

**Comments of the Federal Republic of Germany
on the communication from WWF Germany
to the Aarhus Convention Compliance Committee
dated 10 February 2016**

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Reference: ACCC/C/2016/137

On 16 February 2016, 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 WWF Germany (communicant), which was received by the Compliance Committee of the Aarhus Convention on 10 February 2016.

The communication alleges non-compliance by the Federal Republic of Germany with its international obligations under Articles 2 No. 5, Article 3 para. 4, Article 3 para. 6, as well as Article 9 para. 2, of the Aarhus Convention in connection with the German provisions for the recognition of environmental organizations, requiring amongst other things that the organization allow all interested individuals to become members and to have full voting rights in the general meeting.

At its 52nd meeting on 11 March 2016, the Compliance Committee determined, on a preliminary basis, the communication 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 invited the Federal Republic of Germany to submit any written explanations or statements by 3 January 2017 at the latest. 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 and the legal foundations (in I), on the admissibility of the communication (in II) and on the individual allegations of the communicant (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.

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I. On the facts of the matter and the legal foundations

The communicant is an environmental organization which is organized as a foundation under civil law with legal capacity and domiciled in Berlin. From the year of its establishment in 1963 until 1973, the communicant operated as a registered association (*eingetragener Verein*) under the name “*Verein zur Förderung des World Wildlife Fund*” (Association to Promote the World Wildlife Fund). The association was transformed into a foundation in 1973; the foundation has the name “WWF Germany”.

Under German law, a foundation is an organization established by one or more founders which is to make use of the assets devoted to the foundation in order to fulfill, in the long term, a purpose established by the founder. To put it differently, a foundation is a legally-independent set of assets with legal personality. An essential characteristic of a foundation is that it does not have any members. The only body of the foundation that is prescribed by law is the Board (section 86 in conjunction with section 26 subsection (1) of the German Civil Code [*Bürgerliches Gesetzbuch*]¹), which is the legal representative of the foundation. Moreover, the foundation’s bylaws can provide for a supervisory body. The communicant has also established a Foundation Council in addition to the Board, consisting of between seven and eleven members, cf. section 5 of the WWF’s bylaws². Individuals can only support the work of a foundation by making financial donations to it. The communicant organizes the

¹ English version at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

² Bylaws of WWF Germany, <http://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/WWF-Deutschland-Satzung.pdf>.

donations from private individuals via a construction to which it refers as “promotional membership” (*Fördermitgliedschaft*). This term is to be understood non-technically since, as explained, foundations do not have any members as defined by the law. The bylaws consequently also do not contain any provisions on this “membership”. This “promotional membership” currently costs at least 48.00 EUR per year. “Promotional members” receive a WWF badge with a panda bear, the WWF’s quarterly magazine and a book containing vouchers with exclusive offers from bonus partners. “Promotional members”, finally, can take part in excursions to project areas.³ This does not entail involving them in the sense of participation within the foundation.

The Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz – UmwRG*) came into force on 15 December 2006⁴. The Act serves amongst other things to transpose the stipulations contained in Directive 2003/35/EC of the European Community (today: European Union), which in particular had transposed the stipulations contained in Article 9 paras. 2, 4 and 5 of the Aarhus Convention into Community law. The directive obliges the Member States to supplement or create possibilities for legal protection, in particular also for environmental organizations, in projects related to the EIA Directive and the IPPC Directive (today: Industrial Emissions Directive). The major reform contained in the Environmental Appeals Act consisted of the expanded introduction of a representative action under environmental law for specific approval decisions under environmental law. These provisions are orientated towards the representative action under nature conservation law, which had been introduced in the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) in 2002, and were also adjusted in line with the stipulations of the Aarhus Convention.

Since the Act came into force, section 3 of the Environmental Appeals Act has regulated the recognition procedure applying to “*Vereinigungen*”. Recognition is a vital prerequisite in order to be able to lodge appeals in accordance with the Environmental Appeals Act. “*Vereinigungen*” are entitled to be awarded recognition if they satisfy the prerequisites in

³ Cf. <https://www.wwf.de/spenden-helfen/wwf-mitglied/>.

⁴ Act Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC – Environmental Appeals Act (*Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG – Umwelt-Rechtsbehelfsgesetz – UmwRG*) in the version of the promulgation of 8 April 2013, most recently amended by Article 1 of the Act Amending the Environmental Appeals Act in Transposition of the Judgment of the European Court of Justice of 7 November 2013 in Case C-72/12 of 20 November 2015 (*Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes zur Umsetzung des Urteils des Europäischen Gerichtshofs vom 7. November 2013 in der Rechtssache C-72/12 vom 20.11.2015*) (Federal Law Gazette Part I p. 2069).

accordance with section 3 subsection (1), sentence 2, of the Environmental Appeals Act. The provision reads as follows:

The Vereinigung shall be recognized if:

- 1. according to its bylaws, it ideationally, 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 offers guarantees of proper performance of its duties; the type and scope of its previous activity, its membership, and the effectiveness of the Vereinigung shall be taken into account in that regard,*
- 4. it promotes public-benefit purposes as defined in section 52 of the German Fiscal Code (Abgabenordnung); and*
- 5. it allows any person who supports the objectives of the 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-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.*

The communicant has not yet submitted a request for recognition as an environmental organization in accordance with section 3 of the Environmental Appeals Act.

II. On the admissibility of the communication

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

As the Compliance Committee found in Nos. 1 to 5 of its preliminary determination of admissibility of 11 March 2016, the admissibility of a communication is to be judged in accordance with paragraphs 20 and 21 of the annex to decision I/7. Whilst No. 20 of the annex to decision I/7 refers to the content of the communication, in accordance with paragraph 21, furthermore, any available domestic remedy should be taken into account

unless the application of the remedy would unreasonably prolong the proceedings, or obviously does not provide an effective and sufficient means of redress for the communicant. Even if failure to make use of available domestic remedies does not automatically lead to the inadmissibility of a communication, this question is certainly to be considered when determining the admissibility of a communication.

The Federal Republic of Germany stated on pages 1 to 3 of its consideration of the preliminary admissibility of 1 March 2016 that there are effective domestic remedies available to the communicant that can bring effective and sufficient means of redress.

In its preliminary determination of admissibility of 11 March 2016, the Compliance Committee nonetheless did not even touch on the question of the exhaustion of the domestic remedies.

The Federal Republic of Germany emphasizes that the communicant has never submitted a request for recognition to the competent authority. In case of the rejection of the recognition request, the communicant could assert the incompatibility of the impugned provision contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act with national law, as well as with European Union and international law. The Federal Republic of Germany refers to the remarks in this regard contained in its statement of 1 March 2016 in other respects.

The existence of effective domestic remedies in Germany is moreover shown by way of example by the fact that an action by Greenpeace e.V. against the Federal Republic of Germany has been pending at Halle Administrative Court since September 2016.⁵ Greenpeace e.V. unsuccessfully requested recognition in accordance with section 3 of the Environmental Appeals Act from the Federal Environment Agency. After an objection that was lodged had also been unsuccessful, Greenpeace e.V. filed a court action against the rejection notice. The Federal Environment Agency rejected the request because Greenpeace e.V. does not satisfy the prerequisite of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act. Whilst Greenpeace e.V. is a registered association (*eingetragener Verein*), and the communicant is a foundation, the *Vereinigungen* however have in common that they do not satisfy the precondition of the “democratic internal structure” provided for in section 3

⁵ Greenpeace e.V. against Federal Republic of Germany, pending at Halle Administrative Court since 2 September 2016 (ref.: 2 A 583/16 HAL), served on the respondent on 17 October 2016

subsection (1), sentence 2, No. 5 of the Environmental Appeals Act. The plaintiff bases its argumentation amongst other things on an interpretation of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act in conformity with European Union law, as well as on Article 9 para. 3 of the Aarhus Convention. The Federal Government does **not** share the legal view of the plaintiff. This case however shows that German law provides for effective remedies that can bring effective and sufficient means of redress for plaintiffs, including with regard to their arguments under European Union and international law.

