



International Court of Environmental Arbitration and Conciliation

CONSULTATIVE OPINION, Case EAS- OC 15/05 Ayamonte

CONSULTATIVE OPINION: EAS – OC 15/05

REPORTER: H.M.C. MICHEL PRIEUR

DRAFTER: SERGIO SALINAS

SECRETARY: H.M.C. DEMETRIO LOPERENA ROTA

CONSULTATIVE OPINION

**INTERNATIONAL COURT OF ENVIRONMENTAL
ARBITRATION AND CONCILIATION**

May 8, 2007

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**CONSULTATIVE OPINION ON THE HABITAT
DESTRUCTION OF THE PLANT *PICRIS WILLKOMMII*
AND OTHER FLORA IN “LA RODADERA” AND ITS
SURROUNDINGS**

(EAS-OC 15/05 AYAMONTE)



HABITAT DESTRUCTION OF THE PLANT *PICRIS WILLKOMMII* AND OTHER FLORA IN “LA RODADERA” AND ITS SURROUNDINGS

Upon request by the *Asociación para la Protección del Patrimonio Histórico y Paisajístico de Ayamonte* (ALMACAL), this consultative opinion analyses the conformity of the urbanization project to construct houses in the zone known as *Los cabezos de le Rodadera* (near the *Parador de Turismo* of Ayamonte (Huelva)) with the obligations imposed by relevant international and Spanish law concerning the conservation of protected species; in particular the plant *Picris Willkommii*. The plant is endemic to the Southwest Iberian Peninsula. Its surface distribution is greatly reduced and almost exclusively limited to the aforementioned zone. Any damage caused to the plant's existing population in said zone represents a risk for the conservation of the species.

The subsequent analysis will proceed with a description of relevant legal regimes concerning protection of the plant; including their mention in a range of normative texts as well as the measures prohibited by such regimes. The discussion will then turn to an analysis of the project's consistency with obligations imposed by previously mentioned protected species laws. Special attention will be given to a range of international norms that have been incorporated into Spanish law.

I. Protected Species Norms Concerning the Plant *Picris Willkommii*

The plant is mentioned in various local and international normative texts concerning the protection of flora and fauna, including: the **Convention on the Conservation of European Wildlife and Natural Habitats** (Bern, September 19, 1979), to which Spain became a signatory party on May 13, 1986 (as evidenced by the *Boletín Oficial del Estado* no. 235, October 1, 1986). See also, **Council Directive 92/43/CEE, May 21, 1992, on the conservation of natural habitats and of wild fauna and flora** (*Diario Oficial de las Comunidades Europeas* n° L 206, July 22, 1992), incorporated into Spanish law via the **Real Decreto (Royal Decree) 1997/1995, December 7, establishing measures that contribute to guaranteeing biodiversity through protecting the**



natural habitats of wild fauna and flora (*Boletín Oficial del Estado* no. 310, December 28, 1995).

Both texts mention the *Picris Willkommii*. The Bern Convention categorizes the plant as a *strictly protected* floral species (see Annex I). Likewise, the Directive 92/43/CEE describes the plant as one of common interest that requires *strict protection* (see Annex IV.b.). As noted by various informational texts, including the **Atlas and Red Book of Threatened Vascular Flora of Spain (Atlas y Libro Rojo de la Flora Vascular Amenazada de España)**, published by the Spanish Ministry of the Environment, *Picris Willkommii* is considered a species *in danger of extinction*. Similarly, the **Red List of Threatened Flora (Lista Roja de Flora Amenazada)**, adopted in 2005 by the Andalusia Ministry of the Environment, notes that *Picris Willkommii* is *endangered*. The **Red Book of Threatened Flora Wildlife of Andalusia (Libro Rojo de la Flora Silvestre Amenazada de Andalucía)**, published in 2001, classified the plant as *vulnerable* in 2001, thus indicating the species' recent deterioration.

