Final version: 15 April 2014

Comments of the Federal Republic of Germany on the communication from Ms Brigitte Artmann to the Aarhus Convention Compliance Committee dated 24 June 2013, Reference: ACCC/C/2013/92

On 17 December 2013, the Secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) forwarded a communication to The Federal Republic of Germany from Ms Brigitte Artmann (complainant) dated 24 June 2013 and addressed to the Compliance Committee of the Aarhus Convention.
The communication alleges non-compliance by Germany with Articles 1, 3, 4 and 6 of the Aarhus Convention in connection with its alleged failure to provide the German public with opportunities to participate in a transboundary environmental impact assessment procedure concerning the proposed construction of two nuclear reactors at Hinkley Point C.

At its 42nd meeting on 27 September 2013, the Compliance Committee determined, on a preliminary basis, that the communication was to be admissible in accordance with paragraph 20 of the annex to decision I/7 of 2 April 2004 (ECE/MP.PP/2/Add.8).

The Secretariat of the Convention requested that the Federal Republic of Germany submit comments on the communication by 17 May 2014. With this present letter, the request has been fulfilled within the stipulated period.

In the following the Federal Republic of Germany presents comments on the facts of the matter (in I), on the admissibility of the communication (in II) and on the individual allegations of the complainant (in III).

In the final analysis, the Federal Republic of Germany believes that the individual allegations are unfounded and that it has not violated any of its obligations under the Aarhus Convention.

Structure of the comments

I. On the facts of the matter and the procedure

1. The United Kingdom plans to build and operate two new reactors of the European Pressurized Reactor (EPR) type at the current nuclear power plant location Hinkley Point (Hinkley Point C). The responsible British authorities carried out a national-level EIA, but not a transboundary EIA, before a decision on approval was made concerning the new construction plans.

According to information on the website of the competent British authority, the Planning Inspectorate (http://infrastructure.planningportal.gov.uk/projects/south-west/hinkley-point-c-new-nuclear-power-station/), the United Kingdom conducted an assessment as to whether this project required a transboundary EIA in accordance with the UN ECE - Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 (Espoo Convention) and in accordance with Article 7 of the Directive 2011/92/EU of the European Parliament and of the Council on the assess-

ment of the effects of certain public and private projects on the environment (EU EIA Directive). On 11 April 2012, the United Kingdom arrived independently at the following conclusion:
"Under Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) and on the basis of the current information available from the Developer, the Secretary of State is of the view that the proposed development is not likely to have a significant effect on the environment in another EEA State." (cf. **Annex 1**, print copy of the website mentioned).

The competent British authority believes that the proposed activity is not likely to have a significant effect on the environment in other countries. For this reason, neither directly neighbouring countries such as France or the Republic of Ireland nor other EU member states or parties to the UN ECE were notified. There was therefore no transboundary EIA process carried out in accordance with the Espoo Convention or the EU EIA Directive.

According to the information on the website of the competent British authority, the approval decision for the proposed development was made on 19 March 2013.

2. As explained, the Federal Republic of Germany and other countries were not informed about this project by the United Kingdom within the framework of the Espoo Convention or the EU EIA Directive, therefore no transboundary participatory process was initiated.

   As far as is known, only Austria asked the United Kingdom for the opportunity to make comments on the proposed activity. The opportunity was granted by the United Kingdom in letters from October and November 2012 after the national EIA process had been completed with reference to the decision scheduled in the first quarter of 2013 (cf. **Annex 2 and 3**. The letters were made available by Austria to the Federal Republic of Germany upon request in February 2013. The occasion for the request was parliamentary queries on various nuclear projects in other European countries).

3. According to Article 37 of the Euratom Treaty, every member of the European Union is required to inform the European Commission of plans to dispose of radioactive sub-

stances. That means approval decisions that regulate and limit emissions with exhaust air and waste water as well as the emission of solid radioactive waste from nuclear installations operating normally. For every plan, "general data" is to be provided so that it can be determined whether the implementation of the plan will cause radioactive contamination of the water, soil or airspace of another member state. The "general data" also include data about observed incidents and accidents. The European Commission then presents an opinion on the plan. Only then may the competent authority in the European Union member state grant approval of the project. Such opinions by the European Commission are to be published in the Official Journal of the European Union.

