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27 November 2012

Ref. ACCC/C/2012/67 (Denmark) – Compliance - Provisions on public participation in the adoption of river management plans

Dear Ms Aphrodite Smagadi,

The Danish State (the Ministry of the Environment) has by letter of 8 October 2013 requested the Aarhus Convention Compliance Committee (the "ACCC"), primarily, to suspend the consideration of the above matter due to pending cases before the Danish courts and the Environmental Board of Appeal in Denmark.

With respect to the request for temporary suspension, on behalf of the Danish Agriculture Food Council we have the following comments:

I would like to start by stating that all Exhibits of this submission have been translated from Danish into English by the certified translators in my offices.

1. Summary

This submission has been prepared as a consequence of the Danish State's request for the ACCC's temporary suspension of the case until the concurrent cases before the Environmental Board of Appeal and the High Court of Western Denmark, respectively, have been completed.

Under clause 2, an account is given of the ACCC's possibility of temporarily suspending the case as well as the ACCC's practice in this respect.

Under clause 3, an account is given of the specific case and it is stated here that there are three reasons why the ACCC should not temporarily suspend the consideration of the case.

Firstly, *the right of review has de facto been exhausted* (the deadline within which complaints have to be filed expired on 19 January 2012, and the deadline within which proceedings must be commenced expired on 22 June 2012) for several thousand of the complainant's members). The right to an alternative national review is the basic precondition to be satisfied in order for the ACCC to temporarily suspend a case. Thousands of the cases of the complainant's members cannot be reviewed by bodies or courts.

Secondly, it applies in relation to those of the complainant's members who are actually included in a concurrent administrative national case that they are probably not guaranteed *an independent and impartial national review*, which is another precondition to be satisfied in order for the ACCC to temporarily suspend a case.

And thirdly, it is discussed that, notwithstanding the ACCC's practice, the right to temporary suspension is a discretionary right, which the ACCC *may* exercise. The ACCC may therefore also decide not to suspend the case due to other concerns in the case. It is submitted that the case is hugely important to the Aarhus Convention's effectiveness on a European level and that the specific case furthermore contains violations of the Aarhus Convention that are so obvious and far-reaching that there is a need for the ACCC, as an expert international body, to proceed with the matter with a view to providing guidance to the Danish authorities with respect to the construction of the Aarhus Convention.

The Danish Minister for the Environment has restricted the right to complain in such a manner that the by far dominating interest group, the Danish Agriculture & Food Council, has not had an opportunity as an organisation to complain about the decisions regarding to river basin management plans on behalf of all its members. Other organisations, such as e.g. the Danish Sports Angling Association, have been granted a right to complain.

As a consequence of this restriction, an association complaint has not been filed by the Agriculture & Food Council on behalf of all its thousands of members. This would in reality force each individual farmer to commence complicated complaints proceedings and legal proceedings which is not realistic within the time-related and financial framework.

The Agriculture & Food Council undoubtedly has a right to complain in respect of this complaint and the Agriculture & Food Council is, on an overall basis, cut off from obtaining a general decision on the issue of invalidity by the Environmental Board of Appeal.

This entails that the case can only be decided in favour of the comparatively small number of complainants and plaintiffs.

The ACCC has by letter of 8 May 2012 asked the Danish State two simple questions. The ACCC has, *inter alia*, asked the Danish State about the scope of a decision from the Environmental Board of Appeal which covered the three complainants. The purpose of the question

was to clarify whether the Danish State, where the three complainants are successful in their claims before the Environmental Board of Appeal, will let the decision in respect on invalidity extend to all affected parties by letting the river basin management plans lapse in their entirety due to invalidity. Where the Danish State answers this simple question in the affirmative, the ACCC will as a general rule be able to temporarily suspend the complaint awaiting the final decision. If, on the contrary, the Danish State reserves the right to only let the three specific complainants be covered by a decision on invalidity, thousands of farmers will de facto be cut off from having the river basin management plans reviewed in general, including their own cases, as a consequence of the deadlines stipulated for complaints and proceedings.

This would in such case be a considerable argument in favour of the ACCC not suspending these complaint proceedings.

It is submitted in summary that the respondent's request for a temporary suspension of the case should not be allowed, and that the ACCC should, on the contrary, take steps to proceed with the consideration of the case.

2. The ACCC's right to temporarily suspend a case

2.1 Background to the request

The request is justified as follows:

> *"[…]the key issues put before the Compliance Committee by the complaint are already pending before the Nature and Environmental Board of Appeal.*
> *[…]the key issues put before the Compliance Committee by the complaint are already pending before an ordinary, higher domestic court, namely the Western High Court (Vestre Landsret)."*

Against this background and with reference to ACCC Decision I/7, para. 21 of the annex, the Ministry of the Environment believes that the ACCC should temporarily suspend the case.

The following appears from the ACCC Decision I/7, para. 21 of the annex:

> *"The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."*

As appears, this is therefore not a provision according to which the ACCC must *automatically* suspend the consideration of a case merely because the case is also considered by national administrative bodies and/or national courts.

2.2 The legal basis in relation to the ACCC as the expert monitoring body

It is stipulated in the preamble, whereas-clause 18, of the Aarhus Convention that:

> *" The Parties to this Convention,*
> *[...]*
> *Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,"*

As for the parties to the Convention, it is further stated in whereas-clauses 21 and 22 of the preamble:

> *"Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),*
>
> *Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,"*

It may thus from the preamble to the Aarhus Convention alone be derived that the parties wished for an improved right to effective legal mechanisms in order to protect the lawful interests of the public.

