Federal Ministry for the
Environment, Nature Conservation
and Nuclear Safety

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Communication ACCC/C/2008/31

Letter of the Communicant of 22 February 2013

Berlin, 11.03.2013

Dear Ms. Smagadi,

As regards the letter of the Communicant of 22 February 2013 in the above mentioned compliance procedure the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety holds that clarification on several aspects is necessary:

(1) Examples of jurisprudence given by the Communicant

First, the Communicant refers in **paragraph 22** of its letter to three decisions of German courts in order to underline that **access to justice for environmental organisations** is limited.

The first case does not even concern an environmental organisation:

- The decision of the Oberverwaltungsgericht Nordrhein-Westfalen of 29 August 2012 (case 2 B 940/12) deals with an **appeal of an individual** (applicant) against the building permit for a wind turbine. The admissible appeal was not well-founded and, hence, not successful since the operation of the wind turbine, as it is granted by the building permit, does not violate individual rights of the applicant. In

particular, the noise level caused by the windmill complies with the legal provisions.

Access to justice for individuals is independent of the question whether this wind turbine requires an environmental impact assessment (EIA), as access to justice in this case is governed by the general rule that "the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or its omission", section 42(2) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung). Only as regards access to justice of environmental organisations in accordance with Article 9(2) of the Aarhus Convention an EIA as a procedure with public participation is one possible requirement for an admissible action.

Furthermore, it is compatible with Annex I of the Aarhus Convention and with Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment that the building and operation of a wind turbine in particular in this case does not require an EIA.

The other cases did *inter alia* relate to environmental organisations. But in accordance with the Aarhus Convention and the relevant European Directives access to justice in these cases is not regulated by Article 9(2) of the Aarhus Convention but by Article 9(3) of this treaty. As stated on pages 16 and 17 of the German response of 25 July 2011 this provision differs considerably from Article 9(2) of the Aarhus Convention as regards its requirements, the degree to which its obligations are binding and the discretion on the implementation accorded to the Parties. In particular, this provision leaves discretion to the Parties to lay down criteria which have to be fulfilled to have access to justice. In the following two cases the environ-

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mental organisations did not meet these criteria and, hence, did not have access to justice:

- 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.
- The decision of the Bayerische Verwaltungsgerichtshof of 21 August 2012 (case 8 CS 12.847) refers to an application for interim measures of an environmental organisation and two individuals against a decision to grant permit for the discharge of rainwater at a drilling site to a river. In accordance with the Annex I of the Aarhus Convention and Directive 2011/92/EU such an activity does not require an EIA. Thus, the court denied access to justice in accordance with the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz). Even taking Article 11 of Directive 2011/92/EU into account the

court could not give access to justice to the environmental organisation. Furthermore it has to be noted, that the environmental organization in question at the time of the submission of its appeal has not even initiated a request for recognition procedure.

Second, with regard to the other allegations I would like to add the following remarks for clarification:

(2) Access to justice for environmental organisations

In **paragraph 3** of its letter of 22 February 2013 the Communicant argues that "environmental organizations only have, under the Umwelt-Rechtsbehelfsgesetz a right of access to justice". This allegation is not correct and contradicts paragraph 21 of the same letter. In Germany environmental organisations have access to justice

- when they claim the infringement of any of their subjective rights, and without asserting the infringement of their own rights
- according to the Federal Nature Conservation Act (Bundesnaturschutzgesetz) and
- according to the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz) which applies to decisions
    - for which an EIA has to be conducted,
    - concerning permits for installations, for uses of bodies of water that are linked with a project within the meaning of Directive 2008/1/EC and for certain landfills,
    - pursuant to the Environmental Damage Act (Umweltschadensgesetz implementing Directive 2004/35/CE on Environmental Liability).

In order to avoid repetitions, for further details on this issue I would like to refer to pages 18 and 19 of the Response of the Federal Republic of Germany of 25 July 2011.

(3) Limitation of tackling decisions which affect statutory rights of an NGO

The complaint made in **paragraph 5** of the Communicant's letter of 22 February 2013 that the decisions an environmental organization may have reviewed by the courts are restricted to those which affect the **organization's statutory objectives** is unjustified, as the restriction falls within the discretion accorded to States and, having regard to the spirit and purpose of the Aarhus Convention, is compatible also with its objectives. The substantive link that is required between the subject-matter of the authority's decision and the bylaws of the environmental organization ensures that the NGO acts not only as an independent representative of the interests of the public but also as a particularly competent representative in environmental matters. Additionally, I would like to refer to the arguments given on pages 3 to 5 of the Response of the Federal Republic of Germany of 25 July 2011.

