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Reply to the comments of the Federal Republic of Germany

Reference: ACCC/C/2016/137

Name of Organization: WWF Germany (communicant)

Name of Party concerned: Federal Republic of Germany (FRG)

The communicant invites the Committee to take into consideration the following answers on the comments of the FRG. The numbering of the answers corresponds to the numbering of the comments of the FRG.

II. The communicant refers to No. VI. of the communication and adds the following: Concerning the pending action by Greenpeace e.V. against Germany at Halle Administrative Court¹ the legal situation of Greenpeace e.V. and the WWF is not comparable. Greenpeace e.V. is a registered association with memberships and special voting rights for some of its members. Hence for

¹ cf. p. 6/7, comments of the FRG.

Der WWF Deutschland ist Teil der internationalen Umweltschutzorganisation World Wide Fund For Nature (WWF).

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Greenpeace e.V. a request for recognition can be promising from a legal perspective because the wording of Section 3 para. 1 No. 5 Environmental Appeals Act (EAA) can be interpreted widely in that way that it is in accordance with the internal democratic structure of Greenpeace e.V.. The communicant however is constituted in the legal form of a foundation and can under no circumstances meet the requested criterion to “give full voting rights in the general meeting” of the “Vereinigung” (Section 3 para. 1 No. 5 EAA). Therefore a formal application for recognition must be rejected by the responsible authority and the courts because they have no capacity to interpret this provision *contra legem* (against the clear wording of the law).

III. 1./2.

To determine the limits of the Parties’ discretion in defining “requirements under national law”² the specific and unique role of recognized environmental organizations in Germany as the exclusive representatives of “the public” to protect the environment through access to justice must be taken into account. In Germany the importance of environmental organizations can not only be seen in their “greater ability to effectively exercise their rights under the Convention than individual members of the public.”³ But under the German national legal order recognized organizations are exclusively entitled to exercise most rights on access to justice guaranteed under the Convention.⁴ Only they can “enforce general interests which individuals may not assert in court.”⁵ Only they are entitled by the provisions of the EAA which is understood to transpose the provisions of Art. 9 para. 2 AC. And only they will be the representatives to enforce the provision of Art. 9 para. 3 AC in German law: With the “Draft Law aligning the Environmental Appeals Act and other provisions to stipulation of European and International Law”⁶ which is aiming to rectify the violation of the Convention found and adopted by Decision V/9h on the fifth Meeting of the Parties, the legislator is seeking to implement Art. 9 para. 3 AC as well only by extending standing for registered environmental organizations. No other members of “the public” as defined in Art. 2 para. 4 AC will be enabled through this amendment to enact the provisions of Art. 9 para. 2 and para. 3 AC in the German national legal order.⁷ Hence under German law the representative action for recognized environmental organizations is not a supplementary right of “the public” to exercise their rights under the Convention but the exclusive option.

Therefore in Germany the domestic requirements for the recognition of environmental organizations are directly restricting the access to justice in environmental matters guaranteed under the Convention. “The public (concerned)” as defined in Art. 2 No. 4 (and 5) AC is only represented by these recognized environmental organizations which meet all the criteria of Section 3 para. 1 No. 1 – 5 EAA.

² Art. 2. No. 5 of the Aarhus Convention (AC).

³ Findings on ACCC/C/2004/05, Section 16 (Turkmenistan).

⁴ c.f. communication, III. 7 d.

⁵ cf., p. 16, comments of the FRG.

⁶ Draft Law aligning the Environmental Appeals Act and other provisions to stipulation of European and International Law BR-Drs. 422/16 v. 12.08.16,:

<https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2016/0401-0500/0422-16.html> (20.01.2017).

⁷ e.g. to review the decisions on the acceptance of plans and programs that are subject to a strategic environmental impact assessment under national law (cf. Draft Law aligning the Environmental Appeals Act and other provisions to stipulation of European and International Law BR-Drs. 422/16 v. 12.08.16, p. 27 and 28.)



