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in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Forty-fifth meeting

Maastricht, the Netherlands, 29 June–2 July 2014

Item 7 of the provisional agenda

#### Communications from members of the public

### Findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany\*

Adopted by the Compliance Committee on 20 December 2013

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\* This document is a late submission owing to editorial and secretariat capacity constraints and the need to give priority to the processing of documents for the fifth session of the Meeting of the Parties (Maastricht, the Netherlands, 30 June and 1 July 2014).

## I. Introduction

1. On 1 December 2008, the non-governmental organization (NGO) ClientEarth, supported by the NGO Nature and Biodiversity Conservation Union (*Naturschutzbund Deutschland*), (collectively, the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Germany failed to comply with the Convention's provisions on access to justice.<sup>1</sup>
2. Specifically, the communication alleges that the legislation of the Party concerned establishes criteria for standing for environmental NGOs which are narrower in scope than those set out in article 9, paragraph 2, of the Convention and also does not ensure that members of the public concerned may challenge the procedural legality of any decision subject to article 6, as required by article 9, paragraph 2.
3. In addition, the communication alleges that, by failing to provide environmental NGOs with the possibility to challenge acts and omissions of private persons and public authorities which contravene environmental law when the "impairment of rights" criterion is not satisfied, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention.
4. At its twenty-second meeting (Geneva, 17–19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.
5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 24 December 2008. By letters of 16 January 2009, the Party concerned and the communicant were invited to address questions from the Committee.
6. By letter of 26 March 2009, the Party concerned suggested the case be postponed as its courts had recently referred a similar case (later known as the *Trianel* case)<sup>2</sup> to the Court of Justice of the European Union (CJEU) where it was currently under consideration.
7. At its twenty-third meeting (Geneva, 31 March–3 April 2009), the Committee decided to suspend the deadline for the Party concerned to respond to the communication until two months after CJEU had delivered its opinion and agreed to seek the communicant's view on that approach.
8. By letter of 11 May 2009, the communicant expressed its support for that decision. The Committee, using its electronic decision-making procedure, decided to defer the deadline and its decision was communicated to the parties by letter of 18 May 2009.
9. On 12 May 2011, CJEU issued its preliminary ruling in the *Trianel* case. Considering the two-year delay in the Committee's consideration of the communication, the Committee using its electronic decision-making procedure instructed the secretariat to invite the Party concerned to submit its response by 20 June 2011 (i.e., before the two-month deadline from the issuance of the judgment originally envisaged) so that formal discussions might take place at its thirty-third meeting (Geneva, 28–29 June 2011). By letter of 18 May 2011, the secretariat conveyed this message to the Party concerned.

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<sup>1</sup> The communication and related documents are available from <http://www.unece.org/env/pp/compliance/Compliancecommittee/31TableGermany.html>.

<sup>2</sup> Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening)* [2011] ECR I-3673.

10. By letter of 20 May 2011, the Party concerned replied that the Government's assessment of the CJEU judgment would not be completed by the proposed deadline of 20 June 2011.
11. At its thirty-third meeting, the Committee considered that it should await the decision of the German court after the preliminary CJEU ruling.
12. On 6 July 2011, the communicant submitted additional information and on 25 July 2011 the Party concerned responded to the communication.
13. On 13 December 2011, the communicant informed the Committee that the German court's decision had been issued.
14. On 27 February 2012, the Party concerned provided the decision of the regional Higher Administrative Court, Oberverwaltungsgericht für das Land Nordrhein-Westfalen, of 1 December 2011, together with a summary, both in German. On 26 March 2012, the Party concerned provided an English translation of parts of the decision and informed the Committee that, while the regional government had opted not to appeal that decision, the energy supply company involved (Trianel), had challenged the regional government's decision not to appeal, and the case was thus considered still pending at the domestic level.
15. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee provisionally scheduled to discuss the communication at its thirty-seventh meeting (Geneva, 26–29 June 2012). It instructed the secretariat to seek the parties' views on the impact on the communication of Trianel's challenge of the regional government's decision.
16. The communicant and the Party concerned provided their views on 23 and 26 April 2012, respectively. After taking into account their views, the Committee using its electronic decision-making procedure decided to discuss the communication at its thirty-eighth meeting (Geneva, 25–28 September 2012).
17. The Party concerned submitted additional information to the Committee on 20 August and 11 September 2012.
18. The Committee discussed the communication at its thirty-eighth meeting, with the participation of representatives of both parties. It confirmed the admissibility of the communication and put questions to the communicant and the Party concerned, inviting them to respond in writing after the meeting.
19. The communicant and the Party concerned submitted their responses on 29 October and 5 November 2012, respectively.
20. In view of the entry into force of amendments to the German Environmental Appeals Act, at the Committee's request, additional information was submitted by the Party concerned and the communicant on 19 February and 22 February 2013, respectively.
21. The Committee completed its draft findings at its forty-second meeting (Geneva, 24–27 September 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded to the parties on 11 November 2013 for their comments by 9 December 2013.
22. The Party concerned and the communicant provided comments on 6 and 7 December 2013, respectively.
23. At its forty-third meeting (Geneva, 17–20 December 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee adopted its findings and agreed that they should be published as a formal pre-session document for its forty-fifth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. Summary of facts, evidence and issues<sup>3</sup>