The parties further acknowledged that the United Nations Economic Commission for Europe (ECE) would be key to this work and that the background to this, *inter alia*, was that the ECE itself had previously worked with the guidelines for access to environmental information and public participation in decision-making processes as accepted in the Ministerial Statement adopted at the third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995.

Against this background, it was natural that the monitoring vis-à-vis the Convention was not left to the parties themselves at a national level, but that it was with Article 15 of the Aarhus Convention left to the parties to establish a supranational monitoring unit for monitoring of compliance with the Convention. Accordingly, it is stated in Article 15 of the Convention:

> *"REVIEW OF COMPLIANCE*
> *The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."*

The Convention stipulates *that* an independent supranational body is to be established to monitor Convention compliance, *that* the public must be involved in the work of this body and *that* the

work of the body must, *inter alia*, be based on approaches by members of the public regarding the Aarhus Convention.

These aspects led to the above-mentioned meeting summarised in ACCC Decision I/7 whereby the ACCC was established, its legal basis being Article 15 of the Aarhus Convention. It is stipulated in para. 21 of the annex to ACCC Decision I/7 that:

> *"The Meeting,*
> *[...]*
> *Establishes the Compliance Committee for the review of compliance by the Parties with their obligations under the Convention."*

It may therefore be assumed that the ACCC's very raison d'etre is to monitor compliance with one specific set of rules: The Aarhus Convention.

It may furthermore be taken into account that the ACCC – in performing this work – must base its work on the above motivations, including such that the ACCC in particular:

- Must observe the Convention parties' wishes to facilitate improved access to effective legal mechanisms in order to protect the legal interests of the public and to ensure that the act is enforced in accordance with the Aarhus Convention, see the preamble, whereas-clause 18, and

- must remember that ECE and thereby the ACCC are intended to have a quite special and exclusive role in this work, including, *inter alia*, as a consequence of ECE's previous work with drawing up guidelines for the access to environmental information and public participation in decision-making processes connected thereto prior to the Sofia Declaration in 1995.

2.3 The ACCC's right to temporarily suspend the consideration of the case in question

As can be seen above from paragraph 2.1, a request as the one at hand, according to which the ACCC is requested to temporarily suspend the consideration of the case with reference to pending national proceedings, is not sufficient for the ACCC to be able to or to have to accommodate the request.

The ACCC's very existence is in fact based on the Convention parties' acknowledgement of the importance of the monitoring of the issues which are described in the Aarhus Convention being brought up to an inter-state level rather than letting the monitoring remain at a national level and being considered by ECE as a body with special competencies to do so.

Against this background, it would be directly contrary to the intentions with the ACCC as well as the Aarhus Convention itself if the ACCC was to stop the consideration of a case, *simply* with reference to a case pending at national level which only covers a very small number of the Danish farmers.

In addition, the ACCC's statements are, according to Article 15 of the Convention, precisely designed to be "*non-confrontational, non-judicial and [only of] consultative nature*".

This means, first of all, that the consideration of cases by national courts and administrative bodies, involving a construction of the Aarhus Convention is not affected by the ACCC considering the case concurrently, as the ACCC's statements do not have a prejudicial effect and are not binding in respect of the decisions made by the national courts or administrative bodies. Therefore, no "*harm*" is done to the national bodies by the ACCC considering the case.

Secondly, and perhaps most importantly, the ACCC's statements may *precisely* be characterised as very valuable aids either for the national authority or the national court in their construction of questions according to the Aarhus Convention.

The ACCC stated as follows in ACCC Decision II/5 on general issues of compliance:

> *"The meeting,*
> *[...]*
> *4. Recommends, on the basis of the information derived from the reporting by Parties on their implementation of the Convention and the findings and recommendations of the Committee (ECE/MP.PP/2005/13, paras. 36-38), that Parties should keep under review their legal and institutional frameworks as well as their practical experience with implementing various provisions of the Convention, taking into account their obligations under article 3, paragraph 1;*
> *[...]*
> *9. Takes note of the Committee's observations with regard to the need to raise awareness among the judiciary and public authorities other than environment ministries of the relevant obligations under the Convention and encourages Parties to take the necessary measures to that effect;"*

A consequence of the above is in reality that in cases such as the one at hand where the case raises separate questions according to the Aarhus Convention and where national courts as well as national administrative bodies have a need for contributions to understand the rules of the Convention, the ACCC should not temporarily suspend the consideration, but should on the contrary in fact *proceed with* the consideration of the case in order to efficiently ensure *that* the intentions of the Aarhus Convention in respect of due process in the environmental area gain a foothold at national levels and *that* this happens in a uniform manner in all the Convention states.

2.4 Construction of the ACCC Decision I/7, para. 21 of the annex

On the face of the comments above, it appears as if it would be directly contrary to the intentions of the ACCC as well as the Aarhus Convention itself if the ACCC were to temporarily suspend the consideration of a case merely with reference to the fact that a case which concerns only a very small part of the parties affected is pending at a national level as is the case in the matter at hand.

It should also be added that ACCC Decision I/7, para. 21 of the annex, indicates that what is to be "*taken into account*" is an "*available domestic remedy*" unless this "*remedy*" is insufficient. Based on a general linguistic interpretation, this seems to be the *execution* and/or *enforcement* in the contracting state that are to be respected rather than the national right of review.

