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Item 7 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee*

Compliance by Germany with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 19 of decision V/9 of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

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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

2. The Party concerned provided its first progress report on the implementation of decision V/9h on 16 December 2014.

3. At the Committee's request, on 2 January 2015 the secretariat forwarded the first progress report of the Party concerned to the communicants of communication ACCC/C/2008/31, inviting them to provide their comments on that report by 23 January 2015. No comments were received from the communicants.

4. At its forty-eighth meeting (Geneva, 24-27 March 2015), the Committee reviewed the implementation of decision V/9h in open session taking into account the comments received from observers present.

5. 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.

6. On 27 October 2015 the Party concerned provided its second progress report on the implementation of decision V/9h.[1]

7. At the Committee's request, on 6 November 2015 the secretariat forwarded the second progress report by the Party concerned 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.

8. 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 second progress report by the Party concerned 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.

9. 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 and 12 May 2016.

[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 8 June 2016, five environmental non-governmental organizations (NGOs), namely a communicant of communication ACCC/C/2008/31 (Naturschutzbund e.V.) and four observers (Bund für Umwelt und Naturschutz e.V., Deutscher Naturschutzring e.V., WWF Deutschland and Greenpeace e.V.), provided comments on the second progress report by the Party concerned.

11. The Party concerned provided further updates on its legislative developments on 13, 16 and 23 June, 8 July and 5 October 2016. On 23 June 2016, it informed the Committee that the federal Cabinet had adopted the draft "Aarhus amendment"[2] with some slight revisions. On 8 July 2016, the Party concerned provided an English translation of the draft bill as adopted by the Cabinet.

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

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

14. At the Committee's fifty-fifth meeting (Geneva, 6-9 December 2016), representatives of the Party concerned and the observers referred to in paragraph 10 above participated by audio conference in an open session on the implementation of decision V/9h.

15. On 6 December 2016, the Party concerned provided an update via email announcing that the "Seveso III amendment"[3] had now entered into force.

16. By letter of 1 February 2017, the secretariat sent the Committee's second progress review on the implementation of decision V/9h to the Party concerned.

17. At the Committee's fifty-sixth meeting (Geneva, 28 February-3 March 2017), representatives of the Party concerned and the communicant of communication ACCC/C/2008/31 participated by audio conference in an open session on the implementation of decision V/9h.

18. On 15 March 2017, the Party concerned provided further information.

19. On 28 March 2017, the Committee received a submission from an observer (ECO Forum).

20. On 31 March, 26 and 28 April, 5 and 16 May 2017, the Party concerned provided updates on the legislative procedure for the adoption of the "Aarhus amendment", including draft legislative texts. In its update of 28 April 2017, the Party concerned stated that its Bundestag had adopted the "Aarhus amendment" on 27 April. In its update of 16 May 2017, the Party concerned reported that the Bundesrat had given its consent to the act without changes on 12 May 2017. On 2 June 2017, the Party concerned reported that the "Aarhus amendment" had entered into force on that day (i.e. 2 June).

21. The Committee adopted its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9h through its electronic decision-making procedure on 31 July 2017, and thereafter requested the secretariat to send it to the Party concerned, communicant and observers.

[2] "Bill Aligning the Environmental Appeals Act and other provisions to Stipulations of European and International Law", see annex 1 to email update from the Party concerned, 26 April 2017

[3] "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" see annex to email update from the Party concerned, 6 December 2016.

III. Considerations and evaluation by the Committee

22. 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";[4] 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.[5]

23. The Committee welcomes the three progress reports received from the Party concerned, which have been received on time, as well as the further information and as applicable, legislative texts, provided on 5, 13 and 25 April, 4 and 12 May, 13, 16 and 23 June, 8 July, 5 October and 6 December 2016 as well as 15 March, 26 and 28 April, 5 and 16 May and 2 June 2017.

24. The Committee also welcomes the comments and information provided by the communicants and observers on 18 December 2015, 8 June 2016 and 28 March 2017.

A. Paragraph 2 (a) of decision V/9h

25. With respect to paragraph 2 (a) of decision V/9h, the Committee welcomes the adoption of the "Aarhus" amendment, which made changes, inter alia, to section 2, subsection (1), sentence 1, numbers 1 and 3, of the Environmental Appeals Act.

