COMMUNICANTS' OPENING STATEMENT IN ACCC/C/2016/137
Communicant: WWF Germany – Party Concerned: Germany

Dear Chair and dear Members of the Compliance Committee,

I am very happy to represent the communicant today and to have your attention for the next couple of minutes.

This is what this case is about: Is the recognition practice in Germany as contained in the Environmental Standing Act (EEA) in line with Art 3.4 – and especially as a precondition for access to justice? Can a group of people earnestly engaged in environmental protection that can participate in accordance with Art 6 at the same time be excluded from going to court, i.e from exercising rights under Art 9.2 and Art 9.3? Or is such practice in violation of Art 3.4, 9.2 (2.5) and 9.3 (2.4) of the Convention? For your convenience, the relevant provision of the German Environmental Appeals Act is copied into the Annex of this Statement.

I would like to do two things in this oral statement: (1) discuss what we see as the key issues, and where possible highlight points of agreement or disagreement between the Communicant and the Party Concerned; and (2) explain why we decided to bring this communication in the first place – why it matters.

I would like to make clear at this stage that the Communication also argues non-compliance with Article 9.3 of the Convention as the revised EAA of 2017 now also implements Art 9.3 of the Convention. This was not the case in 2016, but raised before in writing.[1]

Of course I am happy to elaborate on any of these or other points and welcome your questions.

1. No disagreement on facts

This case thankfully is void of any difficulties in facts.

There is no disagreement between the Communicant and the Party concerned: on the basis of the current law in Germany, a multitude of groups, including some of the largest environmental organisations such as WWF and Greenpeace,[2] but also several hundreds of local and regional initiatives cannot be recognized on the basis of the EEA and thus never get through the door of a German court to argue substantive environmental law. They **can** (and do) participate[3] in permitting procedures in accordance with Art 6 of the Convention without recognition[4], but they **cannot** go to court without recognition.

The Party concerned argues that there *might* be domestic legal remedies to challenge this[5], but not once has it argued that this is not the desired content and effect of its legislation. Rather, it justifies this in its response to the Communication. The Party concerned does **not** want such groups to be recognised and thus to be able to exercise rights in accordance with Art. 3 para 4 and 9. 2 and 9.3 of the Convention.

[1] Letter from Communicant of 17 April 2018, p.5; clarification during hearing on preliminary admissibility of 7th March 2016.
[2] Response by the Party concerned, 3rd January 2017, p. 4.
[3] Response by the Party concerned, 3rd January 2017, p. 21
[4] See in particular § 73 para. 4 of the Administrative Procedure Act (VwVfG) "Anyone whose interests can be affected" can participate.
[5] Response by the Party concerned, 3rd January 2017, p.5 f.

2. What is the problem that we raise here?

We say that the recognition practice for groups is too stringent and arduous, and thus in non-compliance with Art 3.4. It is stricter than the requirements for recognition for representative action in other areas of law[6] and in conjunction with the German practice this also means that there is not sufficient access in accordance with Art 9.2 and 9.3.

To be clear: The term „Vereinigungen" in § 3 of the German EAA as such covers all different forms of groups and organizations, that is true.[7] But the non-compliance alleged here has nothing to do with this term. Non-compliance arises because, not only must a group have members and a democratic constitution to be recognised, as stipulated in para § 3 para. 1 No. 5 of the German EEA which is at the centre of this dispute, but it must fulfil **5 cumulative criteria** to be recognised and have legal standing: [8]

The organization must

1. "predominantly", and not just temporarily, encourage the objectives of environmental protection
2. be legally constituted for a period of at least three years
3. have an organizational ensuring "the proper performance of its statutory duties"
4. must pursue charitable, non-profit objectives and thus in practice have a recognised charitable status under tax law, and
5. must have democratic structures, i.e. allow any person who supports the objectives of the organization to become a member of it and to have full voting right in the general meeting of the organization

On this basis, and as evidenced in the German practice, only a formally incorporated association (*eingetragener Verein*) or a cooperative society would fulfil all of these requirements.[9]

All other groups fall through the gap.[10]

A local initiative concerned with a new runway for an airport which will affect the environment for decades to come will be rejected if it exists less than three years and in any case because it will be found to only "temporarily" encourage environmental objectives, i.e. only with regard to this project. It can (and will) participate in the permitting procedure – but not go to court. Indeed, this is a very common answer to local initiatives applying for recognition on the "Länder" level. It would also be rejected because such groups have no formal "general meeting" or voting rights.

