

Rechtsanwälte Günther

Partnerschaft

Rechtsanwälte Günther • Postfach 130473 • 20104 Hamburg

United Nations Economic Commission for Europe
Palais des Nations
Aarhus Convention
Compliance Committee
CH-1211 Geneva 10

Fiona Marshall <Fiona.Marshall@unece.org>

Michael Günther *
Hans-Gerd Heidel *¹
Dr. Ulrich Wollenteit *²
Martin Hack LL.M. (Stockholm) *²
Clara Goldmann LL.M. (Sydney) *
Dr. Michéle John *
Dr. Dirk Legler LL.M. (Cape Town) *
Dr. Roda Verheyen LL.M. (London) *
Dr. Davina Bruhn
Jenny Kortländer LL.M. (Brisbane)

¹ Fachanwalt für Familienrecht

² Fachanwalt für Verwaltungsrecht

* Partner der Partnerschaft
AG Hamburg PR 582

Mittelweg 150
20148 Hamburg
Tel.: 040-278494-0
Fax: 040-278494-99
www.rae-guenther.de

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14/0447 + 16/0161

Mitarbeiterin: Jule Drzewiecki

Durchwahl: 040-278494-11

Email: drzewiecki@rae-guenther.de

**ACCC/C/2016/137 - WWF Germany –
regarding the compliance of the Federal Republic of Germany with Art. 2
Abs. 5, Art. 3 Abs. 4 und Art. 9 Abs. 2 of the Convention**

Submission by Greenpeace Germany,
Greenpeace e.V., represented by its executive director Roland Hipp,
Hongkongstr. 10, D - 20457 Hamburg, www.greenpeace.de

with regard to:

- **WWF's communication of 10 February 2016**
- **Comments of the Party concerned (Germany) of 3rd January 2017**
- **WWF's comments to these of 27 January 2017**

on behalf of Greenpeace Germany I invite the Committee to take into consideration the following facts and issues.

In case the Committee requires a power of attorney, this can be provided.

Buslinie 109, Haltestelle Böttgerstraße • Fern- und S-Bahnhof Dammtor • Parkhaus Brodersweg

Hamburger Sparkasse
IBAN DE84 2005 0550 1022 2503 83
BIC HASPDEHHXXX

Commerzbank AG
IBAN DE22 2008 0000 0400 0262 00
BIC DRESDEFF200

GLS Bank
IBAN DE61 4306 0967 2033 2109 00
BIC GENODEM1GLS

Greenpeace Germany is interested in participating in any hearings scheduled by the Committee on in this case.

1.

Greenpeace Germany is one of the largest environmental organizations in Germany. Greenpeace was founded in Germany in 1980 (i.e. 26 years before the entry into force of the German Environmental Appeals Act) and currently operates under the statute of association of 31.01.2012 which contains the following aim¹:

“The aim of the association as active member of the global organisation, is to assert and make public any problems relating to the environment, in particular those of global origin, and to prevent any negative impacts on natural resources as the basis for human beings, animals and plants; in addition Greenpeace represents the interests of consumers.”

Greenpeace Germany has a staff of 230 and works with more than 5.000 volunteers who are organized in over 100 local groups. Over 580.000 members of the German public support Greenpeace as supporting members (“Fördermitglieder”).

Greenpeace Germany forms part of the global network of Greenpeace groups with national and regional offices in 49 countries, all of which are incorporated under national rules, mostly also as charitable organisations.

2.

Greenpeace Germany has been incorporated as a “eingetragener Verein, e.V.” (registered association) since 1980. As such it has also been legally registered under Germany’s special rules for (charitable) associations. Together, these rules are contained in the Civil Law Code (Bürgerliches Gesetzbuch), the Code on Association (Vereinsgesetz) and, with respect to being able to operate under a favorable tax treatment, the German Fiscal Code (Abgabenordnung).