26. The Committee notes that in accordance with the "Aarhus" amendment, NGOs promoting environmental protection which meet the requirements of section 3 of the Environmental Appeals Act may challenge decisions covered by section 1, subsection (1), sentence 1, number 1 and 2, of the Environmental Appeals Act, 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), sentence 1, of the Environmental Appeals Act, NGOs would still need to show that the challenged decision or omission contravenes "environmental legal provisions" (section 2, subsection 1, last sentence).

27. The Committee takes note in that regard of the submission by the communicant and observers 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 Environmental Impact Assessment Act if it asserted that provisions protecting the environment were breached.[6] The Committee recalls, however, that it already examined the requirement in the Environmental Appeals Act that the challenged breach must relate to the objectives which the NGO promotes in accordance with its statutes in paragraphs 70-73 of

[4] Decision V/9h, para. 2 (a).

[5] Decision V/9h, para. 2 (b).

[6] Comments from the communicant of communication ACCC/C/2008/31 (NABU) and observers (BUND, DNR, WWF, Greenpeace) on the second progress report, 8 June 2016, pp. 2-3.

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".

28. In its second progress review, the Committee asked the Party concerned to clarify whether the requirement in section 2, subsection 1, last sentence of the Environmental Appeals Act (i.e. that the NGO must assert a violation of environmental legal provisions) could apply to any decision, act or omission subject to the provisions of article 6 of the Convention, including article 6, paragraph 1 (b).[7]

29. In its further information provided on 15 March 2017, the Party concerned submitted that section 1, subsection (1), sentence 1, numbers 1 and 2, to which section 1, subsection (1), sentence 2 is not applicable, are the only decisions falling under article 9, paragraph 2, of the Convention.[8] The Party concerned further submitted that also decisions under article 6, paragraph 1 (b), of the Convention would be covered by the Environmental Appeals Act, but excluded from the requirement to assert a violation of environmental legal provisions, because, in accordance with the German law on EIA, these decisions would also require the preparation of an EIA and therefore fall under of section 1, subsection (1), sentence 1, number 1, of the Environmental Appeals Act.[9]

30. While the Committee cannot exclude the possibility that there may be further activities that could fall under article 6 of the Convention that would not be covered by section 1, subsection (1), sentence 1, numbers 1 and 2, of the Environmental Appeals Act as amended, in the absence of evidence of any such activities, the Committee finds that the Party concerned has met the requirements of paragraph 2 (a) of decision V/9h. The Committee makes clear that this finding does not in any way preclude it from examining allegations regarding the application of the "Aarhus amendment" in practice in a future case if brought before it.

B. Paragraph 2 (b) of decision V/9h

31. Regarding paragraph 2 (b) of decision V/9h, the Party concerned has provided the Committee with information on three separate amendments, namely the "Altrip amendment",[10] the "Seveso III amendment" and the previously mentioned "Aarhus amendment", all of which have now entered into force. The Committee welcomes the information provided on all three amendments and examines the extent to which they fulfil the requirements of paragraph 2 (b) of decision V/9h below.

32. The Committee considers that the "Altrip amendment" to the Environmental Appeals Act does not directly implement the requirements of paragraph 2 (b) of decision V/9h, so the Committee will not examine it further.

[7] Committee's second progress review, 1 February 2017, paras. 39 and 61 (c).

[8] Further information received from the Party concerned, 15 March 2017, pp. 5-6.

[9] Ibid., p. 6.

[10] Annex 1 to email with additional information from the Party concerned, 13 April 2016, entitled: 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" entered into force on 26 November 2015.

33. The Committee notes that article 3 of the “Seveso III amendment” extended the scope of the Environmental Appeals Act so that two further categories of decisions, i.e. those relating to the required safety distance between protected sites and sites for storage of hazardous material issued according to the Federal Emission Control Act, are now open to challenge by NGOs promoting environmental protection. The Committee considers that the adoption of this Act contributes to the fulfilment by the Party concerned of the requirements of paragraph 2 (b) of decision V/9h with respect to one area of sectoral law, namely decisions relating to the storage of hazardous waste covered by the Seveso III Directive.[11] While the Committee welcomes this amendment, the Committee considers that, since it only addresses one area of sectoral law, it is in itself insufficient to fully meet the requirements of paragraph 2 (b) of decision V/9h.

