

Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**Second progress review of the implementation of decision V/9h
on compliance by Germany with its
obligations under the Convention**

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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision V/9h on compliance by Germany with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up action with decision V/9h since the Committee's first progress review

2. By letter of 13 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9h to the Party concerned together with a reminder of the request by the Meeting of the Parties to provide its second progress report to the Committee by 31 October 2015 on the measures taken and the results achieved thus far in implementation of the recommendations set out in decision V/9h.

3. On 27 October 2015 the Party concerned provided its second progress report on the implementation of decision V/9e.¹

4. At the Committee's request, on 6 November 2015 the secretariat forwarded the Party concerned's second progress report to the communicants of communication ACCC/C/2008/31, inviting them to provide their comments on that report by 27 November 2015. The communicant of communication ACCC/C/2008/31 (Client Earth) provided its comments on 18 December 2015.

5. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9h in open session taking into account the Party concerned's second progress report and written comments received from the communicant of communication ACCC/C/2008/31 as well as the comments made by audio conference by the Party concerned during the session. Despite invitation, the communicants of communication ACCC/C/2008/31 did not take part in the session. Following the discussion in open session, the Committee commenced the preparation of its second progress review on the implementation of decision V/9h in closed session.

6. On 7 April 2016, the secretariat invited the Party concerned to submit the comments made during the open session at the Committee's fifty-second meeting in writing, together with any relevant legislation in draft or final form, by 13 April 2016. The Party concerned provided an update on its legislative developments on 13 April 2016, and then further updates on 25 April.

7. The Committee continued the preparation of its second progress review at its virtual meeting on 13 May 2016, taking into account the further written comments provided by the Party concerned on 13 April 2016 and 25 April 2016.

8. The Party concerned provided further updates on its legislative developments on 12 May, 13, 16, 23 June, 8 July and 5 and 13 October 2016.

9. On 8 June 2016, five environmental non-governmental organizations (NGOs), Naturschutzbund e.V., Bund für Umwelt und Naturschutz e.V., Deutscher Naturschutzring e.V., WWF Deutschland and Greenpeace e.V., provided comments as observers on the Party concerned's second progress report and on the draft "Aarhus" amendment.

¹ In its letter of 27 October 2015 enclosing its second progress report, the Party concerned indicated that the report had been finalized on 5 October 2015, in order to allow time for translation prior to its submission to the Compliance Committee. The Committee's first progress review was thus not taken into account in its preparation.

10. On 27 October 2016, the communicant of communication ACCC/C/2008/31 provided further comments on the proposed legislative amendments.

11. On 31 October 2016, the Party concerned submitted its third progress report.

12. At the Committee's fifty-fifth meeting (Geneva, 6-9 December 2016), representatives of the Party concerned and the observers referred to in paragraph 9 above participated by audio conference in an open session on the implementation of decision V/9h.

13. On 6 December 2016, the Party concerned provided an update via email announcing that the "Seveso III amendment" had now entered into force.

14. After taking into account the information provided, the Committee adopted its second progress review at its virtual meeting on 22 December 2016 and requested the secretariat to forward it to the Party concerned, communicants and observers.

Party concerned's second progress report and supplementary information

Paragraph 2(a) and (b) of decision V/9h

15. In its second progress report submitted on 27 October 2015, the Party concerned reported that the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety had prepared a draft Act adapting the Environmental Appeals Act and other provisions to European and international law which contained proposals for legislative amendments in order to implement the recommendations in paragraph 2 (a) and (b) of decision V/9h. It reported that the start of consultations with the Länder and associations, publication of the draft act and subsequent adoption of the new draft by the Cabinet (incorporating the results of the consultations) was currently scheduled for the end of December 2015 or beginning of January 2016. It also noted that the judgment of the European Court of Justice concerning case C-137/14 issued on 15 October 2015² would determine whether and on what scale the current draft act would have to be revised.