### A. Legal framework

#### International treaties within the German legal order

24. When Germany becomes Party to an international treaty concerning matters regulated by federal legislation, the consent/participation of the federal legislature is required through the adoption of a law (Constitution (*Grundgesetz*), art. 59). The treaty is not directly applicable, unless it is deemed to be self-executing taking into account its wording, purpose and substance.

25. The Convention is not considered to be self-executing by the Party concerned and the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) (EAA) was adopted to implement article 9, paragraph 2.

26. However, after the preliminary CJEU ruling in the *Trianel* case, the Higher Administrative Court ruled that the provisions of article 9, paragraph 2, of the Convention have direct effect.

#### Standing of environmental NGOs in the review procedures relating to public participation under article 6 (art. 9, para. 2)

27. The rights of environmental NGOs to have access to review procedures relating to public participation under article 6 of the Convention are provided in the Rules on Administrative Court Procedures (*Verwaltungsgerichtsordnung*), section 42, complemented by the provisions of the EAA, sections 1–4.<sup>4</sup>

28. The Rules on Administrative Court Procedures, section 42, reads:

(a) A claim can be made to request that an administrative act be quashed (*Anfechtungsklage*) or, where the administrative act had been refused or failed to be performed [by the public authority], that it be performed (*Verpflichtungsklage*).

(b) Unless otherwise provided in other legislative provisions, a claim is only admissible where the claimant asserts that the administrative act, its refusal or omission has impaired the claimant's own rights.<sup>5</sup>

#### Criteria for NGO standing

29. The EAA<sup>6</sup> regulates the rights of associations<sup>7</sup> to have access to courts proceedings. It was amended in 2013, as a result, inter alia, of the preliminary CJEU ruling in the *Trianel* Case. According to section 2, paragraph 1, of the EAA, the association does not need to

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<sup>3</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>4</sup> Law amending the provisions for environmental appeals in environmental matters, according to EC Directive 2003/35 (Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35) as published on 8 April 2013 and last amended on 7 August 2013.

<sup>5</sup> Translation based on translations provided by the parties.

<sup>6</sup> English translation of the EAA was provided by the Party concerned on 19 February 2013 and the citations are mainly based on that translation.

<sup>7</sup> The EAA refers to the rights of “associations” (“Vereinigungen”). In keeping with the Convention, the present findings use the term “NGOs”, except when citing from translations provided by the parties.

claim that its rights have been impaired (as required by the Rules on Administrative Court Procedures, section 42), but may file an appeal against a decision or the failure to take a decision, as defined in EAA, section 1, paragraph 1, if the association:

- (a) Asserts that the decision/omission violates legal provisions which protect the environment (“*dem Umweltschutz dienen*”) and could be of importance for the decision (“*für die Entscheidung von Bedeutung sein können*”);
- (b) Asserts that promotion of the objectives of environmental protection according to its field of activity, defined in its by-laws, is affected by the decision/omission;
- (c) Was entitled to participate in the process which led to the decision/omission and did so, according to applicable law; or, contrary to applicable law, was refused the right to participate.