The Federal Republic of Germany considers that the Compliance Committee should take these aspects into account when assessing admissibility.

III. Comments on the individual allegations of the communicant in the communication of 10 February 2016

The communication of 10 February 2016 alleges that the Federal Republic of Germany violated various provisions of the Aarhus Convention. The communicant relies here on Article 2 No. 5, Article 3 para. 4, Article 3 para. 6 and Article 9 para. 2 of the Aarhus Convention. The communicant's grounds may be summarized as follows, giving rise in its view to a violation of international law:

- *Vereinigungen* would have to be a legal person, or at least have legal capacity, in order to be amenable to recognition since only then do they promote public-benefit purposes within the meaning of section 3 subsection (1), sentence 2, No. 4 of the Environmental Appeals Act,
- the requirement for recognition of a “democratic internal structure” was said to be too restrictive,
- the requirements for recognition were said to have a discriminatory effect since the legal structure of the representative action under environmental law was allegedly more restrictive than the German provisions on other types of representative action in the law on equality for the disabled and consumer protection,
- the requirements for recognition were said to have a discriminatory effect on foreign environmental organizations since their recognition by another Party to the Convention did not apply under German law or did not lead to a right to recognition,
- the requirements for recognition are said to have been tightened in 2002, 2006 and 2009.

1. On recognition practice in the Federal Republic of Germany

In addition to individual plaintiffs, environmental organizations which satisfy the requirements for recognition in accordance with section 3 of the Environmental Appeals Act may also exercise their rights to file suit derived from Article 9 para. 2 of the Aarhus Convention. Unlike individual plaintiffs, environmental organizations do not have to assert that their own rights have been violated by the impugned infringement. The communicant is mistaken in stating that environmental organizations are “virtually the only part of the public” which has the right to bring proceedings against infringements of environmental law (cf. communication, No. 7.d). Individual plaintiffs may bring proceedings against any act by a

public authority which violates their own rights. This is safeguarded by Article 19 para. 4 of the Basic Law (*Grundgesetz*)⁶. The figures on actions in the environmental field lodged with the administrative courts also confirm in factual terms that large numbers of individual plaintiffs make use of their right to legal protection.⁷

Environmental organizations are recognised in accordance with section 3 of the Environmental Appeals Act. In contradistinction to the communicant's statement, there is no *Land* law which derogates from this or is more restrictive, including not in Saxony or Bavaria; the source from 2010 cited by the communicant in No. 16 of its communication depicts a law which has been long since obsolete.

According to the information provided by the Federal Environmental Agency and the *Länder*, there were a total of 305 environmental or nature conservation *Vereinigungen* in Germany at the time of the communication which were recognised by the Federal Environment Agency (109), or prior to 2006 by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, which was competent at that time, or the competent authorities in the *Länder* in accordance with sections 3, 5 para. 2 of the Environmental Appeals Act (196)⁸; the list presented by the communicant was partly incomplete or incorrect. The number of recognised environmental organizations has increased once more in the meantime: The Federal Environment Agency has recognised two more *Vereinigungen*, the *Länder* have recognized six⁹ more *Vereinigungen*. In contradistinction to the view of the communicant (cf. Communication, No. 2.), not only registered associations are recognised, but also organizations with other legal forms, such as Aqua Viva – Rheinaubund, a Swiss environmental organization.

The background to the large number of registered associations among the recognised environmental organizations is the fact that there has been a strong culture of associations in Germany for a long time. Both in German law and in practice, the registered association is the prototype of a combination of several people to pursue a common ideational purpose. Also in

⁶ English version at https://www.gesetze-in-the-internet.de/englisch_gg/index.html.

⁷ Cf. Federal Statistical Office, *Rechtspflege – Verwaltungsgerichte 2015* (28 November 2016), https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Verwaltungsgerichte2100240157004.pdf;jsessionid=DD9A1DD7ECE5310DDB54976FA31C784F.cae3?_blob=publicationFile.

⁸ Some of the *Vereinigungen* were recognized both by the federal and the *Länder* authorities to enable the *Vereinigungen* to exercise their rights under the Environmental Appeals Act, as well as certain rights under the Federal Nature Conservation Act (Bundesnaturschutzgesetz, BnatSchG).

⁹ One *Vereinigung* lost its recognition because the association disbanded.

environmental protection, the vast share of all environmental organizations are organized under the law on associations: A study on environmental organizations from 2015 observes that, until the mid-1990s, it “[was] virtually a matter of course to become established and organized as a registered association.”¹⁰ It was only later that distinctions arose in the selection of the legal form.

2. The stipulations of the Aarhus Convention on determining the “public concerned” in accordance with Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention

In accordance with Article 9 para. 2 of the Aarhus Convention, the Parties must ensure that “members of the public concerned” have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 of the Aarhus Convention, within the framework of the preconditions defined therein in greater detail.

(1) Article 2 No. 5 of the Aarhus Convention

Article 2 No. 5 of the Aarhus Convention defines the term “public concerned” as *“the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”*

The Aarhus Convention does not define what is meant by “meeting any requirements under national law”. The provision does not specify requirements, nor does it prohibit specific manifestations. The Implementation Guide to the Aarhus Convention, which is not binding, but which is nonetheless recognised as a guide for the interpretation of the provisions contained in the Aarhus Convention, has the following to say on this: *“The reference to ‘meeting any requirements under national law’ should not be read as leaving absolute discretion to Parties in defining requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide “appropriate recognition” for NGOs. (...) Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure*

¹⁰ Sperfeld/Zschiesche (UfU), Umweltverbände als relevante Akteure nachhaltiger Transformationsprozesse, April 2015, p. 31.

*that these requirements are **not overly burdensome or politically motivated**, and that each Party's legal framework **encourages the formation of NGOs and their constructive participation in public affairs**. Moreover, any requirements should be **consistent with the Convention's principles**, such as non-discrimination and the avoidance of technical and financial barriers. Within these limits, Parties **may impose requirements based on objective criteria that are not unnecessarily exclusionary**.*"¹¹.

The Implementation Guide goes on to cite a judgment of the European Court of Justice against Sweden¹². The judgment was handed down on the interpretation of the EIA Directive (at that time: directive 85/337/EEC), the provisions of which on access to justice and on the public concerned transpose Article 9 para. 2 of the Aarhus Convention into secondary European law. The ECJ found in this judgment that the Member States may require a minimum number of members for environmental organizations, but that this number may not be so high as to contravene the goals of the EIA Directive, particularly with regard to access to justice. In accordance with Swedish law, the minimum number of members was set at 2,000, and only two environmental associations were able to satisfy this prerequisite. The ECJ considers this provision to be too restrictive, and hence incompatible with the EIA Directive.

