In the matter of a Communication to the Aarhus Convention Compliance Committee to support the case ACCC/C/2014/119

Opening statement on behalf of the Republic of Poland

The Republic of Poland sustains its position expressed in the response to the Communication submitted by the Frank Bold Foundation to the Committee on 28 November 2014. The Republic of Poland wishes further to repeat and update its position with the following arguments and conclusions.

In its letters dated 28 November 2014 and 30 May 2016, the Frank Bold Foundation presented allegations on the violation of the provisions of the Aarhus Convention by the Republic of Poland (authorities of the Lubuskie Voivodeship) in two areas:

I. Non-compliance of the Polish law in the area of considering the comments submitted by the public with the Aarhus Convention. The allegation includes also insufficient evaluation of public consultations, especially a failure to consider the results of public consultations in the final act.
II. Restricting the rights of environmental organisations and private persons to challenge both material and procedural legality of the act on the spatial development plan.

General comments

The allegations were submitted with regard to the planning procedure carried out by the self-governmental authorities of the Lubuskie Voivodeship concerning the amendment of the Spatial Development Plan of the Lubuskie Voivodeship by the Assembly of Lubuskie Voivodeship under the resolution no. XXII/191/12 of 21 March 2012 (hereinafter referred to as the "Resolution of March 2012").

In the opinion of the Republic of Poland, none of the allegations should be considered. To demonstrate that they are unfounded I would like to familiarize, with respect to the available timeframes, the general legislation applicable to the spatial planning and development in the Republic of Poland, formed individually by each state with consideration to its internal systemic solutions.

Spatial planning in the Republic of Poland has been based on the hierarchy of acts principle. The documents of a nation-wide application are placed at the top of such hierarchy – these include the National Spatial Development Concept adopted by the Council of Ministers and the other sectoral strategies. It should be emphasized that these documents influence the

content of the other acts, including the Spatial Development Plans of the Voivodeships. The Voivodeship Plan has an indirect impact on the content of the legal acts enacted by the communal self-governments. There are two documents issued at the community level – a mandatory study of conditions and directions of spatial development of the commune and local spatial development plan. All these documents constitute the basic spatial planning and development system in the Republic of Poland.

What's important, the hierarchy principle is addressed to the public administration authorities adopting the other planning acts i.e. the Voivodeship self-governmental authorities and the community self-governmental authorities.

From the public perspective, only one from all of the above-mentioned planning acts –local spatial development plan – constitutes a local law act that has binding legal effects to the public. This results directly from Article 4 of the Act on Spatial Planning and Development stating that determination of the land use and location of the public purpose investments as well as determining the manner and conditions for land development is made under the local spatial development plan. Article 4 needs more in-depth analyse in this document.

In this context, one should emphasize that the Voivodeship Plan according to polish legal system has status the internal governance act.

This distinction shows different legal nature of the particular planning acts. Neither the National Spatial Development Concept, nor the Spatial Development Plan of the Voivodeship are the acts of binding force – this status is applied only to the local spatial development plan adopted by the community.

One should note here, that the Polish legislation, meeting its obligations under the Aarhus Convention and *acquis communautaire,* assures the public participation at each stage of the decision-making process. The legal basis for such approach constitute the two following acts: the Act on the provision of information on the environment and its protection, the public participation in environmental protection and environmental impact assessments (hereinafter referred to as the "Public Participation Act") and the Act on spatial planning and development. Public participation includes not only the right to comment on the already prepared draft Voivodeship Plan but reaches earlier stage – it enables public submitting their postulates even before the works on draft plan are started.

Both acts assure the public the right to public access to information on draft plan and the right to submit their comments and postulates as well as provide information on the deadline and place to submit such comments and postulates. This access is formed in public-friendly and deformalize manner.

The right of the public to submit the comments corresponds with the obligation of the authority to receive such comments, consider them and notify the result of consideration.

Ad. I. With regard to the first allegation presented by the Foundation stating that public consultations used to be problematic in the Republic in Poland, it should be emphasize that such statement presents a highly subjective opinion of the Foundation and is not based on the actual situation.

The Public Participation Act in correct manner implements the provisions of the Aarhus Convention on public participation while issuing the documents, including the manner of consideration of the comments submitted by the public.