30. EAA section 2, paragraph 5, provides that a claim by an association is justified if the administrative decision/omission contradicts legal provisions which protect the environment (“*dem Umweltschutz dienen*”) and are of importance for the decision/omission (“*für die Entscheidung von Bedeutung sind*”) and the violation involves issues of environmental protection that are among the objectives proposed by the association according to its by-laws.

31. EAA section 3 provides additional requirements for the recognition of associations for the purpose of filing an appeal under the EAA, including, inter alia, that environmental protection is among the association’s objectives as set out in its by-laws, requirements as to membership and the length of time it has been in existence.

#### **Scope of review**

32. The Administrative Procedures Act (*Verwaltungsverfahrensgesetz*) (APA) provides that “the setting aside of an administrative act which is not void pursuant to section 44 cannot be claimed simply on the basis that in the course of its adoption provisions on procedure ... were infringed where it is evident that the infringement did not affect the substantive decision” (sect. 46).<sup>8</sup>

33. According to German case law, the provision does not apply in cases of “fundamental errors of procedure”, i.e., errors which regardless of the outcome of the procedure are deemed to be substantial. Where there are fundamental errors of procedure, the decision in question may be reversed. In this regard, the Federal Administrative Court (*Bundesverwaltungsgericht*) has held that as a rule a procedural error would lead to the annulment of a decision or the repetition of the failed procedural step if “in the circumstances of the case there is a real possibility” that the error had a bearing on the outcome of the decision (see Federal Administrative Court, judgment of 20 May 1998, case No. 11 C 3/97).<sup>9</sup>

34. EAA section 4, paragraph 1, provides that the reversal of a decision on the admissibility of a project can be requested if an environmental impact assessment (EIA) or a preliminary assessment of the individual case concerning the requirement for an EIA required by law was not carried out and was not carried out in a later stage.

<sup>8</sup> Translation provided by the Party concerned in its response of 25 July 2011, pp. 9–10.

<sup>9</sup> Ibid.

35. The issue of a fundamental error of procedure has recently been before CJEU in the *Altrip* case.<sup>10</sup>

**Review procedures for contraventions of environmental law by authorities/private persons (art. 9, para. 3)**

36. The German Constitution (art. 17) provides for a right of petition, whereby every person has the right to address written requests or complaints to competent authorities and the legislature.

37. The administrative law of the Party concerned allows any person whose rights have been infringed to challenge the decision of an authority or its omission to take certain measures, including measures against third parties that have infringed provisions of environmental law. The appeal is considered by a hierarchically higher body. In the context of German administrative law, this type of procedure primarily aims to ensure the protection of individual interests, either exclusively or at least in parallel to the pursuit of general interest (“impairment of rights” doctrine (“*Schutznormtheorie*”). For instance, under anti-pollution law, such an action may be brought by individuals whose health may be affected by the activity of an industrial plant. Associations, including NGOs, have the right to use this avenue in some cases, such as under the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) and the Environmental Damage Act (*Umweltschadensgesetz*),<sup>11</sup> as required further to relevant EU legislation, and to pursue the enforcement of general environmental laws through collective action in these areas.

38. Moreover, civil law provides for the right to initiate court proceedings against a third party in order to obtain injunctive relief and damages when the third party infringes a fundamental right of an individual in contravention of environmental law; and criminal law provides for the prosecution of several acts and omissions in contravention of environmental law (damage caused to the environment — water, soil, air, fauna and flora).

## **B. Substantive issues**

39. The communicant alleges that the conditions for access to justice for environmental NGOs<sup>12</sup> laid down by German legislation are of a very restrictive nature, effectively deterring most environmental NGOs from exercising their rights under article 9, paragraphs 2 and 3 of the Convention. The Party concerned refutes all the allegations made.

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<sup>10</sup> Case C-72/12, *Gemeinde Altrip and Others v. Land Rheinland-Pfalz* [2013], OJ C 204/6. The Federal Administrative Court made a preliminary reference to CJEU concerning Germany’s implementation of the provisions of the EIA Directive on access to justice. Specifically, the Court asked whether the obligation to carry out a substantive and procedural review of a decision would require that a decision based on an incorrect EIA can be challenged; and also if it is compliant with European Union law that an EIA decision can only be reversed if the error affects subjective rights of the applicant and if without the error the decision would have been different. CJEU delivered its judgment on 7 November 2013, ruling that it must be possible for members of the public to challenge a permit on the ground that the EIA was incorrect; and that national courts can refuse to reverse the decision if it is proven that the decision would not have been different if there was not the procedural error invoked by the applicant. However, the evidence in that respect must be brought by the developer or the authority, or it must be evident from the files; the burden of proof must not be on the applicant.