16. The Party concerned also reported that consultations had been held with the Länder and associations on the draft Act transposing Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (the "Seveso III" amendment) and the draft Act had been published. The Party concerned provided an English translation of article 3 of the draft Act which would amend the Environmental Appeals Act and extend that Act's scope by adding two further categories of possible decisions as subjects of appeal.³ It stated that the planned amendment would implement article 23(b) of the Seveso III Directive. The Party concerned reported that the adoption of the draft Act was scheduled for autumn 2015.

17. The Party concerned also reported that on 12 August 2015 the Government had adopted the draft Act amending the Environmental Appeals Act to implement the judgment of the European Court of Justice of 7 November 2013 on case C-72/12 (the "Altrip" amendment). It provided an English translation of the amendments to sections 4 and 5 of the Environmental Appeals Act. The Party concerned reported that the Act was expected to enter into force in November 2015.

18. In its oral statement during the open session on decision V/9h held during the Committee's fifty-second meeting (Geneva, 8-11 March 2016), the Party concerned reported that it had started

² The date of this judgment post-dated the finalization of the Party concerned's second progress report on 5 October 2015 (see footnote 1 above).

³ Licences for installations pursuant to section 23a subsection (4), first sentence, or section 19 subsection (4) of the Federal Immission Control Act; and decisions concerning the admissibility of projects that are to be carried out within the safety clearance of an establishment pursuant to section 3 subsection (5a) of the Federal Immission Control Act and that require authorisation according to provisions under land law.

the process of public consultation on the draft amendment to the Environmental Appeals Act intended to implement the requirements of the decision V/9h (the “Aarhus” amendment). The Cabinet Decision on the draft Act was expected in May 2016 and the final decision by the Parliament and the Federal Council in the last quarter of 2016. The Party concerned reported that, in order to fully implement decision V/9h, it was also considering to amend the Nature Protection Act.

19. In its additional information of 13 April 2016, the Party concerned provided English translations of the “Altrip” amendment to the Environmental Appeals Act, which had entered into force on 26 November 2015, as well as the draft text of the “Seveso III” amendment. The latter was scheduled to be adopted by the Federal Government at its session on 26 April 2016.

20. In its update provided on 25 April 2016, the Party concerned reported that it had commenced the public consultation on the draft “Aarhus” amendment the week before. It provided a link to where the draft Act could be accessed in German and indicated that an English version of the draft Act would be submitted to the Committee shortly.

21. In its further update provided on 12 May 2016, the Party concerned provided an English version of the draft “Aarhus” amendment and reported that the public consultations on the draft bill had been initiated on 19 April 2016. Written comments were invited until 17 May 2016 and oral hearings with stakeholders would be carried out on 19 and 20 May 2016. Thereafter, the Government would re-examine the draft bill, taking into account the outcomes of the consultation, and prepare it for formal adoption by the cabinet and the start of the parliamentary process.

22. The “Aarhus” amendment would extend the scope of decisions which NGOs promoting environmental protection which meet the requirements of section 3 of the EAA would be able to challenge to include also:

- Decisions on the acceptance of plans and programmes within the meaning of section 2 subsection (5) of the federal EIA Act (*Gesetz über die Umweltverträglichkeitsprüfung*) and within the meaning of the corresponding provisions of land law, for which, in accordance with a) Annex 3 of the federal EIA Act, or b) provisions of land law, there may be an obligation to implement a strategic environmental assessment; plans and programmes shall be excluded from this the acceptance of which is decided upon by formal act, meaning a legislative act (*formelles Gesetz*);
- administrative acts which regulate the permissibility of undertakings other than those designated in numbers 1 to 2b, applying environmental provisions of federal or land law, and
- administrative acts regarding monitoring or supervisory measures serving compliance with environmental provisions of federal or land law.⁴

23. The proposed “Aarhus” amendment would further extend the scope of decisions which NGOs promoting nature protection which meet the requirements of section 3, subsection 1 or 2 would be able to challenge, via an amendment to the federal Nature Conservation Act, to include also:

- Exemptions from requirements and prohibitions for the protection of marine protected areas within the meaning of section 57, subsection (2), as well as derogating decisions in accordance with section 34, subsections (3) to (5), also in conjunction with section 36, sentence 1, number 2, even if such marine areas are included in or replaced by a different decision;
- Licences for the establishment, expansion, substantial modification or operation of a zoo in accordance with section 42, subsection (2), sentence 1;

⁴ Draft amended section 1, subsection (1), numbers 4 – 6 of the EAA.