The background for this is that "*remedy*" is traditionally perceived as the "*result*" of a review. With respect to this concept, the following can be found on page 1320 of Black's Law Dictionary, Eighth Edition:

> *"A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged"*

You may subsequently ask whether ACCC Decision I/7, para. 21 of the annex, even has any independent content, if the object of the provision is not to subject to the review of the courts or administrative bodies in a case at national level.

The ACCC has, however, applied ACCC Decision I/7, para. 21 of the annex, to stop or postpone consideration of a case with reference to the fact that a case was pending at national level or that a right to national review existed.

Against the background of the above considerations, it is, however, clear that a temporary suspension is an *exception* in the ACCC's ordinary work.

The following is stated e.g. in Armenia ACCC/C/2009/43 (ECE/MP.PP/2011/11/Add.1) April 2011, para. 48:

> *"[…] The Committee recalls that in some cases it has decided to suspend consideration of a communication pending national review procedures. […]"*

As can be seen, this is a facultative right on the part of the ACCC. It further appears from the ACCC's practice that, if the consideration of a case is to be temporarily suspended before the ACCC, this at least requires that the review pending or the right claimed under such review is fully independent and impartial and, above everything else, effective.

The ACCC stated as follows in Albania ACCC/C/2005/12 (ECE/MP.PP/C.1/2007/4/Add.1) 31 July 2007, para. 58.

> *"The communicant did […] try to apply to a court or another <u>independent</u> or <u>impartial</u> body established by law, […]*" (Underlining added).

The ACCC has further stated that *a reversed burden of proof* applies in this case. This means that doubts as to whether the body in question actually *is* independent, effective or impartial means that the ACCC will continue its consideration of the case.

This can be derived from the ACCC's decision in Albania ACCC/C/2005/12 (ECE/MP.PP/C.1/2007/4/Add.1) 31 July 2007:

> *59. The communicant attempted to justify this [That the communicant had not tried to apply to a court or another independent or impartial body] at one point by asserting that Albanian legislation did not provide domestic judicial or similar remedies of the kind envisaged under article 9; at another stage, by reference to its lack of confidence in the ability of the Albanian courts to safeguard its interests in an effective way. [...]*
>
> *60. Decision I/7 of the First Meeting of the Parties of the Aarhus Convention says that the Committee should "take into account any available domestic remedy" (emphasis added). As previously noted by the Committee (MP.PP/C.1/2003/2, para. 37), this is not a strict requirement to exhaust domestic remedies. [...]*
>
> *61. The Committee regrets the failure of both the Party concerned and the communicant to provide, in a timely manner, more detailed and comprehensive information on the possibilities for seeking domestic remedies. Furthermore, it does not accept the communicant's assertion that it has tried all possible domestic remedies. Nonetheless, in the face of somewhat incomplete and contradictory information concerning the availability of remedies, also from the side of the Party concerned, the Committee cannot reject the allegations of the communicant that domestic remedies do not provide an effective and sufficient means of redress."* (Underlining added)

So, this means that, if there is any uncertainty or unclarity with respect to the issue of whether the required impartiality, effectiveness or independence exist, the case may be proceeded with by the ACCC.

It must, as mentioned, be acknowledged that the ACCC against the background of ACCC Decision I/7, para. 21 of the annex has, however, developed a practice according to which the ACCC, under special circumstances, has temporarily suspended the consideration of a case.

As stated, it does, however, seem to be necessary to administer this right to suspend considerations with a high degree of diligence seen in light of the above comments on the intentions behind the Aarhus Convention, and this position seems to be reflected in the ACCC's practice.

The ACCC has a restricted right in its practice which means that, only where it has been *proved* that the national administrative or judicial review systems are independent and impartial will it be *possible* for the ACCC to temporarily suspend the consideration until the case has been brought before or completed by such national body. In case of uncertainty with respect to the independence and impartiality, the ACCC will on the contrary continue its consideration of the case.

3. The possibilities for temporarily suspending the case at hand

3.1 Outline

It may be established that, at the present time, there is, for a number of the members which the complainant represents in this case, no other right of review – neither administratively nor judicially – than through the ACCC and for that very reason the ACCC should proceed with the case. This issue is discussed immediately below in paragraph 3.2.

In should be added that, in relation to the national administrative review which is at the moment pending in respect of three of the complainants's members, the independence and impartiality requirement vis-à-vis the national review body which the ACCC has fundamentally established as a condition for suspending the review of a case has not been met.

For this reason as well – and with respect to the complainant's three members – the ACCC should proceed with the consideration. This issue is discussed below in paragraph 3.3.

Finally, it should be borne in mind that the right to temporarily suspend the consideration is a completely facultative right on the part of the ACCC. This means that the ACCC may *on another basis* decide to proceed with a case also where there are national alternative rights of review deemed appropriate to meet the requirement of independence and impartiality.

This case is of wide-reaching significance on a European level and contains such basic disregard of the rules of the Aarhus Convention that there is an obvious need for the ACCC to more fundamentally establish the guidelines of the Convention prior to decisions by the national authorities and courts in the cases raised. For this reason as well, the case should be proceeded with. This issue is discussed below in paragraph 3.4.