(2) Article 3 para. 4 of the Aarhus Convention and its relationship with Article 2 No. 5 of the Aarhus Convention

Article 3 of the Aarhus Convention is entitled "General provisions", and its para. 4 also contains a provision on recognition of and support to environmental organizations. It reads as follows: "*Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.*"

Presuming that environmental organizations take on particular significance in the implementation of the Aarhus Convention, Article 3 para. 4 of the Aarhus Convention largely obliges the Member States to create sufficient possibilities in their legal systems to establish environmental associations, organizations or groups, to promote their participation in public processes and to appropriately support them.¹³ Article 3 para. 4 of the Aarhus Convention as a matter of principle hence refers firstly to the structure of national law as such, which is to suitably support the establishment and participation of environmental organizations.¹⁴

¹¹ The Aarhus Convention – An Implementation Guide, 2nd edition, 2014, p. 58 [only emboldened here].

¹² Judgment of the ECJ of 15 October 2009 (*Djurgarden*), Case C-263/08.

¹³ The Aarhus Convention – An Implementation Guide, 2nd edition, 2014, p. 66.

¹⁴ Cf. on this also ACCC/C/2004/5 (Turkmenistan), Nos. 20 and 21: With regard to Article 3 para. 4 of the Aarhus Convention, this referred to the provisions contained in the law of Turkmenistan "on Public

Article 3 para. 4 of the Aarhus Convention furthermore enhances the provision contained in Article 2 No. 5 in the sense that the Parties are to ensure “appropriate recognition” of those environmental organizations which because of their status are not only “public”, but also “public concerned”.

(3) Preliminary conclusions: the standard for review

The Federal Republic of Germany finds that it follows from Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention that the States have discretion, albeit limited, when forming their national provisions on recognition. The limits are derived from the objectives of the Aarhus Convention, and from the special role which the Aarhus Convention allots to environmental organizations. The following criteria are material here:

- the requirements may not be overly burdensome or politically motivated,
- the requirements are consistent with the Convention’s principles, such as non-discrimination and avoidance of technical/financial barriers,
- the requirements must be objective and not unnecessarily exclusionary, and
- the national legal system encourages the formation of NGOs and their constructive participation in public affairs.

In the understanding of the Federal Republic of Germany, the communicant is not complaining about the last of these items. Insofar as the communicant is asserting a violation of Article 3 para. 4 of the Aarhus Convention, it exclusively relates it to the requirements for recognition of environmental organizations which it considers to be too restrictive to be able to assert the rights in accordance with Article 9 para. 2 of the Aarhus Convention, that is the question of “appropriate recognition”. By contrast, no violation of Article 3 para. 4 of the Aarhus Convention is alleged such that the Federal Republic of Germany was already failing to sufficiently encourage the establishment of environmental organizations or not giving them sufficient support in their activities. The Federal Republic of Germany would nonetheless like to point out that the establishment of environmental associations, organizations and groups, as well as their participation in public processes in harmony with Article 3 para. 4 of the Aarhus Convention, is supported: In the same way as all other parties to the combinations of associations, organizations and groups for a specific purpose, environmental associations, organizations and groups can be established freely and independently in Germany; they are

Associations”, that is to provisions addressing establishment, permitted activities and the requirement to be entered in a register. The ACCC found that there had been a violation of Article 3 para. 4 of the Aarhus Convention.

completely free here under German law to select the legal form which is legally most suitable for their organization. The Federal Republic of Germany also supports the activities of environmental organizations in a great many ways. In addition to tax relief for all organizations which are recognised as promoting public-benefit purposes in accordance with the provisions of the Fiscal Code, support for environmental and nature conservation organizations (including foundations) by granting subsidies for environmental and nature conservation projects by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety in cooperation with the Federal Environment Agency and the Federal Agency for Nature Conservation should be mentioned by way of example.

3. No violation by section 3 subsection (1), sentence 2, of the Environmental Appeals Act of the stipulations contained in the Aarhus Convention: definition of the term “*Vereinigung*”

In harmony with Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention, the Federal legislature has set out objective domestic requirements which an environmental organization must satisfy in order to be recognised, and hence to be able to assert its rights to file actions derived from Article 9 para. 2 of the Aarhus Convention. By establishing domestic requirements for the recognition of environmental organizations, the Federal Republic of Germany has established “requirements under national law” which are within the discretion granted by Article 2 No. 5 of the Aarhus Convention. In accordance with section 3 subsection (1) of the Environmental Appeals Act, all “*Vereinigungen*” can be recognised. The definition is extremely broad, encompassing **all environmental organizations, regardless of their degree of organization or of the legal form which they have selected under company law**. The term “*Vereinigung*” within the meaning of the Environmental Appeals Act covers both all *Vereinigungen* with legal capacity, as well as those without legal capacity, including citizens’ initiatives and foundations. In 2006, the Federal legislature deliberately selected the term “*Vereinigung*” when transposing the Aarhus Convention and the secondary European law which was passed with respect to it in order to guarantee that this umbrella term covers all “associations, organizations or groups” within the meaning of the Article 3 para. 4 of the Aarhus Convention.

The Federal Republic of Germany would like to emphasize once more that the communicant’s translation of the term “*Vereinigung*” as “association” (*Verein*) is not helpful for the purpose of these proceedings. A *Vereinigung* does **not** refer to an “association” (*Verein*) within the

meaning of the law on associations. In fact, according to a statement from the language service of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, there is no term in English able to satisfactorily render the comprehensive nature of the umbrella term “*Vereinigung*”.

The Federal Republic of Germany moreover presumes that by the broad formulation of the term “*Vereinigung*” within the meaning of the Environmental Appeals Act, which also includes foundations, it in fact goes beyond the requirements of the Aarhus Convention. Article 2 No. 5 of the Aarhus Convention, which defines the “public concerned”, is actually to be read in conjunction with Article 2 No. 4 of the Aarhus Convention. This provision defines the public to which Article 2 No. 5 of the Aarhus Convention refers. The Aarhus Convention understands the public to include “*one or more natural or legal persons, and, in accordance with national legislation or practice, **their** associations, organizations or groups*”¹⁵. The definition makes it clear that the Aarhus Convention presumes across the board that environmental organizations are combinations of persons. The French version makes it clearer still: “*Le terme ‘public’ désigne une ou plusieurs personnes physiques ou morales et, conformément à la législation ou à la coutume du pays, les associations, organisations ou groupes **constitués par ces personnes***.”¹⁶. Foundations are however not combinations of natural or legal persons. They are a collection of assets with legal independence, and in particular are not made up of persons. The German term “*Vereinigung*” within the meaning of the Environmental Appeals Act, which itself excludes foundations, therefore in fact goes beyond the requirements of the Aarhus Convention.

The communicant’s presumption is also inaccurate that it follows de facto from section 3 subsection (1), sentence 2, of the Environmental Appeals Act that only *Vereinigungen* with legal capacity, or indeed only legal persons, can be recognised (cf. communication, No. 7.a). The communicant submits that only *Vereinigungen* with legal capacity and legal persons could be recognised by the tax office as organizations under German law promoting public-benefit purposes, so that section 3 of the Environmental Appeals Act de facto imposed legal personality as a legal person, or certainly the legal capacity of *Vereinigungen*, as a requirement. This presumption is inaccurate in several respects. Firstly, *Vereinigungen* without legal capacity and those without their own legal personality can also be given the status of organizations pursuing public-benefit purposes by the tax office; neither the legal

¹⁵ Only emboldened here.

