instituto internacional de derecho y medio ambiente

Law at the service of the environment

El derecho al servicio del medio ambiente

Oral statement of the Communicant

In the hearing on the Communication ACCC/C/2014/122 to the Aarhus Convention Compliance Committee

Communicant: Instituto Internacional de Derecho y Medio Ambiente (IIDMA)

Party concerned: Spain

Date of the hearing: 14 December 2017

Distinguished Committee Members,

Introduction

1. The **core of our communication** lies on the **failure of Spain to ensure a public participation procedure at the time of <u>updating</u> existing environmental permits**. This contravenes the provisions of article 6 (10) of the Aarhus Convention which requires public participation in accordance with paragraphs 2 to 9 of that article when a public authority reconsiders **or updates**[1] the operating conditions for an activity. The origin of such a failure is found in the **First Transitional Provision** introduced by Law 5/2013, which amended Law 16/2002 on Integrated Prevention and Pollution Control[2] (**IPPC Law**) to transpose Directive 2010/75/EU on industrial emissions (IED) into Spanish law.

[1] The Cambridge Dictionary defines "update (verb)" as: to make something more modern or suitable for use now by adding new information or changing its design.

[2] Law 16/2002 on IPPC was subject to a series of amendments in the course of the years its text has been consolidated and harmonized through Royal Legislative Decree 1/2016 of 16 December

Subject matter of the Communication

2. According to that provision the **existing environmental permits of a large number of facilities** had **to be updated** before 7 January 2014 **if they did not include a series of conditions** related to:

    a. Incidents and accidents.
    b. The failure to comply with permit conditions.
    c. In case of waste generation, the implementation of the waste hierarchy.
    d. The baseline report[3] on the state of soil and groundwater required when an activity implies the use, production or emission of hazardous substances, taking into consideration the possibility of groundwater and soil pollution in the site of the facility.
    e. The measures to be applied in the event of anomalous functioning conditions.
    f. The monitoring requirements for soil and groundwater in light of the outcomes of the baseline report.
    g. In the case of an incineration or co-incineration plant: the conditions to waste treated by the plant and the establishment of emission limits values regulated for these types of plants.

The consequence of this provision is that environmental permits were updated introducing new conditions for the operation of the activities subject to those permits[4].

approving the **consolidated text of Law on IPPC**. This Royal Legislative Decree entered into force on 1.01.2017 and repealed Law 16/2002. In spite of this consolidation, the First Transitional Provision remains the same.

[3] It is "information on the state of soil and groundwater contamination by relevant hazardous substances" (Article 3(19) of the IED).
[4] See further info in Section 2 of the Further substantial material submitted by the Communicant. (Note: by mistake that material lists section 2.1.,2.2. and 2.3. as 3.1.,3.2 and 3.3.).

3. However, **the 1st Transitional Provision did not require public participation** in the administrative procedure triggered to update the permits. The Preamble of Law 5/2013 stated that through the update procedure "*the competent authority shall check ex officio through a **brief procedure** the adequacy of the permits with the new Directive".* In that brief procedure the competent authority asked the operator to prove compliance with the conditions listed in the 1st Transitional Provision. Once the operator submitted all those evidences then the competent authority added new conditions to the permit. As the concerned Party contends we agree that it was "not an automatic update of the permits"[5], but it did entail an addition of new conditions to the permit which can be understood as a review or adaptation to the operating conditions. It is a fact that only the competent authority and the operator participated in that procedure because **that transitional provision prevented any participatory procedure**. As a result many environmental permits were updated without public participation. Although, there are no statistics available on the number of permits which were updated, it is important to remark that more than 7.000 facilities are subject in Spain to environmental permit the majority of them listed in Annex I of the Aarhus Convention. We estimate that at least half of those were updated without public participation in accordance with the procedure established in the 1st Transitional Provision. Only after the update the public could have access to the updated permits as these had to be published in the official gazette of the corresponding Autonomous Community (regions).

4. **In the further substantial material IIDMA has submitted we have illustrated with three cases that the update was "not a mere formality"** (Armenia ACCC/C/2009/43; ECE/MP.PP/2011/11/Add.3, 12 May 2011, para 51). One of the cases is the update of a permit to a chlorine production factory (Annex I. (4) (b)) of the Convention), among the updated conditions were the change to the period of validity of the permit itself and the time

[5] See second para of paragraph 2 of Spain's allegations.

when the closure and dismantling procedure of the facility shall start. In addition, that update did not introduce conditions in the permit to monitor soil pollution in spite of the high levels of mercury detected by the baseline report. Another example relates to the case of a cement factory (Annex I.-3 of the Convention) whose updated permit omitted to introduce new emission limit values for NOx as required by the 1st Transitional Provision itself, delaying that obligation for almost one year after, in spite of the impacts on health of NOx emissions.