On 3 February 2012 the European Commission submitted its opinion on the proposed activity Hinkley Point C on the basis of Article 37 of the Euratom Treaty (Official Journal of the European Union C 33/1 of 7 February 2012, attached as **Annex 4**). In its opinion, the European Commission, taking the distance to the nearest neighbouring countries (France at 185 km, Ireland at 250 km) into consideration, came to the conclusion that the implementation of the plan for the disposal of radioactive waste in whatever form from the two EPR reactors on the Hinkley Point C nuclear power station is not liable to result in a radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health.

4. In a letter to the Federal Environment Ministry dated 28 February 2013, the complainant requested the participation of the German public in an EIA on the British Hinkley Point C nuclear power station (the complainant's letter to the Federal Environment Ministry was presented along with the complainant's communication).

   In a letter dated 27 March 2013, the Federal Ministry for the Environment replied to the complainant (the Federal Environment Ministry's reply was presented by the complainant with her communication). Ultimately, the Federal Republic of Germany saw no reason to cast doubt on the assessments conducted by the responsible British authorities or the European Commission's examination of the Hinkley Point C project.

5. The communication also indicates that the complainant wrote to the European Commission on 24 April 2013 about the same issue requesting that a treaty infringement action be opened against the United Kingdom and the Federal Republic of Germany. In its let-

ter dated 31 May 2013, the European Commission rejected this request. Among the reasons given for this was that Article 7 of the EU EIA Directive does not grant individual citizens the right to demand transboundary EIAs.

6. On 24 June 2013 the complainant submitted the present case to the Compliance Committee of the Aarhus Convention for examination. She claims in her communication that the Federal Republic of Germany has violated the provisions of the Aarhus Convention by failing to demand the participation of the German public in an EIA for the planned reactors at the nuclear power plant at Hinkley Point C in the United Kingdom.

7. One case involving Hinkley Point C is also pending before the Implementation Committee of the Espoo Convention (cf. case EIA/IC/INFO/12; status: open; Information forms submitted by a German Member of the Parliament and the Irish NGO Friends of the Irish Environment, on 12 March and 27 March 2013, respectively, regarding the planned construction of NPP Hinkley Point C by the United Kingdom). The Implementation Committee first took up the case in its 28th session from 10 to 12 September 2013. No actions against parties of the Espoo Convention were initiated at this meeting. Instead, the decision was made to procure more information from the United Kingdom, the Federal Republic of Germany, Ireland and Austria. As far as is known, France, the nearest country to the Hinkley Point location, was not consulted. In a letter dated 14 October 2013 (cf. **Annex 5**), questions were put to the Federal Republic of Germany regarding the action. The Federal Republic of Germany then answered in a letter dated 31 October 2013 (cf. **Annex 6**). The Implementation Committee of the Espoo Convention discussed the action again in its 29th session (10-12 December 2013) and its 30th session (25-27 February 2014). No details are available; the discussion is ongoing.

8. On 27 September 2013 the Compliance Committee of the Aarhus Convention took up the case for decision. The case was considered admissible in accordance with paragraph 20 of the annex to decision I/7. It was said that the case under consideration was, for example, not manifestly unreasonable.

9. The Federal Republic of Germany was informed of the communication by the Secretariat of the Aarhus Convention on 17 December 2013 and at the same time asked to comment on it by 17 May 2014 at the latest.

II. On the admissibility of the communication

The Federal Republic of Germany has doubts concerning the admissibility of the communication:

The admissibility of the communication is to be judged by the Compliance Committee of the Aarhus Convention in accordance with paragraph 20 of the annex to decision I/7. This states that a case is not admissible, for example, when it is manifestly unreasonable.

1. This may be the case in this instance, because the Federal Republic of Germany has not manifestly violated any of its obligations resulting from the Aarhus Convention. The matter deals with a decision-making process that did not take place in Germany and in which German authorities were not to make any decisions concerning the approval of the proposed activity. The Federal Republic of Germany also did not influence or limit the participation of the German public in the participation procedure in the United Kingdom in any way.

2. To the extent that the core issue is whether German authorities should have demanded the implementation of a transboundary EIA procedure from the United Kingdom, only the provisions of the Espoo Convention are relevant to a decision. The Espoo Convention, as a dedicated convention on transboundary EIAs, governs, for example, the prerequisites for the obligation of the Party of origin to conduct a transboundary EIA (Article 3 (1) of the Espoo Convention) as well as the right of a potentially affected Party to request when no notification has taken place (Article 3 (7) of the Espoo Convention). In this regard the Espoo Convention takes precedence over the Aarhus Convention (cf. Article 3 (6) of the Aarhus Convention). For the decision in question then, the Implementation Committee of the Espoo Convention is responsible, and that Committee is in the process of "information gathering" with regard to the current case.