¹⁶ Only emboldened here.

capacity nor the legal personality of a *Vereinigung* constitutes a requirement for obtaining public-benefit status. However, the fact that section 3 subsection (1), sentence 2, No. 4 of the Environmental Appeals Act does not demand at all that a *Vereinigung* has been recognised by the tax office as promoting public-benefit purposes is more important still. The provision exclusively requires *Vereinigungen* to “*promote[s] public-benefit purposes as defined in section 52 of the German Fiscal Code*”. In accordance with section 52 subsection (1) of the Fiscal Code, a corporation promotes public-benefit purposes if “*its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects*”. Section 52 subsection (2) of the Fiscal Code contains a long list of possible public-benefit purposes, including the advancement of environmental protection, nature conservation, landscape management and the protection and preservation of historical monuments, the protection of animals, as well as of the concept of local heritage and traditions. A *Vereinigung* can substantiate this requirement by presenting the notice from the tax office, but is not obliged to do so. Substantiation can also be provided by presenting the bylaws or other authoritative documents proving the promotion of one of the purposes designated in section 52 subsection (2) of the Fiscal Code. This certainly also enables *Vereinigungen* without legal capacity, such as citizens’ initiatives, to prove that they promote public-benefit purposes.

The term “*Vereinigung*” is hence in compliance with the stipulations of Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention.

4. No violation by section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act against the stipulations of the Aarhus Convention: requirement of a “democratic internal structure”

In compliance with Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention, section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act requires a *Vereinigung* to have a “democratic internal structure”. The requirement of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act impugned by the communicant requires that the *Vereinigung*

5. *allow[s] any person who supports the objectives of the Vereinigung to become a member; members are persons who are given full voting rights in the general meeting of the Vereinigung upon joining; if at least three quarters of its members are legal*

persons the Vereinigung may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfill this requirement.

The provision stipulates that environmental organizations which wish to assert their particular rights to file an action as “advocates of the environment” in support of the public interest must have an organization with a democratic internal structure. This is the case if the *Vereinigung* grants access to all persons as a member of the *Vereinigung* and if this membership entails full voting rights in the general meeting. This requirement is also referred to as the “everyman principle”, the “principle of having a democratic internal structure” or “democratic internal structure stipulation”.

On the basis of the consideration that environmental organizations act as an intermediary between the public and the State in defending society’s environmental interests within state decision-making processes, and hence combat shortcomings in enforcement, the question has been discussed in Germany since the 1970s as to the degree to which the environmental organizations have the requisite legitimacy. Particularly the instrument of the representative action serves to enforce general interests which individuals may not assert in court. Such legitimacy has been denied for environmental organizations in the political debate in some cases. It will be demonstrated below, following on from a historical presentation of the criterion of having a “democratic internal structure” in German law, that the Federal legislature considers this criterion to ensure the legitimacy of environmental organizations as representatives of the interests of the general public interest that is necessary in a democracy. At the same time, the criterion serves to ensure that the environmental organization is actually pursuing environmental goals, and prevents such an organization from subsequently pursuing purposes which do not serve environmental protection once it has been recognised. The criterion of having a democratic internal structure strengthens the democratic state based on the rule of law, and is in harmony with the stipulations of the Aarhus Convention.

(1) The history of the provision contained in today’s section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act

The provisions contained in the Federal Nature Conservation Act were preceded by the representative action under environmental law in the Environmental Appeals Act. Since 1976, the Federal Nature Conservation Act had governed the participation mechanisms open to recognised nature conservation organizations in the administrative procedure under nature

conservation law, but this was restricted to registered associations at that time. In accordance with section 29 subsection (2), sentence 2, No. 5 of the Federal Nature Conservation Act, the requirements to be satisfied by nature conservation organizations for recognition included that “*membership*” to the association “*is open to anyone who supports the association’s objectives*”.¹⁷

The communicant’s view that this wording at that time opened up the possibility for associations not to grant full voting rights to all members (cf. communication, No. 7.c) is incorrect. The provision already stipulated at that time that only those associations could be recognised which granted full voting rights in the general meeting to each member. Lüneburg Higher Administrative Court found in a judgment in 1990: “An association which divides its members into two classes and does not grant voting rights in the general meeting to all members does not satisfy the “everyman principle” of section 29 subsection (2) No. 5 of the Federal Nature Conservation Act, and is consequently not amenable to recognition.”.¹⁸

In the course of the fundamental reform of federal nature conservation law, the legislature introduced in 2002 a representative action – first as an action to be lodged by associations (*Vereinsklage*) – at federal level in section 59 of the Federal Nature Conservation Act¹⁹. One of the requirements for the recognition of an association in accordance with section 58 subsection (1) No. 6 of the Federal Nature Conservation Act in turn was that “*membership*” of the association “*with full voting rights in the general meeting is open to anyone who supports the association’s objectives. The requirement stipulated in sentence 1 may be waived with regard to associations the members of which are exclusively legal entities insofar as the majority of these legal entities satisfies this requirement.*” The explanatory notes on the Act explain that this provision builds on section 29 of the old version of the Federal Nature Conservation Act, but at the same time makes it clear that “the ‘everyman principle’ is only satisfied if full voting rights in the association’s general meeting are open to any citizen who supports its nature conservation objectives. This is the only way in which the goal of

¹⁷ Federal Nature Conservation Act (*Gesetz über Natur und Landschaftspflege – Bundesnaturschutzgesetz*) of 20 December 1976 (Federal Law Gazette (*BGBI.*) Part I, pp. 3574 and 3580).

¹⁸ Lüneburg Higher Administrative Court, judgment of 8 March 1990 – 3 A 308/87, NVwZ 1990, 999 and 1000 et seq.

¹⁹ Federal Nature Conservation Act of 3 April 2002 (Federal Law Gazette Part I, p. 1192).

participating in the association, namely of enabling citizens to influence the projects listed in section 57 [of the Federal Nature Conservation Act] via the associations, can be achieved.”²⁰

When the Environmental Appeals Act was introduced in 2006, the legislature included this requirement almost word for word in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act, so that the provision initially read as follows: “*recognition shall be granted if membership of the Vereinigung with full voting rights in the general meeting is open to anyone who supports the Vereinigung’s objectives; the requirement stipulated in clause 1 may be waived with regard to Vereinigungen the members of which are exclusively legal entities insofar as the majority of these legal entities satisfies this requirement.*”

The provisions on recognition for nature conservation organizations contained in the Federal Nature Conservation Act, which had previously applied in parallel, were abolished in 2009, so that recognition has been exclusively in accordance with section 3 of the Environmental Appeals Act since that time. As a result, the provision contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act was most recently recast, and has henceforth existed in the version applicable today. As was revealed in the explanatory notes on the Act, the legislature considered it to be necessary to formulate the provision even more clearly, and to unambiguously define the term “member” such that “only those persons are members within the meaning of the Act who can actually contribute towards decisions in the *Vereinigung*. This corresponds to the principle of having a democratic internal structure. Memberships which do not grant voting rights, and hence do not enable members to influence the decision of the *Vereinigung* by casting a vote, do not fall within this principle. This makes it clear that the characteristic of being a member of a *Vereinigung* is contingent on the voting right, and is not founded on the designation in the bylaws. Persons to whom the bylaws refer as members, but who do not have a voting right, hence do not fall under the statutory definition of “member” (for instance supporting members with no voting right).”²¹

²⁰ Draft Act to Recast the Law on Nature Conservation and Landscape Management and Amending other Legal Provisions (*Entwurf eines Gesetzes zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege und zur Anpassung anderer Rechtsvorschriften – BNatSchGNeuregG*), Bundestag printed paper (BT-Drs.) 14/6378, p. 59.

²¹ Draft Act of the Federal Government to Recast the Law on Nature Conservation and Landscape Management (*Gesetzentwurf der Bundesregierung zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege*), Bundestag printed paper 16/12274, pp. 78 et seq.

(2) The rationale behind the provision contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act

The provision contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act ensures the legitimacy of environmental organizations which is necessary in a democratic state based on the rule of law to be able to assert and enforce the public interest in court as advocates of the environment. At the same time, this prevents improper influences and guarantees that the environmental organization is orientated towards interests of environmental protection.

