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ENFORCEMENT OF EC ENVIRONMENTAL LAW
in EIA Projects, IPPC Plants, ET Allowances,
Natura 2000 Sites, and Water and Air Plans

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Questionnaire on National Laws, Practices and Experiences on Enforcement: SPAIN

1.- Please describe generally the most import tools for the enforcement of Environmental law in your country...

In Spain, Environmental Law is traditionally seen, at least in its biggest part, a domain of Administrative Law, so to say a "special" or "specialised" administrative Law (*Derecho administrativo especial)* since it involves mainly administrative action, decisions and activities. Other branches of the Law (criminal law, civil law, tax law, etc) have some, minor, weight in the overall picture. On the other hand, "Environmental Law" as such lacks legal or dogmatic autonomy or conceptual independence. The consequence of this feature is that the most important tools for the enforcement of Environmental law in Spain are the regular and usual tools, instruments and techniques that may be found in other domains of administrative action: plans and programs, licensing and screening, subsidies, inspections, administrative fines and sanctions of different nature, etc. It is arguable whether private law may have any weight at all, since "environmental law" in purely legal terms protects public goods and interests, while Civil Law has a purely private or "property rights" perspective. Anyway, its importance is minor and reduced to torts or nuisance law, while the recent Act of Environmental Liability (transposing the EC directive on the subject) has set up a pure administrative scheme on this issue, thus reducing significantly reduced the presence and importance of civil law devices.

Criminal law should have an important weight in the whole picture since the Spanish Criminal Code establishes several types of environmental, criminal offences, but unfortunately its practical importance is neglectable because: (a) very few people are arrested or indicted with this type of charges; (b) fewer are condemned to jail; (c) if they are condemned to jail they don´t go actually to jail , because the criminal code establishes that if the accused has no previous criminal records and the sentence is shorter than two-years, she doesn´t go to prison. In a nutshell, criminal penalties have more theoretical importance than practical relevance. The only interesting field where criminal law has just begun to be effective is the fight against noise due to the important case law derived from the ECHR.

Enforcement is performed by the three levels of government: local governments, regions (Comunidades Autónomas) and State administration (ministry of the environment

and other entities such as river basin authorities). Each level of government has its own inspectors, inspectorates and environmental police (except in small towns). In the case of State administration, the most important body of environmental police is the "SEPRONA", (Service for Nature Protection) which is a division of the "Guardia Civil", one of the two police *corps* in the country. This service alone has some than 1700 agents working (in a military type mode) in most part of the country. In 2006, this environmental police carried out nationwide more than 160.000 "interventions" (visits, inspections, arrests, etc.) for infringements of environmental laws and regulations.

A final remark: in the Spanish system, EC Environmental Law as such has no independent, distinct or autonomous regime for enforcement, EC rules (especially in the case of directives) lose any legal or institutional visibility from the very moment of transposition in favour of domestic law, and the "direct application" of non-transposed directive is an extremely rare stance. It could be even argued that in Spain, from a *legal realism* cognitive approach, ECEnvLaw does not exist?

2.- Please answer sub-questions I-IV for each situation listed as a-i below. Also indicate whether you know of national cases where these issues have been dealt with

I: Which sanctions are provided under national law (criminal, administrative etc.)?

Spanish Environmental law provides for several types of sancions:

- Monetary sanctions: up to 2.400.000 euros in the case of EIA (Act 1/2008, of 11 January 2008); up to 2.000.000 € in the case of IPPC (Act 16/2002, of 1 July 2002); up tp 2.000.000 € in the case of Nature protection (Act 42/2007, of 13 december 2007). These amounts, established by State legislation, may be increased by regional legislation.
- Executive cease-and-desist orders and positive orders
- Lump sum penalties
- Foreclosure of the industrial facility
- Suspension or withdrawal of the permits and autothisations previously grantes
- Publication of the sanction imposed
- The duty to restore the environment damage and the duty to pay for the damages caused to the environment (this two do not have the technical nature of "sanctions", but may be very much higher than the sanction itself: see the Boliden-Aznalcollar case).

II: Citizens and NGOs challenging enforcement...