III. Comments on the individual allegations of the complainant in the communication of 24 June 2013

The communication of 24 June 2013, the Federal Republic of Germany is alleged to have violated various provisions of the Aarhus Convention. Mentioned in particular are:

- *Article 1,*
- *Article 3 (1)*
- *Article 3 (2)*
- *Article 3 (9)*
- *Article 4 (7)*
- *Article 6 (1)*
- *Article 6 (2)*
- *Article 6 (4)*
- *Article 6 (5)*
- *Article 6 (6) and*
- *Article 6 (7).*

1. Precedence of the Espoo Convention; No violation of the Espoo Convention

The Federal Republic of Germany believes that in the present case the Espoo Convention has precedence. Article 3 (1) of the Espoo Convention states that the Party of origin shall notify any party which it considers may be affected when the Party of origin believes a proposed activity is likely to cause a significant adverse transboundary impact. To determine this, the Party of origin must conduct an appropriate screening. If the Party of origin determines that the proposed activity is not likely to have a significant adverse transboundary impact, and thus that no contracting Party is affected, then no notification is necessary. If the other contracting Party does not share this opinion, then it can, as a potentially affected Party request participation in accordance with Article 3 (7) of the Espoo Convention. It is thus first and foremost up to the Party of origin to assess whether the proposed activity will cause a significant adverse transboundary impact, and only then afterwards the other contracting Party can do so, if needed.

In the current case, the United Kingdom conducted the requisite screening as to whether the proposed activity at the Hinkley Point C location would affect other countries. The result was that the United Kingdom found this not to be the case, especially with regard to the directly

neighbouring countries France and Ireland. The Federal Republic of Germany later concurred with this assessment. Consequently, in the present case no transboundary EIA procedure in accordance with the Espoo Convention was conducted.

2. No violation of the Aarhus Convention by failure to demand a transboundary EIA process in the present case

As has been presented, in the present case the United Kingdom conducted a national EIA, but no transboundary EIA, because the results of the screenings in the United Kingdom indicated that the Hinkley Point C project was not likely to have significant effects on the environment in other countries. Thus the Federal Republic of Germany was not notified by the United Kingdom under the Espoo Convention about the proposed activity and did not itself request participation.

The complainant states: *"After information from the concerned public in Germany about its wish to participate in the public consultation concerning the Hinkley Point C nuclear power station in the United Kingdom, the relevant authorities (e.g. BMU) should have requested from the British authorities the relevant information and have made it available to the German concerned public (also in conjunction with Article 3.2)."*

The question is thus whether the Federal Republic of Germany should have demanded participation as laid down in Article 3 (7) of the Espoo Convention even without being notified similar as Austria did.

Transboundary EIAs are instruments of environmental stewardship. They are intended to ensure that an affected Party, which is not the Party of origin of a project, can participate appropriately and in accordance with international and European laws. The transboundary EIAs also contribute significantly to cooperation between countries. This is especially true for neighbouring countries, which as a rule are most strongly affected by the transboundary impact of projects. The legal basis for conducting a transboundary EIA is the Espoo Convention and the EU EIA Directive. Alone the Convention and Directive govern the transboundary EIA procedure. However, they do not contain evaluation criteria or assessment standards for the question as to whether a project can have significant adverse impacts on the environment in another country and can thus be the subject of a transboundary EIA. In Germany, these international and European requirements are implemented in the Environmental Impact Assess-

ment Act (AEIA). Section 9 (b) of the AEIA governs Germany's participation in transboundary EIAs concerning foreign projects. In the case of transboundary EIAs, the responsible German authority evaluates whether Germany's participation in the approval procedure in the Party of origin is necessary after receiving notification. According to Section 9 (b) of the AEIA, the responsible German authority may request an EIA procedure if Germany, as a Party potentially affected by a project in another country, was not previously involved.

The assessment is based on the circumstances of each individual case, especially the kind and amount of potential impact on Germany. When assessing the possible transboundary impacts of the project, it is primarily the information provided by the Party of origin at the time of notification of the project and, as the case may be, other information that the authority has (for example, opinions by the European Commission and other competent authorities) that is taken into consideration.