The State has prime responsibility for ensuring society's public interest, which today more than ever includes the protection of the environment. The State does justice to this by creating environmental regulations and implementing them. In a democratic state based on the rule of law, state activity is however inseparably bound to the review of this action. This applies all the more if the State is at the same time a player in the enforcement of environmental law, such as in the implementation of infrastructure projects. The protection of collective assets can however frequently not be asserted in court by individuals. Ensuring the review of state activities which is required according to democratic theory within an appropriate framework is hence a matter for environmental organizations, as custodians of the general public interest in environmental matters.

The Federal Administrative Court for instance emphasizes in its case-law the special role played by nature conservation organizations, and has even gone so far as to refer to them as a "quasi administrative aid with no decision-making powers (*Verwaltungshelfer*)" whose job it is to contribute "their expertise under nature conservation law as a quasi administrative aid with no decision-making powers to the preparations for the authorities' decisions". This is said to counter enforcement shortcomings in nature conservation.²²

In a democratic state based on the rule of law, the representation of the general public interest in environmental matters by environmental organizations however gives rise to the question of the democratic legitimacy of the environment organizations. The characteristic of democratic legitimacy is the possibility for all citizens to participate in this task. Participation in an environmental organization is however only possible if all citizens can take part in carrying out the tasks of the environmental organization. This first of all requires the

²² Federal Administrative Court, judgment of 1 April 2015 – 4 C 6.14, No. 25 with further references.

possibility to become a member of this environmental organization, albeit this is merely a requirement for participation, and does not of itself constitute participation. Participation means democratic participation in the will-forming of the environmental organization. This is communicated by exercising full voting rights in a body of the environmental organization.

For this reason, the Federal Republic of Germany has always linked environmental organizations' custodian role to the requirement of having a democratic internal structure, and demanded that all citizens should be able to become members of this environmental organization and that they be provided with full voting rights in the general meeting. Thus, when the representative action under nature conservation law was introduced, Seelig/Gündling stated the following on the principle of the democratic internal structure: *"This ultimately raises a problem of legitimacy. The rights of participation [in the Federal Nature Conservation Act] relate not to legal constructs underpinned by a large number of passive members, but to associations in which it is guaranteed that each citizen can take an active part."*²³

The Federal Republic of Germany would like to point out that the requirement of a democratic internal structure also reflects the self-perception of the Aarhus Convention as an instrument of *"environmental democracy"*. Moreover, it is in harmony with the stipulations of the Aarhus Convention on the recognition of environmental organizations explained above. The Aarhus Convention itself furthermore presumes that the associations, organizations or groups represent natural or legal persons, as emerges from the definition of "public" in Article 2 No. 4; the wording there is *"one or more natural or legal persons, and, in accordance with national legislation or practice, **their** associations, organizations or groups"* (cf. above, p. 14).

²³ Seelig/Gündling, Die Verbandsklage im Umweltrecht – Aktuelle Entwicklungen und Zukunftsperspektiven im Hinblick auf die Novelle des Bundesnaturschutzgesetzes und supranationale und internationale rechtliche Vorgaben, NVwZ 2002, 1033, 1037.

(3) Compatibility of the “principle of internal democratic structure” with the stipulations contained in the Aarhus Convention

(aa) Section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act is not “politically motivated”.

The requirement of a democratic internal structure does not pursue political goals, and is also not “politically motivated”, but serves to ensure that environmental organizations are in a position of legitimacy when they carry out their role as the custodians of the general public interest. Environmental organizations that are recognised in accordance with section 3 of the Environmental Appeals Act particularly have rights to file court actions and to participate. These rights are based on the purpose and the task of the environmental organization to represent the interests of environmental protection for the public, and to act as “advocates of the environment” without presenting an interest or affectedness of their own.

Foundations such as the communicant are environmental organizations, but do not satisfy the criterion of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act since they are not democratically organized in terms of their legal form. Because of the legal form voluntarily selected by the founder, foundations do not enable citizens to participate. Citizens can only act as supporters of a foundation and contribute their money in the shape of donations. They are however prevented from the outset from taking part in the will-formation which takes place in the foundation, and this also cannot be granted to them.

(bb) Section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act is not “overly burdensome”.

The requirement of a democratic internal structure is also not “overly burdensome”. The criterion neither entails administrative effort, nor does it depend on external circumstances which are partly or indeed entirely beyond the control of the environmental organization. The Federal Republic of Germany would like to recall in this context that, in 2009, the ECJ found a Swedish requirement for recognition which demanded that an environmental organization had to have 2,000 members to be too restrictive and hence incompatible with secondary European law transposing the Aarhus Convention.²⁴ In this case, only **two** organizations in all of Sweden were able to satisfy the criterion; it was made practically impossible for any small, particularly local organizations to exercise the right to lodge a court action.

²⁴ Judgment of the ECJ of 15 October 2009 (*Djurgarden*), Case C-263/08; see also above, p. 11.

That the requirement is not “overly burdensome” is already demonstrated by the large number of recognised environmental organizations in Germany. 111 *Vereinigungen* have now been recognised as environmental organizations at federal level. Added to these are another 201 *Vereinigungen* which are recognised by the *Länder* (as of 20 December 2016), with a current total of 312 *Vereinigungen* in Germany being recognised environmental organizations and having the rights which this entails. The large number of recognised *Vereinigungen* indicates that the requirement of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act does not constitute such an obstacle that recognition, and hence the ability of *Vereinigungen* to challenge measures in court, is made excessively difficult.

The communicant’s argument that, with an estimated number of 10,300 registered associations and foundations (not including citizens’ initiatives), the low number of 282 recognised environmental organizations showed that the requirement for recognition contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act was too restrictive, misses the point. The communicant, firstly, disregards the fact that the *Vereinigungen* which it mentions, with the exception of foundations, can as a matter of principle all be recognised in accordance with section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act. Secondly, the communicant suggests that the environmental organizations all had an interest in recognition in accordance with section 3 of the Environmental Appeals Act. The communicant does not provide any evidence with regard to this presumption, and to the knowledge of the Federal Republic of Germany there are also no scientific statements which could even begin to confirm such a presumption.

Rather, there is a need first and foremost to take a look at the relationship between the requests for recognition which have been filed by environmental organizations and the number of actual recognitions. It is only by filing a request within the meaning of section 3 of the Environmental Appeals Act that the organization in question shows an interest in exercising rights to file actions in accordance with the Environmental Appeals Act. It is hence particularly revealing that 98 out of 149 requests which were filed at federal level between 2006 and November 2016 were approved, and only three requests were turned down. 18 requests are still being processed, and the remaining requests were withdrawn. The reasons for the withdrawals vary. The Federation lacked competence in accordance with section 3 subsection (2) of the Environmental Appeals Act for many of the requests which have been

withdrawn. As the competent authority at federal level, the Federal Environment Agency only decides on requests from *Vereinigungen* with an area of activity which goes beyond the territory of a *Land*, as well as on applications from foreign *Vereinigungen*. Otherwise, authorities in the *Länder* are competent. In most other cases, *Vereinigungen* withdrew their requests once the Federal Environment Agency had informed them that the requirements of section 3 subsection (1), sentence 2, Nos. 1 and 2 of the Environmental Appeals Act (predominantly promoting objectives of environmental protection) or of section 3 subsection (1), sentence 2, No. 3 of the Environmental Appeals Act (proper performance of its duties) were not satisfied or were not adequately documented. As far as can be ascertained, only one *Vereinigung* withdrew its request for recognition because the everyman principle precluded recognition. Hence, only roughly 1 % of the requests that were lodged were rejected. According to the information provided by the *Länder*, only 16 requests have been turned down over the last years. None of those rejections were because the requirement of a democratic internal structure was not fulfilled. This ratio between the requests lodged and the actual recognitions shows that recognition in accordance with section 3 of the Environmental Appeals Act is by no means overly burdensome or indeed impossible.