- Approval of an exception in accordance with section 45, subsection (7), sentence 1, by means of a statutory instrument or by a general ruling;
- Derogating decisions in accordance with section 34, subsections (3) to (5), also in conjunction with section 36, sentence 1, number 2.

Comments on the Party concerned's second progress report and supplementary information

24. In its comments of 18 December 2015 on the Party concerned's second progress report, a communicant of communication ACCC/C/2008/31 (Client Earth) submitted that the Party concerned had more or less provided a waiting reply, invoking the outstanding judgment of the European Court of Justice in case C-137/14. That judgment was in the meantime delivered on 15 October 2015 but was not taken into consideration by the Party concerned. The communicant stated that it would therefore wait until the new draft legislation was submitted to the Committee before making substantive comments.

25. The communicant noted the lengthy delay in bringing national legislation into compliance with the requirements of the Convention and asked the Committee to set a deadline by which the Party concerned should submit its amended legislation, even if in draft form.

26. In their comments of 8 June 2016, the observers expressed their concern that the proposed amendment (see paragraphs 22 and 23 above) would not bring the legislation and practice of the Party concerned into compliance with article 9, paragraph 2 of the Convention. With respect to paragraph 2(a) of decision V/9h, the observers submitted that for the annulment of any decision subject to the EAA, section 2, subsection (4) of the EAA would still require that "the breach relates to the objectives which the association promotes in accordance with its statutes". The observers contended that since a registered environmental organization in Germany must, in accordance with section 3 of the EAA, focus on environmental and nature protection matters, this provision meant that an NGO would still only be able to challenge a decision or omission as defined in section 2, subsection (3) of the federal Environmental Impact Assessment Act (EIA Act) if it asserted that provisions protecting the environment and nature had been breached.

27. Regarding paragraph 2(b) of decision V/9h, the observers submitted that if the proposed amendments to section 1, subsection (1) of the EAA would be adopted there would still be remaining gaps with regard to the implementation of the requirements of article 9, paragraph 3 of the Convention. The observers provided examples of plans and programmes not subject to SEA, as well as of acts "not taken in the form of an administrative act" and of "projects" ("*Vorhaben*"), which they asserted related to the environment, and should thus be subject to article 9, paragraph 3 of the Convention, which they claimed would fall outside the scope of decisions, acts and omissions which could be challenged by NGOs under the EAA. The observers further stated that the proposed amendments to the EAA entirely failed to establish direct standing rights to challenge "acts and omissions by private persons".

28. The observers further submitted that it violates the spirit of the Convention and the objectives of the compliance procedure that, as per section 7 of the amended EAA, the improved rights to challenge decisions only apply from 31 December 2016, while decision V/9h dates back to July 2014.

29. The observers also submitted that, while it was not at the core of communication ACCC/C/2008/31, the newly introduced section 5 of the EAA, by excluding challenges on matters which have not been raised during a preceding administrative procedure "in bad faith", raised issues of non-compliance. The observers alleged that this "bad faith" test was not defined in the law and would have profound impacts on whether "wide access to justice" is granted in practice. The observers proposed that section 5 of the EAA should, at the very least, be defined in a way that would only preclude a legal challenge if it could be proven that an environmental association had participated in a pertinent administrative procedure and had willingly and knowingly not reported a certain fact with the intention of only raising it in court.