Article 3 (7) of the Espoo Convention assumes that a contracting Party is of the opinion that it may be affected by significant adverse transboundary impacts of a planned activity listed in Annex I, and then exchanges information on the question of the likelihood of these impacts with the Party of origin even without notification. Nuclear power plants are listed in Appendix I of the Espoo Convention. There was no notification. If the Federal Republic of Germany, contrary to the assessment of the United Kingdom, had believed that it might have been affected by significant adverse transboundary impacts, it could have, as a first step, requested sufficient information to examine in detail the likelihood of such impacts. Article 3 (7) of the Espoo Convention does not provide for automatic implementation of a comprehensive participation process solely on the basis of such a request. If the potentially affected Party and the Party of origin do not agree as to whether the other country might be affected, Article 3 (7) of the Espoo Convention states that this disagreement can only be resolved through a complex inquiry procedure in accordance with the Espoo Convention.
Moreover, Article 3 (7) of the Espoo Convention establishes only a right, not an obligation of a potentially affected Party to demand a transboundary procedure in any case. This also applies when a portion of the public expresses the wish to participate in such a procedure. Such demands by the public are to be appropriately considered in the assessment of the responsible authority of the potentially affected Party concerning a possible request for a transboundary procedure. According to Article 3 (7) of the Espoo Convention, a crucial factor for the possi-

bility of participation is alone the question as to whether significant adverse impacts are likely in the territory of the other country.

In the present case, Germany reviewed this question and assumed that it would not be affected. This cannot be contested from a legal viewpoint. The assessment as to whether the proposed activity at the Hinkley Point location would likely lead to significant adverse impacts in the territory of the Federal Republic of Germany was conducted after the responsible authorities became aware of this particular case. The review concluded that there was no reason to doubt the assessment of the responsible authorities of the United Kingdom, especially because this assessment was confirmed by the opinion of the European Commission.

According to the Espoo Convention, the competent body of the potentially affected contracting Party has a degree of discretion as to whether to request a procedure under the Espoo Convention. This degree of discretion is not limited by a demand made by the nation's public for implementation of a transboundary EIA on a foreign approval process for a proposed activity.

Because the parallel Conventions are independent of each other, this is also logical. If a specific case requires the implementation of a transboundary EIA under the Espoo Convention, then both the Espoo Convention and the procedural guarantees of the Aarhus Convention apply (cf. with reference to a national EIA: The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 118). If neither the Party of origin nor the potentially affected Party deems that a specific case requires the implementation of a transboundary EIA, there is no grounds to apply the provisions of the Aarhus Convention to this inter-state process governed by the Espoo Convention (cf. with reference to a national EIA: The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 118).

This is also the view of the Compliance Committee of the Aarhus Convention. In its Findings and Recommendations on Communication ACCC/C/2008/24 concerning Spain the Compliance Committee determined that the decision by a contracting Party for or against the necessity of an EIA cannot be considered as a failure to company with Article 6 of the Aarhus Convention, even if the decision was taken in breach of applicable domestic law (ECE/MP.PP/C.1/2009/8/Add.1, para 82; cf. also The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 118, 125): *"Accordingly, the factual*

accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular the decisions that there is no need for environmental assessment, even if such decisions are taken in breach of applicable national or international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention.".

The Federal Republic of Germany has thus in the present case not violated its obligations under the Aarhus Convention by failing to demand of the United Kingdom that a transboundary EIA process be conducted. This is the case even given the complainant's letter of 28 February 2013 requesting participation.

In point of fact, it already seems very doubtful that the United Kingdom could have fulfilled a theoretical participation request by the Federal Republic of Germany communicated after 28 February 2013. The decision concerning the approval of the project has taken by the responsible British authority shortly thereafter. Already in the case of Austria, the United Kingdom had only agreed to the possibility of participation on the condition that the schedule for the decision-making process not be delayed. A comparable answer would have been expected in the case of a theoretical participation request by the Federal Republic of Germany.

3. No violation of the specific provisions of the Aarhus Convention

Also in as far as the complainant claims that specific provisions of the Aarhus Convention were violated, the Federal Republic of Germany did not violate its obligations under the Aarhus Convention in the present case.

a. No violation of Article 1 of the Aarhus Convention

Contrary to the complainant's claims, there was no violation of Article 1 of the Aarhus Convention. Article 1 of the Aarhus Convention lays out the basic goals of the convention. It does not however create rights or obligations, but is always to be seen in connection with the specific provisions of the Convention (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 30). A right to the implementation of public participation in a specific case cannot be derived from this provision in isolation.

b. No violation of Article 3 of the Aarhus Convention

There was also no violation of Article 3 of the Aarhus Convention.