The categorization of the *Picris Willkommii* as *vulnerable* is also found at a legislative level, beyond the aforementioned international covenants that have been further incorporated in the Spanish Code, for instance in Annex II of two adopted rules by the Autonomous Community of Andalusia: the **Directive 104/94, May 10, which approves the Andalusia catalogue of threatened flora wildlife** (*Boletín Oficial de la Junta de Andalucía* no. 107, July 14, 1994) and **Law 8/2003, October 28, of Flora and Fauna Wildlife** (*Boletín Oficial del Estado* no. 288, December 2, 2003).

Once the plant's classification is determined, the appropriate protective regimes become apparent. Both international and local texts designate activities that are prohibited due to the requirement for special protection and then list a series of exceptions that permit such activities if they meet certain criteria. Particular focus will be placed on the *strict protection* regimes as set forth in the Bern Convention and the Directive 92/43/CEE.



The Bern Convention, which, as mentioned, has been incorporated into Spanish law, also conforms to **article 96.1 of the Spanish Constitution**. After the general obligations listed in articles 2 and 3, article 4 states: “ Each Contracting Party shall take appropriate and necessary legislative and administrative measures **to ensure the special protection of the wild flora species**, in particular those enumerated in Annex I [as is the case of the *Picris Willkommii*] and II, and to **safeguard the natural habitats threatened with disappearance.**” Moreover, the resulting obligations for strict protection are summarized in article 5, which states: “Each contracting party will adopt the appropriate legislative and regulatory measures to ensure the conservation of particular threatened species of flora enumerated in Annex I. **Deliberate picking, collecting, cutting or uprooting of such plants shall be prohibited.** Each Contracting Party shall, as appropriate, prohibit the possession or sale of these species.”

Article 9 of the Bern Convention explains that, under exceptional circumstances, activities that are prohibited in principle can be carried out. Nevertheless, there are diverse safeguard measures related to these exceptions; for example article 9, section 1 explains that each contracting party may make exceptions to the prohibition : **“Provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:**

- for the protection of flora and fauna;
- to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
- in the interests of public health and safety, air safety or other overriding public interests;
- for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding;
- to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.”

It can be clearly inferred that the listed activities have been excepted on the basis that their occurrence serves an important general interest, but **without jeopardizing the**



preservation of the strictly protected species. Paragraph 2 of article 9 contains an **additional guarantee, obligating Contracting Parties to submit a report on the exceptions every two years to the Standing Committee** established by article 13; identifying the populations which are or have been subject to the exceptions and when practical, the number of specimens involved; the means authorised for the killing or capture; the conditions of risk and the circumstances of time and place under which such exceptions were granted; the authority empowered to declare that these conditions have been fulfilled, and to take decisions in respect of the means that may be used, their limits and the persons instructed to carry them out; the controls involved.

In conclusion , **the regime governing strictly protected flora species, including *Picris Willkommii*, prohibits any form of activity which extensively affects the plant directly in its habitat. Moreover, the cited regulatory exceptions are interpreted in a highly restrictive way.**

The regime of Directive 92/43/CEE concerning common interest flora requiring *strict protection*, thus including *Picris Willkommii*, takes a similar approach to the Bern Convention. The resulting similarity is logical when one considers that the States Parties to the Bern Convention includes the European Member States to whom the Directive is addressed.

Article 2 of the Directive reaffirms the general obligation: “[...] ensuring biodiversity through the **conservation of natural habitats and of wild fauna and flora** in the European territory of the Member Status to which the Treaty applies.” Paragraph 2 of the same article reiterates the species’ preservation as an objective focused on the conservation of its natural habitat: “Measures taken pursuant to this Directive shall be designed to maintain or restore, **at favourable conservation status**, natural habitats and species of wild fauna and flora of Community interest.”