This specific role of environmental organizations sets a specific standard for review on the FRG's discretion to formulate national provisions on recognition: The discretion of the Parties in defining "requirements under national law"⁸ has to be read in conjunction with the principle that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".⁹ The Parties have to guarantee "access to justice in environmental matters in order to contribute to the protection of the right of every person (...) to live in an environment adequate to his or her well-being."¹⁰ As in Germany the effective judicial mechanisms guaranteed by the Convention to enforce the compliance of environmental law provisions are exclusively accessible for recognized environmental organizations, the discretion of the Party in defining the "requirements under national law"¹¹ must be limited in that way that the national requirements ensure for "the natural or legal person"¹² to be effectively represented by these recognized organizations. Hence an "appropriate recognition"¹³ is only provided when the recognition criteria do not prevent those organizations from being recognized that the public has chosen to represent them.

But currently due to Section 3 para. 1 No. 5 EAA the two biggest German environmental organizations that "the public" has chosen as "their association" – the communicant (more than 500.025.000 persons trust in the communicant to be their representative¹⁴ in environment matters) and Greenpeace Germany e.V.¹⁵ – are excluded from being recognized.

These members of the public are excluded from access to justice guaranteed under the Convention in two perspectives: Firstly they have no access to justice on all the environmental issues exclusively appointed to the recognized environmental organization by the legislator. And secondly the environmental organization which is their representative in environmental matters is excluded from access to justice as well.

Because de facto the requirements of Section 3 para. 1 EAA law only provide for organizations who have chosen the legal form of an registered association¹⁶ to be recognized "the public" can not be sufficiently represented: Even though a lot of German environmental organizations have been founded in this legal form it has to be emphasized that the communicant has chosen to be organized in a different legal form – that of a foundation – already in 1972. This means four years before the first recognition criteria under the Federal Conservation Act have first been established in Germany. And since then the legislative requirement of the democratic internal structure has been beyond the control of the communicant: It is legally not possible to reorganize

⁸ Art. 2. No. 5 AC.

⁹ Findings on communications: ACCC/C/2006/18 (Denmark) para. 30 and ACCC/C/2011/58 (Bulgaria) para. 52.

¹⁰ Art. 1 AC.

¹¹ Art. 2 No. 5 AC.

¹² Art. 2 No. 5 AC.

¹³ Art. 3 para. 4 AC.

¹⁴ Jahresbericht WWF Deutschland 2015/2016, p. 61

¹⁵ With 580.000 supporting members.

¹⁶ Until now all recognized environmental organizations (Cf. Attachment 2, communication) are organized in the legal form of an association – which is true as well for the Aqua Viva Rheinaubund, which is organized in the legal form of an association under Section 60 of the Swiss Civil Code (Cf. <http://www.aquaviva.ch/ueber-uns/statuten> (20.01.2017)).



an existing foundation under a different legal form. And a support association could in no way represent the communicant. It would be a different and independent legal organization.¹⁷

III. 3./4.

The term “Vereinigungen” in Section 3 para. 1 EAA covers different environmental organizations regardless of their legal form on a first view. But in combination with the further five recognition criteria laid down in Section 3 para. 1 No. 1 – 5EAA¹⁸ de facto all environmental organizations not organized in the legal form of registered associations or cooperative societies are excluded, as well as organizations which apply a different model of internal organization.¹⁹ And the impossibility for foundations to be recognized is confirmed by the FRG.²⁰ This is especially problematic because in Germany organizations are generally completely free “to select the legal form which is legally most suitable for their organization.”²¹ And it must be stressed that the choice of the legal form of an organization does not allow at all to judge on the organizations suitability to engage in common tasks as e.g. the protection of the environment nor to represent the public properly. In Germany the right to select the legal form of an organization is protected under the German Constitution.²² Because different legal forms serve best for different purposes. The legal form of a (private-non-profit) foundation has the same long tradition in playing an important role to support public interests in a democratic society as those of a registered association.²³ Private non-profit organizations are traditionally understood to guarantee best that private initiatives which support common tasks are permanently established. They serve a big variety of community tasks and are the most common and efficient legal instrument to ensure that the assets transferred to this legal entity will be permanently used for the foundation goal.²⁴ The legal form of a registered organization in comparison can be established easier because no assets to constitute the foundation are needed.