<sup>11</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

<sup>12</sup> “Associations” under German legislation, encompassing NGOs, see footnote 7 above.

The allegations and the Party concerned's response are summarized in the following paragraphs.

**Review procedures relating to public participation under article 6 (art. 9, para. 2, in conjunction with art. 2, para. 5): standing and scope of review**

40. The communicant claims that the rights of environmental NGOs to request a review of a decision, act or omission subject to article 6 of the Convention are restricted because of standing requirements and the limited scope of review, which have a significant deterrent effect. In its communication, the communicant raises four aspects of concern<sup>13</sup> (see subsections (a)-(d) below) which, taken separately and in a cumulative manner, mean that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

41. The communicant also claims that, since the Party concerned does not have a common law system (for instance, the case law on "fundamental errors of procedure" is not absolutely binding on the courts), to ensure legal certainty it is important to transpose the Convention in a way that keeps national law close to the text of the Convention.

42. The Party concerned stresses that the purpose of the wording in article 9, paragraph 2, and the intention of the Parties, was to leave discretion to each Party to decide how to implement the provision "within the framework of its national legislation", without compromising the objective of the Convention. Therefore, in addressing the communicant's allegations, it is important to keep the right balance between the substantive elements of the Convention and the discretion left to the Party for implementation.

43. The Party concerned also argues that, while according to the Constitution judges are independent and subject only to legislation, for reasons of legal certainty there is some uniformity in court jurisprudence, especially when there is a higher court judgement on a specific issue.

(a) *Requirement for an NGO applicant to assert that the challenged decision affects its objectives, as defined in its by-laws*

44. According to the communicant, the requirement that an NGO applicant has to assert that the challenged decision, act or omission under article 6 affects the objectives of environmental protection as defined by its by-laws (EAA section 2, para. 1.2, and section 2, para. 5), creates an additional burden on NGOs to demonstrate that their interests are affected in a specific case, and therefore the Party concerned is not in compliance with article 9, paragraph 2, of the Convention. It may, for instance, be very difficult for an NGO specializing in transport and environmental matters, to argue that the development of a power plant affects its purposes as defined in its by-laws. The requirements for NGOs set in EAA section 3 (see para. 31 above) are sufficient for the purposes of article 2, paragraph 5, of the Convention.

45. In contrast, the Party concerned contends that the requirement in question is a "requirement under national law" according to article 2, paragraph 5, and within the spirit and purpose of that provision. The Party concerned explains that the general requirements

<sup>13</sup> The original communication included an additional allegation that NGOs could access review procedures under article 9, paragraph 2, of the Convention only if they could prove that an individual whose personal rights had been impaired could also bring that claim (EAA, before the April 2013 amendment, s. 2, para. 1.1 and s. 2, para. 5, in conjunction with Rules of Administrative Court Procedures, s. 42, para. 2). Further to the preliminary ruling of CJEU in C-115/09 and the amendment to the EAA (on 21 January 2013, in force since April 2013), the communicant agreed that this allegation was no longer relevant.

in EAA section 3 lay down a standard and objective recognition procedure for NGOs, while the assessment under EAA section 2, paragraph 1.2, is carried out by courts on a case-by-case basis and aims to ensure that the public interest is represented as competently as possible while minimizing the risk that the rights for filing an application are abused. For instance, an environmental NGO specializing in coastal conservation cannot be a competent representative of the public interest in a case concerning an inland disposal installation. All these requirements, according to the Party concerned, are in line with article 2, paragraph 5, which grants Parties the discretion to define requirements for NGOs to have access to a review procedure under article 9, paragraph 2.

- (b) *The Convention's requirement for the review of the "substantive and procedural legality of any decision" not transposed into German law*

46. The communicant alleges that the Party concerned has not clearly transposed into national law the Convention's obligation that members of the public concerned have the possibility to request both the procedural and substantive review of decisions, acts and omissions subject to article 6. The communicant submits that, in such a situation, it is up to the Party to submit evidence that, nevertheless, its national administrative and judicial practice is in compliance with the Convention.

