effective. The final approval of the Urbanization Project UA1 took place on 5 April 2006, as originally planned in the agreement of 2003, and was published in the Official Journal on 3 May 2006.

51. The communicant alleges that by failing to take into account any of the concerns raised in the comments submitted by the communicant and the affected neighbours in any of the public participation procedures, the decision-making authorities failed to comply with article 6, paragraph 8, of the Convention. The public, through the communicant, had sought relief by lodging administrative appeals and then administrative lawsuits. Some of the administrative appeals failed because the authorities considered they were submitted after the set deadline, although the communicant disagrees with the method adopted by the authorities to calculate the appeal time.

52. The Party concerned in its 25 June 2009 report to the Committee does not specifically address the above allegations and, as already mentioned, generally maintains that all planning procedures complied with the applicable laws.

### **Access to justice, financial barriers and remedies**

53. The decision by the Administrative Proceedings Court on the appeal by the communicant against the denial of precautionary measures required that all the costs be covered by the plaintiff, i.e. the communicant. The costs were 2,148 Euro, mostly covering the fees for the lawyers of the City Council. The communicant asserts that the costs imposed in just one of the court proceedings of the appellate court were equal to a full monthly budget of a local family or three monthly budgets of a single person in Murcia; it also asserts that no state assistance mechanisms were available for members of the communicant. Criminal proceeding No. 4444/2006 was initiated by a complaint submitted in 2006 by the communicant before the Murcia Magistrate's Court. The complaint asserted the application of article 404 of the Criminal Code on wilful breach of official duty for failure to afford due protection of archaeological remains found within the boundaries of the land affected by the urbanization project. The Magistrate's Court shelved the case and imposed upon the communicant a "bond" (deposit) requirement of 60,000 Euro in the event the Court decides to take up the case.

54. The Party concerned in its 25 June 2009 report to the Committee does not agree with the communicant's allegations. It maintains that its Constitution and national legislation guarantee the rights specified in the Aarhus Convention. Specifically, article 119 of its Constitution "establishes that justice shall be free of charge when so disposed by the law and, in any case, when evidence is shown of lack of resources to go to law". Moreover, the Spanish Law on Free Legal Assistance 1/1996 of 10 January 1996 "guarantees the right to free legal assistance recognized by the Constitution, depending on the person's economic circumstances". In the opinion of the Party concerned, these norms represent a guarantee of the right to effective legal protection "much more far-reaching and comprehensive than that specified in generic terms in the precepts of the Aarhus Convention [...]".

55. The communicant claims that all of its requests for preliminary suspension of the decisions challenged (interim injunctive relief) were rejected, but in its view, even if a request for suspension had been successful, the decision granting the suspension would have taken place after the initiation of construction works. Specifically, in its judgment (case 487/2005), the court refused to suspend the decision on Modification No. 50, because in its view it "[could not] have irreversible impact on the environment since Modification No. 50 does not grant directly the right to start development of the area and is subject to future approval by other decisions." The communicant filed a lawsuit to challenge the decision approving the construction project and requested the court to suspend the decision, but, according to the communicant, the court refused to suspend the decision because the environmental aspects had already been considered in previous decisions relating to the project, namely Modification No. 50 and Land Slot Plan, and since neither of them were suspended by courts, there was not an adequate legal basis to suspend the decision approving the construction project.

### **Use of domestic remedies**

56. The communicant attempted to make use of the domestic remedies available by initiating six judicial proceedings - three administrative lawsuits, one constitutional appeal, and two criminal complaints - to pursue its rights under the Aarhus Convention (see also paras. 20-24 and 53-55 above). All administrative decisions – approving Modification No. 50 to the City General Plan, the Land Slot Plan and the Urbanization Project - were challenged. The communicant also filed an administrative complaint challenging the difficulties it encountered in exercising its right to access information relating to the urbanization project.<sup>6</sup> The communicant argues that it decided not to challenge the local copying fees before the courts, in order to save resources and use them instead for its participation in the decision-making process and its work to influence decisions regarding the urbanization project. The communicant also explained that the community found more effective ways to obtain the information requested from representatives of the local opposition parties, who have the right to obtain this information without charge from the local government.