30. In its letter of 27 October 2016, a communicant of communication ACCC/C/2008/31 (NABU) submitted that the proposed version of section 7, subsection (5) of the EAA pending before the Parliament of the Party concerned at that time would not bring the Party concerned into compliance with decision V/9h. Pursuant to this provision, for a number of the decisions challengeable by NGOs under the EAA, violation of substantive legal provisions would only lead to the rescission of the decision if faults in the decision cannot be remedied by supplementing the decision or by a supplementary procedure by an administrative authority. The communicant alleged that accordingly, in order to remedy the faults in an illegal decision, the public concerned would be obliged to not only file a rescissory action but also an action for obligation and performance. The communicant submitted that this would make proceedings unfair and prohibitively expensive, as the public would need to put greater effort into filing various different types of complaints without being able to challenge the decision as a whole. The communicant further submitted that this contradicted the principle of a swift and timely procedure, because authorities would be able to correct illegal decisions in the proceedings as often, and taking as much time, as they wished. The communicant also alleged that the amendment was not necessary for the legal protection of the permit holder, as the permit holder would be able to request a new permit if it has been rescinded by the court and because no legitimate expectations arise from an illegal permit. The communicant submitted that this possibility would prevent a majority of the actions against illegal decisions filed by members of the public at the present time from being submitted in the future.

Party concerned's third progress report

31. In its third progress report dated 31 October 2016, the Party concerned informed the Committee that the "Aarhus" amendment had been considered on first reading by both legislative chambers and submitted that it will likely be adopted by the Bundestag (first chamber) on 10 November 2016 pending final approval of the Bundesrat (second chamber) by 16 December 2016. The Party concerned further informed the Committee that the "Seveso III" amendment was also currently under consideration by Parliament and submitted that the amendment will likely enter into force by the end of 2016. The Party concerned stated that it would continue to report on the further steps of the legislative proceedings with regard to both amendments.

32. The Party concerned further noted that the "Altrip" amendment had entered into force on 26 November 2016.

III. Considerations and evaluation by the Committee

33. In order to fulfil the requirements of decision V/9h, the Party concerned would need to provide the Committee with evidence that it had taken the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:

- (a) NGOs promoting environmental protection can challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, without having to assert that the challenged decision contravenes a legal provision "serving the environment"; and
- (b) Criteria for the standing of NGOs promoting environmental protection, including standing with respect to sectoral environmental laws, to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention had been revised, in addition to any existing criteria for NGO standing in the Environmental Appeals Act, the federal Nature Conservation Act and the Environmental Damage Act.

34. In its first progress review, which reviewed the Party concerned's first progress report, the Committee invited the Party concerned in its second progress report to provide:

- (a) An approximate timeline for the various stages of its internal procedures leading up to the final adoption of the legislative, regulatory and administrative measures and practical arrangements necessary to meet the requirements of decision V/9h; and

(b) Any drafts of the legislation aimed at implementing the requirements of decision V/9h available at the time of submitting the second progress report, together with English translations thereof, or with summaries of the substantive contents of such drafts.

35. The Committee welcomes the second progress report of the Party concerned, which was submitted on time, and the information contained therein.

Paragraph 2(a) of decision V/9h

36. With respect to paragraph 2(a) of decision V/9h, while welcoming the information received regarding the current legislative process, the Committee notes that no legislative or other measures ensuring that NGOs promoting environmental protection are able to challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, without having to assert that the challenged decision contravenes a legal provision “serving the environment”, have yet been adopted by the Party concerned. With respect to the current legislative process, the Committee welcomes the frequent updates provided by the Party concerned concerning the procedure to adopt the “Aarhus” amendment, which proposes changes, inter alia, to section 2, subsection (1), sentence 1, numbers 1 and 3 of the Environmental Appeals Act (EAA).

37. The Committee notes that if the proposed “Aarhus” amendment is adopted, NGOs promoting environmental protection which meet the requirements of section 3 of the EAA would be able to challenge decisions covered by section 1, subsection (1), sentence 1, number 1 of the EAA, without having to assert that the challenged decision contravenes a legal provision “serving the environment”. To challenge other decisions, acts and omissions covered by section 1, subsection (1) of the EAA, NGOs would still need to show that the challenged decision or omission contravenes “environmental legal provisions” (section 2, subsection 1, last sentence).