3.2 The right of review has de facto been exhausted

The cases pending on which the Ministry of the Environment has based its request for a temporary suspension are:

a) An administrative complaint pending before the Environmental Board of Appeal caused by a complaint submitted on 19 January 2012 by the interest group, the Danish Agriculture & Food Council, acting for three farmers: Nicolai Hansen, Christian Teisen and Henrik Sunke.

It appears from section 56(1) of the national legislative basis on which the complaint is based, the Act on environmental objectives etc. for water bodies and international nature protection areas, see Consolidation Act no. 932 of 24 September 2009 (the Environmental Objectives Act) that:

> *"Complaints must be submitted in writing within four weeks after the plan has been publicly announced. If the period allowed for filing complaints expires on a Saturday or a holiday, the deadline is extended to include the following weekday."*

The ACCC has received a translated version of the Environmental Objectives Act with our letter of 21 September 2012.

The public announcement of the river basin management plans forming the basis of the complaint made to the Environmental Board of Appeal and of the present case before the ACCC was made by way of Consolidation Act no. 1208 of 15 December 2011 on the coming into force of the environmental objectives, action programmes and prioritisations, etc. in the river basin management plans for the planning period 2010-2015 which stipulated that:

> *"Pursuant to section 29(5) of the Act on environmental objectives etc. for water bodies and international nature protection areas (the Environmental Objectives Act), see Consolidation Act no. 932 of 24 September 2009 it is laid down that the river basin management plans' chapter 1.2 on environmental objectives, Chapter 1.3 on action programmes and prioritisations, chapter 1.4 on guidelines as well as Annex 2 on implementation of measures to improve wastewater purification in the open country in the river basin management plans announced pursuant to section 31(1) and (2) of the Environmental Objectives Act on the website of the Danish Nature Agency for the 2010-2015 planning period enter into force on 22 December 2011."*

This means that the period allowed for filing complaints expired on 19 January 2012.

Prior to the expiry of the period allowed for making complaints, the Danish Agriculture & Food Council acting for three farmers; Nicolai Hansen, Christian Teisen and Henrik Sunke, as stated, filed a complaint. The Danish Agriculture & Food Council is not aware of the extent to which *other* members have at their own initiative filed similar complaints prior to expiry of the period allowed for filing complaints, but as more than 30,000 farmers and 300 undertakings are members of the Danish Agriculture & Food Council, it may be taken into account that far from all members are covered by a complaint filed in due time with the Environmental Board of Appeal. It can be stated that a total of 89 complaints (presumably filed both by members and non-members of the complainant) have been filed with the Environmental Board of Appeal in this case.

The members who are not covered by one of these complaints are at this time de facto cut off from the administrative national right of review.

b) Legal proceedings pending before the High Court of Western Denmark, initiated by a writ of summons submitted on 31 May 2012 by the interest group the Danish Agriculture & Food Council acting for four farmers: Erik Gade, Jeroen Hagting, Carsten Høegh and Tokkerupgård I/S.

It appears from s. 58 of the Environmental Objectives Act that:

> *"Legal proceedings for the adjudication of decisions on matters subject to this Act must be commenced within six months after the decision has been publicly announced."*

This means that the deadline for instituting proceedings expired on 22 June 2012.

In this connection, the Danish Agriculture & Food Council *is* aware that a number of other members and non-members have at their own initiative commenced proceedings before the Danish courts, but as the organisation as mentioned has more than 30,000 farmers and 300 undertakings as members, it may also in this respect be taken into account that far from all members are covered by legal proceedings commenced in due time.

These members who have not commenced proceedings are therefore at this time cut off from review by the national courts.

In summary, it can therefore be concluded that a very large number of the members whom the complainant in this case, the Danish Agriculture & Food Council, represents, at this time de facto do not, with respect to the ACCC, have an alternative national right of review – neither administratively nor judicially – and therefore there is in respect of these parties no de facto basis for temporarily suspending the current case.

It should be noted that the above would not apply where a national decision on invalidity in the proceedings would mean that *all* adopted river basin management plans would be deemed to be invalid. In such case, the parties who do not have a right of national administrative review or review by the courts, respectively, will also be directly affected by the outcome of the cases in which these parties are not involved.

Undoubtedly, the general rule is that such an invalidity decision only has effect with respect to the river basin management plans which are actually being reviewed. Subsequently, it is up to the authorities to determine whether the invalidity is to be extended to cover the other river basin management plans.

Against this background, the ACCC by the enclosed letter of 8 May 2012 asked the complainant:

> *"What is the legal nature of the decision of the Danish Nature and Environmental Board of Appeal? What is the legal effect of its decision, in particular with respect to those river management plans which were not challenged before the Board? If, for example, the Board finds that the three challenged river management plans should be annulled due to flowed public participation procedures, will this decision have any impact on those river management plans that although not challenged before the Board, they were adopted following the same procedures?"*

By letter of 21 September 2012, the complainant accounted for its viewpoints in relation to this question. However, the respondent has not even answered the question before expiry of the time allowed on 8 October 2012 and, therefore, the general rule taken into account must be that invalidity will only be effective for the parties actually covered by the cases.

3.3 No right of independent and impartial national review before the Environmental Board of Appeal

Also with respect to the members who *are* actually covered by the administrative complaint before the Environmental Board of Appeal, see the above under clause 3.2 a), it must be established that there is no basis for the ACCC to temporarily suspend the case.

The background therefore is that these members are not, through the national administrative review, ensured an *independent and impartial* review which is a condition in the ACCC's practice in order to temporarily suspend a case.