Moreover, all environmental organizations which wish to assert the rights awarded in accordance with the Environmental Appeals Act can as a matter of principle adjust their structure in line with the requirement contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act. For instance, associations which do not grant to all citizens a right of accession with full voting rights can satisfy the requirement by simply amending their bylaws. The Compliance Committee recognised in Case ACCC/C/2008/31 that environmental organizations can be expected to (re-)formulate their bylaws such that the requirements on asserting the rights in accordance with the Environmental Appeals Act are satisfied.²⁵ The recommendations and findings were confirmed by the fifth session of the Meeting of the Parties.²⁶

Environmental organizations which are organized as a foundation are furthermore free to establish a support association (*Förderverein*) with a democratic internal structure. The administrative requirements and the costs involved are minimal. Associations can be established in Germany if at least two members agree on bylaws. If the association is to be

²⁵ ACCC/C/2008/31, section 72.

²⁶ Decision V/9h on Compliance by Germany with its obligations under the Convention, ECE/MP.PP/2014/2/Add.1, p. 66.

entered in the register of associations, it must have seven members, and fees of 75.00 EUR are charged for making the entry. Added to this is the cost of having the signatures certified by a notary; the fee rate is between 20.00 and 70.00 EUR in a normal case. Added to these are expenditure for the announcement of the entry. The procedure takes roughly four weeks from the time of registration, depending on the court district.

Finally, foundations may also become members of a *Vereinigung* which has an internal democratic structure or of an environmental organization recognised in accordance with section 3 of the Environmental Appeals Act.

(cc) Section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act is an “objective criterion” and not “unnecessarily exclusionary”.

The requirement that a *Vereinigung* must have a democratic internal structure constitutes an objective criterion which is not “unnecessarily exclusionary”, or does not have an “unnecessarily exclusionary” effect. It is provided in the law in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act, and serves the legitimate purpose of ensuring the democratic legitimacy of the environmental organizations.

In contradistinction to the presumption of the communicant (cf. communication, No. 6), the criterion can by no means only be satisfied by registered associations promoting public-benefit purposes or similar cooperatives: As has already been explained (cf. p. 13), legal capacity or indeed legal personality does not constitute a requirement for falling under the umbrella term of “*Vereinigung*”. On the contrary, the criterion of a democratic internal structure is completely unrelated to the question of whether a *Vereinigung* has legal capacity or has legal personality as a legal person. It is quite sufficient for the *Vereinigung*, whatever its structure may be, to permit all persons to become members and to grant them full voting rights. Recognition under tax law as “promoting public-benefit purposes” (cf. p. 14 et seq.) is also unrelated to this criterion. Hence, both those associations which are not registered, and those which have not filed a request for recognition of their status as promoting public-benefit purposes, can satisfy the requirements of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act. Something similar applies to cooperatives; here, each member has one vote (section 43 subsection (3), sentence 1, of the Cooperatives Act [*Genossenschaftsgesetz*]). They too do not need to be recognised as promoting public-benefit purposes in order to satisfy the requirements of section 3 subsection (1), sentence 2, of the

Environmental Appeals Act, and in particular the criterion of having a democratic internal structure.

In addition to all associations and cooperatives, as a matter of principle citizens' initiatives can also satisfy the requirement of having a democratic internal structure, as can civil-law partnerships organized along membership lines.

The requirement of having a democratic internal structure is also applied without distinction to all environmental organizations of any size or content orientation which file a request. It covers in equal measure environmental organizations which promote the interests of environmental protection as a whole, as well as environmental organizations who focus their expertise on a specific environmental medium or on a specific region. The communicant states in this context that many small environmental organizations, in particular user organizations, are recognised, but that two of the most important environmental organizations in Germany – Greenpeace e.V. and communicant itself – are not recognised (cf. communication, No. 8.). The communicant concludes from this that the German recognition criteria could not be compatible with the stipulations of the Aarhus Convention.

The Federal Republic of Germany would like to point out that the communicant is disregarding the reason here as to why it cannot be recognised. Its ability to be recognised does not fail because of its size, but due to the fact that, as a foundation, it is not a *Vereinigung* that has been endowed with a democratic internal structure. The size of the environmental organization also does not correlate with the question of whether the *Vereinigung* is more or less able to satisfy the criterion of having a democratic internal structure. This is made clear by many examples from German recognition practice: One of the environmental organizations recognised in Germany in accordance with section 3 of the Environmental Appeals Act is the German Nature and Biodiversity Conservation Union (NABU). The NABU had approx. 541,000 members in 2015²⁷, and is therefore one of the largest environmental organizations in Germany. Friends of the Earth Germany (BUND), also one of the environmental organizations that are recognised in accordance with section 3 of the Environmental Appeals Act, had more than 380,000 members in 2015²⁸. Both the German Alps Association (DAV), which with more than 1,000,000 members is the largest mountain

²⁷ NABU, Annual Report 2015, p. 34, <https://www.nabu.de/downloads/jb2015.pdf>

²⁸ BUND, Annual Report 2015, p. 30, https://www.bund.net/fileadmin/user_upload_bund/publikationen/bund/bund_jahresbericht_2015.pdf

sports association in the world, and the German Animal Welfare Federation with roughly 800,000 members, have even more members than the NABU and the BUND²⁹. The former two are also environmental organizations that are recognised in accordance with section 3 in conjunction with section 5 subsection (2) of the Environmental Appeals Act. Additionally, smaller and highly-diverse environmental organizations such as the Frankfurt Zoological Society of 1858, with roughly 3,600 members³⁰, the Lübeck and Surrounding Area Anti-Aircraft Noise Association, with approximately 430 members³¹ and the Bothel/Brockel Environment Protection Association (BBU), with approx. 270 members³², are environmental organizations which are recognised in accordance with section 3 of the Environmental Appeals Act.

In contradistinction to the submission of the communicant (cf. communication, No. 8.), whether these organizations avail themselves of their right to file actions is irrelevant. It is important that they have made a request for recognition in accordance with section 3 of the Environmental Appeals Act and can exercise these rights as an advocate for the environment if need be.

5. No violation by section 3 subsection (1), sentence 2, of the Environmental Appeals Act against the stipulations of the Aarhus Convention: No discrimination against environmental organizations recognised abroad

The requirements contained in section 3 of the Environmental Appeals Act do not constitute discrimination against foreign environmental organizations in comparison to German environmental organizations. The structure of the requirements for recognition is compatible with the stipulations of the Aarhus Convention, and particularly corresponds to the principle of non-discrimination in accordance with Article 3 para. 9 of the Aarhus Convention.

The communicant states at No. 7.e of its communication that foreign *Vereinigungen* may also be recognised in accordance with section 3 of the Environmental Appeals Act. They are subject to precisely the same requirements as German *Vereinigungen* in this regard. Section 3 subsection (1) of the Environmental Appeals Act reads as follows: “*Upon request, a German or foreign Vereinigung shall be recognized for the purpose of filing appeals pursuant to this*

²⁹ DAV, Annual Report 2015, p. 36; http://www.alpenverein.de/chameleon/public/d22b889a-f2d9-fb2d-5288-68a4f48fa31c/1604-Jahresbericht2015_OL_27000.pdf

³⁰ Zoologische Gesellschaft Frankfurt, Fact Sheet, https://fzs.org/files/8014/2254/5287/Fact_Sheet_ZGF.pdf.