38. Concerning the observers’ submission (see paragraph 26 above) that the proposed amendment would reinstate the requirement that an NGO could only challenge a decision or omission as defined in section 2, subsection 3, of the EIA Act if it asserted that provisions protecting the environment were breached, the Committee notes that it has already examined the EAA’s requirement that the challenged breach must relate to the objectives which the NGO promotes in accordance with its statutes in paragraphs 70-73 of its findings on communication ACCC/C/2008/31. In those findings, the Committee found that no information had been submitted to show that the authorities and courts of the Party concerned used this criterion in such a manner so as to effectively bar environmental NGOs from access to justice and the Party concerned did not fail to comply with the Convention in this respect. The Committee emphasizes that any such criterion should be interpreted in a broad manner, to require only a general relationship between the statutory objectives of the NGO and the reasons of the appeal. It should not prevent NGO applicants from including in their claim allegations that the challenged decision contravenes legal provisions which are not “serving the environment”.

39. In order to evaluate if the proposed amendment outlined above would fully meet the requirements of paragraph 2(a) of decision V/9h, the Committee will require further evidence that the requirement in section 2, subsection 1, last sentence of the EAA (i.e. that the NGO must assert a violation of environmental legal provisions) would not apply to any decision, act or omission subject to the provisions of article 6 of the Convention, including article 6, paragraph 1(b). In this context, the Party concerned may also wish to elaborate on whether any decision under article 6, paragraph 1(b) of the Convention may, in certain circumstances, fall under section 1, subsection (1), sentence 1, number 5 of the EAA without falling under section 1, subsection (1), sentence 1, number 1 of the EAA.

40. The Committee accordingly finds that the Party concerned has not yet fulfilled the requirements of paragraph 2(a) of decision V/9h, but welcomes the steps taken by the Party concerned to date in that direction.

Paragraph 2(b) of decision V/9h

41. Regarding paragraph 2(b) of decision V/9h, while welcoming the information received regarding the current legislative process to amend the EAA, the Committee notes that as at the date of this progress review, the criteria for the standing of NGOs promoting environmental protection to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention are unchanged.

42. The Committee, however, welcomes the information provided by the Party concerned about the legislative process on the draft Act transposing Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major accident hazards involving dangerous substances (the “Seveso III” amendment). Article 3 of the draft Act would extend the scope of the Environmental Appeals Act so that two further categories of decisions, which relate to the required safety distance between protected sites and sites for storage of hazardous material issued according to the federal Immission Control Act, would be subject to appeal by NGOs promoting environmental protection. The Committee considers that such an Act, if adopted, may partially fulfil the requirements of paragraph 2(b) of decision V/9h, albeit in the limited context of the requirements of the Seveso III Directive with regard to the storage of hazardous waste.

43. The Committee notes that the “Altrip” amendment to the Environmental Appeals Act (see paragraphs 17 and 19 above) does not directly implement the requirements of paragraph 2 (b) of decision V/9h, so it will not examine it further.

44. The Committee further welcomes the information provided by the Party concerned about the “Aarhus” amendment and the expected timeline for its adoption. The Committee notes that if the “Aarhus” amendment was adopted, the scope of administrative acts which could be challenged by NGOs promoting environmental protection would be extended considerably. However, if it is adopted in its current form, a considerable number of acts and omissions which could contravene provisions of national law of the Party concerned relating to the environment would appear to not be covered.

45. Regarding the proposed provisions of the “Aarhus amendment”, the Committee notes that proposed section 1, subsection (1), sentence 1, number 4 of the EAA would cover decisions on the acceptance of plans and programmes for which there may be an obligation to implement a strategic environmental assessment (SEA). In that regard, the descriptions to the “Aarhus” amendment clarify that a preliminary assessment shall be made as to whether an SEA was actually carried out or should have been carried out. The Committee points out that there is nothing in the wording of article 9, paragraph 3, of the Convention that would limit the review of plans and programmes relating to the environment to only those which may be subject to SEA.