The general rule in Spain is that it is within the full discretion of the competent authority to decide whether and how offences should be sanctioned. From a sociological point of view, it should be stressed that NGOs are not very active in Spain, and in general weakly supported by the general, indifferent people. In many cases they are under the threat of vested interests. It should also be observed that public authorities do not usually pay much attention to complaints submitted by ordinary citizens. According to a leading Administrative law scholar, less than 1% of all complaints submitted by citizens is seriously considered by the authorities. Bearing this in mind, it may be said that citizens and NGO have a certain role in this domain and it is not very much encouraged by the authorities.

(a) As a general rule of Spanish administrative and environmental law, they may file complaints and reportings before the competent administrative bodies in any field of

environmental law, if they feel that the law is breached by the *environmental wrongdoer*. But the government enjoys discretion as to open a sanctioning procedure or not, and, under general Administrative Procedure Law, this decision can not be challenged in courts, since the citizens have the "right" to file complaints, but not the "right" to have procedures opened. The definition of the facts and of their relevance regarding the type of sanction to impose also depends on the Administration. Therefore, there is a margin of appreciation on the part of the public authorities when deciding the degree of seriousness of breaches.

(b) A specific rule has been established by the Act 27/2006, of 18 July, on participation, access to information and access to justice (Aarhus + Directive 2003/35): art. 22 establishes an *actio popularis* in environmental issues, granting the right to some NGOs to challenge administrative decisions both by filing appeals within the Administrative organisation (first) and before administrative courts (second, and after exhaustion of the former). However, this general proclamation does not undermine the rule explained in (a) *supra*. The main reason is that "environmental enforcement" usually involves more *pure action* or activity than "formal decisions", which, as a rule, are the only items that may challenged in courts, but see (c) below:

(c) In case of blatant and evident "inactivity" from environmental bodies (for instance, no inspections conducted by the competent bodies, no files opened, no sanctions imposed, etc), citizens and NGOs may file a law suit in the Administrative courts against that factual situation. However, this possibility is successful only in exceptional cases because administrative courts either: (i) do not recognise standing under Spanish Administrative Courts proceedings law, or (ii) they think that this "inaction" does not meet the technical requirements of "administrative inactivity" as regulated in the Act of 1998 on judicial control of administrative action.

III: In light of European Community law,...does national law grant NGOs ...

NO. In some cases, a person directly affected by a polluter may file an injunction in the civil courts, using the remedies and instruments of civil law. This is recognised both by general civil law and by specific, regional legislation (for instance, the Catalan statute on the law on inmissions). This is not really connected to pure "environmental law" but to "private property protection law", and has nothing to do with ECLaw.

IV: Could the competent authority under national law be held liable...?

Remark: it is unclear what "liable" means in this context. Since Spain is a *Droit Administratif* type of country, there are three possible meanings for this proposition and three different legal paths:

- (1) Administrative bodies may see their decisions overturned by Administrative Courts in the case of erroneous (understood as "unfawful") acts. In this case, the possibilities and legal paths explained in the precedent point II (letters (b) and (c)) would apply. However, if the problem is that there is no enforcement in a given case, then there is no "decision", thus this possibility does not apply, see (b)

- (2) An administrative court orders an Administrative body to do something positive

(that is, to enforce), through a specific proceeding designed for challenging administrative "inaction". This remedy, unfortunately, is not very applied in practice, due to the narrow and restrictive judicial interpretation of what is technically "inaction" (*inactividad*), as explained *supra*.

- (3) An official or a civil servant is indicted and prosecuted for committing a criminal offence (for instance, corruption or prevarication as a civil servant). This way has been attempted mainly in the domain of local government corruption connected with housing and land development (currently there are at least fifty majors indicted or prosecuted for these charges in different parts of Spain). The usual scenario is the case of illegal housing developments that damage or destroy protected sites, but have been granted the "legally required" permits and authorisation by the city council. In some cases, criminal courts even admit the possibility of committing this crime in an "omissive" way: that is, the "unlawful" or corrupted decision consists precisely in doing nothing and let environmental damage take place.

If we apply the precedent possibilities to the different situations proposed by the questionnaire, the result would be the following one:

-(a) *An EIA project is established without an EIA permit*:

This situation is written in a confusing way, since "EIA" and "permit", at least in Spanish law, are two distinct figures. If an EIA project is established without an EIA procedure, then the applicable path would the one described as (1) *supra,* since lack of EIA is seen a a serious administrative "vice", triggering the nulity of the administrative decision. Two further matters should be observed: (1) Public authorities are not subject to sanctions in the case of EIA; only private developers are mentioned by Spanish rules. (2) If a private project lacks an EIA, the competent public authority should halt its execution.