3.3.1 The factual circumstances of the national administrative complaints proceedings.

As stated above, an administrative complaint is currently pending before the Environmental Board of Appeal caused by a complaint submitted on 19 January 2012 by the interest group, the Danish Agriculture & Food Council, acting for three farmers.

As for substance, the complaint proceedings cover a complaint in respect of the validity of certain river basin management plans introduced by the Minister for the Environment and which are in part prepared by an agency under the auspices of the Ministry, the Danish Nature Agency.

It is the very same Minister for the Environment who is the overall administrative authority for the national administrative review body before which the administrative complaint is pending.

On 7 February 2012, the Minister for the Environment put out a draft bill for consultation. The bill contained an amendment to the national statutory basis which both the current complaint and the complaint before the national complaint body are based on, the Act on environmental objectives etc. for water bodies and international nature protection areas (the Environmental Objectives Act).

The proposal of the Minister for the Environment meant that the Environmental Board of Appeal, in the, already at that time, pending complaint, and in future cases, would only have to establish *shortcomings* in the national river basin management plans, but that the Board could not make a decision as to the *consequence* of such *shortcomings*. This consequence could only be decided by the Minister himself. This proposal was unheard of and it excluded that the board could declare the river basin management plans invalid, if the board found material legal shortcomings in the decision, such as violations of the Aarhus Convention.

Consultation of *"Bill to amend the Act on environmental objectives etc. for water bodies and international nature protection areas, the Forestry Act, the Act on the Environmental Board of Appeal and the Act on rivers (amendment to the Environmental Board of Appeal's powers, digitalisation and specification of provision on river basin borders)", s. 1 stated as follows;*

> *"The following amendments are made to Act on environmental objectives etc. for water bodies and international nature protection areas, see Consolidation Act no. 932 of 24 September 2009, [...]:*
>
> *"3. The following is incorporated as sub-section (2) in section 53:*

> *"(2) In cases covered by sub-section (1)(ii) and (iii) the Board of Appeal will determine whether shortcomings exist in the procuration, but it will not make a decision on any consequences thereof.""*

The ACCC has received a translated version of the Environmental Objectives Act with our letter of 21 September 2012. A translated version of an extract of the mentioned consultation (**Exhibit 1**) is enclosed with this submission.

It appears from the Ministry of the Environment's comments to the bill that the idea was that:

> *"[The Environmental] Board of Appeal will not be entitled to counter such shortcomings with sanctions, such as invalidity in whole or in part."*

It further appears from the comments that it should:

> *"be for the Minister to decide whether and, if so, which initiatives any shortcomings in the procuration shortcomings must give rise to."*

The bill will therefore mean that the issuing authority itself would have to determine the consequence of its own mistakes, which must be deemed a serious breach of the administration law principles in connection with the consideration of complaints and appeals.

Initially after being announced, the bill resulted in significant criticism from independent experts and, a couple of days after the consultation period started, the Minister for the Environment decided to withdraw the bill. The following was among other things printed in the Danish newspaper, Politiken, on 24 February 2012 (**Exhibit 2**):

> *"Peter Pagh, professor of environmental law at the University of Copenhagen, finds the complaint "exciting", also because there are no precedents. "And with regard to the contents of the complaint, I believe that they are well-founded", he says.*
>
> *It was Peter Pagh who, two weeks ago, strongly criticised a bill introduced by Ida Auken limiting citizens' right to complain retrospectively. A procedure which, according to the environmental law professor, was contrary to the Aarhus Convention and could generally be compared to similar restrictions in democracy in countries, such as Belarus and Kazakhstan. The criticism made the Minister for the Environment promptly withdraw the bill."*

The Minister's bill was an expression of a direct obstruction of several of the most important intentions of the Aarhus Convention.

After this, the public was left with the impression that the Ministry of the Environment was aware that the complainants in the pending proceedings had "*a good case*" and that the Ministry of the Environment was willing to adopt means so far not used in order to avoid the Board having to consider the validity of the river basin management plans.

The river basin management plans which are the subject-matter of the complaints are administratively placed in the Danish Nature Agency under the auspices of the Ministry of the Environment.

On 21 May 2012, the Danish Nature Agency submitted the complaints received to the Environmental Board of Appeal. Following approx. four months' consideration, the Danish Nature Agency presented five pages of general comments to all 89 complaints. The essence of these pages from the Danish Nature Agency was a refusal that any mistakes had been made in connection with the procuration of the national river basin management plans.

On 31 May 2012, the Danish Agriculture & Food Council, as mentioned on behalf of four selected farmers, issued a writ of summons against the Ministry of the Environment and the Danish Nature Agency. It was stated that the proceedings were among other things instituted due to the timelimit of six months allowed for instituting proceedings of s. 58 of the Environmental Objectives Act. The Ministry of the Environment, as the respondent, submitted a defence on 9 November 2012.

By email of 13 June 2012 (**Exhibit 3**), we contacted the Environmental Board of Appeal in order to receive information on the expected case handling time. The inquiry originated in a request made by the ACCC. The Chairman of the Environmental Board of Appeal replied by email of 20 June 2012 (**Exhibit 4**) that a number of decisions of general public importance would be made in the autumn.