The resulting regulatory obligations for strict protection of endangered flora species are further substantiated in article 13 of the Directive, which prohibits the “[...] **deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild**”; including “[...] the keeping, transport, and sale or



exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.” Like the Bern Convention, the Directive provides for **exceptions**. Thus, Article 16 establishes that prohibited activities may be rendered permissible under certain exceptional circumstances: **“Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.”**

Article 16 specifies the following **exceptional circumstances**:

- In the interest of protecting wild fauna and flora and conserving natural habitats;
- To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- For the purpose of research and education, of repopulating and reintroducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants,
- To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

The Directive, like the Bern Convention, also submits these exceptions to decisions by the Commission and like the Bern Convention, follows a similar mechanism for reporting **by the Member States every two years**. The reports should mention the species which are subject to the derogations and the reason for the derogation, including the nature of the risk with, if appropriate, a reference to alternatives rejected and scientific data used; the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use; the circumstances of when and where such derogations are granted; the authority empowered to declare and check the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry but the task; and the supervisory measures used and the results obtained. The Directive goes beyond the Bern



Convention, however, in that it indicates that **the Commission must issue an opinion based on the remitted report, within a maximum period of twelve months** from the reception of the report remitted by the Member State.

Article 23.1 of the Directive establishes another obligation: **Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification and shall forthwith inform the Commission thereof.** Spain failed to comply with this obligation in that it did not adopt the necessary legal provisions to incorporate the Directive into internal law within the proscribed deadline. While the Directive was notified on June 10, 1992, a national transportation law, Real Decreto (Royal Decree) 1997/1995, was adopted in December 1995; thus, adopted after the deadline expired in June 1994. Nonetheless, there has been no procedure by the Commission nor decision by the Court of Justice respecting said breach.

As noted, though, the Directive was incorporated into Spanish law by the Real Decreto (Royal Decree) 1997/1995. Article 10 of the decree establishes that the animal and plant species recognized in Annex IV (which coincide with those mentioned in the Directive) will enjoy the measures of protection established in articles contained in Title IV of the **Law 4/1989, March 27, on Conservation of Natural Spaces and Wild Flora and Fauna** (*Boletín Oficial del Estado* no. 74, March 28, 1989), and in the **Real Decreto (Royal Decree) 439/1990, March 30, which regulates the National Catalogue of Threatened Species (el Catálogo Nacional de Especies Amenazadas)** (*Boletín Oficial del Estado* no. 82, April 5, 1990). It must be noted that Real Decreto (Royal Decree) 1997/1995, among other provisions, was modified by **Real Decreto (Royal Decree) 1193/1998, June 12** (*Boletín Oficial del Estado* no. 151, June 25, 1998), precisely in relation to article 13, which recognizes the exceptional methods regime and seeks to further adapt the regime to the one already recognized in the Directive.

It should be added that the previously mentioned **Decree 104/94** and **Law 8/2003** of the Autonomous Community of Andalusia lists the plant *Picris Willkommii* among the vulnerable species. Article 2 of the Decree 104/94 prohibits: “[...] **any non-authorized**



“felling, destruction, mutilation, uprooting, or harvesting” of the said plant. Article 10 indicates the possibility of **exceptionally authorizing such activities that do not create grave detriment to the species’ population levels in its natural distribution area** so long as they meet the following circumstances: beneficial to public health or other prioritized public interests, or when necessary for scientific aims, education, propagation, repopulation, or restitution to natural means. Moreover, article 7.1 (c) in Law 8/2003 prohibits: **“Destroying, gathering, cutting, felling or uprooting, in part or in whole, natural wild flora species, so as to destroy its habitats.”** Article 9 of the said law adds the following possible exceptions: **“when no other satisfactory solutions exist, the affected species’ situation is not put in danger,** if certain compensatory methods are established in cases in which the wild flora and fauna species:

- Produce health or security risks to persons;
- Damage other wild species;
- Damage agriculture, cattle ranches, forests, or quality of the water;
- Hinder investigation, education, repopulation or reintroduction, and raising them in captivity advances the same ends;
- Hinder aerial security; or
- It is permitted, under strictly controlled conditions and of a selective way, to capture, retain (or other prudent means) the species in small quantities and with precise limitations to guarantee their conservation.