34. With regard to the “Aarhus amendment”, the Committee considers that that amendment has extended the scope of administrative acts which could be challenged by NGOs promoting environmental protection considerably. As compared to the 2013 version of the Environmental Appeals Act, the “Aarhus amendment” provides NGOs with standing to challenge the following categories of acts:

(a) Decisions on the acceptance of plans and programmes within the meaning of section 2, sub-section (5), of the Environmental Impact Assessment Act and within the meaning of the corresponding provisions of *Land* (provincial) law, for which, in accordance with (a) Annex 3 of the Environmental Impact Assessment Act, or (b) provisions of *Land* law, there may be an obligation to implement a strategic environmental assessment (excluding plans and programmes the acceptance of which is decided upon by means of a formal law);

(b) Administrative acts or contracts under public law by means of which projects other than those designated in numbers 1 to 2b, applying environmental provisions of Federal law, *Land* law or directly applicable legal acts of the European Union, are permitted, and

(c) Administrative acts regarding monitoring or supervisory measures for the implementation or performance of decisions in accordance with numbers 1 to 5 serving to bring about compliance with environmental provisions of Federal law, *Land* Law or directly applicable legal acts of the European Union.

35. However, in its second progress review, the Committee raised a number of concerns regarding certain provisions of the “Aarhus amendment” and requested further information.[12] These concerns and the responses of the Party concerned thereto are considered in paragraphs 37-65 below.

36. As a preliminary point before doing so, the Committee notes that the allegations in communication ACCC/C/2008/31 relating to article 9, paragraph 3 of the Convention were of a rather general nature. The recommendation in paragraph 2 (b) of decision V/9h is consequently likewise of a general nature, and in particular asks the Party concerned to “revise” the criteria for the standing of NGOs promoting environmental protection to challenge act and omissions under article 9, paragraph 3 of the Convention. In these circumstances, the Committee does not consider the requirements of paragraph 2 (b) of decision V/9h to require the Party concerned to prove exhaustively that all acts and omissions under article 9, paragraph 3, of the Convention can be challenged by NGOs. The

[11] 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

[12] Committee’s second progress review, 1 February 2017, para. 61 (d).

Committee notes that, through the “Aarhus amendment”, the scope of acts and omissions under article 9, paragraph 3, subject to review by NGOs has been fundamentally extended by the Party concerned. Due to the short time since the amendment’s entry into force, its application in practice is not yet known and the Committee makes clear that its considerations in the present report do not in any way preclude it from examining allegations regarding the application of the “Aarhus amendment” in practice nor allegations regarding access to review procedures under article 9, paragraph 3 of the Convention in the Party concerned generally, in the future should such cases be brought before it.

Judicial review of plans and programmes

37. In its second progress review, the Committee noted that section 1, subsection (1), sentence 1, number 4, of the Environmental Appeals Act covers decisions on the acceptance of plans and programmes for which there may be an obligation to implement a strategic environmental assessment (SEA).[13] In its review, the Committee emphasized 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.[14]

38. In its further information provided on 15 March 2017, the Party concerned submitted that under its law, plans and programmes relating to the environment in accordance with article 7 of the Convention are those which may require an SEA and that, if it were to emerge in an individual case that a plan or programme relating to the environment within the meaning of article 7 of the Convention potentially did not require an SEA under its law, an SEA requirement could be ordered in accordance with the law on SEA.[15] The Party concerned further submitted that limiting direct review to plans and programmes potentially requiring an SEA constitutes an exercise of the discretion provided to Parties in article 9, paragraph 3, of the Convention and that other plans and programmes can be incidentally reviewed through challenges to downstream decisions based on the plan or programme.[16] In this respect, the Committee notes that the scope of plans and programmes “relating to the environment” may be broader than the scope of application of the SEA Act of the Party concerned. Moreover, the Committee underlines that while article 9, paragraph 3, of the Convention provides some discretion as to the criteria, if any, which members of public must meet to have access to review procedures, it does not allow the same discretion as regards the definition of the “acts” which may be challenged.[17]