Article 3 of the Aarhus Convention contains overarching principles to be applied in the implementation of specific obligations based on the three pillars - access to information, public participation in decision-making and access to justice (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 50).

aa. No violation of Article 3 (1) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 3 (1) of the Aarhus Convention by the Federal Republic of Germany.

In accordance with Article 3 (1), the Federal Republic of Germany must take the necessary legislative, regulatory and other measures to establish and maintain a framework to implement the Convention. The Federal Republic of Germany has implemented the requirements of the Aarhus Convention in national law and applies these regulations (cf. in detail the "Nationalbericht der Bundesrepublik Deutschland für das Jahr 2014 zur Umsetzung der Aarhus-Konvention", Germany's national implementation report, which was submitted to the Secretariat of the Aarhus Convention in December 2013). The necessary measures for implementing the Aarhus Convention at national level have thus been taken (cf. section III.2 of the present document for information on the implementation of the Espoo Convention in German law).

bb. No violation of Article 3 (2) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 3 (2) of the Aarhus Convention by the Federal Republic of Germany.

According to Article 3 (2) of the Aarhus Convention, contracting parties must endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters. According to Article 2 (4) of the Aarhus Convention “the public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

It is doubtful whether Article 3 (2) of the Aarhus Convention can apply in the current case, because at issue is not a decision-making procedure in Germany, for which the relevant authorities in Germany were responsible and thus would have been obligated to provide support

and guidance. According to the eighth paragraph of the Preamble of the Aarhus Convention the support by state authorities is to assist citizens in exercising their rights under the Aarhus Convention. At issue for the complainant however is mainly that Germany should have requested a transboundary EIA under Article 3 (7) of the Espoo Convention, which is thus at best indirectly a question of the right to participation in the sense of the Aarhus Convention.
Moreover Article 3 (2) of the Aarhus Convention could only apply if the competent authorities in the Federal Republic of Germany had failed to provide any support or guidance at all to the public, in particular to the complainant, in the current case. The Federal Republic of Germany did however respond to the complainant's letter of 28 February 2013 and provide guidance. The complainant's request for participation was not fulfilled, but she did receive information about the assessments of the United Kingdom and the European Commission with which the Federal Republic of Germany concurred. That means that the complainant did receive a response to her request for participation. The Federal Republic of Germany's response was also clear and comprehensible, providing adequate support and guidance. More could not be required of the responsible authorities in the Federal Republic of Germany. After the legally incontestable decision not to submit a request under Article 3 (7) of the Espoo Convention had been made, it was not possible for the Federal Republic of Germany to give more support than that provided in its letter of 27 March 2013. Thus the Federal Republic of Germany's obligation under Article 3 (2) of the Aarhus Convention to "endeavour to ensure" support and guidance was not violated (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 54).

cc. No violation of Article 3 (9) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 3 (9) of the Aarhus Convention by the Federal Republic of Germany.

Article 3 (9) of the Aarhus Convention contains a non-discrimination clause, requiring that members of the public have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile.

The complainant makes the following claim: "*The German public was not identified as public concerned in case of a Beyond Design base Accident (BDA) by the relevant British and German authorities and therefore was clearly discriminated. This is violating Aarhus 3.9.*"

The process of public participation took place in the United Kingdom within the framework of the EIA and approval process for the proposed activity conducted there. There, all members of the public concerned were to be granted access to the public participation process that was conducted without discrimination. No authorisation application was submitted to German authorities, though, and no decision-making procedure was conducted as provided for by Article 6 of the Aarhus Convention. Thus no public participation process had to be conducted in the Federal Republic of Germany on its own accord.

In accordance with Article 3 (9) of the Aarhus Convention, rights under the convention must be able to be exercised without discrimination on the basis of nationality. The fact that the public in Austria was involved in addition to the public of the United Kingdom is due to a separate request for participation by Austria as provided for by Article 3 (7) of the Espoo Convention. The Federal Republic of Germany did not request this though and so it cannot be held accountable for it in any way.

Thus Article 3 (9) of the Aarhus Convention was not violated by the Federal Republic of Germany in this case in any way.

c. No violation of Article 4 of the Aarhus Convention

The communication also claims that Article 4 (7) of the Aarhus Convention was violated, saying that British authorities did not respond to the persons on the signature lists and did not explain in writing, why their request for participation was denied and not accepted.