II. The level of conformity of urban-planning activities with the *strict protection* regime of the plant *Picris Willkommii*

Having described the obligations that derive from the protection regime contained in legal texts, the opinion now turns to an analysis of the degree to which the zone’s various development activities conform to these established obligations. It should be pointed out that the activities will be described in a generic way—to gather, to cut, to uproot, to intentionally destroy, etc. The mentioned activities could be allowed if they aim at any of the recognized objectives in the regime’s listed exceptions. The inferred conclusion is



that **when the final inquiry reveals that such actions do not fall within any of the conditions within the listed exceptions, those actions should be considered prohibited.**

Accordingly, it must be examined whether the urban-planning activities, claimed to lead to the destruction of *Picris Willkommii* specimens, are in principle prohibited absent certain exceptions. It should once again be pointed out that both the Bern Convention and the Directive 92/43/CEE approach the exceptions regime in a highly restrictive way, imposing **prior conditions** such as **the absence of other satisfactory solutions** and that **the activities do not harm the conservation of the protected species**. Though these may counsel against carrying out urban-planning activities, they must be considered along with two other factors: to avoid damage to other forms of property and to protect important public interests.

In terms of avoiding damage to other forms of property, it does not seem that urban-planning activities can be considered akin to the protection of crops, cattle, forests, fisheries or the water. The reference to other forms of property seemingly relates to activities that entail a general benefit for the existing surrounding population, entail important economic factors, or satisfy basic necessities; none of which seem to extend to urban-planning activities.

The second factor, which the Bern Convention refers to as the **satisfaction of priorities in the public interest** and the Directive 92/43/CEE refers to as **imperative reasons in the public interest of the first order**, does not seem to protect the urban-planning activities in this case because **the private nature of the activity is distinct from the public interest upon which the exception rests**. A different case would be posed by construction that was directed towards satisfying a service of general interest (building hospitals, schools, etc.), in which case the urban-planning activities would be protected by the public interest exception.

This conclusion is affirmed when recognizing the disturbing impact of such activities on the species' conservation, as mentioned in various informative texts. Consider the **Red Book of Threatened Flora Wildlife of Andalusia (Libro Rojo de la**



Flora Silvestre amenazada de Andalucía), published by the Andalusia Ministry of the Environment (p. 264), which includes among its methods for conservation of the *Picris Willkommii* the **prevention of the expansion of Ayamonte into the area occupied by the plant**. Similarly, the **Atlas and Red Book of Threatened Vascular Flora of Spain (Atlas y Libro Rojo de la Flora Vascular Amenazada de España)**, published by the Ministry of the Environment in 2003, points out that accelerated urbanizing development in the zone of Ayamonte is the principal risk for the destruction of the only known locality of this species in Spain and in turn proposes the creation of a fenced in mini-reserve.

The incompatibility of the present urban-planning activities with the protection regime is also noted by an expert, a university professor of botany and a collaborator with the International Union for the Conservation of Nature, who points out that the *vulnerable species* status **requires making a plan for its conservation, and in this case, the protection of its habitat**. Moreover, the recommendation further **calls for recovery plans which consider the suitable handling of these habitats**. It also affirms that **any urban or farming activities which poses a threat for the species or its habitat should be properly regulated—even prohibited—and any breach prosecuted and punished by law**.

It should further be noted that even if urban-planning activities can be included within the aforementioned regime of exceptions, the competent authorities are not free to authorize them without first filing the required reports as required under the Bern Convention and the European Community Directive. Moreover, the requisite data in these reports suggest a reinforcement of the restrictive nature of the exceptions which are limited to cases of true urgency, always safeguarding the protection of the threatened species.