To receive recognition as a charitable organization (“gemeinnützig”), the Fiscal Code prescribes that an organization must fulfill certain requirements, in particular the organization must operate with strictly charitable and public-benefitting aims (i.e. social, religious or environmental). This is in fact one of the preconditions for acceptance under § 3 EAA: the applicant must “promote public-benefit purposes as defined in section 52 of the German Fiscal Code” (see also p. 15 of the response of the Party concerned of 3rd January 2016)

¹ „Zweck des Vereins ist es, als international tätige ökologische Organisation die Probleme der Umwelt, insbesondere die globalen, bewusst zu machen und die Beeinträchtigung oder Zerstörung der natürlichen Lebensgrundlagen von Menschen, Tieren und Pflanzen zu verhindern; darüber hinaus nimmt Greenpeace die Interessen der Verbraucher wahr.“

As any association, Greenpeace Germany is governed by a voting assembly which consists of members, ¼ of which are directly elected from the group of members actively engaged in volunteering for local groups. The voting assembly elects the governing board. There has been no argument by the German authorities that Greenpeace is not a “proper” association under German law for the entire time it has been operating in Germany, and there is no quarrel with the German Government about the fact that it promotes environmental and purely public benefit purposes in the sense of § 52 of the Fiscal Code.

In fact, the German constitutional court (Bundesverfassungsgericht) has recently found that Greenpeace is a valuable contributor to the scientific debate about environmental risk. In a key judgement about the legality of the law on the phasing out of nuclear energy, Greenpeace is recognized by the Court as “sachkundiger Dritter”² (informed and competent third Party) and facts and figures provided by Greenpeace used to justify the nuclear phase out decision.

3.

Greenpeace Germany has applied to be recognized under the German Environmental Appeals Act (EAA) but this has been rejected – solely due to § 3 para. 1 Nr. 5 EAA, which is the provision at the centre of this case before the Committee.

The application for recognition under § 3 EAA was launched by Greenpeace Germany on 22.04.2015, and rejected by the Environmental Protection Agency (Umweltbundesamt, UBA) on 01.03.2016. The administrative appeal by Greenpeace (05.04.2016) was rejected again on 01.08.2016. The legal challenge / judicial review of this decision was registered with the Administrative Court of Halle on 01.09.2016. The case is pending.

The application for recognition is possible because Greenpeace Germany, as set out above, actually has *members* in the sense of § 3 para. 1 Nr. 5 EAA. WWF as a foundation does not have members, as the Party concerned notes itself notes on p.3 of its comments of 3rd January. For WWF it is therefore legally impossible or at least completely futile to apply for recognition. Due to the German constitution, neither the authority nor the court will be able to grant recognition against the express wording in the law itself (Art 20 Basic Law, Grundgesetz).

The reasons why there are *de facto* no legal remedies open to WWF in Germany are set out by the Communicant in its response of 27th January 2017, and

² Judgement of 6th Dezember 2016, 1 BvR 2821/11 / 1 BvR 321/12 / 1 BvR 1456/12, Rdnr. 326.

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Greenpeace Germany contends with those. The possibilities cited by the Party concerned to exhaust legal remedies are purely theoretical.

For Greenpeace, it is arguable that the *interpretation* of § 3 para. 1 Nr. 5 EAA should be such as to allow Greenpeace to be recognized. This is not the case for a foundation with no formal members at all, such as WWF.

Therefore, in our view, the communication is admissible.

4.

In detail, Greenpeace's dispute with regard to § 3 para.1 Nr. 5 EAA concerns the following:

Greenpeace Germany fulfils the first four criteria of § 3 para 1 EAA. This is undisputed. The reason for rejecting the recognition of Greenpeace Germany is only § 3 para. 1 Nr. 5 EAA, and is justified by the German Government (here: The Environment Agency – UBA) as follows:

While Greenpeace is a membership organization and thus fulfils the criterion of having members as such, it is argued that it does not have an organizational structure that allows any person who supports the objectives of the organization to automatically become a member of it and to have full voting right in the general meeting of the organization, without any further requirements attached to this right.

This “full” internal democratic structure, it is argued, is the requirement set out in § 3 para. 1 Nr. 5 EAA which stipulates that the applicant must:

“.. enable³ any person who supports the objectives of the association to become a member; members are persons who are given full voting rights in the general meeting of the association upon joining; if at least three quarters of its members are legal persons the association may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfil this requirement.”

It is true that not every supporting member is automatically afforded a voting right in the general meeting of Greenpeace Germany, but any supporter can acquire such right in the general assembly by becoming an active member in one of the over 100 local groups.