The statement presented on page 3 of the letter of the Foundation of 30 May 2016 that this Act implies the obligation to justify only the comments which have been considered and the scope of their consideration in the summary is incorrect.

This issue is regulated by Article 55(3) of the Public Participation Act, which implies the obligation on the authority to explain the way the comments submitted by the public were taken into account. **It needs to be emphasized that this article refers to all of the comments not only to the accepted comments. This means that the authority is obliged to take into account all of the submitted comments and explain to what extent they were accepted.** In spite of statements presented by the Foundation, the act obliges the authority to explain why the submitted comments have not been accepted.

Documentation available in the case, i.e. "The justification for the opinion concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship" and "The justification for the suggestions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship" clearly demonstrates that the **authority of the Voivodeship has taken into account all of the opinions and postulates submitted during the public participation procedure within the strategic environmental impact assessment. The comments have been not rejected in automatic manner and the way these were considered meets the minimal obligations implied under the Aarhus Convention. In addition, the authorities of the Lubuskie Voivodeship published the list of comments submitted under the public consultations on its official website.**

The document specifying the manner of considering the comments should be view as a part of planning documentations. The 2030 National Spatial Development Concept adopted by the resolution of the Council of Ministers of 13 December 2011 stipulated the protection of Gubin and Gubin 1 lignite deposits. According to the legislation currently in force, this issue has been subject to wide-scale public consultations, carried out further during the strategic environmental impact assessment. The issue of mineral reserves protection has been also addressed within the consultation process. **This means that as early as at this stage both the NGOs and natural persons could provide their detailed opinion on the solutions that have been further reflected in the Voivodeship Plan.**

Due to significant number of comments submitted by the public – more than 1100 – the authority divided them into groups – adopting the level of acceptance of comments as the key criterion. It seems that such solution was considered acceptable (Clause 179 of the Maastricht Recommendations).

On the site note of the case one should emphasize that apart from the public consultations, due to significant number of remarks submitted by the German party, several meetings between the Polish and German representatives of the authorities were organized during the

transboundary assessment. All the submitted comments were discussed in details then. Despite differences between the public participation procedure covered by the Aarhus Convention, the German authorities do also act as a guardian of the public opinion. The attitude of the authorities of the Republic of Poland clearly demonstrates their focus on reliable and relevant consideration of the comments submitted by all entities during public participation.

Following the letters of the Foundation, one may have the impression that the point is on failure to accept the remarks rather than insufficient consideration. These are two different issues. The authority is in any case obliged to take into consideration the comments however it has no obligation to accept them. In the case of the resolution of March 2012, impossibility to accept the comments was dictated by the legal conditions of the Polish spatial planning system that are binding for the authority and which cannot be freely amended by such authority.

In this circumstances, the allegation presented by the Foundation concerning insufficient consideration of the comments and the remarks during the public consultation procedure and insufficient implementation in the Public Participation Act and therefore violation of Article 7 with regard to Article 6(3)(4) and (8) of the Aarhus Convention is unfounded and not acceptable.

Ad. II. The second allegation presented by the Foundation concerning the restriction of the rights of environmental organisations and private persons to challenge both material and procedural legality of the act on the spatial development plan is also unfounded.

The arguments raised in the letter present the issue of access to justice in the Polish legislation in too simply manner failing to reflect the complexity of the issue. In particular ignores the characteristic features of spatial planning, including the nature of the Voivodeship Plan - being (just to remind) – qualified as the internal governance act. The letter of the Frank Bold Foundation quotes several judicial opinions in the cases, in which the subject goes far beyond the planning procedure. Due to independence of judges and binding them only with the provisions of the Constitution of the Republic of Poland and the acts, forming the conclusions in such general way and predicting the future judicial decisions in analogous manner is impermissible. The judge deciding in an individual case is not bound by the decisions made in the other, even similar cases.

In the Polish legislation, the access to justice is based on violation of legal interest or rights by the challenged act. Considering the above in a view of the planning documents, we clearly see that the legal interest referring to the national spatial development concept, Voivodeship spatial development plan (internal governance act) and to the local spatial development plan will be completely different. Only local spatial development plan is legally binding to the non-administrative entities i.e. the public, which should be strongly emphasized here. **Only this document legally determinates the land use, location of public purpose investment and specifies the land development conditions** (Article 4 of the Act on Spatial Planning and Development quoted above).