5. We agree with the concerned Party´s allegation that the main purpose of Law 5/2003 was to transpose the IED into Spanish Law[6]. However, we cannot agree that the whole content of the Spanish Law is determined by that of the Directive given that environmental protection is a shared competence between the EU and its Member States (article 4 (2)(e) Treaty on the Functioning of the EU-TFEU). In addition it is relevant to note that article 96(1) of the Spanish Constitution provides that international treaties are part of the Spanish legal order once they have been published in our official state journal (BOE). The Aarhus Convention was published in the BOE number 40 on 16 February 2005. In fact, article 1(5) of the Spanish Civil Code provides "*Legal rules contained in international treaties shall have no direct application in Spain until they have become part of the domestic legal system by full publication thereof in the Spanish Official State Gazette".* Therefore, Spanish authorities were and are bound by article 6(10) of the Aarhus Convention at the time of drafting Law 5/2014.

6. It is important to stress in light of the argument provided by Spain how "the terms of EU law are heavily influential on EU member states in considering their own implementation of the Convention. See e.g. ACCC/C/2006/17, where the Compliance Committee observed that "*most Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the*

[6] See paragraph 1 of Spain's allegations.

Community is also a party" "[7]. For this strong influence I would like to call your attention on our Communication in the case ACCC/C/2014/121 on the failure of the EU to comply with article 6(10) of the Aarhus Convention regarding the update and review of conditions of the IED permits and respectfully stress the need that this Committee takes a decision on it. Nevertheless, we highlight that the subject matter of this communication is different from the one on the communication in case 121.

The Aarhus Convention and public participation in the update of permits

7. It is clear from the wording of the Convention and the Compliance Committee's decisions[8] that **article 6(10) does not grant a complete discretion to Parties to deny public participation through a brief and expeditious administrative procedure to update a myriad of permits as the 1st Transitional Provision provided for**. It is important to highlight that these permits are granted to facilities whose activities fall under Annex I of the Aarhus Convention.

8. The Implementation Guide of the Aarhus Convention clearly states that paragraph 10 of article 6 "is triggered in the case of subsequent administrative procedures"[9]. As explained in paragraph 3 of this oral statement the 1st Transitional Provision triggered an administrative procedure which effectively prevented public participation.

9. The term **"mutatis mutandis"** implies that when comparing two or more cases or situations, necessary alterations may be introduced but while not affecting the main point at issue. According to the Implementation Guide, this term "means **"with the necessary changes"**" and that Guide also recalls that the "Committee considered that the clause **"where appropriate" introduces**

[7] Paragraph 16 of the speaking not on behalf of the Communicants in the ACCC/C/2014/101.
[8] See Section V of our Communication.
[9] "The Aarhus Convention, An Implementation Guide", second edition 2014, page 158.

an objective criterion to be seen in the context of the goals of the Convention"[10].

10. These goals are found in its Preamble and its provisions. It is important to remind that the Preamble of the Aarhus Convention recognizes the **right** of every person to live in an environment adequate to his or her health and well-being, and the **duty** of person(s) to protect and improve the environment for the benefit of present and future generations. The preamble further states that to be able to assert this right and observe this duty, citizens must be entitled to participate in decision-making. It also recognizes that in the field of the environment public participation in decision-making enhance the quality and the implementation of decisions and give the public the opportunity to express its concerns. However, the 1st Transitional Provision has denied the possibility to Spanish citizens to assert their right to live in an adequate environment and their duty to protect and improve the environment. In addition, this Provision did prevent any possibility to enhance the quality of the conditions included in the updated permits. As a result, **the First Transitional Provision is not in line with the objective/goal of the Convention as stated in its article 1**.

11. In addition, by adopting the 1st Transitional Provision, Spain did not the "*take the necessary legislative, regulatory and other measures… as well as proper enforcement measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention*" as required by its article 3(1).

12. For all the stated reasons, **IIDMA respectfully request the Compliance Committee to declare that Spain was not in compliance with Article 6(10) of the Convention by enacting the 1st Transitional Provision introduced by Law 5/2013 to the Spanish IPPC Law, which established a**

[10] Ibid, Pag 159.

brief administrative procedure to update existing environmental permits without providing for and preventing public participation.