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Response of the Federal Republic of Germany to the draft findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany

I. Introduction

On 11 November 2011, the Federal Republic of Germany received the draft findings and recommendations of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) to the communication of ClientEarth.

The Compliance Committee concludes on several allegations made by the Communicant that they are unfounded.

With regard to two allegations of the Communicant the Compliance Committee finds that Germany fails to comply with the Aarhus Convention:

1. By imposing a requirement that an environmental NGO must assert that the challenged decision contravenes a legal provision "serving the environment";
2. By not ensuring NGO standing in many of its sectoral laws to challenge acts or omissions of public authorities and private persons which contravene provisions of national law relating to the environment.

In the text below a response will be given to these main findings of the Compliance Committee with regard to the concluded non-compliance. This response shall demonstrate that in our view Germany is in compliance with the provisions of the Aarhus Convention also concerning these two remaining issues.

With regard to the question of the review of procedural errors Germany thanks the Compliance Committee for its evaluation. In the view of Germany the judgement of the Court of Justice of the European Union (CJEU) in the Altrip-case (judgement of 7 November 2013, case C-72/12) acknowledged in principle the conformity of the German administrative law system with the European Union law transposing the provisions of the Aarhus Convention. Nevertheless the consequences of the judgement will be examined carefully by the Federal Government.

We do not reply to the considerations and evaluations of the Compliance Committee regarding the other specific allegations made by the Communicant.

We will comment on the more abstract considerations of the Compliance Committee on the conduct of its evaluation in the paragraphs 64 to 68 only in the context of the two specific remaining allegations and only as far as necessary in our view.

II. Response to the draft findings and recommendations of the Compliance Committee

1. Non-compliance with article 9, paragraph 2 of the Aarhus Convention

The Compliance Committee follows the argument of the Communicant that the Environmental Appeals Act (EAA) by limiting the scope of judicial review to alleged contraventions of statutory provisions "serving the environment" narrows down the range of administrative decisions which may be challenged by members of the public concerned. This contradicts article 9 paragraph 2 of the Aarhus Convention (para. 76). There should be no restriction for review procedures to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection for the environment", as there is no legal basis for such limitation under the Aarhus Convention (para. 78). Furthermore it is for the Party concerned to bring evidence that its courts interpret the national legislation in accordance with the Aarhus Convention and Germany has not shown this for the requirement "serving the environment" (para. 79).

Germany does not share these considerations and evaluations. In our understanding the result of the discussion at the thirty-eighth meeting of the Compliance Committee in Geneva in September 2012 was a common agreement that a provision regarding "environment-related provisions" would be in accordance with the Aarhus Convention. The remaining disagreement between the Communicant and the Party concerned was focused only on the question, if the German provision really had this meaning or not. After the thirty-eighth meeting of the Compliance Committee no further questions with regard to this allegation have been raised. Therefore we are very surprised by these conclusions drawn by the Compliance Committee.

Furthermore the discussion at the thirty-eighth meeting of the Compliance Committee for the first time has really clarified the focus of this allegation. Based on the original communication

it was unclear, if this allegation aims at the supposed narrowing down of the range of environmental decisions that can be challenged or only at the supposed narrowing down of the range of legal provisions that can be infringed in the context of an environmental decision (see on this our original response, page 7). Only after the thirty-eighth meeting it is clear that the allegation is focused on the latter and that the range of challengeable decisions is defined under section 1 (1) of the EAA in accordance with the Aarhus Convention.

Germany still is of the opinion that Article 2, paragraph 5 of the Aarhus Convention is a sufficient legal basis for the requirement "serving the environment" (see on this also our original response, page 8).

The conclusions of the Compliance Committee seem to be based on a misunderstanding of the relevant provision in Section 2 (1) no. 1 of the EAA. It can only be emphasized that the formulation of the EAA does not limit the scope of judicial review in environmental matters. It includes all legislation relating to the environment. The formulation legal provisions "serving the environment" (*dem Umweltschutz dienen*) is a commonly used wording in German law. According to the official explanatory memorandum to the EAA the formulation "serving the environment" does not include any restriction to provisions promoting explicitly the protection of the environment and does not add additional requirements that restrict the rights provided by the Aarhus Convention. Section 2 (1) of the EAA does not only cover provisions which exclusively serve the protection of the environment but also provisions which serve both the protection of the environment and for example safety at work and accident prevention (Legislative Proposal by the German Federal Government of 4 September 2006, Drucksache (Printed Paper) 16/2495, p. 12).