(4) Challenging the procedural legality of a decision

As regards the Communicant's statement on **challenging the procedural legality** of a decision I would in general like to refer to pages 6 and 8 to 13 of the German Response of 25 July 2011 as well as to pages 2 to 5 of the German response of 5 November 2012.

Furthermore, I would again like to point out that questions regarding challenging the procedural legality - in respect of the transposition of Article 10a of Directive 85/337/EC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (now Article 11 of

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the codified Directive 2011/92/EU), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, which is worded almost identically to Article 9, paragraph 2 of the Aarhus Convention – are pending as a new preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court) at the European Court of Justice (Case C-72/12).

In addition, clarification on the Communicant's argument that German courts are not obliged to follow the concept of fundamental errors developed by the Federal Administrative Court (paragraph 9, second indent of the letter of 22 February 2013) is necessary: It is right that German law is not based on precedent judgments since Article 97(1) of the Basic Law (Grundgesetz) provides for judicial independence when it reads:

> "Judges shall be independent and subject only to the law."

Still, for reasons of legal certainty some kind of uniformity in jurisdiction is necessary. Therefore, there are two cases in the German legal system in which courts are bound by a precedent judgment. This is when a higher court has ruled on an issue either because a (lower) court wants to deviate from the jurisdiction of a higher court or when it is a fundamental judgment on a matter to which no jurisdiction of a higher court exists. Deviation from such a decision is only possible if specific reasons exist.

(5) Provisions that serve the protection of the environment

With regard to the requirement of the German law that "a decision violates **statutory provisions that protect the environment**" (section 2(1) No. 1 of the Environmental Appeals Act) the Communicant obviously changed its opinion. Whereas this requirement was found not at all admissible in the original Communication of 1 December 2008 (paragraph 27), it is now only argued that this requirement is narrower than the corresponding provision of

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the Aarhus Convention which reads "relating to the environment" (paragraphs 12 ff. of the Communicant's letter of 22 February 2013).
The Communicant refers to potential uncertainties whether a specific area such as transport or energy falls in the scope of the German requirement (paragraph 13 in the letter of 22 February 2013 and paragraph 28 in the original Communication of 1 December 2008). However, such uncertainties obviously do not exist. As pointed out by the German delegation in the hearing in Geneva on 27 September 2012, there is no legal difference in German law between the wording "serving the protection of the environment" and "relating to the environment".
Furthermore, there is no case known to the Federal Ministry for the Environment in which an action of an environmental organisation was not admissible due to this requirement (and only this would be relevant instead of the claim of the Communicant that no positive ruling is known). This result can be explained with the fact that, if a court has doubts, it has to interpret the relevant provision taking into account the purpose of this provision as well as the purpose of the underlying provisions of international law such as the Aarhus Convention (granting wide access to justice) and the declared intention of the legislator. As already stated on pages 7 and 8 of the German Response of 25 July 2011, in particular the legislator clearly assumed in its explanatory memorandum a broad definition of statutory provisions that protect the environment.
To illustrate this argument, I would like to highlight that decisions of German courts exist in which the protection of human health (Verwaltungsgerichtshof Baden-Württemberg, decision of 20 July 2011, case 10 S 2102/09, and Oberverwaltungsgericht Nordrhein-Westfalen, decision of 9 December 2009, case 8 D 10/08.AK) and flood protection (Oberverwal-

tungsgericht Lüneburg, 5 January 2011, case 1 MN 178/10) were classified as environmental protection.

(6) Preclusion of arguments

Finally, the Communicant raised the issue of **preclusion of arguments** in its letters of 29 October 2012 (paragraphs 23 and 24) and of 22 February 2013 (paragraphs 15 ff.). Until then this issue had not been subject of this compliance procedure. I would like to point out that the instrument of preclusion as it is provided for in the Environmental Appeals Act is also subject matter of an ongoing infringement procedure against the Federal Republic of Germany (case 2007/4267 - C(2012)6581 final) that was initiated by the European Commission in October 2012. Until now the European Commission has not yet decided on the information submitted by the German government in November 2012.

Yours sincerely,
For the Federal Ministry for the Environment,
Nature Conservation and Nuclear Safety

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