47. The Party concerned contends that the communicant's allegation is unfounded and flawed, because EAA section 2, paragraph 1, subjects decisions under article 6 of the Convention to a review procedure as a whole, including a review of procedural and substantive legality. The Party concerned adds that article 9, paragraph 2, of the Convention does not require Parties to ensure that every procedural error automatically results in the reversal of a decision subject to article 6 (see further below); moreover, in implementing the Convention Parties do not have to stick to its exact wording.

- (c) *Requirement to assert that the challenged decision violates legal provisions "serving the environment"*

48. The communicant alleges that because a review may be requested only with respect to legal provisions which promote the protection of the environment (EAA sect. 2, para. 1.1, "*dem Umweltschutz dienen*"), the Party concerned, in implementing article 9, paragraph 2, applies a narrow approach and adds requirements that are not in compliance with that provision of the Convention.

49. The Party concerned contends that the communicant's argument is based on an incorrect understanding of the law. It explains that the EAA provision in question does not restrict the ambit of decisions under article 6 of the Convention which may be challenged and that legal provisions "serving the environment" ("*dem Umweltschutz dienen*") are not limited to environmental legislation in a strict sense, but include all legislation relating to the environment. Moreover, there appears to be no case where an action brought by an environmental NGO was not admissible for that reason. In general, however, it is in line with the Convention if the applicant can only challenge the aspects of the decision which concern, directly or indirectly, environmental matters.

- (d) *Requirement to assert that the challenged decision violates legal provisions which could be of importance for the decision; and review of procedural errors*

50. The communicant alleges that because of the requirement that a review may be requested only if the decision violates legal provisions that could be of importance for the decision ("*für die Entscheidung von Bedeutung sein können*", EAA sect. 2, para. 1.1), the Party concerned, in implementing article 9, paragraph 2, applies a narrow approach and adds requirements that are not in compliance with that provision of the Convention. This is important namely with respect to review of the procedural legality of decisions. According

to the jurisprudence of the Federal Administrative Court (see para. 33 above), in relation to projects subject to EIA, procedural errors are only relevant when there is a concrete possibility that the decision concerning the project would have been different if the procedural error had not occurred and the onus is on the applicant to prove that the decision would have been different without the procedural error. This means that if the permit for a project was issued without the EIA required by law, this procedural error is irrelevant unless the applicant NGO proves that the decision would have been different had an EIA been properly carried out. The communicant submits that EAA section 4, paragraph 1, only partly addresses the issue, because the burden of proof still rests with the applicant.

51. The Party concerned refutes the communicant's allegations. It explains that the principle in APA section 46 (see para. 32 above) is a measure of procedural economy to ensure that a decision is not reversed for a mere infringement of a formality as long as the outcome is correct. The principle does not apply to so-called "fundamental errors of procedure" (see para. 33). According to the Party concerned, a failure to comply with any of the public participation elements of article 6 of the Convention should be considered as a fundamental error of procedure that would lead to the annulment of the decision (see EAA sect. 4, which is a *lex specialis* against the general rule of APA sect. 46).<sup>14</sup> The Party claims that its approach is therefore in compliance with article 9, paragraph 2, of the Convention, which accords discretion to a Party in the framework of its national legislation to set certain conditions, such as the intensity of the judicial review and the consequences in the event of infringement. The Party concerned also, in this respect, refers to the CJEU judgment in the *Altrip* case (see footnote 10 above), which proves that the German law system is "in principle" in conformity with EU law transposing the Convention.

52. The Party concerned also argues that the objective of EAA section 2, paragraph 1.1, and section 2, paragraph 5.1 — i.e., the requirement for contravention of legal provisions that protect the environment ("*dem Umweltschutz dienen*") and that are of importance for the decision ("*für die Entscheidung von Bedeutung sind*") — is to exclude applications for infringement of provisions that are not relevant for the decision. This, according to the Party concerned, is within the limits of discretion for implementation granted by article 9, paragraph 2, of the Convention, and the communicant's allegation is therefore unfounded. The Party concerned also provides examples of recent court jurisprudence,<sup>15</sup> delivered after CJEU issued its preliminary ruling on the *Trianel* case, to show that both article 11 (former art. 10a) of the EIA Directive<sup>16</sup> and article 9, paragraph 2, of the Convention have direct effect in German law. The Party concerned contends that that means, inter alia, that the Convention supplements EAA section 2, paragraphs 1 and 5, and the applicant is entitled to assert a violation of any provision of German law related to the environment.