In contrary to the evaluation of the Compliance Committee (para. 77) the requirement of provisions "serving the environment" is not a requirement that inevitably burdens or restricts the way the public may realize the rights awarded by the Aarhus Convention. For the standing in a review procedure before a German Administrative Court it is sufficient in this regard that the litigant claims that an administrative decision is an infringement of one or more legal provisions. It is then up to the court to decide, if such an infringement is possible, and in the case of the EAA additionally if such an infringement is related to a provision that is serving the environment. There is no additional requirement, especially for NGOs, to argue or give evidence that one or more of the provisions that could be infringed by the administrative decision are "serving the environment".

One reason that might have led to this misunderstanding by the Compliance Committee might have been the submitted unofficial English translation of the German legal text. The German expression "*geltend macht*" could not only be translated as "asserts". Also a translation into "claims" or "declares" is possible, because the term is linked only to the arguments that any litigant submits to a court aiming to win the case.

In addition it might be important to explain briefly the German legislation concerning administrative decision-making. The Articles 6 and 9, paragraph 2, of the Aarhus Convention do not regulate - despite the requirements for public participation - all the details of the domestic decision-making. It is sufficient that there is a decision-making legislation for the permitting of the activities according to Annex I of the Aarhus Convention in place. In German legislation different types of decision-making are provided. For example industrial installations require usually a single permit according to the Federal Immission Control Act. But for several other activities a so called planning appraisal (*Planfeststellungsbeschluss*) is required (e.g. decision-making on the construction of railways, airports, motorways, waterways, dams, pipelines or overhead electrical power lines). Such a planning appraisal according to German law usually compromises all kinds of necessary permits in one administrative decision-making ("concentration effect"). And all these planning appraisals that offer the decision-making on activities of Annex I of the Aarhus Convention fall under Section 1 (1) of the EAA. But these decision-making includes usually not only environmental considerations. For example the decision-making according to the Energy Act is focused - besides environmental aspects - on the secure supply of energy and affordable costs for consumers. Such conditions have no link to environmental matters. Therefore the requirement "serving the environment" in the EAA is needed due to German system concerning administrative decision-making. It is only consequent that an environmental NGO in a review procedure can only challenge these conditions of a planning appraisal that concern directly or indirectly environmental matters or in the wording of the EAA "are serving the environment". This is in accordance with the statement of the Compliance Committee in para. 78 that the Aarhus Convention requires Parties only to ensure access to review procedures in relation to environmental decision-making under Article 6 of the Aarhus Convention. But if a long-established domestic decision-making system as the planning appraisal is not only an environmental decision-making as envisaged by the Aarhus Convention, there is no need under the Aarhus Convention - as long as this system is in accordance with the Aarhus Convention - to adapt this domestic system. But at the same

time it must be possible to limit the review procedure of such a broader decision-making system on the possible infringement of those provisions that are "serving the environment".

Furthermore we disagree with the considerations of the Compliance Committee in para. 79. If the Compliance Committee pays attention to the general picture regarding access to justice in the Party concerned (see para. 64), it is very questionable that the Compliance Committee concludes in para. 79, it is for the Party concerned to bring evidence on court jurisprudence. Usually such evidence in any legal review procedure is to bring by a litigant, if not very specific reasons justify a different approach. In the context of the compliance procedure under the Aarhus Convention such an obligation would be for the Communicant. In addition such a new obligation on the Party concerned as expressed in para. 79 cannot be established for a Party concerned without warning. Germany has not been asked to submit court cases concerning this specific allegation. Therefore the conclusion that Germany fails to comply in this respect is very surprising.