When referring to the presented allegations, one should point out that Article 9(3) of the Aarhus Convention enables to implement in the national administrative procedural law conditions on access to justice.

According to the Polish legislation, the public administrative acts adopted by the self-governments may be claimed by any entity with regard to violation of its legal interest or right. This issue is specified in detail in the Act on the Voivodeship Self-Government (Article 90) and the Act on the Community Self-Government (Article 101). Since the planning acts are a part of public administration activity, anyone can challenge them.

The point is that examining the case by judge requires proving the existence of the legal interest whereas winning it – demonstrating the illegality of violating such interest.

The judgment of the Supreme Court of Administration File No. II OSK 647/14 quoted by the Foundation and issued under the control of the resolution of March 2012 confirms the legal basis presented above.

According to this judgment, the claim lodged by a private person was examined by the judge however he decided that the allegations were non founded. This means that in the judge opinion there was no violation of legal interests considered. The point is that the claimant not submit the arguments on violating the environmental protection provisions but that the resolution violates its property interests.

The Voivodeship Plan not specify the manner of exercising the ownership rights directly. This rights is defined in the local spatial development plan, being the local law act and, under Article 15(3)(4b) and Article 44 of the Act on spatial planning and development. According to hierarchical system- this act must consider the content of the acts ranked higher in the hierarchy, including the location of the public purpose investments. The mine, is qualified as the public purpose investment.

The claimed Voivodeship spatial development plan does not determine directly that the said land is to be dedicated to the public purpose investment in the form of a lignite mine and only specifies the areas located within the Gubin, Brody and Lubsko Municipalities as the lands of "areas of national importance, related to the planned exploitation of Gubin and Gubin 1 lignite deposits and therefore requiring separate detailed studies and decisions to be undertaken apart from the planning activities of the Voivodeship". This means that the public will have further opportunity to present its opinion on the provisions of the local spatial development plan and thus it is not deprived of its opportunity to participate in the procedure at the stage, at which all the options continue to be available. Therefore the requirement under Article 7 and 6(3)(4) and (8) of the Convention is met.

In the opinion of the Republic of Poland, the Aarhus Convention imposes no obligation to provide access to justice in the case of each document, including in particular the Voivodeship spatial development plan, ranked in the middle of the hierarchic structure of the planning acts and being the internal governance act.

The Frank Bold Foundation failed to present evidences demonstrating that it lodged a claim to the administrative court referring to the resolution of the Assembly of the Lubuskie

Voivodeship of March 2012. In response to the request of 9 April 2015 to provide information about its use of national review remedies, the Foundation presented only the two judgements of the Supreme Administrative Court –a complaint lodged by a private person, File No. II OSK 647/14, and a complaint by the Municipality of Gubin, File No. II OSK 1598/13. it did not present a ruling of the Administrative Court which would indicate that it was refused access to justice in this specific case. One should emphasize here that the using the national review remedies is the mandatory condition to communicate to the Aarhus Convention Compliance Committee. In addition, the allegations presented in the communication should be based on facts rather than an assumption of the Frank Bold Foundation on the potential decision of the court on the opportunities of participation of the Foundation in the review procedure.

The Foundation failed to use measures available under the Polish legislation. On 28 November 2014, it only lodged the claim concerning non-compliance with the Aarhus Convention directly to the Compliance Committee - more than two years upon the adoption of the challenged resolutions and in 3 months before the judgment on the case claimed by a natural person was issued by the Supreme Administrative Court.

The final comment should refer to the Municipality of Gubin case pending before the Supreme Administrative Court. The Polish authorities maintain their position, that the disputes between the public authorities are not covered by the Aarhus Convention. Since in its letter informing on the legibility of the communication the Community did not addressed this issue, the Polish authorities wish to repeat that in their opinion the dispute between the Municipality of Gubin and the Lubuskie Voivodeship should be excluded from the present procedure.

I deeply hope that any potential doubts concerning the subject-matter of the case will be solved in question phase.