46. In addition, the Committee observes that section 1, subsection (1), sentence 3, number 3 of the EAA as well as the proposed sections 19b, subsection (2) and section 16, subsection (4) of the federal EIA Act further exclude specific plans and programmes which would mostly seem to relate to the environment. Again, the Committee points out that article 9, paragraph 3 of the Convention provides no legal basis for excluding such plans and programmes from the scope of review.

47. With regard to proposed section 1, subsection (1), sentence 1, number 5 of the EAA, the Committee notes that this provision only applies to the permitting of “projects” (“*Vorhaben*”) applying environmental legal provisions. The proposed wording of the provision limits its applicability to permitting processes relating to *Vorhaben*, a fixed term in the German legal system defined in section 2, subsection (2) of the EIA Act broadly stated as physical intervention in the landscape. As noted by the observers, this excludes regulatory acts not relating to the permitting of projects from the scope of this provision. The observers cite regulatory acts with regard to emission limits of cars as an example of an act that would potentially be excluded. The Committee notes that, depending on the specific circumstances, these or similar acts should indeed be challengeable under article 9, paragraph 3 of the Convention.

48. In addition, the requirement in section 1, subsection 1, sentence 1, number 5 of the EAA that challengeable projects must be subject to permitting procedures applying environmental legal provisions could potentially be interpreted so as to prevent challenges concerning projects which are not subject to permitting procedures intended to protect the environment, but may nevertheless contradict provisions of national law relating to the environment. The Committee thus invites the Party concerned, in its final progress report, to clarify this point.

49. With regard to proposed section 1, subsection (1), sentence 1, number 6 of the EAA, the Committee welcomes the inclusion within the scope of review of supervisory or monitoring acts of public authorities relating to the other reviewable acts mentioned. However, the Committee notes that, in order to be the subject of a challenge, decisions on monitoring measures must once again serve to bring compliance with environmental legal provisions. As noted in paragraph 48 above, this raises the concern that the provision may be interpreted so as to possibly prevent challenges of monitoring and supervisory measures that are not intended to protect the environment, but nevertheless contradict provisions of national law relating to the environment.

50. The Committee also welcomes the specific additions to the scope of section 64 of the Act on Nature Conservation and Landscape Management (the federal Nature Conservation Act) outlined in paragraph 23 above. The Committee has, however, not been provided with sufficient information to demonstrate that these additions would fully cover every act that may contravene provisions of German nature conservation law or otherwise that these acts would be reviewable under the regime discussed above. The Committee notes in particular the differing scope between section 63 and section 64 of the federal Nature Conservation Act that would appear to result in the following measures being exempt from review:

- Regulations and other statutory ordinances ranking below laws in the field of nature conservation and landscape management adopted by the Federal Government or the *Länder* authorities,
- Landscape programmes and landscape master plans (in accordance with section 10 of the Nature Conservation Act) and landscape plans and open space structure plans (in accordance with section 11 of the federal Nature Conservation Act),
- Plans to be observed or taken into account by the public authorities when deciding on nature conservation issues (in accordance with section 36.1.2. of the federal Nature Conservation Act)
- Other procedures that are so designated under *Länder* law and that affect the task areas of the nature conservation organization.

51. The Committee notes that some of the acts indicated in the preceding paragraph may be covered by the newly added provisions of the EAA, in particular section 1, subparagraph (1), sentence 1, number 4 of the EAA, but it has not been provided with information that would clearly demonstrate that that is the case.

52. The Committee has further not been provided with any information on any proposed amendment that would implement the requirement in article 9, paragraph 3, of the Convention that acts of private persons that contravene the national law relating to the environment can be the subject of review. All numbers in section 1, subsection (1), sentence 1 of the EAA and all subparagraphs of section 63 of the Nature Conservation Act appear to refer to acts and omissions of public authorities.