³¹ SGF Lübeck, <http://www.flughafen-luebeck-info.eu/ueber-uns.php>

³² Umweltschutzverband Bothe/Brockel, <http://www.y-nein.de/>, at: “wer sind wir?”

Act. ***The Vereinigung shall be recognized if***”³³. As the communicant also correctly observes, the recognition of an environmental organization by another Party to the Aarhus Convention does not entail the automatic grant of rights to file actions in Germany or a right to recognition in accordance with section 3 of the Environmental Appeals Act.

That said, the Federal Republic of Germany would additionally like to point out that the Environmental Appeals Act ensures via a further provision that foreign environmental organizations are also not treated less well in de facto terms when lodging appeals than domestic environmental organizations. A requirement for lodging appeals in accordance with section 2 subsection (1) of the Environmental Appeals Act is as a matter of principle that an environmental organization is recognised in accordance with section 3 of the Environmental Appeals Act. Section 2 subsection (2) of the Environmental Appeals Act governs the special case that an environmental organization has not yet been recognised, but has already lodged a request for recognition. The action is admissible in these cases if the environmental organization has lodged a request to the competent authority, the requirements for recognition are satisfied, and “*a decision regarding recognition has not yet been made for reasons for which the Vereinigung is not responsible*” in this regard. According to the reasoning for the Act, the legislature presumes with domestic *Vereinigungen* which have been in existence for a long time that they have already had the opportunity to request recognition at an earlier date.³⁴ Section 2 subsection (2), sentence 2, of the Environmental Appeals Act deliberately makes an exception to this provision for foreign environmental organizations, and orders that “*the requirements of number 3 are considered to have been fulfilled*” per se. This means, if the foreign environmental organization has lodged a request for recognition and satisfies the requirements, that it does not need to demonstrate why the recognition procedure has not yet been completed. The background to the provision is the consideration that a foreign environmental organization may not have previously seen any reason to obtain recognition in Germany and that it is now affected by German measures for the first time, for instance in a cross-border EIA project, and would like to take action against them.

The Federal Republic of Germany rejects the communicant’s allegation that German law is in violation of stipulations of the Aarhus Convention. Germany is complying with its obligation

³³ Only emboldened here.

³⁴ cf. Draft Act of the Federal Government, Draft Act Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC (*Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG – Umwelt-Rechtsbehelfsgesetz*), Bundestag printed paper 16/2495, p. 12.

ensuing from Article 3 para. 9 of the Aarhus Convention by treating both domestic and foreign environmental organizations equally. This provision contains a ban on discrimination in the context of the relevant provisions of the Aarhus Convention with regard to citizenship, nationality or domicile, and specifically in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities. Since the German provisions on recognition for environmental organizations apply equally to both domestic and foreign environmental organizations, and since it is also ruled out in de facto terms that foreign environmental organizations receive worse treatment if recognition proceedings are pending on the basis of section 2 subsection (2), sentence 2, of the Environmental Appeals Act, there is no violation of Article 3 para. 9 of the Aarhus Convention.

An obligation under international law for the Federal Republic of Germany in accordance with which a *Vereinigung* recognised by another state must be recognised by the Federal Republic of Germany, or recognition must be made to apply, emerges neither from general provisions of international law, nor from the Aarhus Convention in particular. Domestic acts of a state have no impact on the territory of another state, subject to the proviso of a special provision under international law. Such a specific provision engendering an obligation to acknowledge recognitions issued abroad does not emerge from the Aarhus Convention. On the contrary, Article 2 No. 5 of the Aarhus Convention provides that the Parties can link the recognition of environmental organizations to “*meeting any requirements under national law*” – within the boundaries which have already been explained and tested. The Federal Republic of Germany has decided to establish requirements for recognition applicable to both foreign and domestic *Vereinigungen* regardless. All requirements of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act can be met in equal measure by both German and foreign environmental organizations; none of the requirements imposes more stringent requirements on foreign environmental organizations than on German ones. Foreign *Vereinigungen* can equally prove that

- according to their bylaws, they ideationally, and not only temporarily, promote the objectives of environmental protection,
- they have existed for at least three years at the time of recognition and have been promoting the objectives of environmental protection in this period,
- they offer guarantees of proper performance of their duties, taking into account the type and scope of their previous activity, their membership, and the effectiveness of the *Vereinigung*,

- they promote public-benefit purposes as defined in section 52 of the German Fiscal Code; it is material here that it is sufficient to promote public-benefit purposes corresponding to those of section 52 of the Fiscal Code. *Vereinigungen* can fulfill this criterion either by means of a certificate from the tax office on their exemption from tax, as well as by any other suitable document (such as their bylaws, bookkeeping documents and the like), and
- they have a democratic internal structure.

In accordance with section 3 subsection (2) of the Environmental Appeals Act, the Federal Environment Agency has central competence for the recognition of foreign environmental organizations. All information on recognition is also available in English on the website of the Federal Environment Agency.³⁵ The Agency has so far received requests from four foreign *Vereinigungen*, of which one (Aqua Viva Switzerland) was approved. Three requests from Dutch *Vereinigungen* are currently still being assessed.

Because of the equal treatment of foreign and domestic environmental organizations in assessing recognition in accordance with section 3 of the Environmental Appeals Act, there is hence no violation of Article 2 No. 5, Article 3 para. 4 and Article 3 para. 9 of the Aarhus Convention.

6. No violation by section 3 subsection (1), sentence 2, of the Environmental Appeals Act against the stipulations of the Aarhus Convention with regard to the principle of equal treatment with other representative action arrangements in German law

In contradistinction to the view of the communicant, there is also no violation of Article 2 No. 5, Article 3 para. 4 and Article 9 para. 2 of the Aarhus Convention with regard to the principle of equal treatment by the Federal Republic of Germany.

The communicant submits that the Federal Republic of Germany had violated its international obligations under the Aarhus Convention by introducing more stringent statutory requirements for representative actions under environmental law than for other types of representative action in German law, namely in the law on equality for the disabled and on consumer protection (cf. communication, No. 7.b).

³⁵ <http://www.umweltbundesamt.de/en/recognition-of-environmental-nature-protection>.

The communicant is first of all neglecting here the fact that representative actions under the Equal Opportunities for Persons with Disabilities Act (*Behindertengleichstellungsgesetz*) and those in accordance with the Act on Actions for an Injunction (*Unterlassungsklagengesetz*) do not pursue any goals that are related to the Aarhus Convention: Neither of these serves to protect the environment. The Aarhus Convention therefore does not apply to questions relating to representative actions under the law on equal opportunities for persons with disabilities or under the law on consumer protection. The Equal Opportunities for Persons with Disabilities Act exclusively serves to remedy or prevent discrimination against persons with disabilities; it is intended to guarantee that they can participate in life with equal rights and lead a self-determined life, cf. section 1 subsection (1) of the Equal Opportunities for Persons with Disabilities Act.³⁶ This representative action is hence closely related to the protection of the human rights of persons with disabilities, but it is completely unrelated to environmental protection. Representative actions under the law on equal opportunities for persons with disabilities are, incidentally, not open to foundations at all. The same applies to the right to lodge representative actions, which is governed by the Act on Actions for an Injunction³⁷. The Act serves to implement the law on General Terms and Conditions of Business and on consumer protection legislation. The provisions, which also do not open up any rights to lodge representative actions for foundations, transpose secondary European law into civil consumer protection law; they too are unrelated to environmental protection.