### **III. CONSIDERATION AND EVALUATION BY THE COMMITTEE**

#### **A. Legal basis and scope of considerations**

57. The Convention was signed by Spain on 25 June 1998, ratified on 29 December 2004, published in the Spanish Official Journal on 16 February 2005, and entered into force for Spain on 29 March 2005. On 18 July 2006, the Government of Spain enacted Act 27/2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters.

58. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for Spain, the Committee decided not to address acts or omissions related to procedures leading to the agreement between Murcia City Council and Joven Futura in 2003 (para. 14 above) as well as the screening decision of 2004 (para. 19).

59. In respect of Modification No. 50 to the City General Plan of April 2005 (para. 20) the Committee noted that, although the City Council approved Modification No. 50 to the City General Plan in April 2005 and the final approval was granted in June 2005, many significant events of the procedure relating to Modification No. 50 took place well before the entry into force of the Convention for Spain. The procedure was initiated in June 2004, the public notice and subsequent commenting period started in August 2004 and the screening decision was taken in September 2004. Moreover, the agreement between the Murcia City Council and Joven Futura was concluded already in 2003. Bearing the above in mind, the Committee decided not to render findings on these events.

60. The decision-making procedures concerning Land Slot Plan ZA-Ed3 of November 2005 (para. 21) and Urbanization Project UA1 of Land Slot Plan ZA-Ed3 of April 2006 (para. 22), were both fully conducted after entry into force of the Convention for Spain, and thus all the requirements of the Convention were applicable

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<sup>6</sup> Annexes 3 and 4 to the additional information provided by the communication on 28 August 2008.

61. The legal nature of the decisions mentioned in paras. 59 and 60 above is not clear enough for the Committee to determine whether they are subject to the requirements of article 6 or article 7 of the Convention. The names of the decisions could suggest that they have the legal nature of plans subject to article 7, although the name “project” of the Urbanization Project UA1 suggests that this decision may be subject to article 6. The Party concerned denies that any of these decisions qualify as permitting decisions under article 6, but fails to provide any explanation as to their legal nature.

62. The Committee has been confronted with similar problems and refers to its previous findings where it stated that the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions when it determines how to categorize the relevant decisions under the Convention (ECE/MP.PP/2006/2/Add.1, para. 28 (Armenia)), their labels under the domestic law of the Party concerned are not decisive (ECE/MP.PP/2006/4/Add.2, para. 29 (Belgium)), but rather the issue is determined on the basis of the context, taking into account the legal effects of the decision (ECE/MP.PP/2008/5/Add.6, para. 57 (Lithuania)).

63. In this case, the Committee recognizes that different interpretations are possible and decided, as has previously done, to “focus on those aspects of the case where the obligations of the Party concerned are most clear-cut. In this respect, [...] the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public participation requirements that are common to article 6 and article 7, the Committee decides to examine the way in which those requirements have or have not been met” (ECE/MP.PP/2007/4/Add.1, para. 70 (Albania)).

64. The Committee further notes that while no EIA procedure was carried out in either of the approvals, the public was informed about the decision-making procedure and had some opportunity to submit comments in relation to all three approvals. However, in the case of the Urbanization Project UA1 of the Land Slot Plan ZA-Ed 3, the opportunity was not effective, since it was provided during the Christmas holiday season (see para. 92 below).

65. The Committee regrets that it did not have any opportunity to discuss the matter with both the communicant and the Party concerned, and that where the observations of the Party concerned do not address specifically some of the communicant’s allegations, the Committee must rely mostly on the facts and evidence provided by the communicant, bearing in mind, however, that the Party concerned was provided with the opportunity to discuss the matter but chose not to do so.

66. The Committee takes note of information available in the public domain that the European Parliament recently criticized extensive urbanization practices in Spain. The resolution adopted by the European Parliament in March 2009 refers to the “frequently excessive powers often given to town planners and property developers by certain local authorities” at the expense of communities and the citizens who have their homes in the area. The resolution calls for the suspension and

revision of all new building projects which do not respect the environment or guarantee the right of ownership and calls for adequate compensation for those affected.<sup>7</sup>

## **B. Substantive issues**

### **Access to information in the form requested - article 4, paragraph 1 (b)**

67. The Convention requires in article 4, paragraph 1, that public authorities, when responding to a request for environmental information, make such information available in the form requested, unless it is reasonable for the public authority to make it available in another form (in which case reasons shall be given for making it available in that form) or the information is already public available in another form.