A small organization will also be rejected if it cannot show an organizational structure which enables it to ensure the "proper performance of its statutory duties", in particular the participation in permitting procedures, i.e. participation in the sense of Art 6 of the Convention. This latter requirement was actually added in the most recent reform of the Environmental Appeals Act in 2017 and in practice narrows down recognition options for small groups again.

[6] Communication of 10th February 2016, p. 6.
[7] Response by the Party concerned, 3rd January 2017, p.13-15.
[8] See Communciation of 10th February 2016, p. 3 f.
[9] Communication III.6.
[10] See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.4.

WWF and Greenpeace, both potent and capable, which would fulfil the other four requirements[11] will – in turn – be rejected because they either have no members at all (WWF) or not allow all of them full voting rights (Greenpeace).

3. Aside Art 3.4 - why is this even relevant if the public at large is covered by Art 9.2 and 9.3? Why is this issue important to the German public and for the implementation of the Convention?

For three reasons:

i) In Germany, no member of the public can argue compliance with environmental law in court unless he or she can show that they are individually affected (§ 42 para. 2 Administrative Procedure Act). [12]

For example, no member of the public can argue general issues such as groundwater pollution from too much fertilizer use or damage to ecosystems due to climate impacts. Also, no member of the public was and is able to bring an action against the German authorities for permitting fraudulent cars in general. As the Party concerned concedes: The protection of collective assets cannot "be asserted in court by individuals".[13]

Under the new EAA, this is even clearer: Art 9.2 and 9.3 rights are to be exercised though environmental associations. This is not disputed by the Party concerned, but a corner stone of the implementation of Decision V/9.h[14]

ii) The same Act then excludes hundreds of small and regional organisations, as well as the largest and most capable ones. While both WWF and Greenpeace can always and often do participate in decision making the sense of Art 6 of the Convention as part of the pubic concerned in accordance with the general Administrative Procedural Code , are recognized by the German Federal Constitutional Court as "Sachkundiger Dritter"[15] (informed and competent third Party) they cannot go to court to exercise rights under Art 9.2 and 9.3.[16] This is clearly askew.

iii) If these conditions are not changed, Millions of Germans engaged in citizens initiatives, in regional groups of WWF and GP and as supporters of the two largest environmental organizations are absolutely barred from rights conferred onto them by Art. 9 of the Convention. They **can** participate in permitting procedures but they **cannot** go to court to make sure objective law is upheld and they **cannot** do it through "their associations, organisations or groups" as foreseen in Art. 2 para. 4 and 5 of the Convention.[17]

This communication does not raise the general issue of the German practice to only extend the EEA to associations, despite the fact that the public in the sense of Art 2. para 4 and 5 is "any person". This continues to be a contentious issue.

[11] See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.6.
[12]See Communication of 10th February 2016, p. 7; "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.5, para. 5.
[13]See Response by the Party concerned, 3rd January 2017, p. 19.
[14]See letter by the Communicant, 17.04.2018, p.5 with references to the legislative procedure and memorandum.
[15]See Observer letter, Greenpeace Germany, 07.02.2017 p. 3.
[16]See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.3.
[17] See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.3.