The communication does not make clear if this allegation is also directed against the Federal Republic of Germany. If this is the case, the allegation is unfounded.

The complainant wrote to then Federal Environment Minister Peter Altmaier on 28 February 2013. In this letter the complainant did not however request access to environmental information available to the Federal Republic of Germany as provided for by Article 4 of the Aarhus Convention. The complainant only requested the Federal Government to ensure that the United Kingdom conduct a transboundary EIA in which the German public could be involved. The Federal Environment Ministry responded to this letter on 27 March 2013.

A potential violation of Article 4 (7) of the Aarhus Convention by the Federal Republic of Germany has thus not been convincingly presented by the complainant, and would be baseless.

d. No violation of Article 6 of the Aarhus Convention

Article 6 of the Aarhus Convention contains requirements for public participation in environment-related decision-making processes on the authorisation of specific projects.

aa. No violation of Article 6 (1) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (1) of the Aarhus Convention by the Federal Republic of Germany.

In accordance with Article 6 (1) of the Aarhus Convention, every contracting party must apply the provisions of that article with respect to decisions on whether to permit proposed activities listed in annex I of the Aarhus Convention.

Nuclear power plants indisputably fall under annex I (1) of the Aarhus Convention.

However, in the present case it is important that it is a question of public participation in a decision-making procedure for a project submitted for approval in the United Kingdom, to be realised in the United Kingdom and to be approved solely by the authorities of the United Kingdom. Such a procedure was not initiated in the Federal Republic of Germany. Obligations under Article 6 of the Aarhus Convention can however only apply when a contracting party implements a decision-making procedure within the meaning of Article 6 of the Aarhus Convention. Contrary to the claims of the complainant, Article 6 of the Aarhus Convention does not require that a decision-making procedure be implemented. Article 6 of the Aarhus Convention requires only in cases of the implementation of a decision-making procedure concerning a proposed activity that there is also public participation as stipulated in Article 6 of the Aarhus Convention (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 122). Article 6 of the Aarhus Convention also does not imply that one party must encourage another party to allow the former's public to participate in the latter's decision-making processes.

From the point of view of the Federal Republic of Germany, Article 6 (1) of the Aarhus Convention does not apply to the contractual obligations of Germany in the current case because a decision-making procedure in Germany is not at issue in which German authorities would have had to decide on the approval of a concrete project. It is therefore out of the question that the Federal Republic of Germany violated Article 6 (1) of the Aarhus Convention.

bb. No violation of Article 6 (2) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (2) of the Aarhus Convention by the Federal Republic of Germany.

In accordance with Article 6 (2) of the Aarhus Convention, the public concerned must be informed in an environmental decision-making procedure in accordance with Article 6 (1) of the Aarhus Convention in a timely manner of information specified in the regulation concerning proposed activities. Article 6 (2) of the Aarhus Convention is thus based on Article 6 (1). This means that if no decision-making procedure within the meaning of Article 6 (1) of the Aarhus Convention is implemented in the Federal Republic of Germany, then there can be no violation of Article 6 (2) of the Aarhus Convention.

cc. No violation of Article 6 (4) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (4) of the Aarhus Convention by the Federal Republic of Germany.

In accordance with Article 6 (4) of the Aarhus Convention each contracting party must provide for early public participation, when all options are open and effective public participation can take place.

Such early public participation must take place when a decision-making procedure within the meaning of Article 6 (1) of the Aarhus Convention is implemented in Germany. In the current case however, there was no German decision-making procedure, so the Federal Republic of Germany has not violated Article 6 (4) of the Aarhus Convention.

dd. No violation of Article 6 (5) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (5) of the Aarhus Convention by the Federal Republic of Germany.

Article 6 (5) of the Aarhus Convention stipulates that each party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

The complainant claims that the Federal Republic of Germany should have encouraged the British company applying for approval or the British Government to implement a transboundary EIA. The complainant states on this issue:
"Germany as a party should have encouraged the prospective applicant (e.g. NNB and the British government) to identify the public concerned, including the public that may be affected in case of a beyond design accident of the nuclear power plant. However, the German government (e.g. BMU) accepted the argumentation from the government of the United Kingdom that beyond design accidents were not part of the criteria for public participation and refused with that the only formally possibility to its citizens to participate in the procedures, i.e. in a transboundary Environmental Impact Assessment as prescribed under the Espoo Convention. The public concerned in Germany has no other possibility to participate. The German authorities should have encouraged the authorities of the United Kingdom as well as NNB to include German citizens in the procedure over a transboundary EIA".