At the thirty-eighth meeting of the Compliance Committee Germany has stated that the German delegation does not have knowledge of a court case, where the requirement "serving the environment" really was an obstacle for access to justice by an environmental NGO. The Compliance Committee was aware of this information. Furthermore Germany has submitted as an Annex to the letter of 5 November 2012 a table with 17 examples of German court jurisprudence on access to justice in environmental matters. In none of these cases the requirement "serving the environment" was an obstacle. Therefore we believe in contrary to the conclusion by the Compliance Committee that we have given evidence on the court practice in Germany that safeguards the correct application of the Aarhus Convention also concerning this allegation.

Nevertheless Germany has again examined the Court practice and found the following positive examples, partly already included in table submitted on 5 November 2012:

- Higher Administrative Court of Mannheim, judgment dated 20 July 2011, docket no. 10 S 2102/09, para. 28:
  Section 2 (1) No. 1 of the EAA covers all provisions that at least serve the protection of the environment – including human health.
- Higher Administrative Court of North Rhine Westphalia, judgement dated 9 December 2009, docket no. 8 D 10.08.AK, para. 54:
  Section 2 (1) No. 1 of the EAA covers all provisions that at least serve the protection of the environment – including human health.

- Higher Administrative Court of Lüneburg, judgement dated 5 January 2011, docket no. 1 MN 178/10, para. 51:
  Flood Protection is serving the environment in accordance with the EAA.
- Administrative Court Ansbach, judgement dated 19 October 2011, docket no. AN 11 K 10.00643, para. 37:
  The term environment in the EAA has a broad meaning.
- Higher Administrative Court of Rhineland-Palatinate, judgement dated 08 July 2009, docket no. 8 C 10399/08, para 115:
  The term environment in the EAA has a broad meaning. The EAA covers all provisions that at least serve the protection of the environment – including human health.
- Higher Administrative Court Of Hamburg, judgement dated 18 January 2013, docket no. 5 E 11/08, para 11:
  Nature conservation law and Water law serve the protection of the environment.

In the light of the short time-frame (less than four weeks) to prepare this response to the draft findings and recommendations, it was not possible to conduct an even broader research or to facilitate further translations into the English language.

At the same time the German Government has not identified any case in German jurisprudence in which access to justice in environmental matters was refused due to the challenging of a provision that is not "serving the environment". The Compliance Committee should also take into account the fact that even the communicant has failed to provide for relevant court cases that would confirm his argumentation.

With regard to a possible definition of the term "serving the environment" the legal academic sciences in Germany make inter alia reference to the definitions of environment or environmental factors in the EU Directives on EIA and on industrial emissions and their national implementation, e.g. in the Federal EIA Act, but also to the EU Directive on access to environmental information and the similar definitions in the Aarhus Convention.

All these examples of court jurisprudence and legal academic sciences demonstrate that the Compliance Committee has misinterpreted the term "serving the environment" in stating that this would only cover provisions to promote the protection of the environment, but not the application of legal provisions that may impact on human health or the environment (e.g. provisions concerning conditions for building and construction or of waste disposal) – see on this para. 78. The opposite is true for the German legislation and the German practice: As stated in the response above and backed by the court jurisprudence mentioned the term

"serving the environment" is much broader as only the promotion of the protection of the environment. Provisions "serving the environment" in the German legislation always cover as well impacts on human health and on the environment. And the examples given by the Compliance Committee - impact on human health or on the environment by conditions for building and construction - without any doubt would fall under the term "serving the environment". The same applies clearly for any provisions concerning waste disposal. Such provisions can be challenged in Germany in accordance with Section 2 (1) no. 1 of the EAA.

Therefore the Compliance Committee is asked to re-consider its evaluation and its conclusion on this allegation, because a misunderstanding of the German legislation and its practical application by the courts must have taken place.

2. Non-compliance with article 9 paragraph 3 of the Aarhus Convention; NGO standing to challenge acts and omissions of private persons and public authorities

The Compliance Committee finds that Germany by not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment fails to comply with article 9, paragraph 3 of the Aarhus Convention (para. 100).

Germany does not share the evaluation and consideration of the Compliance Committee in the draft findings and recommendations concerning this allegation. We re-iterate our previous responses in this regard and our statements at the thirty-eighth meeting of the Compliance Committee.