By our letter of 31 August 2012 (**Exhibit 5**), the Chairman of the Environmental Board of Appeal was made aware that legal proceedings were now also pending in which the Legal Advisor to the Danish Government represented the Danish Nature Agency. Consequently, we stated in the letter to the Chairman of the Board that it would be unacceptable if the Environmental Board of Appeal was *also* to receive legal advice from the Legal Advisor to the Danish Government in connection with the handling of the complaints considering the fact that, in the light of proceedings pending, the Legal Advisor to the Danish Government must safeguard the interests of the Danish Nature Agency.

In our opinion, the Legal Advisor to the Danish Government cannot be the legal adviser to the Environmental Board of Appeal, in its capacity as an independent board of appeal, when the Legal Advisor to the Danish Government at the same time renders legal advice to the Danish Nature Agency which is the respondent authority in legal proceedings dealing with the same questions on which the Board must make decisions.

By our letter of 31 August 2012 (Exhibit 5), we also requested that the Board inform us whether the Environmental Board of Appeal had unilaterally discussed the case with the Danish Nature Agency, being one of the parties to the case.

By letter of 6 September 2012 (**Exhibit 6**), the Chairman of the Environmental Board of Appeal replied to our letter. The Chairman stated that the Environmental Board of Appeal *had* actually received advice from the Legal Advisor to the Danish Government on whether the Board's consideration of the case should be temporarily suspended due to the fact that legal proceedings

are pending in respect of the river basin management plans and issues covered by the complaints. It was stated that, on the basis of this advice, the Board proceeded with the consideration of the case.

Furthermore, the Chairman stated that the Environmental Board of Appeal had held separate discussions with the other party, the Danish Nature Agency, on for example the details of the cases concerning the river basin management plans as well as the circumstance that the Danish Nature Agency, at a meeting concerning the river basin management plans, had stated that it would make a supplementary statement.

By letter of 10 September 2012 (**Exhibit 7**), we stressed the problematic issue that unilateral discussions were held with the lawyer for the other party and the other party itself. Vi also emphasised that this constitutes a setting aside of the principles of equal treatment and contradiction. In the letter, we also requested to receive the notes on the meeting which should be available considering the meetings and any telephone discussions held. Finally, we requested to receive information on who attended the said meetings.

By letter of 19 September 2012 (**Exhibit 8**), the Chairman of the Environmental Board of Appeal now stated that *no* discussions had been held in respect of the cases in question with the Legal Advisor to the Danish Government or the Danish Nature Agency.

The Chairman of the Environmental Board of Appeal refused to acknowledge that notes should have been prepared in respect of the meetings held with the Danish Nature Agency. Minutes of the meeting have also been withheld from the complainants. It was stated that the persons attending the meeting were solely informed that the Danish Nature Agency wished to make a supplementary statement. Finally, it was stated that the persons attending the meeting on the part of the Danish Nature Agency were Helle Pilsgaard, assistant director, Oluf Engberg, head of the legal department, Sara Røpke, head of office, as well as two legal case handlers, whereas the Environmental Board of Appeal was represented by Anne-Marie Rasmussen, Chairman, Mikkel Schaldemose, Vice-chairman, as well as two case handlers. As for the usual practice at meetings held in the central administration in Denmark, it should be noted that this is an impressive make-up of persons attending a meeting at which, allegedly, the only topic was to inform the attendants that the Danish Nature Agency wished to make a supplementary statement.

By letter of 20 September 2012 (**Exhibit 9**), we answered the Chairman of the Environmental Board of Appeal and, in that connection, we stressed our concern in relation to the unilateral discussion of the cases with the Danish Nature Agency. We also requested to receive a detailed account of how the Environmental Board of Appeal considered the unilateral discussions and meetings held with the Danish Nature Agency to be compatible with the principle of equal treatment and the duty to ensure contradiction. Finally, we pointed out in our letter that, in a case like the one in question, it should be of paramount importance to the Environmental Board of Appeal that it not only *was* impartial, but that it also *appeared* to be impartial, including not least considering the Board's quasi-judicial character.

By letter of 20 September 2012 (**Exhibit 10**), we also requested to be granted access to all documents relating to the meeting between the Danish Nature Agency and the Environmental Board of Appeal.

On 5 October 2012, we received from the Environmental Board of Appeal the Danish Nature Agency's supplementary statement made on 4 October 2012. The statement focuses on the river basin management plans' alleged legal status and nature as general regulation or administrative decisions, respectively. I have not included this fairly comprehensive document as a translated exhibit to this submission since I believe that the submission is not important to anything but the substantive part of the case.

On 8 October 2012, I received a reply to my request for access to documents from the Danish Nature Agency (**Exhibit 11**). The Danish Nature Agency stated in accordance with the explanation from the Environmental Board of Appeal that the said *"public meeting"* between the Environmental Board of Appeal and one of the parties to the complaint, the Danish Nature Agency, was solely a meeting at which the Agency had expressed a wish to make a supplementary statement.

The Danish Nature Agency stated that, *"for the purpose of the preparation of the meeting"*, it had prepared a list of legal questions pertaining to the case, but that it was not handed out nor presented to the Board.