Concluding observations on paragraph 2(b) of decision V/9h

53. With regard to the foregoing paragraphs, the Committee recalls that article 9, paragraph 3, of the Convention is intended to cover all acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. This formulation must be interpreted in a broad manner. Article 9, paragraph 3, is not intended to only give members of the public the possibility to review acts of public authorities that are intended to protect the environment. Rather, the provision serves to give access to courts in cases in which acts or omissions of private persons or public authorities contravene the national law relating to the environment, regardless of their intended purpose. Moreover, article 9, paragraph 3, does not limit

the types of acts or omissions that may be reviewed to only acts or omissions that have a specific form, a specific nature or that constitute decisions that permit an activity or establish a plan or programme. The Committee invites the Party concerned to bear this in mind in the further development of the proposed legislation.

54. To be able to evaluate if the “Aarhus” amendment would nevertheless fully meet the requirements of paragraph 2(b) of decision V/9h, the Committee will need a more detailed explanation of which acts and omissions by private persons and public authorities that could contravene the provisions of the Party concerned’s national law relating to the environment would be covered by the proposed provisions, which possibly not, and for what reasons. The explanation should take into account the concerns raised by the Committee in the preceding paragraphs.

55. In the light of the above, the Committee finds that the Party concerned has not yet fulfilled the requirements paragraph 2 (b) of decision V/9h, but welcomes the steps taken by the Party concerned to date in that direction.

Other remarks

56. The Committee recalls that in its findings on communication ACCC/C/2008/31, it did not come to a conclusion of non-compliance with regard to the allegations of the communicant that decisions could not be reviewed on the basis of procedural errors. As the Committee noted in paragraph 89 of those findings, no adequate evidence had been provided that a consistent court practice would prevent the consideration of these errors. The Committee nevertheless welcomes the efforts made through the “Aarhus” and “Altrip” amendments to remedy the lack of clarity with regard to procedural errors, which had also been raised as a matter of concern in paragraph 90 of its findings. The Committee observes, however, that the proposed amendments to section 4 of the EAA appear to leave considerable gaps as to which decisions can be reviewed on the basis of procedural errors. Pursuant to the proposed section 4, it would seem that challenges against procedural errors could only be brought where they have prevented public participation or relate to the absence of an adequate EIA or SEA or an adequate screening thereof.⁵ The Committee notes that it is not at all evident that this would cover all potential procedural errors relevant to the legality of the decision. Furthermore, it appears that procedural errors in the context of decisions under sections 1, subsection (1), sentence 1, number 3, number 5 and number 6, of the EAA may not form the subject of a challenge at all. While the issue of procedural errors is not within the scope of decision V/9h, as the Committee did not find non-compliance on this matter in its findings on ACCC/C/2008/31, the Party concerned may wish to take the Committee’s observations into account in its further deliberations on the “Aarhus” amendment.

57. The Committee further takes note of the observers’ submissions on the preclusion on the grounds of “bad faith” under section 5 EAA (see paragraph 29 above). The Committee notes that, in its findings on communication ACCC/C/2008/31, it did not examine the issue of preclusion and it is thus not within the scope of decision V/9h. In this context, the Committee, nevertheless, welcomes the fact that proposed section 2, subsection (1), sentence 1, number 3, removes the material preclusion rule for most of the decisions listed in section 1, subsection (1), sentence 1, of the EAA. The Committee notes, however, that in addition to the new “preclusion” on the grounds of “bad faith” introduced through the new section 5 EAA, pursuant to section 2, subsection (1), number 3, the material preclusion rule appears to have been maintained for challenges brought under section 1, subsection (1), sentence 1, number 4, of the EAA, except for zoning plans under section 7, subsection (3), of the EAA. Since, however, the issue of preclusion was not considered by the Committee in its findings on communication ACCC/C/2008/31 and is not within the scope of decision V/9h, it will not examine either of these points further in the context of its review of that decision.