The German principle of administrative law, which basically grants access to justice to persons and organizations who claim that their own rights are injured, does not contradict article 9, paragraph 3 in conjunction with article 9, paragraph 4 of the Aarhus Convention:

Article 9, paragraph 3 of the Aarhus Convention applies to a broad range of acts or omissions and confers great discretion on Parties when implementing it. The parties are not obliged to establish a system of popular action in their national laws – in so far we agree with the Compliance Committee (see para. 92). But it follows from this statement that each Party has the freedom to lay down criteria. The German legislation ensures effective legal

protection for the public in the field of environmental protection. The rules set according to the impairment of rights theory are within the discretion conferred upon a Party to implement the Aarhus Convention. The limits to the discretion accorded to each party are to be found at the point where those criteria render legal action impossible.

Even if we would agree on the broad interpretation of Article 9, paragraph 3 of the Aarhus Convention by the Compliance Committee that access to justice by environmental NGOs should be the presumption and not the exception and that the discretion of Parties in implementing Article 9, paragraph 3 of the Aarhus Convention does not allow for such strict criteria that they effectively bar all or almost all environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment (see para. 92), in Germany legal action of environmental NGOs beyond the scope of the EAA and in accordance with Article 9, paragraph 3 of the Aarhus Convention is possible (see below).

The conclusion of the Compliance Committee in para. 94, that according to Article 9, paragraph 3 of the Aarhus Convention access of environmental NGOs to a review procedure must be provided by Parties for all contraventions of national law relating to the environment, is in our view not sufficiently based on the provisions of the Aarhus Convention. If this conclusion would be valid, Article 9, paragraph 2 of the Aarhus Convention would be of no importance at all, because then any access to justice of environmental NGOs with regard to Article 6 would already be fully covered by Article 9, paragraph 3 of the Aarhus Convention. We ask therefore the Compliance Committee to re-consider this conclusion.

Under German law access to justice by environmental NGOs beyond the scope of the EAA is possible. According to Article 9, paragraph 3 of the Aarhus Convention this is primarily facilitated by two options:

(a) One option is that an environmental NGO has access to justice without having to maintain the impairment of a right. This is the case in the areas of nature conversation and goes beyond the scope of the EAA.

(b) The second option is that an environmental NGO on its own has the possibility to maintain the impairment of a right and therefore falls under the "impairment of rights doctrine" (*Schutznormtheorie*).

- This could always be the case, if an environmental NGO can claim the impairment of a right, because the NGO is for example the owner of a neighbouring area, where a project should be permitted.
- But this option can also be applicable, if the German legislation explicitly grants such a right also for environmental NGOs. An example for this is the German implementation of the EU Directive on Environmental Liability, where the implementing Environmental Damage Act (*Umweltschadensgesetz*), section 10, establishes a right inter alia for environmental NGOs to request action by authorities.
- Furthermore this option secures the access to justice for environmental NGOs, if judgements of administrative courts extend the scope of rights that fall into the frame of the "impairment of rights doctrine". This kind of evolution is always possible. A very important example for this is the recent Judgement of the Federal Administrative Court (BVerwG, Judgement of 5 September 2013, docket no. 7 C 21.12). This judgement demonstrates the possibilities of the German jurisprudence to extend the "impairment of rights doctrine" with a view to grant wide access to justice in environmental matters.

On this judgement of 5 September 2013, docket no. 7 C 21.12:
The Federal Administrative Court confirmed the admissibility of an action by an environmental NGO which is challenging the omission to enact a specific air quality plan. In this judgement the Federal Administrative Court refers to CJEU jurisprudence, the European law principle of effectiveness and the practice of the Compliance Committee of the Aarhus Convention in its previously adopted findings and recommendations. In the judgement of the CJEU in case C-240/09 ("Slovak Brown Bear") of 8 March 2011, on which the Federal Administrative Court ruling is based, the CJEU pronounced that the procedural rules relating to the conditions to be met to bring administrative or judicial proceedings to court have to be interpreted, to the fullest extent possible in accordance with the objectives of article 9 paragraph 3 of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by European Union law. This interpretation must enable an environmental NGO to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