In this connection, it is particularly important to stress that the Danish Nature Agency's letter of 8 October 2012 was accompanied by a copy of the notices convening the meeting on 28 August 2012 (**Exhibit 12**). It appears from the notices convening the meeting that the meeting was held according to agreement with the Chairman of the Environmental Board of Appeal in order to:

> *"discuss the importance of the legal status of the river basin management plans and various matters in connection with the supplementary consultation".*

This must be taken to mean that the meeting - as opposed to what has been claimed by both the Danish Nature Agency and the Environmental Board of Appeal - was *not* confined to dealing with a simple declaration on the part of the Danish Nature Agency that it would make a supplementary statement. The notice convening the meeting (Exhibit 12), however, proves that the substance of the case, including the most relevant issues of complaints, were discussed at a meeting between the Danish Nature Agency and the Environmental Board of Appeal at the highest level, and that is without the complainant attending the meeting. This seriously compromised the Board's impartiality.

By letter of 8 October 2012 (**Exhibit 13**) to the Environmental Board of Appeal, we elaborated on our viewpoints on the basis of a telephone conversation with the Chairman of the Board a couple of days earlier. In the letter, we once again urged the Chairman of the Environmental Board of Appeal to account in detail for the proceedings at the meeting.

On 12 October 2012, we received a reply from the Chairman of the Environmental Board of Appeal to our letters of 20 September and 8 October 2012 (**Exhibit 14**). The letter, however, only reiterates the previous statements made.

By letter of 12 October 2012 (**Exhibit 15**), we informed the Chairman of the Environmental Board of Appeal that, by being granted access to documents, we had received the aforesaid notice convening the meeting from the Danish Nature Agency from which appears that the parties attending the meeting discussed *"the importance of the legal status of the river basin management plans and various matters in connection with the supplementary consultation"*. Against this background, we stressed in the letter that the Board had not given a true and fair presentation of what had been discussed at the meeting held between the Danish Nature Agency and the Environmental Board of Appeal.

3.3.2 Specific shortcomings

It is submitted that, in relation to the right to have administrative decisions reviewed by the Environmental Board of Appeal in Denmark, the independent and impartial review has not been guaranteed as presumed by the ACCC's practice on temporary suspension of a case.

3.3.2.1 Disqualification

Good administrative practice requires that, in their case handling, authorities work to build up confidence in the administration.

In this case, it should be noted that the complaints were filed against some river basin management plans which were prepared by a board under the auspices of the Minister authorised to compose *"the judicial power"*, i.e. the Environmental Board of Appeal. The *"judiciary"*, the respondent Board and the Minister are represented by the same lawyer.

The rules of qualification are based on confidence issues and, in our opinion, it is difficult to have confidence in the case handling of the Environmental Board of Appeal in this case in which the respondent held meetings with the Chairman of the Board and the relevant case handlers on the most important legal issues constituting the subject-matter of the complaints to be considered. In this context, importance should mainly be attached to the fact that the Board rejected to account in detail for what was discussed at the said meeting when it appears from the notice convening the meeting that the legal status and the supplementary consultation in respect of the river basin management plans were the topics for discussion at the meeting.

In addition, the *"public meeting"* and the aforesaid course of events took place *after* the failed attempts made by the Minister for the Environment of adopting a *special act* which was to make it impossible for the Environmental Board of Appeal to reach a result in respect of the complaints which could imply that the disputed river basin management plans could be declared invalid.

This as well as the aforesaid subsequent course of events render probable that the Ministry of the Environment unduly seeks to influence the final decision to be made by the Environmental

Board of Appeal in the case and, consequently, it is clear that complaints in the case before the ACCC are *not* guaranteed an independent and impartial alternative, national review as presumed in the ACCC's practice on the temporary suspension of cases.

Alternatively, it is submitted that, at any rate, the aforesaid will at least cast serious *doubt* on whether the complaint before the Environmental Board of Appeal constitutes an appropriate independent and impartial national alternative to ACCC's consideration of this case and, consequently, the ACCC should also for that reason proceed with the consideration of the case, see the criteria of the decision in Albania ACCC/C/2005/12 (ECE/MP.PP/C.1/2007/4/Add.1) of 31 July 2007.

3.4 Proceeding with the case on the basis of special circumstances of general public importance

The river basin management plans which are the subject-matter of the complaint before the ACCC have considerable far-reaching implications for all farmers in Europe since the implementation of the river basin management plans is based on an EU Directive.

Therefore, it is of wide-reaching significance for the efficiency of the protection in the Aarhus Convention that, in the construction of the Convention, the ACCC, as an exclusive, expert body, is given the opportunity to make a statement as to how the rules of the Convention must be construed in connection with a case of this nature in time for the Danish courts deciding the many cases to take the ACCC's comments into consideration when delivering judgments.

This will not only be of decisive importance to the effect of the Aarhus Convention in Denmark, but will also have a spillover effect of importance on the other EU Member States.

In that connection, it should be noted that, as previously stated, the intended role of the ACCC is quite special in respect of the compliance with the Aarhus Convention as the ACCC must observe the wishes of the Convention parties to guarantee improved access to efficient legal remedies with a view to protecting the legal interests of the public and enforcing the law in accordance with the Aarhus Convention, see the preamble, whereas-clause 18, and it must be called to mind that the intended role of the ECE and thereby the ACCC in such work is special and exclusive, including for example as a consequence of the ECE's previous work with giving the guidelines for access to environmental information and public participation in decision-making processes in that respect prior to the Sofia Declaration in 1995, cf. paragraph 2.2 above.

In addition, the ACCC should proceed with the consideration of the case as a consequence of the *far-reaching and obvious violations* of the Aarhus Convention having taken place.