68. It is not disputed that the information requested (see details at paras. 25-30 above) was recognized as environmental information in the meaning of the Aarhus Convention. The Party concerned denies any unlawful conduct in a general way, but has not provided any specific explanation in relation to the situation described above; in particular, it does not give either of the reasons envisaged in article 4, paragraph 1 (b) (i) or (ii) for not providing the information in the form requested.

69. The Party concerned in its 25 June 2009 report states that “sending of information by electronic means is exempt from payment of the fee”. It is not clear to the Committee from this statement whether providing information on a CD is not considered under Spanish law as “sending of information by electronic means” and therefore whether charging 13 Euro for making information available in the form of a CD raises an issue of compliance with article 4, paragraph 8. However, the Committee decided to focus its attention only on the issue raised by the communicant which is directly related to compliance with article 4, paragraph 1 (b).

70. The Committee finds that by failing to ensure that the public authority provided the environmental information in the form requested (in the form of a CD for a cost of 13 Euro, instead of paper copies of the documentation of 600 pages for a cost of 2.05 Euro/page), Spain failed to comply with article 4, paragraph 1 (b), of the Convention.

### **Access to information within one month - article 4, paragraph 2**

71. The Committee notes that the request of 17 February 2005 was made before the entry into force of the Convention for Spain, but was not addressed until three months after the date the Convention entered into force on 29 March 2005. The Committee decided to focus on the request of 29 September 2006 submitted by the communicant to the Urban Planning Department, for which access was granted on 17 April 2007.

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<sup>7</sup> European Parliament resolution of 26 March 2009 on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received published on the Internet at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0192+0+DOC+XML+V0//EN&language=EN> (last seen on 5 October 2009).

72. Article 4, paragraph 2, of the Convention requires that environmental information be made available as soon as possible and at the latest within one month after the request has been submitted. The volume and the complexity of the information may justify an extension of this period until up to two months after the request, in which case the applicant should be accordingly informed.

73. The Committee notes that the first reaction of the authorities to the communicant's request took place on 19 December 2006, when the authorities called the communicant's representative to enquire about the request, almost three months after the request had been submitted and with the objective of seeking clarification about the formal position of the person representing the communicant. The reaction of the authorities constitutes non-compliance with article 4, paragraph 2.

74. The Committee further notes that information itself was provided only three to seven months after the request for information had been submitted. The Committee notes that article 4, paragraph 2, providing for an extension where justified by the volume and complexity of the information, means that irrespective of the number of extensions, the total time of all extensions provided cannot exceed two months after the submission of the request for environmental information. Upon lapse of this two-month period, the Party concerned should either grant access to the requested information or deny access on the basis of the exceptions of article 4, paragraphs 3 and 4, of the Convention. Thus, the Party concerned failed to comply with article 4, paragraph 2, of the Convention.

#### **Unreasonable costs – article 4, paragraph 8**

75. It is not disputed that, as a condition of receiving copies of documents, the city imposed a charge of about 2 Euro per page. The price for photocopies of agreements or records held by the offices or municipal archives was established at 2.05 Euro per one-sided page in 2008. The 2009 fees chart provided by the communicant shows that the currently applicable charges for copies amount to 2.15 Euro per page.

76. Article 4, paragraph 8, of the Convention provides that public authorities may charge for supplying information, under the condition that such charge does not exceed a reasonable amount. The Party concerned maintains that the charges imposed by its authorities have been set in compliance with article 4, paragraph 8, and are thus reasonable, because they comply with article 25 of the Local Finances Regime Law as “special utilization of the public domain” and are supported by economic analysis.

77. In considering the issue, the Committee took note of decisions by the Court of the European Community<sup>8</sup> and national courts and appeal bodies<sup>9</sup> on the meaning of reasonable costs. Although

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<sup>8</sup> More than ten years ago the Court of Justice of the European Communities (CJEC) ruled in Case C-217/97 *Commission v. Germany* (see paragraph 47) that: “[A]ny interpretation of what constitutes ‘a reasonable cost’ for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. [...] [C]onsequently, the term ‘reasonable’ for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.”

the Committee is not bound by decisions of these courts and appeal bodies, their jurisprudence can shed light on how the term “reasonable” of the Convention may be understood and applied at the domestic level.