58. The Committee also takes note of the communicant’s submission with regard to section 7, subsection (5) of the EAA, according to which violation of substantive legal provisions shall only

⁵ See proposed section 4, subsection (4), sentence 1.

lead to the rescission of some of the decisions challengeable by the NGOs under the EAA if the decision cannot be remedied by supplementing the decision or by a supplementary procedure by an administrative authority (see paragraph 30 above). The Committee notes that this issue has not been addressed in its findings in ACCC/C/2008/31 and is thus not within the scope of decision V/9h. The Committee will accordingly not examine this issue here. The Committee notes, however, that both paragraphs 2 and 3 of article 9 of the Convention, in conjunction with paragraph 4 of the same article, require not only access to review procedures, but also that these procedures provide adequate and effective remedies.

59. The Committee also takes note of the submission by the observer regarding the fact that the “Aarhus amendment”, once in force, would only apply from 31 December 2016, while decision V/9h dates back to 2014 (see paragraph 28 above). While the Committee calls upon Parties to remedy issues of non-compliance as soon as possible, the deadline set does not change the Committee’s considerations in the circumstances of the case.

IV. Conclusions

60. The Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9h but welcomes the steps taken by the Party concerned to date in that direction.

61. In order for the Committee to prepare its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9h, the Committee invites the Party concerned to provide by 15 March 2017:

- (a) Evidence of the legislative, regulatory or administrative measures and practical arrangements already adopted in order to fulfil the requirements of decision V/9h, together with English translations thereof;
- (b) Any drafts of legislation or other measures aimed at implementing the requirements of decision V/9h, available at the time of submitting the final progress report, together with English translations thereof, and with an approximate timeline for the procedures leading up to their final adoption;
- (c) With regard to paragraph 2(a) of decision V/9h, evidence that the requirement in the EAA, as amended by the “Aarhus amendment”, to assert that the challenged decision, act or omission contravenes a legal provision “serving the environment,” by way of section 2, subsection (1), last sentence of the EAA or any other provision, is not applicable to any decisions, acts or omissions within the scope of article 6 of the Convention, including article 6, paragraph 1(b). In this context, the Party concerned may also wish to elaborate on whether any decision under article 6, paragraph 1(b) of the Convention may, in certain circumstances, fall under section 1, subsection (1), sentence 1, number 5 of the EAA without falling under section 1, subsection (1), sentence 1, number 1 of the EAA;
- (d) With regard to paragraph 2(b) of decision V/9h:
 - (i) An explanation of the limitations applicable to section 1, subsection (1), sentence 1, number 4, in particular regarding:
 - a. The requirement that plans and programmes must be subject to SEA to be subject to review;
 - b. The specific exclusions in section 1, subsection (1), sentence 3, number 3 of the EAA;
 - c. The specific exclusions in proposed sections 19b subsection (2) and section 16, subsection (4) of the EIA Act;
 - (ii) An explanation of the limitations applicable to proposed section 1, subsection (1), sentence 1, number 5 of the EAA, in particular that decisions must relate to the permitting of “projects” (“Vorhaben”) applying environmental legal provisions (“unter

Anwendung umweltbezogener Rechtsvorschriften”). This should include clarification of whether this could potentially be interpreted so as to prevent challenges brought concerning projects, which are not subjected to permitting procedures intended to protect the environment, but may nevertheless contradict provisions of national law relating to the environment;

(iii) An explanation of the limitations applicable to proposed section 1 subsection (1), sentence 1, number 6 of the EAA, in particular that decisions must relate to monitoring and supervisory activities applying environmental provisions (“*unter Anwendung umweltbezogener Rechtsvorschriften*”) and whether that requirement may be interpreted so as to possibly prevent challenges of monitoring and supervisory measures that are not intended to protect the environment;

(iv) An explanation of the differing scope between section 63 and section 64 of the Nature Conservation Act including clarification as to whether the measures identified in paragraph 50 above would be exempted from review or instead would be reviewable under the provisions of the proposed EAA or some other provisions of national law; and

(v) Information as to the possibilities under the EAA, or any other provisions of national law, for the public to challenge acts and omissions of private persons contravening the Party concerned’s law relating to the environment.

62. The Committee informs the Party concerned that all measures necessary to implement decision V/9h should be completed by, and reported upon by no later than 15 March 2017, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision V/9h.