39. With regard to plans for which no obligation to prepare an SEA exists, the Committee notes that article 9, paragraph 3, of the Convention does not set specific requirements as to the stage at which an act should be challengeable. Bearing this in mind, the Committee accepts that if a plan and programme not subject to SEA under the law of the Party concerned was to contravene national law relating to the environment, the possibility of an incidental challenge in the context of the review of a subsequent, “downstream” decision may be adequate, though not necessarily – for instance, there may be some plans or programmes for which there would be no downstream decisions that could be reviewed; for others, the elements of the plan or programme that contravene national law relating to the environment may fall outside the scope of review of any related downstream decision. However, as the Committee has no concrete examples before it of

[13] Ibid., para. 45.
[14] Ibid.
[15] Further information from the Party concerned, 15 March 2017, p. 7.
[16] Ibid., p. 8.
[17] See the Committee’s findings on communication ACCC/C/2008/32 (European Union) (part II), ECE/MP.PP/C.1/2017/7, para. 78.

any such plans or programmes and bearing in mind the considerations in paragraph 36 above, the Committee does not conclude that the Party concerned has failed to meet the requirements of paragraph 2 (b) of decision V/9h in this respect.

Specifically "exempted" acts

40. In its second progress review, the Committee observed that section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act as well as sections 19b, subsection (2), and section 16, subsection (4), of the federal Environmental Impact Assessment Act exclude a number of plans and programmes which would mostly seem to relate to the environment.[18] The Committee pointed out that article 9, paragraph 3, of the Convention provides no legal basis for excluding specific plans and programmes from the scope of review.[19] The Committee accordingly requested further information from the Party concerned on these provisions.[20]

(i) Section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act

41. In its further information of 15 March 2017, the Party concerned emphasized as a preliminary matter that section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act addresses not only plans and programmes but also other decisions.[21] The Committee notes that these are decisions that nonetheless appear to have the potential to contradict provisions relating to the environment and they are therefore also considered in this section. The Committee addresses the above provision as well as sections 19b, subsection (2), and section 16, subsection (4), of the federal Environmental Impact Assessment Act below.

42. The Party concerned submits that, rather than introducing specific exclusions, section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act merely upholds the specific provisions in incidental review applicable to specific acts regulated in specific laws. According to the Party concerned, for all these acts, downstream decisions based on these acts are challengeable and the courts can also review "the lawfulness of the plan or programme" in that context.[22]

43. The Committee accepts that there may be certain plans and programmes for which the possibility to incidentally review all relevant aspects of a plan or programme in subsequent downstream decision may be sufficient (see para. 39 above). At the same time, the Committee notes the submission by the communicant and observers that, pursuant to section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act, the review of national grid extension and construction plans is excluded.[23] The communicant and observers did not, however, provide specific information that would demonstrate that the possibilities for incidental review of these plans are insufficient. Therefore, while noting that uncertainties remain, the Committee considers that this factor as such does not prevent the Party concerned concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.

[18] Committee's second progress review, 1 February 2017, para. 46.
[19] Ibid., para. 46.
[20] Ibid., para. 61 (d) (i).
[21] Further information from the Party concerned, 15 March 2017, p. 8, footnote 1.
[22] Ibid., p. 8.
[23] Comments from the communicant of communication ACCC/C/2008/31 (NABU) and observers (BUND, DNR, WWF, Greenpeace) on the second progress report, 8 June 2016, p. 3.

(ii) Sections 19b, subsection (2) and section 16, subsection (4), of the federal EIA Act

44. The Party concerned submits that regional policy plans, one of the categories of acts covered by section 16, subsection (4), of the federal Environmental Impact Assessment Act, as well as federal transport infrastructure plans, one of the categories of acts covered by section 19b, subsection (2), of the federal Environmental Impact Assessment Act, can be deviated from in subsequent decisions.[24] With regard to other kinds of plans and programmes covered by these provisions, the Party concerned submits that they can be made subject to incidental review in connection with a challenge of subsequent permitting and zoning decisions.[25]

45. The Party concerned further argues that in the context of wind concentration plans and plans on raw material extraction, which are covered by section 16, subsection (4), of the federal Environmental Impact Assessment Act, there are certain circumstances in which review at the later stage is more appropriate as it allows challenges to aspects of a plan or programme to be reviewed without creating a legal vacuum due to the complete rescission of the plan or programme in question.[26]