78. The considerations of the Committee are based on the assumption that Spanish law does not envisage any charges for the applicant to examine/retrieve information in situ and/or to receive the information by electronic means, and thus the fee scheme in question relates only to making the information available in copies.

79. The Committee notes that the Party concerned has failed to provide any argument justifying why the fees charged for making the planning documents in question available in copies differ from the fees charged for copying other documents. Given that the commercial fee for copying in Murcia is 0.03 Euro per page, which seems to be generally equivalent to the standard commercial fee for copying in the UNECE countries, the Committee concludes that the charge of 2.05 Euro per page for copying cannot be considered reasonable and constitutes non-compliance with article 4, paragraph 8, of the Convention.

#### **Public participation and EIA – article 6, paragraph 1 (a)**

80. The communicant makes a number of general observations concerning the importance of EIA for ensuring effective public participation. In this context, it alleges that the screening decision related to Modification No. 50 was not impartial and not based on sufficient legal and scientific arguments, amounting to non-compliance with article 6, paragraph 1 (a).

81. As already noted, the Committee decided not to consider the screening decision (para. 58 above). Nevertheless, it comments on the general observations made by the communicant to the extent that these seem to be related to procedures leading to decisions that the Committee has decided to consider.

82. The Committee notes that it cannot address the adequacy or result of an EIA screening procedure, because the Convention does not make the EIA a mandatory part of public participation; it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (paragraph 20 of annex I to the Convention), such public participation must apply the provisions of its article 6. Thus, under the Convention, public participation is a mandatory part of the EIA, but an EIA is not necessarily a part of public participation. Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular the decisions that there is no need for environmental assessment, even if such decisions are taken in breach of applicable national or

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<sup>9</sup> By way of indication, the Information Tribunal of the United Kingdom in a recent case ruled that “the Council should adopt as a guide price the sum of 10p per A4 sheet [about 0.11 Euro], as identified in the Good practice guidance on access to and charging for planning information published by the Office of the Deputy Prime Minister and as recommended by the DCA [Department of Constitutional Affairs]. [...] The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so.” See, Information Tribunal, Appeal Number: EA/2005/0014, *David Markinson v. Information Commissioner* (14 March 2006), published on the Internet at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i161/Markinson.pdf> (last seen on 15 September 2009).



international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention.

83. The Committee, however, in principle acknowledges the importance of environmental assessment, whether in the form of EIA or in the form of strategic environmental assessment (SEA), for the purpose of improving the quality and the effectiveness of public participation in taking permitting decisions under article 6 of the Convention or decisions concerning plans and programmes under article 7 of the Convention.

**Informing the public and effective participation - article 6, paragraph 2 (a) and (b) - and early participation - article 6, paragraph 4**

84. The allegations concerning informing the public and providing early participation when all options are open are all related to the procedures which the Committee decided not to consider on the merits, namely to the agreement between the City of Murcia and the developer Joven Futura, the screening decision regarding Modification No. 50 and the procedure leading to the approval of the Modification No 50. Nevertheless, the Committee notes with concern that the final approval of Modification No. 50 by the City Council and the regional authority took place in 2005, shortly after the ratification of the Convention, without the public concerned having been informed or having been granted an opportunity to comment on the changes that were introduced after the lapse of the public comment period concerning the density of construction (see para. 39).

85. The Committee is not examining the agreement between the City of Murcia and the developer Joven Futura, and its role in further decision-making, on the merits because of the timing. It nevertheless recalls its previous findings whereby, in relation to the resolutions of local authorities allowing for contracts with private operators for the carrying out of public services, it held that such resolutions were not subject to the provisions of article 6 or 7 of the Convention, if they did not have any legal effect on these plans, confer any rights for the use of the sites or amount to the legal effect of a change in a planning instrument (findings for communication ACCC/C/2007/22, paras. 32 and 33 (France)).