(e) *EAA 2013 amendments*

53. Subsequent to its original communication, the communicant alleges that the 2013 amendments to the EAA introduce new impediments for NGOs to get access to justice, such as a six-week limit for indicating the facts and evidence to justify their appeal and limitations to the scope of judicial review of the discretionary powers of administrative authorities in environmental matters.

<sup>14</sup> See also Higher Administrative Court of Rheinland-Pfalz judgment of 25 January 2005, case No. 7 B 12114/04.

<sup>15</sup> See letter of 5 November 2012.

<sup>16</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.

**NGO standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)**

54. The communicant alleges that, beyond the scope of article 9, paragraph 2, of the Convention, environmental NGOs cannot seek review of acts and omissions of private persons and public authorities that contravene German environmental laws unless the rights of the NGO itself have been impaired (“impairment of rights” doctrine (“*Schutznormtheorie*”). The Party concerned has not introduced any amendments to its legislation since the ratification of the Convention and the situation is not compatible with the general objective of the Convention to give the public, including environmental organizations, wide access to justice. In this context, the communicant refers also to the requirement in article 9, paragraph 4, of the Convention for procedures to be effective, fair, equitable, timely and not prohibitively expensive. In support of its allegations, the communicant presents recent case law to the effect that an NGO may not challenge a permit if no EIA is required by law, such as for the construction and operation of a windmill.<sup>17</sup>

55. The Party concerned contends that the communicant’s allegation is unjustified and misinterprets the requirements of article 9, paragraph 3, of the Convention. It argues that German law ensures effective legal protection for the public in the field of environmental protection as required by article 9, paragraphs 3 and 4, and that rules set according to the impairment of rights theory, a well-enshrined theory in German legal tradition, are within the discretion conferred upon the Party to implement the Convention. This is clear from the language of the provision, i.e., “where they meet the criteria, if any, laid down in its national law” and that Parties “shall ensure”, which means that if Parties have in place laws that already ensure the minimum standards to access to review procedures, there is no need for further amendment.

56. The Party concerned recalls that, unlike paragraph 2 of article 9, paragraph 3 refers to the “public” and not “the public concerned”. Therefore, the privilege granted to environmental NGOs according to article 2, paragraph 5, does not apply. Moreover, under German law environmental NGOs have access to review procedures in the area of nature conservation<sup>18</sup> and environmental liability.<sup>19</sup>

57. The Party concerned also recalls that article 9, paragraph 3, provides for access to administrative “or” judicial procedures. Therefore, in assessing alleged non-compliance with this provision, the availability of administrative procedures may suffice. The Party concerned argues that it has a coherent and effective set of administrative, civil and criminal law rules that allow an individual or an association, including an NGO, to pursue the observance of environment-related provisions and to challenge any infringement of those provisions by an authority or private person.

58. In support of its argument, the Party concerned refers to decision II/2 of the Meeting of the Parties on promoting effective access to justice,<sup>20</sup> to previous jurisprudence of the Committee (e.g., the findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2) and ACCC/C/2008/32 (EU) (Part I) (ECE/MP.PP/C.1/2011/4/Add.1)), and in particular to German case law showing that courts increasingly opt for a wide interpretation of the impairment of rights theory. For instance, in a 2009 case, the Federal Constitutional Court (*Bundesverfassungsgericht*)<sup>21</sup> ruled that the legal provisions concerning the issue of a permit for the transport of nuclear fuel intended

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<sup>17</sup> Communicant’s submissions of 22 February 2013.

<sup>18</sup> Federal Nature Conservation Act.

<sup>19</sup> Environmental Damage Act.

<sup>20</sup> ECE/MP.PP/2005/2/Add.3.