46. On this point, the Committee notes the submission by the communicant and observers that spatial plans relating to raw material extraction and wind energy as well as the federal road and railroad plan are excluded from review under these provisions.[27] With respect to the latter plan, the communicant and observers submitted that this plan irrevocably determines which road or railroad projects are "required" – a decision central to the development consent, which *de facto* cannot be challenged in court because an applicant is required to demonstrate that the decision was "obviously arbitrary", a threshold which the communicant and observers state has never been met in practice.[28]

47. The Committee considers that, while the communicant and observers' submission is certainly of relevance to compliance by the Party concerned with article 9, paragraph 3, of the Convention more generally, it is not within the scope of decision V/9h, which concerns restrictions on standing and not on the actual scope of the review itself. In the light of the above, while taking note of the communicant and observers' submissions, the Committee considers that the concern raised does not as such prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.

Limitation to review of projects ("*Vorhaben*")

48. With regard to section 1, subsection (1), sentence 1, number 5, of the Environmental Appeals Act, the Committee noted in its second progress review that this provision only applies to the permitting of "projects" (*"Vorhaben*") applying environmental legal provisions.[29] The wording of the provision limits its application to permitting processes relating to *Vorhaben*, a fixed term in the German legal system defined in section 2, subsection (2), of the federal EIA Act, broadly stated as physical intervention in the landscape. As also noted by the communicants and observers,[30] this excludes regulatory acts not relating to the permitting of projects from the scope of this provision. The

[24] Further information, received from the Party concerned on 15 March 2017, pp. 9 and 10.

[25] Ibid., p. 9.

[26] Ibid., p. 9-10.

[27] Comments from the communicant of communication ACCC/C/2008/31 and observers (BUND, DNR, WWF, Greenpeace) on the second progress report, 8 June 2016, p. 3.

[28] Ibid., pp. 3-4, and footnote 8.

[29] Committee's second progress review, 1 February 2017, para. 47.

[30] Comments from the communicant of communication ACCC/C/2008/31 and observers (BUND, DNR, WWF, Greenpeace) on second progress report, 8 June 2016, p. 4.

communicants and observers cited regulatory acts concerning emission limits of cars as an example of an act that would potentially be thereby excluded.[31] In its second progress review, the Committee highlighted that, depending on the specific circumstances, these or similar acts should indeed be challengeable under article 9, paragraph 3 of the Convention.[32]

49. On this point, the Party concerned referred the Committee to the justification for the legislative proposal, which inter alia states:

> The new number 5 covers decisions on approval for other projects which do not already fall under numbers 1, 2, 2a or 2b as industrial plant or infrastructural activities. Accordingly, this primarily covers decisions in the shape of an administrative act, by means of which a project is licensed or permitted.[33]

50. The Committee points out that article 9, paragraph 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of "acts" under article 9, paragraph 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment. The Committee therefore considers that, if it were to be shown that the courts of the Party concerned were to refuse standing to challenge measures such as emission limits for cars on the basis that they do not relate to "projects" in the sense of section 1, subsection (1), sentence 1, number 5, of the Environmental Appeals Act, this may constitute non-compliance with article 9, paragraph 3, of the Convention. However, in the absence of any concrete examples under the amended Environmental Appeals Act as applied in practice, and bearing in mind the considerations in paragraph 36 above, the Committee does not make such a finding in the abstract. Accordingly, while noting that uncertainties remain, the Committee considers that this factor as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.

"Applying environmental legal provisions"

51. In its second progress review, the Committee pointed out that the requirement in section 1, subsection 1, sentence 1, number 5, of the Environmental Appeals Act that, in order to be 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.[34] Similarly, with regard to section 1, subsection (1), sentence 1, number 6, of the Environmental Appeals Act, the Committee welcomed the inclusion, within the scope of review, of the review of supervisory or monitoring acts of public authorities relating to the acts in numbers 1-5 but noted 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.[35] The Committee therefore requested the Party concerned to provide clarification of these points.[36]

[31] Ibid., p. 5.
[32] Committee's second progress review, 1 February 2017, para. 47.
[33] Further information received from the Party concerned, 15 March 2017, p. 11 referring to p. 37 of the English version of the reasoning accompanying the EAA legislative proposal.
[34] Committee's second progress review, 1 February 2017, para. 48.
[35] Committee's second progress review, 1 February 2017, para. 49.
[36] Ibid., para. 61 (d) (ii) and (iii).