-(b) *Conditions attached to the EIA decision, granting a development consent, are disregarded*

Citizens/NGOs may file complaints to the competent enforcement authority (see, point II, letter (a)). Again, in the case of private projects the public authority should halt their execution. If the environmental data contained in the environmental impact study are false or have been grossly modified, the project should also be halted provided those false data have basically determined the outcome of the EIA. At the end of the day Spanish law encourages inaccurate environmental studies.

-(c) *An IPPC facility is established without an IPPC permit:*

Same reply as the precedent

-(d) *An IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive:*

Administrative appeal, plus law suit in the Administrative courts, if the former is rejected.

-(e) *An IPPC facility is operated in violation of conditions of an IPPC permit*:

Citizens/NGOs may file complaints to the competent enforcement authority (see, point II, letter (a))

- (f) *An IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive*:

Citizens/NGOs may file complaints to the competent enforcement authority (see, point II, letter (a)).

-(g) *An IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive*:

If it has been licensed, NGO/citizens complaint to the administrative body. If disregarded challenge in administrative courts. If not, they may file complaints to the competent enforcement authority (see, point II, letter (a))

-*(h) Water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the "old" water directives – are not complied with:*

Citizens/NGOs may file complaints to the competent enforcement authority (see, point II, letter (a)).

-(g) *Air plans under the Air Framework Directive are not complied with*:

Citizens/NGOs may file complaints to the competent enforcement authority (see, point II, letter (a)).

- *Please, comment on whether you find the national means of enforcement adequate...*

In general, the national means of enforcement, at least from the technical point of view, are adequate. However, enforcement could be improved by: (a) granting more participation to public and NGOs in the operational side of enforcement; (b) relaxing the tight requirements for judicial review of administrative "inactivity"; (c) putting more political interest and will in the enforcement; (d) increasing the number of "environmental" police officers, and even lawyers at the local and regional level; (d) connecting and coordinating in a more effective way the different competent authorities of the three tiers of government; (e) making the criminal sanctions more "visible" and "real" to the public.

3.- How is article 9(3) of the Aarhus Convention,... complied with...

As explained *supra*, the package "Aarhus+Directive 2003/35 has been "transposed" by means of Act 27/2006, of 18 July. This statute grants overall procedural rights to members of the public to participation. However, real "standing" to sue is only granted to NGOs meeting the well-known requirements of (a) two years of activity; (b) having environmental protection as its founding goal; (c) having in the same territory where the decision has been taken.

4.- Factors that may prevent effective access to justice for members of the public...
Several factors are accountable:

- The incredibly long length of the procedures in the Administrative courts, which are the competent ones.

- Challenging administrative action is costly: the challenger must pay not only one, but two lawyers, evidence is hard to get or expensive to obtain, the actual "execution" of the likely judicial decision is left in the hand of the (defendant) administrative bodies, etc.
- the relatively little interest or awareness of the public at large (at least as compared to other countries). In general, the people (especially in the current situation of deep economic crisis) are more concerned about the economy (or football, of course) than on environmental issues.
- Governmental activity is broadly seen as a "fatal" type of action, "nothing can be done", etc.
- the awareness that, when the judicial decisions will be rendered, it will be too late
- in general, it is very difficult to stop public infrastructures; judges think it twice before granting interim measures.
- in many occasions, environmental NGOs are seen as "the bad guy". This is the case when an NGO is trying to stop in court a housing development that has received the "required" (althoug unlwful) permits. Future house owners, the workers of the construction company, the developper, relatives of all that people, the city council, etc. see and present the NGO as the one that is going to *spoil the party*.

5.- NGOs and/or citizens having access to injunctive relief and interim legal remedies....

See reply to point 2.II, *supra.*

6.- Examples where a final administrative decision reopened because of a complaint...ECJ?

We are not aware of such a decision.