On the one hand, Article 6 (5) of the Aarhus Convention is subject to the reservation of appropriateness. On the other hand, the text of Article 6 (5) of the Aarhus Convention expressly refers to prospective applicants, that is, someone who intends to apply for approval of a proposed activity (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 148 f.). The Federal Republic of Germany cannot have violated this regulation because at the time of the complainant's letter of 28 February 2013 it was no longer a question of a prospective authorisation procedure, rather the authorisation process in the United Kingdom was already very advanced and also completed shortly thereafter. In addition to this, because in the current case there was no German decision-making process within the meaning of Article 6 (1) of the Aarhus Convention, there can be no violation of Article 6 (5) of the Aarhus Convention by the Federal Republic of Germany.

ee. No violation of Article 6 (6) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (6) of the Aarhus Convention by the Federal Republic of Germany.

Article 6 (6) of the Aarhus Convention stipulates that each party should require the competent public authorities in a decision-making process within the meaning of Article 6 of the Aarhus Convention to give the public concerned access to relevant information specified in that Article.

The complainant claims that the decision of the Federal Republic of Germany not to make use of Article 3 (7) of the Espoo Convention and demand a transboundary EIA was practically equivalent to refusing to grant access to the relevant documentation of the United Kingdom: "*By its refusal to call on the Espoo Convention and instigate a transboundary EIA, the German authorities refused the public concerned de facto access to all information relevant to the decision-making.*"

As far as is known, the competent British authority published many if not all documents on the website mentioned above. In her letter of 28 February 2013, the complainant herself refers to documents known to her from the website of the Environment Agency Austria. German authorities, on the other hand, had no documents. Once more, because in the current case there was no German decision-making process within the meaning of Article 6 (1) of the Aarhus Convention, there can be no violation of Article 6 (6) of the Aarhus Convention by the Federal Republic of Germany.

ff. No violation of Article 6 (7) of the Aarhus Convention

Contrary to the claim of the complainant there has been no violation of Article 6 (7) of the Aarhus Convention by the Federal Republic of Germany.

Article 6 (7) of the Aarhus Convention stipulates that procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

The allegation brought forward by the complainant is as follows: *"By its refusal to call on the Espoo Convention and instigate a transboundary EIA, the German authorities blocked the possibilities for the public concerned to submit its comments, information, analyses or opinions."*

As has been explained, in the current case there was no decision-making process conducted by German authorities concerning any proposed project inside Germany within the meaning of Article 6 (1) of the Aarhus Convention. The complainant therefore does not charge the Federal Republic of Germany with a direct violation of Article 6 (7) of the Aarhus Convention, but rather solely criticises the failure to take advantage of the rights of the Federal Republic of Germany resulting from the Espoo Convention. The allegation of a violation of the Aarhus Convention would thus be only an indirect consequence. As has been explained, it is consistent with the Espoo Convention for the Federal Republic of Germany not to have called for participation under the Espoo Convention. Also for this reason there can be no question of a violation of Article 6 (7) of the Aarhus Convention.

In so far as the complainant also makes the allegation that "*The public concerned in Germany has no other possibility to participate",* it must be mentioned that the population of a country potentially affected by the project, regardless of the implementation of a transboundary EIA as provided for by the Espoo Convention, may been entitled to participation rights under the Aarhus Convention concerning the decision-making process in the foreign country itself. These rights are not affected whether or not the potentially affected country calls for a transboundary EIA or not. In addition to this, the Federal Republic of Germany did not in any way prevent the German public from directing comments or opinions directly to the United Kingdom and submitting them to the authorities in that country. As explained in section III.3.d.ee, the complainant was aware of documents concerning which she could have sent comments directly to the British authorities.

IV. Conclusion

The Federal Republic of Germany accepted the assessment of the United Kingdom that significant adverse impacts on the territory of the Federal Republic of Germany were unlikely to result from the proposed project. It did so in a way that is legally unobjectionable. Therefore no request under Article 3 (7) of the Espoo Convention was made. In the Federal Republic of

Germany, there was no decision-making procedure within the meaning of the Aarhus Convention. In sum, the Federal Republic of Germany did not violate any obligations under the Aarhus Convention in the present case.

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