Apart from that both in fact and law there do exist a lot of overlaps between these legal forms:²⁵ E.g. like in other environmental organizations the annual work of the communicant is financed by its promotional members to a high degree. The income of the foundations’ assets plays a minor role in the budget plan of the communicant. Currently 45 % of the annual budget of the communicant is provided by the membership fees.²⁶

As explained in the communication the WWF Germany e.V. was first constituted in the legal form of a registered association in 1963.²⁷ But the members of this registered association have decided in 1972 that the legal form of a foundation would better serve their common goal to permanently establish an organization to support the environment. As pointed out above at this time no recognition criteria which might have been taken into consideration have existed at all.

¹⁷ Cf. below III.3./4.

¹⁸ Cf. P. 5, comments of the FRG.

¹⁹ Cf. III. 6, communication.

²⁰ Cf. p. 25, comments of the FRG.

²¹ Cf. p. 13, comments of the FRG.

²² v. Campenhausen, in: Seifart/v. Campenhausen, Stiftungsrechts-Handbuch, 3. Aufl. (2009), S. 41 ff.

²³ Cf. v. Campenhausen, in: Seifart/v. Campenhausen, Stiftungsrechts-Handbuch, 3. Aufl. (2009), § 5 Rn. 1 ff.

²⁴ Cf. Reuter, in Münchner Kommentar, Bürgerliches Gesetzbuch, Bd. 1, 3. Aufl., S. 637.

²⁵ Cf. Reuter, in Münchner Kommentar, Bürgerliches Gesetzbuch, Bd. 1, 3. Aufl., S. 638.

²⁶ Jahresbericht WWF Deutschland 2015/2016, p. 62

²⁷ Cf., communication, III.7.



Since its foundation the communicant has indisputably been pursuing purposes which do serve environmental protection under this legal form. The change of the legal form has had no influence on the communicants work as an important representative for the protection of the environment. The communicant currently has a permanent staff of 247 and is permanently supported by 500.025 promotional members. These natural persons trust the communicant with their representation in environmental matters and have chosen the communicant as “their association” in the sense of Art. 2 No. 5 AC. Moreover their opinion founds the basis for the work of the communicant – e.g. via social media channels their opinion is recognized constantly and it has always been an integral part of the will-formation of the communicant. Moreover the communicant is following strict democratic standards in his internal organization: E.g. all the members of the foundation council which is constantly examining that the foundation goal is ideally implemented are elected for a maximum of two election periods.

The communicant is part of the worldwide WWF network which represents 30 national organizations which are operating independently with separate managements. More than 5.000.000 people are supporting this network which has 90 offices in more than 40 countries. And currently employees of the WWF network are conducting 2000 different projects to protect the environment. The various WWF country organizations are constituted in different legal forms but all share the same ideationally goal: The protection of the environment.

A representative survey of the communicant with other European WWF organizations has shown that other member states to the Convention do not restrict access to justice in environmental matters for these partner organizations – no matter in which legal form they are constituted under domestic law: For example the Swedish²⁸ and Swiss²⁹ WWF is organized in the legal form of a foundation. In Spain or Italy the WWF is organized in the legal form of associations. All of them have standing in environmental matters under the domestic law.

Moreover in other member states to the Convention the criteria to bring actions in environmental matters is either not limited to “recognized organizations” at all³⁰ or in case of a mandatory recognition the criteria to be recognized are less strict than in Germany:³¹ E.g. in Poland the recognition criteria for environmental organizations explicitly refer to foundations as a possible legal form to be registered.³² To the knowledge of the communicant in no other European Country an “internal democratic structure” of environmental organizations is mandatory to exercise the rights on access to justice guaranteed under the Convention.

And this requirement can no longer be justified with the German tradition in administrative law: Before Germanys ratification of the Convention the representative action of environmental organizations under the Nature Conservation Act was a special exemption to the traditionally restrictive “subjective-rights-doctrine” under German administrative law which generally granted access to justice in environmental matters in a very limited manner. With the adoption of the Aarhus Convention the role of these environmental organizations has changed. They are now the exclusive representatives of the general public to exercise the rights of Art. 9.2 and 9.3 AC.