Spanish authorities never review previous decisions contradicting ECJ rulings (delivered at a later stage) even though under Spanish Administrative law they should be forced to do so. As far as we know, the European Commission has never requested the Spanish authorities to overturn those decisions. Arguably, quashing authorisations and other decisions taken before an ECJ ruling under Article 226 EC (and holding the corresponding breach) are also part of the measures that must be adopted to put at end to the violation. Therefore, in practice, wrongdoings remain. Likewise, we are not aware of any infringement procedure against the Kingdom of Spain due to the improper application of EC law by a judge, e.g., Spanish Supreme Court Judgment of 7 July 2004 regarding Article 6(3) of the Habitats Directive (see also "Recent developments", below).

7.- Cases in which the State or the local authority have been held liable for not remedying ...

This type of cases is very rare in Spain, save perhaps in the case of noise pollution. The main reason explaining this situation is the fact that, as explained in point 1, in its broadest part EC Environmental Law consists of directives. Thus, it is usually regarded by courts as not having a substantive and independent entity apart from the domestic environmental rules and regulations that transpose EC directives. EC Environmental Law is only in rare cases used as "the rule of reason" by courts, disconnected or independent from domestic law. Regulations are scarce and don´t trigger noticeable litigation in Spanish

courts. Consequently, in cases where the State or the local authorities have been held liable for not remedying environmental damage, courts refer to domestic rules, and rarely to EC rules. Another example of this reluctancy of Spanish courts to work with EC environmental law as an independent or autonomous body of law is the fact that, to our knowledge, only in one case (in more that 23 years!) has a Spanish court dared to submit a preliminary ruling to the ECJ connected to ECEnvLaw (case *Ecologistas en acción v. Ayuntamiento de Madrid).*

8.- Do you now of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?

Unfortunately, the answer is no. What is more, no developments might take place because enforcement of EC environmental law is by no mean independent from "enforcement of EC environmental law". Improvement of the enforcement of EC environmental law may only be the indirect result of an improvement in the enforcement of "Spanish" environmental law. EC environmental law is still regarded as "foreign law" in certain quarters not least by the public authorities who largely ignore its complexities.

PART II

Noticeable recent development in environmental law in Spain

Fortunately enough for the concision of the present paper, no noticeable recent development in environmental law has taken place in Spain during the last months, or at least since our last Avosetta meeting. The main reason for this "legislative atony" is the total passivity of the current Ministry of the Environment, Agriculture and Fisheries (the result of mixing the former ministries on Environment and on Agriculture) is launching or proposing new legislation. The impression is that, instead of a merger, the "environment" has been devoured by other interests or priorities.

The only noticeable development is the bill to amend the EIA legislation. Once of the matters that is likely to be modified is the period of time public authorities enjoy to issue the environmental declaration (*declaración de impacto ambiental*) and the environmental conditions a project subject to EIA must comply with. Interestingly, this was one of the first measures the Spanish government mentioned in his first package to combat the current economic downturn.

By Order of 13 July 2009, the Spanish Supreme Court rejected an application for the adoption of interim measures regarding the construction of a jail in the Basque Country. The project covers 44 ha near a Site of Community Importance (SCI) where priority habitats and species are located (one of the species even received funding under LIFE +). Both the Basque Government and the Province Government of Alava requested the halting of the works due to the lack of prior EIA. The Spanish Government decided to exempt the carrying out of an EIA by relying on Article 2(3) of Directive 85/337 neglecting the wording of Article 6(3) of Directive 92/43 and ECJ case law (Case C-127/02). The Ministry for the Environment had previously acknowledged that the project was likely to have effects on the SCI. The Supreme Court came to the conclusion that despite the

apparent effects of the project there was no need to carry out an EIA. According to the Court the Spanish Government had correctly demanded the developer (a State Agency) to adopt several protection measures to avoid likely damages. Nevertheless, the Court overlooked the fact that the execution of the measures depended on the developer's goodwill, e.g., not to disturb wild birds during the rearing season, or to plant unspecified vegetation). In addition the Supreme Court argued that a decision halting the works would also mean a decision on the substance of the case. The Supreme Court also indicated that this case was similar to another one taking place in the province of Navarre (also referring to the construction of a jail). However, the Court ignored that in this latter case there were no special protected areas under the Habitats Directive. A further appeal against the Order of July 2009 is pending before the Supreme Court.