

From: Dominique Doyle <DDoyle@clientearth.org>

Sent: 03 October 2018 09:20

To: Fiona Marshall; ECE-Aarhus-Compliance

Cc: Sam Bright

Subject: Communication alleging non-compliance by Spain with articles 6 and 7 of the Convention

Dear Fiona,

I am writing to update you on recent developments concerning our communication to the ACCC, which alleges non-compliance by Spain with Articles 6 and 7 of the Convention.

In paragraph 52 of our original communication (attached), we explained that IIDMA had filed a case in the Spanish Supreme Court against the TNP on a number of grounds. Two grounds were based on Spain's failure to comply with Article 7 and 6 (3), (4) and (8) of the Aarhus Convention ('**the Grounds**'), namely:

- i. Spain failed to undertake any public participation procedure during the preparation of the first, second and fourth versions of the TNP; and
- ii. Spain failed to provide for an adequate, timely and effective public participation during the preparation of the third TNP proposal.

On 12 July 2018, the Spanish Supreme Court issued a judgment dismissing the case brought by IIDMA. The judgement is mainly composed of literal excerpts of the defendant's (i.e. the State Attorney's) legal arguments.

IIDMA maintains that the Supreme Court decision does not sufficiently address the Grounds.

Exhaustion of domestic remedies

All domestic remedies concerning this communication have now been exhausted for the following reasons.

1. Any future action cannot address or reconsider the substance of the Supreme Court decision.

On 12 September 2018, IIDMA filed a nullity action ("*incidente de nulidad de actuaciones*") before the Supreme Court challenging the Court's judgment of 12 July 2018, which dismissed all grounds claimed in the TNP case. Under Spanish law, this action is the only available remedy to directly challenge the Supreme Court's Judgment.

A nullity action is considered an exceptional remedy under Spanish law, allowing any legitimate party to claim a violation of a fundamental right under the scope of Article 53.2 of the Spanish Constitution, provided that certain procedural requirements are met. The same Court will address whether an alleged infringement of a fundamental right took place. A nullity action does not undertake any evaluation on the substantial grounds, for example the alleged legality of the TNP.

Based on the above, IIDMA's claim sought a declaration of nullity of the Supreme Court's judgment of 12 July 2018. The claim was founded on a violation of the fundamental right to an effective remedy, given the failure of the Court to provide an adequate reasoning for its judgment. On 19 September 2018, the Supreme Court resolved the nullity action (it was notified to IIDMA on 25 September 2018) declaring it as inadmissible. The Court has rejected the alleged violation of

the right to an effective remedy, by claiming that the Supreme Court's judgment provides a sufficient and adequate reasoning.

2. No remedies are open in any appeal.

As previously mentioned, Spanish law does not provide for any ordinary or extraordinary judicial remedy to challenge the content of the Supreme Court's judgment on the TNP case. The only existing judicial remedy (of extraordinary character) consists of filing a nullity action against the Court's decision for having violated the right to an effective judicial remedy, which opened the limited a possibility for the Court to declare the nullity of its judgment. However, even in such a case, the Supreme Court would not have reconsidered the substance of the TNP case while issuing a new judgment.

IIDMA is planning to challenge the Supreme Court's decision on inadmissibility of the nullity action before the Constitutional Court (highest judicial instance at national level) by bringing an *amparo* appeal. However, as was the case of the nullity action, this judicial procedure will only focus on the eventual infringement of a fundamental right. Thus, the Constitutional Court will not address the substance of the TNP's legality.

Therefore, given the lack of legal venues in Spain to change the Supreme Court's decision on the TNP case, it can be said that domestic remedies have been totally exhausted.

I understand that this communication will be considered for preliminary admissibility at the next ACCC meeting in November. I look forward to receiving the details for the hearing.

Many thanks,
Dominique

Dominique Doyle
Lawyer, Energy

t. +32 2 808 34 65
ClientEarth, 60 Rue du Trône (Box11), Brussels, 1050
[email](#) | [website](#) | [twitter](#)