**Reasonable time-frames for effective public participation – article 6, paragraph 3**

86. The communicant reports two instances of time-frames that did not allow for effective participation: (a) for the Land Slot Plan ZA-Ed 3 of November 2005, the notice was published on 25 August 2005 providing a time-frame of one month for the public to submit comments; and (b) for the Urbanization Project UA1 of the Land Slot Plan ZA – Ed 3 of April 2006, the notice was published in the Official Journal on 22 December 2005 providing a time-frame of 20 days for the public to submit comments (on a file consisting of more than 1,000 pages and on many plans related to the construction of 23 buildings containing 1,390 apartments).

87. The communicant alleges that considering that the comment period started during the summer holiday season for the first case and at the Christmas holiday season for the second case, as well as the volume of the related documentation and the time necessary for the public to process the documentation, the time-frames of one month and 20 days respectively were unreasonably

short for the public to prepare and participate effectively during the environmental decision-making.

88. In its findings with regard to communication ACCC/C/2006/16 (Lithuania), the Committee stated that “[t]he requirement to provide “reasonable time frames” implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project”. Further, the Committee established that the “time frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3” (ECE/MP.PP/2008/5/Add.6, paras. 69 and 70 (Lithuania)).

89. In its findings with respect to communication ACCC/C/2007/22 (France), the Committee was “convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention” (findings for communication ACCC/C/2007/22, para. 22 (France)).

90. The Committee considers that the present case is slightly different from the two cases mentioned above with regard to article 6, paragraph 3, in that in the present case it is not only the time span itself which is questioned, but most importantly the timing of the commenting period, which was during the summer holiday season or during the Christmas holiday season. In that respect, the Committee is fully aware that in many countries of the UNECE region the period between 22 December and 6 January is considered as Christmas holiday season, despite the fact that officially many offices work during that time.

91. Considering that, as already established in previous cases, the requirement for reasonable time-frames relates both to the time-frames for inspecting the relevant documentation and to those for submitting comments, the Committee assumes that in Spanish law the time-frame set for commenting includes the time-frame for inspecting the relevant documentation and is deemed to start immediately after the public notice.

92. On the basis of the above, the Committee finds that a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country. Moreover, the Committee notes that the initial proposal was made on 12 December 2005, and that the time span between this initial proposal and the public notice on 22 December 2005 was ten days, indicating that the authority was in an extraordinary rush to initiate the commenting period; this can indeed give reason to suspect that making the notice so fast was not a routine procedure, as also evidenced by other cases reported in the current communication. Therefore the Committee finds that the Spain was in non-compliance with article 6, paragraph 3.

93. As for the allegation concerning the Land Slot Plan ZA-Ed 3, the Committee has not been provided with sufficient evidence to prove that the volume and complexity of the documentation justified the claim that the one month time-frame was unreasonable for the public to prepare and submit comments. In particular, the Committee notes that while the month of August is indeed a traditional summer holiday season month in many countries, the given time-frame began on 25 August 2005 and included most of the month of September, which is considered a “regular” working month. Under these circumstances, the Committee does not consider the given time-frame as amounting to non-compliance with the Convention..

#### **Information to be made available – article 6, paragraph 6**

94. Article 6, paragraph 6, of the Convention does not apply to plans and programmes and therefore, consistent with its decision to focus only on compliance with the provisions that are common to both articles 6 and 7 (see para. 63 above), the Committee did not consider the allegations in this respect.

95. The Committee makes two general remarks/observations concerning this provision. First, the Committee notes that article 6, paragraph 6, does require authorities to give the public concerned access to the relevant information free of charge, but only “for examination”. Thus this provision does not allow making a charge for the examination of the information in situ but does not forbid making a charge for copying.

96. Furthermore, this provision applies “at the time of the public participation procedure”. Therefore outside the time of public participation procedure, the right to examine information under article 6, paragraph 6, does not apply and the public needs to rely on the rights of access to information under article 4.

#### **Due account taken of the outcome of the public participation - article 6, paragraph 8**

97. The communicant alleges that none of the serious concerns raised in comments submitted by the communicant and affected neighbours were taken into account by decision-making authorities in any of the public participation procedures.