52. In its further information of 15 March 2017, the Party concerned stated that under its national system, it is established that the term “applying environmental legal provisions” is to be interpreted in the sense that a public authority “actually applied – or should have applied ‘environmental legal provisions’”.[37] The Party concerned further submitted that it had not received any criticism of civil society on this phrasing in the law.[38] Having not received any information to the contrary from observers or communicants or having any other evidence before it that would call the explanation provided by the Party concerned into question, the Committee considers that this factor as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.

Scope of section 64 of the federal Act on Nature Conservation and Landscape Management

53. In its second progress review, the Committee welcomed the specific additions to the scope of section 64 of the federal Act on Nature Conservation and Landscape Management (the federal Nature Conservation Act) while noting that it had 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.[39] The Committee also noted the differing scope between section 63 and section 64 of the federal Nature Conservation Act which appeared to result in the exemption of a number of measures from review.[40] The Committee accordingly requested the Party concerned to provide further information on this point.[41]

54. The Party concerned submitted in that regard that, in accordance with section 1, subsection 3, of the Environmental Appeals Act, the general provisions on standing under section 1, subsection (1), sentence 1, numbers 1 and 2, of the Environmental Appeals Act take precedent over section 64 of the federal Nature Conversation Act. The Committee notes that in the finally adopted version of the Environmental Appeals Act, this provision has been extended to cover section 1, subsection 1, numbers 1 to 5, which helpfully clarifies the relationship between these provisions. Accordingly, section 64 of the federal Nature Conservation Act provides for additional standing to the provisions analysed above. The Committee considers each of the specific categories of acts that appear to be excluded below.

(i) 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

55. The Party concerned submits that in almost all *Länder* (territorial sub-units), such regulations and statutory ordinances can be reviewed under section 47 of the Code of Administrative Court Procedure.[42] In that regard, the Committee notes that this provision requires a violation of the rights of the applicant and does not therefore go beyond the previous regime on standing.

56. The Party concerned further submits that there is the possibility of incidental review of these acts in the context of the review of subsequent downstream decisions.[43] In that

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37 Further information from the Party concerned, 15 March 2017, pp. 12-13.
38 Ibid., p.12.
39 Committee’s second progress review, 1 February 2017, para. 50.
40 Ibid.
41 Ibid., para. 61 (d) (iv).
42 Further information received from the Party concerned, 15 March 2017, p. 15.
43 Ibid.

regard, the Committee refers back to its earlier statement on incidental review in paragraph 39 above. Accordingly, while noting that uncertainties remain, in the absence of evidence to the contrary, the Committee considers that this factor as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.

(ii) Landscape programmes and landscape master plans (section 10 of the federal Nature Conservation Act) and landscape plans and open space structure plans (section 11 of the federal Nature Conservation Act)

57. The Party concerned states that, pursuant to section 19 (a), of the federal EIA law, these plans may be subject to an SEA under the conditions set out under *Land* law and that these plans and programmes therefore fall under section 1, subsection (1), sentence 1, number 4, of the Environmental Appeals Act and are thus reviewable.[44] On the basis of this clarification, and in the absence of any evidence to the contrary, the Committee considers that the Party concerned meets the requirements of paragraph 2 (b) of decision V/9h in this respect.

(iii) Plans to be observed or taken into account by the public authorities when deciding on nature conservation issues (section 36.1.2. of the federal Nature Conservation Act)

58. The Party concerned states that, pursuant to section 14 (c) of the federal EIA law these plans and programmes are also subject to a requirement to prepare an SEA and accordingly also subject to review under section 1, subsection (1), sentence 1, number 4, of the Environmental Appeals Act.[45] In light of this clarification, and in the absence of any evidence to the contrary, the Committee considers that the Party concerned meets the requirements of paragraph 2 (b) of decision V/9h in this respect.