But **if** the Party concerned decides to implement Art. 9 mainly through "representative action" for associations, the respective recognition criteria need to ensure that those organisations and citizens initiatives are recognized that the public has chosen to represent them[18]. It cannot restrict access on both planes: if the general public in Germany cannot exercise its rights under Art. 9 of the Aarhus Convention, it is inadmissible to also widely restrict access of its groups and organisations.[19]

4. Are the restrictions justified?

Essentially, the Party concerned argues that the recognition criteria are in line with Art. 2.5 of the Convention. Associations are only deemed to have an interest if they "meet any requirements under national law".[20] Yet, as stated by this Committee, Parties "may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention."[21] That is exactly what we argue here, both for Art. 2.4 and 2.5. The qualifiers contained in these provisions allow *some* national recognition criteria, but not unlimited flexibility. As the Implementation Guide points out, flexibility "does not give Parties a license to introduce or maintain national legislation that undermines or conflicts with the obligation in question."[22]

Recognition criteria may only restrict access to rights insofar as they are in line with the object and purpose of the provision, as set out in Article 31 of the Vienna Convention. This is not the case.

In particular, there is no justification for a membership structure or full voting rights anywhere in the Convention, and in fact, the Party concerned does not even argue that there is[23], and neither does it justify the other requirements. It only contends that many groups have in fact been recognized, and that this criterion "guarantees" that the organization is really pursuing environmental interests[24] - clearly a circular argument since this is already covered by the first criterion in § 3 EEA.

But: Art. 2.4 and 2.5 speaks of "their [the public's] groups" – so if a citizen decides to become a member or support a group with a certain structure, or even a foundation, it remains "his or her group".[25] The Party concerned fails to explain why the public needs to be protected by democratic structures, and what the danger of more or other recognized associations (without full democratic voting rights) would be. Certainly, this perception of danger is not shared by any other party to the Convention, as this criterion does not exist anywhere else. As a result, groups accepted by neighboring states will **not** have standing in Germany. [26]

This treatment also is discriminatory to environmental groups: The concept of "representative action", meaning organizations that act as an intermediary between the public and the state, granting these organizations rights to enforce general interests in court, is well known in Germany in other fields like the consumer protection or equality protection law.[27] However these

[18] See further "Reply to the comments of the Federal Republic of Germany, 27January 2017, p.3.
[19] See Oberserver letter, Greenpeace Germany, 07.02.2017 p. 5
[20] Response by the Party concerned, 3rd January 2017, p.10 f.
[21] Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, 12 May, 2011, para. 81.
[22] The Aarhus Convention: An Implementation Guide, 2nd Ed., 2014, p. 44
[23] Response by the Party concerned, 3rd January 2017, p.16 ff.
[24] Response by the Party concerned, 3rd January 2017, p.16 and 19..
[25] See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.3.
[26] Communciation, para 7 e)
[27] Coummunication III, 7. b).

organizations recognized in these fields of law are considered to be "representatives of the interests of the general public interest that is necessary in a democracy"[28] must not demonstrate full voting rights for members and experience less stringent conditions.

Also, contrary to what the Party concerned argues in its response, it **is very burdensome** to fulfil all of the requirements set out by § 3 EEA - especially for local groups. For others such as Greenpeace it would mean an absolutely disproportional restructuring of a well established and professional entity. And for foundations like the communicant, a restructuring is not even possible under German corporate law[29].

We say: cumulative requirements that exclude large numbers of grassroot groups as well as the most potent ones that would be on eye level with the administration are not in line with what the Convention set out to do – especially if the members of the public concerned themselves are also barred from the courts to enforce objective normative standards for environmental protection.

5. Relationship of ACCC/C/2008/31 and Decision V/9h to this Case

This committee has just closed a case concerned with the implementation of Art. 9 of the Convention in Germany. Progress has clearly been made by the new Environmental Appeals Act and the Communicant welcomes the role this Committee and the Convention has played in the past to increase access to justice in Germany.

But the current case and topic is outside of the scope of Decision V/9h. The issue of recognition and representative action as never deliberated in the context of the communication ACCC/C/2008/31.

And let us also be clear: while the Party concerned had a lot of work to do to implement Decision V/9.h, the issue at stake here would be quickly fixed. The issue is not complicated – simply relax the recognition requirements in one single section of the Environmental Appeals Law – and thus adapt to the practice in other State Parties. This could be done by simply deleting some of the cumulative requirements, such as No. 5 on the democratic voting rights.