Yet, this “restriction” to affording voting rights – which is fully in line with the legal framework for charitable associations in Germany otherwise – is rea-

³ The translation provided by the Party concerned on p. 5 of its response of 3rd January 2017 is incorrect. The phrase contains the German word “ermöglicht” (enables) and not the word “erlaubt” (allows).

son enough for the German administration to deny recognition under § 3 EAA and thus deny a lawfully and professionally operating environmental association representing over half a million citizens in Germany access to administrative and judicial procedures.

Greenpeace Germany has argued that this “criterion of internal democracy” is not in line with the Aarhus Convention, and at the very least the term “enable” must be interpreted broadly (this is possible while the term “member” is a de-facto absolute limitation for the WWF).

Without repeating the legal argument set out by the WWF in its response of February 2017, our view is supported by the following general arguments:

- There is no basis in the Aarhus Convention to restrict standing to organizations or groups on the basis of democratic requirements, given that the original right is afforded to the public which must be entitled to freely chose its associations, organizations or groups”. Some may chose organizations such as Friends of the Earth Germany (which automatically gives full voting right to members) and some chose Greenpeace. The public’s rights to choose a representation may only be restricted if it is necessary, which it is not because:
- The criteria 1-4 of § 3 para 1 EAA ensure fully and sufficiently that only legitimate groups that actually work on environmental issues and for the public benefit will gain standing. In particular, only charitable groups will be recognized, and the test applied under § 52 of the Fiscal Code is rigid enough to ensure that illegitimate groups are excluded.
- The over half a million supporting members of Greenpeace are the public in the sense of Art 2.4 They, together with the rest of the general public in Germany, have de facto no standing for 99% of decisions taken by Government, not now and not under the revised EAA. Only the recognized environmental associations under the EAA can sue in court regardless of subjective rights of the individual. The Committee has been subjected to discussions of § 42 para. 2 of the Administrative Code (VwGO) before. This implementation of the Aarhus Convention is in itself a violation of the Aarhus Convention. But – assuming this legislative decision is admissible, the Party concerned 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 restrict access of its groups and organisations.

- Moreover, the Committee's draft findings ACCC/C/2008/32 (EU) – part II. in particular paras. 85-86 suggest that the restriction of access to court to (certain) groups actually infringes Art. 9. para 3 of the Convention. This

“requires that “members of the public” must to be given access to administrative or judicial procedures. The term “members of the public” in the Convention includes NGOs, but is not limited to NGOs. It follows that the Aarhus Regulation fails to correctly implement article 9, paragraph 3, in this respect (see findings on communication ACCC/C/2006/18 (Denmark), paras.30-31). “

This clearly supports the opinion that a member State may not restrict the public's rights as well as the rights of their associations and groups.

5.

Lastly, the argument made by the German Government that the WWF should be able to create a “*Förderverein*” and thus a different legal personality to create an association that could be recognized under the EAA (p. 15 of the response of 3rd January 2017) must be briefly commented on.

The Aarhus Convention is a human rights based instrument. There is absolutely no remedy in this suggestion for all the people in Germany who trust the WWF (or Greenpeace Germany) with their representation in environmental matters. It is the WWF and Greenpeace that actually work on and understand environmental issues, it is them that fulfill the other criteria of § 3 para. 1 – safe the one about “democratic structures”. It is them these members of the public trust.

A new association with membership and full voting rights can be founded without any problems but this new entity would **not** be recognized immediately under the EAA and probably not at all if it worked simply as a shell for other legal entities. It would also not automatically represent the same members of the public, which may or may not chose to become a member.

Similarly, it is not possible for the WWF to change back into a membership organization – this is set out in more detail in the response by WWF of 27th January 2017. Neither is it a simple matter for Greenpeace to changes its statutes, as is now argued by the Germany Government. These entities have existed well before the EAA and have justified reasons for their fashion of incorporation. It might be justified to ask whether the criterion of “democratic internal structures” may have been construed with them in mind to exclude them from the rights afforded by the EAA.

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On behalf of Greenpeace Germany, I would like to thank the committee for taking into consideration the arguments made above. Any further information, such as the legal briefs mentioned above can be provided immediately, if the Committee would consider these helpful. In the interest of efficiency, annexes have been omitted in this submission.

Kind regards

Rechtsanwältin – Attorney at Law
Dr. Roda Verheyen