²⁸ C.f. <http://www.wwf.se/wwfs-arbete/om-wwf/1122807-om-wwf> (20.01.2017).

²⁹ C.f. <https://www.wwf.ch/de/ueberuns/organisation/portraet/beschwerderecht/> (20.01.2017).

³⁰ E.g. England, Scotland, Wales, France, Sweden, Italy, Czech Republic.

³¹ E.g. Switzerland, Poland, Netherlands.

³² E.g. in Poland in Art. 3 para. 1 of the national EIA Act



The representative action of registered environmental organizations now serves to implement the provisions under Art. 9 AC.

And the recognition requirement of an “internal democratic structure” is not relating to the definition for environmental organizations under the Convention. As the Implementation Guide explains the focus for the determination whether an organization serves the interests of environmental protection “can be ascertained in a variety of ways, such as through its charter, by-laws or activities. “Environmental protection” can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3.”³³

For this purpose the requirements of Section 3 para.1 No 1-4 EAA are completely sufficient. They totally ensure that only organizations which serve the public interest of environmental protection constantly and without any improper influence can be registered. The communicant indisputably fulfills all these other four recognition criteria: According to his bylaws he ideationally encourages the objectives of environmental protection;³⁴ he has existed for more than three years;³⁵ he has constantly proven that he can guarantee a proper performance of its duties;³⁶ and he has pursued public benefit purposes as defined in Section 2 of the German Fiscal Code since his foundation.³⁷ Moreover in contrast to the comments of the FRG especially due to his legal form which legally binds him to only serve the foundations’ goal to serve the environment he is prevented permanently by the law from “subsequently pursuing purposes which do not serve environmental protection.”³⁸

The recognition criteria of Section 3 para. 1 No. 5 EAA moreover is overly burdensome because it is entirely beyond the control of the communicant. The communicant was founded before any such recognition criteria existed. And the law does not allow for a reorganization of a foundation in a different legal form. The dissolution of a foundation is restricted to special circumstances as e.g. the complete fulfilment of the foundations goal.³⁹ And in fact a reorganization of a legal entity with more than 247 employees and 475.000 members would be absolutely disproportional and could endanger the existing highly professional performance.

Concerning a “support association” the communicant sees again both in law and fact no conceivable option for such circumvention: In law of course it is always possible for anyone in Germany to establish a new registered association. However such a new association could not conduct any actions of the communicant. Nor could it represent him in fact or legally. It is impossible to incorporate a registered association into an existing foundation. So this new legal entity could under no circumstance become a part of the communicant itself. Under no circumstances could it represent the public that has chosen the communicant to be their association. It would be a completely independent new association.

And in fact it is especially crucial for the communicants’ self-conception of integrity to represent the public that has trusted him in environmental matters himself.

³³ The Aarhus Convention – An Implementation Guide, 2nd edition, 2014, p. 57/58.

³⁴ Section 3 para. 1 No. 1 EAA.

³⁵ Section 3 para. 1 No. 2 EAA.

³⁶ Section 3 para. 2 No. 3 EAA.

³⁷ Section 3 para. 1 No. 4 EAA.

³⁸ Cf. p. 16, comments of the FRG.

³⁹ Cf. Hof, in: Seifart/v. Camphausen, Stiftungsrecht Handbuch, 3. Aufl., München 2009, S. 395.



III.5.

The communicant wants to emphasize again that environmental organizations that are recognized in one of the nine neighbouring states and do not fulfil the criterion of the “democratic internal structure” will have no possibility to represent the public of this state in court under German law.

III.6.

The communicant invites the committee to take into consideration that organizations that are active in the representative action in other fields of law relating to human rights do not need to meet the requirement of a democratic internal structure.

III.7.

The Communicant once again wants to highlight that the legal amendments concerning the requirements for recognition made it legally impossible to interpret the law widely in a manner that foundations can be recognized as environmental organizations. The criterion of a membership that “is open to anyone who supports the association’s objectives”⁴⁰ could have been met by the communicant.

Berlin, 27 January 2017

Yours sincerely,

Christoph Heinrich

⁴⁰ Cf. p. 16, comments of the FRG.