6. Domestic Remedies

Finally, let me briefly state that this is a clear cut case of domestic remedies for the Communicant being only theoretically available and thus unreasonable. Recognition is impossible on the basis of the clear wording of the law. This was the result of two internal legal opinions which were commissioned by the Communicant, which is why WWF never applied formally.

German authorities are bound by Art 20 of the Grundgesetz, the Constitution of Germany. They cannot act *contra legem* – against the letters of the law. Rejection is 100% certain for these types of groups.[30]

Any legal action in court to follow would not – in the words of Decision I/7, para 21 "provide an effective and sufficient means of redress". Even if the Aarhus Convention was directly applied by a German Court (which is unlikely and would only happen on the basis of the Convention also constituting EU Law) the courts would not set aside a written requirement of the law. This is underpinned by the fact that Greenpeace Germany, which in fact has formal

[28] Response by the Party concerned, 3rd January 2017, p. 16.
[29]See further "Reply to the comments of the Federal Republic of Germany, 27 January 2017, p.6, para 4.
[30]Communication VI; Answers to the questions of the Committee concerning the use of domestic remedies of 17 April 2018, p. 2 ff.

members, has been rejected. The pertinent court in Halle has put the proceeding on hold depending on the ACCC ruling in this case – only if the Committee deems the German practice in non-compliance will the Court see any way to interpret the EEA (here the term "*enable* any person… to become a member") in an Aarhus consistent way – not set the law aside as it would have to do with WWF.

Lastly, the remote possibility of this issue being referred by a German Court to the European Court of Justice does not constitute a domestic remedy. Yes, the issue has once been dealt with by the ECJ in the cited Swedish case cited by the Party concerned. But the ECJ itself has ruled that the preliminary ruling procedure is not a legal remedy[31] and this was confirmed by this Committee when stating that the system of preliminary ruling does not in itself meet the requirements of access to justice in Article 9 of the Convention.[32] No plaintiff in Germany has any meaningful and effective way of forcing a court of law to refer to the ECJ.

CONCLUSION:

Considering all of the above, we submit the Federal Republic of Germany is in noncompliance with articles Art. 3 para 4, Art. 9 para. 2 in conjunction with Art. 2 para. 5 and Art. 9 para. 3 in conjunction with Art 2.4 of the Convention and we respectfully ask this Committee to issue findings to that effect and appropriate recommendations.

I look forward to answering any questions you might have.

Dr. Roda Verheyen, 4th July 2018

---Annex ----

Environmental Appeals Act (as of 23rd August 2017) *Umweltrechtsbehelfsgesetz*, § 3 para. 1 (Recognition of Associations (Vereinigungen)

"Upon request, a native or foreign association will be granted the right to submit legal appeals in accordance with this law. The association (Vereinigung) shall be recognized if:

1. according to its bylaws, it predominantly, and not only temporarily, encourages the objectives of environmental protection,

2. it has existed for at least three years at the time of recognition and has been active as defined in number 1 during that period,

3. it guarantees proper performance of its duties; in particular for the adequate participation in permitting procedures; in determining this, the type and scope of its previous activity, its membership, and the capability of the association (Vereinigung) shall be taken into account

4. it promotes charitable purposes as defined in section 52 of the German Fiscal Code (Abgabenordnung); and

5. it allows any person who supports the objectives of the association (Vereinigung) to become a member; members shall be deemed to be persons who are given full voting rights in the general meeting of the Vereinigung upon joining; Vereinigungen at least-

[31] *SRL CILFIT — in liquidation — and 54 Others, Rome, v Ministry Of Health and Lanificio di Gavardo SPA, Milan*, Case 283/81, 6th October 1982.
[32] ECE/MP.PP/C.1/2011/4/Add.1, para 90.

three quarters of whom are legal persons may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfill this requirement."