98. The Committee recalls its earlier observation that the requirement in article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to the right of the public to veto the decision, and that this provision should not be read as requiring that the final say about the fate and the design of the project rests with the local community living near the project, or that their acceptance is always needed.<sup>10</sup>

99. Furthermore, it is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to

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<sup>10</sup> See paragraph 29 of the report of the Compliance Committee at its twenty-fourth meeting in Geneva, 30 June – 3 July 2009 (ECE/MP.PP/C.1/2009/4).

take 'due account' under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to 'make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based'. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.<sup>11</sup>

100. The Committee cannot assess, on the basis of the information provided, if indeed all the comments were ignored, as alleged by the communicant. Nevertheless, the Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.

#### **Access to justice, injunction and financial barriers - article 9, paragraphs 2, 3, and 4**

101. The communicant asserts that the Party concerned failed to comply with article 9, paragraphs 2 and 3, of the Convention. However, since the allegations are not substantiated, the Committee makes no findings in this respect.

102. The communicant filed three administrative lawsuits challenging the decisions approving Modification No. 50 to the City General Plan, the Land Slot Plan and the Urbanization Project. In all three lawsuits the communicant requested the courts to suspend the three decisions. According to the communicant, the courts rejected all three requests. The communicant appealed to the Constitutional Court to consider the constitutional redress claim regarding the Murcia High Court Decision of 21 December 2007. The constitutional redress claim, inter alia, sought to overturn the lower court's decision to impose all costs upon the communicant. On 15 September 2009, the Constitutional Court rejected the communicant's appeal on the procedural grounds that no constitutional issue had been raised.

103. The Party concerned in its 25 June 2009 report stated that the communicant is arguing simply that it has a right to a favourable decision. However, the Committee notes that in case 487/2005, the court held that the request for suspension of Modification No. 50 and of the Land Slot Plan were too early; it also held that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court in case 539/2006 held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely Modification No.50 and the Land Slot Plan. As a consequence, the court held that the project could not be suspended, since neither of these decisions had been suspended by the courts. On appeal, the court (case 953/2007) endorsed this judgment and did not suspend the decision.

104. The Committee finds that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee finds that the Party concerned is in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief.

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<sup>11</sup> See The Aarhus Convention Implementation Guide, United Nations, 2000 at 109.

105. As to financial barriers, on 3 July 2006 the communicant filed an administrative lawsuit to the Administrative Proceedings Court challenging Urbanization Project UA1 and also requesting suspension of the decision. On 12 March 2007, the Administrative Proceedings Court took a separate decision on the suspension request, rejecting the application. The communicant lodged an appeal on 17 April 2007, which was rejected by the Murcia High Court on 21 December 2007. The High Court decided to impose all costs (2,148 Euro) on the communicant.

106. The cost of 2,148 Euro imposed a financial burden on the communicant. The communicant has substantiated the allegation that the costs were equal to the average monthly budget of a local family or a three monthly budget of a single person in Murcia. However, the information provided is not sufficient to conclude in this respect whether the costs imposed and the procedures applied by the Party concerned are prohibitively expensive and accordingly in conflict with the requirements of article 9, paragraph 4.

107. The Committee emphasizes that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases.

108. The Committee has taken note of the basic provisions governing the cost issues relating to Court proceedings. However, it received information from the communicant to the effect that if a citizen loses a case against a public authority at a procedure before a court of first instance, the citizen does not have to pay the costs of the public authority's lawyers, except if the citizen proceeded in bad faith or recklessness.

109. From a formal point of view, Spanish legislation does not appear to prevent decisions concerning the cost of appeal from taking fully into account the requirements of article 9, paragraph 4, that procedures be fair, equitable and not prohibitively expensive. However, the evidence presented to the Committee demonstrates clearly that in practice if a natural or legal person loses in the court of first instance against a public authority, appeals the decision and loses again, the related costs are being imposed on the appellant. The Committee therefore stresses that if the trend referred to reflects a general practice of courts of appeal in Spain in such cases this constitutes non-compliance with article 9, paragraph 4, of the Convention.

110. In 2006, the communicant submitted a complaint before the Murcia Magistrate's Court initiating criminal proceedings no. 4444/2006 on the basis of article 404 of the Criminal Code on wilful breach of duty, for failure of the authorities to afford due protection to archaeological remains found on land within the boundaries of the urbanization project. The Magistrate's Court shelved the case and imposed upon the communicant a "bond" requirement of 60,000 Euro, in the event the Court decided to take up the case. It is not clear to the Committee what the bond costs aim to cover. The bond fee has been appealed to the High Court and the case is pending. For that reason, the Committee declines to consider this matter, noting, however, that according to article 9, paragraph 3, each Party must ensure that members of the public have access to procedures to

challenge acts and omissions which contravene provisions of its national law relating to the environment.