It is therefore from the outset not possible to review the prohibition of discrimination enshrined in Article 3 para. 9 of the Aarhus Convention. The prohibition of discrimination reads as follows: “*Within the scope of the relevant provisions of this Convention, the public shall 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 and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.*” Since the provisions of the law on equal opportunities for persons with disabilities and of the Act on Actions for an Injunction do not fall “*within the scope of the relevant provisions of this Convention*”, Article 3 para. 9

³⁶ Equal Opportunities for Persons with Disabilities Act (*Gesetz zur Gleichstellung von Menschen mit Behinderungen – Behindertengleichstellungsgesetz – BGG*) of 27 April 2002 (Federal Law Gazette Part I, pp. 1467 and 1468), most recently amended by Article 2 of the Act of 19 July 2016 (Federal Law Gazette Part I, p. 1757).

³⁷ Act on Actions for an Injunction in Infringements of Consumer Law and other Infringements (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen – UKlaG*) of 26 November 2001, recast by promulgation of 27 August 2002 (Federal Law Gazette Part I, pp. 3422 and 4346), most recently amended by Act of 11 April 2016 (Federal Law Gazette Part I, p. 720).

of the Aarhus Convention is already not applicable. Moreover, the Federal Republic of Germany would like to point out that the facts submitted by the communicant do not affect any of the characteristics of discrimination of the norm, so that there is also no violation of Article 3 para. 9 of the Aarhus Convention for this reason.

Furthermore, the provisions contained in the Aarhus Convention can also not be interpreted in such a way as to suggest that they contain requirements over and above their own area of application, as to how the requirements regarding the “public concerned” are to be constructed in comparison to provisions of national law which do not fall under the Aarhus Convention. The relevant stipulations on the determination of the “public concerned” are contained in Article 2 No. 5 and Article 3 para. 4 of the Aarhus Convention. These requirements serve comprehensively, as well as exclusively, to determine the scope of the rights of the “public concerned” in the context of Articles 6 and 9 of the Aarhus Convention. Neither Article 2 No. 5 nor Article 4 para. 3, or any other provision of the Aarhus Convention, contains stipulations as to how the national provisions to transpose the Aarhus Convention are to act vis-à-vis provisions which do not fall within the area of application of the Aarhus Convention. Put differently: The provisions contained in the Aarhus Convention do not claim to take effect beyond their area of application.

From the point of view of the Federal Republic of Germany, the argument put forward by the communicant proves when looked at in greater detail not to be a question of the interpretation of the Aarhus Convention to be assessed under international law, but at best a question which is to be assessed purely in accordance with national constitutional law, namely whether the national legislature may provide for different requirements for representative actions in different fields of law. This is evidently a question which does not need to be answered by the Compliance Committee.

To sum up, given that the German legislature has provided in section 3 of the Environmental Appeals Act for slightly derogating provisions on the recognition of environmental organizations vis-à-vis the provisions on representative actions in the law on equal opportunities for persons with disabilities and the law on consumer protection, there has been no violation of provisions of the Aarhus Convention.

7. No violation of the stipulations of the Aarhus Convention by amendments of German law in 2002, 2006 and 2009

In contradistinction to the view of the communicant, there has also been no violation of Article 2 No. 5 and Article 3 para. 4 in conjunction with Article 3 para. 6 of the Aarhus Convention by the Federal Republic of Germany. In accordance with Article 3 para. 6 of the Aarhus Convention, the Convention does not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

The communicant submits in No. 7.c of its communication that the Federal Republic of Germany tightened the requirements for the recognition of nature conservation organizations in 2002, and those for all other environmental organizations in 2006; the communicant also mentions a legal amendment from 2009.

The facts of which the communicant complains do not constitute a violation of Article 2 No. 5 and Article 3 para. 4 in conjunction with Article 3 para. 6 of the Aarhus Convention for several reasons.

Firstly, the Aarhus Convention is not applicable *ratione temporis* to the act of the Federal Republic of Germany in 2002 and 2006 mentioned by the communicant; the Federal Republic of Germany already pointed this out in its consideration of 1 March 2016. Germany ratified the Aarhus Convention on 15 January 2007. In accordance with Article 20 para. 3 of the Aarhus Convention, the Convention entered into force for Germany on 15 April 2007, on the ninetieth day after the date of deposit of the instrument of ratification. It is only since the Aarhus Convention entered into force that Germany has been bound by the provisions of the Convention. By contrast, the Aarhus Convention does not apply to legal acts which took place prior to 15 April 2007, so that a violation of international law is not possible from the outset.

Secondly, and in contradistinction to the view of the communicant, Article 3 para. 6 of the Aarhus Convention does not contain an absolute ‘anti-deterioration’ clause. Some of those involved in the negotiations on the Aarhus Convention did put forward this view.³⁸ The Compliance Committee nonetheless found in the case of a communication regarding Hungary in 2005 that: “[the negotiating parties] ... did not wish to completely exclude a possibility of

³⁸ The Aarhus-Convention – An Implementation Guide, 2nd edition, 2014, p. 68.

reducing existing rights as long as they did not fall below the level granted by the Convention. However, the wording of article 3, paragraph 6, especially taken together with article 1 and article 3, paragraph 5, also indicates that such reduction was not generally perceived to be in line with the objective of the Convention.”³⁹ The Compliance Committee nonetheless expressed doubts in the specific case as to compatibility with the goals of the Aarhus Convention⁴⁰, but the Meeting of the Parties did not confirm these findings and recommendations.⁴¹

Thirdly, Germany has not tightened the requirements for recognition. As stated above [p. 16 et seq.], the legal amendments were clarifications; as demonstrated above, the case-law had always interpreted and applied the criterion within the meaning of the subsequent language version of the statute.

Finally, the Federal Republic of Germany would like to point out that the criterion of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act also does not preclude the stipulations of the Aarhus Convention. Even if the Compliance Committee were to characterize the legal amendments as tightening, Germany has certainly not failed to meet the minimum standard set by the Aarhus Convention, so that for this reason too, the Federal Republic of Germany has not committed a violation of Article 3 para. 6 of the Aarhus Convention.

³⁹ ACCC/C/2004/4 (Hungary), section 18.

⁴⁰ ACCC/C/2004/4 (Hungary), section 18

⁴¹ cf. Report of the Second Meeting of the Parties Addendum, Decision II/5 – General Issues of Compliance, ECE/MP.PP/2005/2/Add.6, section 3: “Takes note of the conclusions by the Committee concerning compliance by Hungary with its obligations under the Convention (ECE/MP.PP/2005/13/Add.4) and, in particular, that Hungary was in compliance with its obligations under articles 6 and 9 of the Convention”.

IV. Conclusion

The German provisions on the recognition of environmental organizations in accordance with section 3 of the Environmental Appeals Act are in compliance with the stipulations following from Article 2 No. 5, Article 3 para. 4 and Article 9 para. 2 of the Aarhus Convention. The German requirement for recognition of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act, which requires the environmental organizations to have a democratic internal structure, ensures the legitimacy of environmental organizations necessary in a democratic state based on the rule of law as a representative of the general public interest in the environmental field. The requirement of having a democratic internal structure ultimately also reflects the self-perception of the Aarhus Convention as an instrument of “environmental democracy”.

To sum up, the Federal Republic of Germany also did not violate any obligations under the Aarhus Convention in the present case in other respects.

The Federal Republic of Germany reserves the right to make a further statement in the event of the communicant providing details or additions to the statements in its communication.