(iv) Other procedures that are so designated under Länder law and that affect the task areas of the nature conservation organization

59. The Party concerned submits that only some of the *Länder* have made use of the provision contained in section 63, subsection (2), number 8, of the federal Nature Conservation Act and "as far as the federal government is aware", those *Länder* have also adopted corresponding provisions on the right to file suit under article 64, subsection (3) of the Nature Conservation Act.[46]

60. The Committee first notes that the internal organization and division of competences of the Party concerned may not be used as an excuse for not providing concrete information on relevant matters. A federal government is accordingly expected to provide information relating to the law adopted by the federal sub-units, even if it does not fall within its direct competence under national law. The Committee accordingly finds that the information provided by the Party concerned does not provide full clarity on the issue. Nonetheless, the Committee has no concrete example before it of any measures that fall under article 9, paragraph 3, of the Convention that are excluded on the basis of this provision. Accordingly, while noting that some uncertainty remains, in the absence of any evidence to the contrary, the Committee considers that that uncertainty as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h in this respect.

[44] Ibid.
[45] Ibid.
[46] Ibid., p. 16.

Acts and omissions of private persons

61. In its second progress review, the Committee noted that it lacked information on any proposed amendments that would implement the requirement in article 9, paragraph 3, of the Convention that acts of private persons that contravene national law relating to the environment can be the subject of review. The Committee accordingly requested further information in this regard.[47]

62. In its further information of 15 March 2017, the Party concerned asserted that, while private persons are not explicitly named in section 1 of the Environmental Appeals Act, the Aarhus amendment introduces a "complete" judicial review of acts of private persons relating to the environment, since the omission of supervisory and monitoring action towards private actors can always be challenged. The relevant provisions are section 1, subsection (1), sentence 1, number 6, in conjunction with section 1, subsection (1), sentence 2, of the Environmental Appeals Act.[48]

63. Article 9, paragraph 3, of the Convention requires that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of national law relating to the environment. While the Committee considers article 9, paragraph 3, of the Convention does not necessarily require members of the public to have direct access to courts with respect to acts and omissions of private persons, recourse to administrative procedures must provide for effective enforcement and meet the requirements of article 9, paragraph 4, of the Convention.

64. In this context, the Committee recalls paragraph 28 of its findings on communication ACCC/C/2006/18, where it held that:

> Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency […] This part of the Convention is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Thus, [the Party concerned] is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.[49]

65. Since the above provisions of the Environmental Appeals Act are yet to be applied in practice, the Committee has no information before it that would demonstrate that the system introduced through the "Aarhus amendment" would not meet the requirement of article 9, paragraph 3, of the Convention to ensure access to procedures to challenge acts and omissions of private actors contravening the national law relating to the environment. Nor does the Committee have any information before it that the system introduced would not meet the requirement in article 9, paragraph 4, of the Convention to provide an adequate and effective remedy. Accordingly, while noting that some uncertainties remain, in the absence of any information to the contrary, the Committee considers that the Party concerned meets the requirements of paragraph 2 (b) of decision V/9h in this respect. The Committee makes clear that the above considerations do not in any way preclude it from examining allegations regarding the application of the "Aarhus amendment" in practice in a future case if brought before it.

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[47] Committee's second progress review, 1 February 2017, paras. 52 and 61 (d) (v).
[48] Further information from the Party concerned, 15 March 2017, p. 17.
[49] ECE/MP.PP/2008/5/Add.4.

Other matters

66. In its second progress review,[50] the Committee responded to a number of further allegations made by the communicants and observers, which concern matters outside of the scope of decision V/9h and are therefore not reproduced here.

IV. Conclusions

67. The Committee welcomes the constructive engagement of the Party concerned in the compliance review process during the intersessional period.

68. Having reviewed the information provided in the intersessional period, the Committee finds that the Party concerned has seriously and actively engaged in efforts to follow the recommendations set out in paragraph 2 of decision V/h. Based on the information provided, and in the absence of evidence to the contrary, the Committee considers that the Party concerned has fulfilled the requirements of paragraph 2 of decision V/9h and accordingly is no longer in a state of non-compliance with article 9, paragraphs 2 and 3, of the Convention with respect to the points of non-compliance identified in the Committee's findings on communication ACCC/C/2008/31.

69. The Committee recommends that, pursuant to paragraph 35 of the annex to decision I/7, the Meeting of the Parties endorse the above report with regard to compliance by Germany.

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[50] Committee's second progress review, 1 February 2017, paras. 56-59.