With a delay of exactly 24 months as compared to the requirements laid down by the Water Framework Directive, the Danish government adopted the national river basin management plans under the authority of the Danish Act on Environmental Objectives. In that way, the Danish Government avoided that the European Commission took any further steps in the Treaty violation proceedings commenced against Denmark as a result of too late implementation. A

material precondition for this being possible was that only a very brief supplementary consultation was conducted in *10 days*, which, however, gave the plot owners affected by the consultation very poor chances of submitting actual responses.

From relevant case law on this issue, reference may be made to the UNECE Compliance Committee's report no. ECE/MP.PP/2008/5/Add.6 of 4 April 2008 on Lithuania's handling of the obligations provided for in the Aarhus Convention.

The case pertained to the establishment of a large landfill - in an existing landfill - in the village of Kazokiskes in the municipality of Elektrenai Vilnius in Lithuania in which case plans existed of future deposits of 6.8 million tonnes of waste for a 20-year period. The landfill was in future to work as a waste deposit for the entire Vilnius region.

Attempts had been made to make the public aware of the decision-making process in respect of the establishment of the landfill through *"Elektrenu Zinios"* which is a public, weekly magazine. In addition, in accordance with Lithuanian law, the public was given a consultation period of 10 working days within which period the public had to familiarise itself with the documentation concerning the landfill and the reports, etc., in the case and subsequently submit comments thereto.

The ACCC found that the project announcement in the weekly magazine did not fulfil the requirement of Article 6(2) of the Convention stating that the public must be informed efficiently, just as the consultation period of 10 working days was not found to equal the requirement for *"reasonable time frames"* of Article 6(3).

Consequently, the ACCC stated as follows:

> *"89. The Committee finds that by failing to inform the public in an adequate, timely and effective manner about the possibility to participate in the decisions concerning the EIA decision (paras. 65–69), and by providing too short a time to inspect the documentation and to submit comments in relation to the above decisions regarding the landfill in question, Lithuania failed to comply with the requirements of article 6, paragraphs 2, and 3, of the Convention.*
>
> *90. Moreover, the Committee finds the following general features of the Lithuanian legal framework as not being in compliance with article 6 of the Convention:*
> *(a) Lack of clear requirement for a public to be informed in an adequate, timely and effective manner (article 6, para. 2);*
> *(b) Setting a fixed 10 working-day period for inspecting the documentation and for submitting the comments (article 6, para. 3);*
> *[…]."* (Underlining added)

Consequently, in this case, an *obvious* violation took place already because the ACCC has previously determined that a consultation period of 10 days infringes the Convention.

According to the ACCC's practice, the consultation conducted by the respondent under the authority of ss 29-30 of the Act on Water Environment (*vandmiljøloven*) prior to the adoption of the river basin management plans quite obviously violated the provision of Article 6(3) of the Aarhus

Convention. Consequently, no *"reasonable time frames"* have been fixed and no time frames have at all been fixed in relation to informing the public to the effect that the public may prepare *"and actually participate"* in the entire decision-making process.

In addition, the substantive issues of the case imply that the case has *far-reaching* implications since particularly wide-ranging and important interests are at stake for the entire Danish farming industry. Furthermore, the Danish government is particularly interested in ensuring that the implementation of the EU Water Framework Directive will not become subject to proceedings before the European Court of Justice.

Therefore, in a case like the present one, there is a special need for the case handling to be monitored by an international and quite obviously independent and professionally competent body.

On the basis of the aforesaid, the ACCC is therefore respectfully requested not to allow the request made by the Danish Ministry of the Environment on 8 October 2013 for a suspension of the consideration of this case, and the ACCC is instead requested to proceed with the consideration of this case.

4. Exhibits

It should be noted that all Exhibits have been translated from Danish into English by the certified translators in our offices.

Exhibit 1	Extracts of consultation of *"Bill to amend the Act on environmental objectives etc. for water bodies and international nature protection areas, the Forestry Act, the Act on the Environmental Board of Appeal and the Act on rivers (amendment to the Environmental Board of Appeal's powers, digitalisation and specification of provision on river basin borders)"*
Exhibit 2	Excerpt from the daily paper Politiken from 24 February 2012 retrieved from *http://politiken.dk/erhverv/ECE1549731/landbruget-klager-til-fn-over-ida-auken/*
Exhibit 3	Our email of 13 June 2012 to the Environmental Board of Appeal
Exhibit 4	Email sent to us by the Environmental Board of Appeal on 20 June 2012
Exhibit 5	Our letter of 31 August 2012 to the Environmental Board of Appeal
Exhibit 6	Letter sent to us by the Environmental Board of Appeal on 6 September 2012
Exhibit 7	Our letter of 10 September 2012 to the Environmental Board of Appeal

Exhibit 8	Letter sent to us by the Environmental Board of Appeal on 19 September 2012
Exhibit 9	Our letter of 20 September 2012 to the Environmental Board of Appeal
Exhibit 10	Our letter of 20 September 2012 to the Danish Nature Agency
Exhibit 11	Letter sent to us by the Environmental Board of Appeal on 12 October 2012
Exhibit 12	Notices convening the meeting on 28 August 2012
Exhibit 13	Our letter of 8 October 2012 to the Environmental Board of Appeal
Exhibit 14	Letter sent to us by the Environmental Board of Appeal on 12 October 2012
Exhibit 15	Our letter of 12 October 2012 to the Environmental Board of Appeal

Yours sincerely
Håkun Djurhuus

Jacob Schall Holberg