Taking into account these findings, the judgement of the Federal Administrative Court leads to a significant extension of access to justice for environmental NGOs under German law. In its judgement the Federal Administrative Court affirmed the NGO's standing to bring proceedings. It follows from Section 42 subsection (2) clause 2 of the German Code of Administrative Court Procedure. The NGO can claim that its rights were violated by the

refusal to establish an air quality plan. The jurisprudence of the Federal Court interprets "impairment of right" in a broad manner. Taking into account European Union Law in environmental matters concerning health protection natural and legal persons are treated the same way. If a directly affected natural person can according to the rulings of the CJEU (see especially the Janecek-case C-237/07, judgement of 25 July 2008) claim that its own rights are impaired (here health protection), this can also be claimed by an environmental NGO which is an recognized association according to Section 3 of the EAA.

The reasons of this judgement of the Federal Administrative Court in writing are made public only very recent, at the end of October 2013. Nevertheless the Federal Government has provided for a translation into English language that is attached to this response.

Bearing in mind the discussion at the thirty-eighth meeting of the Compliance Committee about the importance of a judgement by the highest Federal Administrative Court (see para. 43 on this), the Federal Government expects that other Administrative Courts will follow these judgement and its reasoning. Despite the immediate effects of this judgement the further consequences will be examined carefully by the Federal Government.

Furthermore this demonstrates that the conclusion of the Compliance Committee in para. 96 does not mirror correctly the German legal system, because the "impairment of rights doctrine" can be extended as well on environmental NGOs and is as such therefore not a limitation that leads automatically to non-compliance with Article 9, paragraph 3 of the Aarhus Convention.

The statement in para. 97 that Germany as the Party concerned agrees that there are no explicit provisions in other sectoral laws which provide legal standing, can therefore be misleading. Despite the area of nature protection and the legislation on environmental damage that is true for the time-being, but in many other areas the "impairment of rights doctrine" as well must not be a barrier for environmental NGOs as explained above.

With regard to the question of who needs to bring evidence on the practice of German courts (see again para. 97) we refer to our general disagreement as stated above on page 5 of this response. As now requested by the Compliance Committee we have submitted the judgement of the Federal Administrative Court of 5 September 2013.
But in the context of its deliberations on this allegation the Compliance Committee relies (see para. 97) primarily on a judgement by the Administrative Court Kassel in 2012 that was provided by the Communicant. Even if the draft findings and recommendations contain no

further specification, we assume that the Compliance Committee refers here to information submitted by the Communicant in its letter sent on 22 February 2013. Obviously here again a misunderstanding has taken place, because the Compliance Committee seems to have taken no regard of our letter, sent on 11 March 2013, that responds inter alia to this judgement of the Administrative Court Kassel. We copy this section of our letter here again:

> "The decision of the Verwaltungsgericht Kassel of 2 August 2012 (case 4 L 81/12.KS) deals with an application for interim measures against the decision to grant a permit for the discharge of wastewater deriving from potash salt mining into groundwater. The appeal was filed by a local community and two recognized associations arguing that an EIA would have been necessary but had not been conducted.
> The court assessed, if the permit had required an EIA, but also if the legal requirements of the water management act had been taken into account. It found that the appeals of the recognized organisations were admissible, but not well-founded, since in accordance with the relevant provisions on EIA such an assessment and, thus, a public participation procedure did not have to be conducted.
> The court also examined whether the organisations had access to justice according to the Federal Nature Conservation Act (Bundesnaturschutzgesetz), which also provides for access to justice independent of the infringement of an individual right. In the end, the court did not find this act to be applicable to this case."

This clearly shows that this judgement is no evidence at all for the allegation that Germany is not ensuring the standing of environmental NGOs beyond the scope the EAA and according to Article 9, paragraph 3 of the Aarhus Convention. The two environmental NGOs in this case have been granted standing by the court, but their case was not successful. That is something totally different as to deny standing.

Therefore the Compliance Committee is asked to re-consider also its evaluation and conclusion on this allegation, because here again a misunderstanding of the German legislation and its practical application by the courts must have taken place.

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