111. Regarding the requirement of timely remedies, a decision on whether to grant suspension as a preventive measure should be issued before the decision is executed. In the present case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the Urbanization Project. Even if it had been granted, the suspension would have been meaningless as construction works were already in process. The Committee has already held that “if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question” (ECE/MP.PP/2008/5/Add.10, para. 56 (European Community)). In the present case, since no timely, adequate or effective remedies were available, the Party concerned is in non-compliance with article 9, paragraph 4.

112. The communicant also argues that Spain failed to comply with article 9, paragraph 5, of the Convention, by not considering “the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.” Law 1/1996 on Free Legal Assistance provides for such assistance to be made available at least in some cases. The Committee, however, does not have at its disposal sufficient information to ascertain whether “appropriate assistance mechanisms to remove or reduce financial [...] barriers to access justice” have been considered as required by article 9, paragraph 5, of the Convention.

#### IV. CONCLUSIONS

Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

##### A. Main findings with regard to non-compliance

113. The Committee finds that as a result of a public authority ignoring a request for environmental information for a period of three months after the submission of the request, by failing to provide the information in the form requested without giving any reasons and by imposing an unreasonable fee for copying the documents, Spain failed to comply with article 4, paragraphs 1 (b), 2, and 8, of the Convention (see paras. 70, 74 and 79 above).

114. The Committee finds that as a result of a public authority setting a time-frame of 20 days during the Christmas holiday season for the public to examine the documentation and to submit comments in relation to the Urbanization Project UA1, Spain failed to comply with the requirements of article 6, paragraph 3, of the Convention, referred to in article 7 (see para. 92 above).

115. The Committee finds that the failure of Spanish system of access to justice to provide adequate and effective remedies as shown in this case constitutes non-compliance with article 9, paragraph 4, of the Convention (see para. 104 above). Furthermore, if the trend referred in

paragraph 109 above reflects a general practice of court of appeals in Spain regarding costs, this would also constitute non-compliance with article 9, paragraph 4.

116. In addition to the above main findings and conclusions, the Committee notes with regret that Spain, by failing to submit written explanations or statements clarifying the matter addressed by the communication (para. 6 above), it failed to comply with its obligations under the Convention as related to paragraph 23 of the annex to decision I/7. In the view of the Committee it is of the utmost importance for the effectiveness and credibility of the compliance mechanism that the procedural rules laid down in decision I/7 on review of compliance are complied with not only by the Committee, communicants and the secretariat, but also by the Parties to the Convention.

## **B. Recommendations**

117. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, recommends to the Government of Spain:

(a) To take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) Only reasonable costs, equivalent to the average costs of a photocopy on paper or electronic means (CD/DVD) are charged for providing access to environmental information to the public at central, regional and local level, with such measures including a review of the Murcia City Council Fees Chart for Services;

(ii) Information requests be answered as soon as possible, at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months from the date of the request; and that related legislation be reviewed to provide for an easy and specific procedure to be followed, in the event of a lack of response to a request;

(iii) Clear requirements be established for the public to be informed of decision-making processes in an adequate, timely and effective manner, including informing public authorities that entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention;

(iv) A study be carried out on how article 9, paragraph 4, is being implemented by courts of appeal in Spain; and in case the study demonstrates that the general practice is not in line with the provision at issue, to take appropriate measures to align it to the Convention;

(v) Public participation procedures include reasonable time-frames for the different phases allowing for sufficient time for the public to prepare and participate effectively, taking into account that holiday seasons as part of such time-frames impede effective public participation; due to the complexity and the need to consult with experts, land use legislation be reviewed to expand the existing time frame of 20 days in the light of the findings and conclusions of the Committee;

(vi) Adequate, timely, and effective remedies, including injunctive relief, which are fair, equitable, and not prohibitively expensive be made available at first and second instance in administrative appellate courts for members of the public in environmental matters; and

(b) To 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 develop an awareness raising programme on Aarhus rights for the public.

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