Of special interest is the report which must be sent to the European Community Commission. According to article 16.2 of the aforementioned Directive, the Commission must release an opinion in response to the remitted report within twelve months of receiving it from the national authorities. This Commission opinion can be seen as a form



of authorization for the permissible exception of the activities sought. In any case, the reports in no way constitute an infringement by Spain of either texts.

A breach of article 23.1 of the Directive should also be considered. Article 23.1 requires **Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive** within two years of its notification and **immediately inform the Commission thereof**. Such breach is not only relevant to the national norm of transposition of the said Directive into Spanish law, i.e. the *Real Decreto* (Royal Decree) 1997/1995 which was adopted upon expiry of the two year time limit, but also because the resulting obligation in article 23.1 has an wider reach for Member States. In effect, this reference is not only directed to the legal provisions but also to their implementation so that **the obligation is fulfilled when concrete measures are taken as specified in the Directive. In this case, that means taking measures that protect the *Picris Willkommii* plant, and once they are adopted, reporting on them to the Commission**. Of relevance is a judgment from the European Union Court of Justice dated 30 January 2002, in the case of *European Commission v. Hellenic Republic* (C-103/100), which declared Greece to be in breach of the Directive's obligations for failing to establish or apply the necessary measures for the rigorous protection of the sea turtle *Caretta Caretta* in Zakynthos.

The Court reached that conclusion on the basis that the activities carried out in the specified zone—acoustic contamination, circulation of mopeds on beaches used for turtle reproduction, proximity of boats to these beaches, and construction—involved a deliberate disturbance of the turtle species during their period of reproduction. A like situation appears in the instant case in that the *Picris Willkommii* is similarly covered by the strict protection regime as specified in Annex IV of the Directive. Accordingly, it is **not only the urban-planning activities but also activities such as motocross, herding, and dumping of debris in the zone which constitute a breach of the imposed obligations by the Directive**.

In terms of the urban-planning activities, the Spanish authorities should have considered that once they identified one of the conditions in the listed exceptions, they



should have sent a report informing the Commission of such and then waited for a judgment within the requisite twelve month time period. Nonetheless, the Provincial Delegation of the Environment released a Definitive Declaration on Environmental Impact on 27 February 2003 (*Boletín Oficial de Huelva* n° 48, p. 1297). Although it recognized the *Picris Willkommii* plant as a vulnerable species and recommended protection and conservation measures such as preventing spills, controlling pasturing, and restraining urban expansion, it authorized the urban-planning activities without soliciting an opinion from the European Commission.

The Definitive Declaration on Environmental Impact notes the **loss of an important number of specimens of the *Picris Willkommii* plant** as a consequence of the Modification Project n° 39 NN.SS. of Ayamonte (La Rodadera), and states that this **can be mitigated by the creation of a botanical garden *in situ***. As can be deduced from international and national norms, the protection regime of species (including *Picris Willkommii*) recognized in such normative texts **calls for the protection and conservation of such species in their natural habitat**. An infringement of this protection regime results not only from direct damage to the species but also from activities that damage their natural habitat. **In no way can the creation of a botanical garden *in situ* be considered a measure of compensation for the destruction of the plant's habitat**; particularly when the activities which will bring about such destruction advance ends such as the aforementioned, and contradict the obligations recognized by the protection regime, the very same regime which establishes the legal order.



Corte Internacional de Arbitraje y Conciliación Ambiental
International Court of Environmental Arbitration and Conciliation

At the request of the Secretariat of the International Court of Environmental Arbitration and Conciliation, we have the honour to present this Consultative Opinion, the HH. MM. CC. Michel Prieur (Reporter), Michael Bothe, Freddy Heinrich Balcazar, Miguel Patiño Posse and Luis Caeiro Pita, all of them members of the Chamber of Consults therefore appointed.

ENQUIRY of the Secretary General Assistant to certify that this document with its thirteen pages is given in witness whereof the aforementioned and joined Opinion of the Chamber of Consults.

San Sebastian, May 25, 2007.

Demetrio Loperena Rota
Secretary General Assistant