<sup>21</sup> Case No. 1 BvR 2524/06 of 29 January 2009.

to protect as “third parties” also those living close to the transport route. This overturned earlier jurisprudence relating to anti-pollution laws, which had defined as “third parties” only those exposed to a certain pollutant. In addition, CJEU, in a ruling on the preliminary reference by the Federal Administrative Court in the *Janecek* case,<sup>22</sup> confirmed the entitlement of an individual to require an air quality plan to be drawn up in the event that established thresholds were exceeded. The Party concerned referred to a decision of the Federal Administrative Court of 5 September 2013<sup>23</sup> to show that German law can be interpreted in compliance with the requirements of article 9, paragraph 3, of the Convention. In that decision the Court adopted a broad interpretation of the term “impairment of the subjective right” with respect to environmental NGOs, stating that NGOs will be affected in their subjective rights by the issuing of the air quality plans, as they have “the right to demand compliance with the imperative provisions of the law on ambient air quality”.

59. For all the above reasons, the Party concerned contends that it does not fail to comply with article 9, paragraph 3.

60. With regard to article 9, paragraph 4, of the Convention, the Party concerned contends that its law satisfies all the requirements of that provision. It maintains that the Rules of Procedure of the Administrative Courts and the Rules of Procedure of Civil Courts (*Zivilprozessordnung*) ensure effective legal protection: if the appeal is well founded, then the authority will be required to reconsider the matter and court decisions are enforced by means of enforcement orders.

### III. Consideration and evaluation by the Committee

61. Germany ratified the Convention on 15 January 2007. The Convention entered into force for Germany on 15 April 2007.

62. The communicant, in alleging deficiencies in the relevant legislation of the Party concerned with respect to the requirements of article 9, paragraphs 2, 3 and 4, of the Convention, stresses that these deficiencies, both separately and in their cumulative effect, form a sufficient basis to conclude that the Party concerned fails to comply with the Convention. This, according to the communicant, cannot be outweighed by possible different court interpretations of the provisions in question.

63. The general argument of the Party concerned is that all the provisions of its legislation contested by the communicant can be — and indeed are — interpreted and applied in compliance with the Convention in practice. The Party concerned considers it has provided the Committee with a number of court decisions supporting this argument and proving that German courts are ready to apply article 9 of the Convention directly if needed.

64. As already noted in its findings on previous communications, when evaluating compliance with article 9 of the Convention, the Committee pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in the preamble of the Convention that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (see findings on communications ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4), para. 30, and ACCC/C/2011/58 (Bulgaria) (ECE/MP.PP/C.1/2013/4), para. 52). The “general picture” includes both the legislative

<sup>22</sup> Case C-237/07, *Dieter Janecek v. Freistaat Bayern* [2008] ECR I-6221.

<sup>23</sup> Case BVerwG 7 C 21.12.

framework of the Party concerned concerning access to justice in environmental matters, and its application in practice by the courts. Moreover, the fact that an international agreement may be applied directly and prior to national law should not be taken as an excuse by the Party concerned for not transposing the Convention through a clear, transparent and consistent framework (see findings on communication ACCC/C/2006/17 (EU) (ECE/MP.PP/C.1/2008/5/Add.10), para. 58).

65. Consequently, when assessing compliance with article 9 of the Convention, the Committee does not only examine whether the Party concerned has literally transposed the wording of the Convention into national legislation, but also considers practice, as shown through relevant case law. The mere hypothesis that courts could interpret the relevant national provisions contrary to the Convention's requirement is not sufficient to establish non-compliance by the Party concerned. If the relevant national provisions can be interpreted in compliance with the Convention's requirements, the Committee considers whether the evidence submitted to it demonstrates that the practice of the courts of the Party concerned indeed follows this approach. If it does not, the Committee may conclude that the Party concerned fails to comply with the Convention.

66. In this context, the Committee notes that EU legislation constitutes a part of the national law of EU member States (see findings on communication ACCC/C/2006/18 (Denmark), para. 27).

67. Where the wording of national legislation appears to contradict the requirements of the Convention, the Committee still considers the case law submitted to it in order to determine whether the line of interpretation by courts or other national authorities nevertheless meets the requirements of the Convention. Under such circumstances, the Committee may conclude that the Party concerned does not fail to comply with the Convention notwithstanding the wording of the national legislation.

68. Based on these general principles, the Committee considers the specific allegations raised by the communicant and the responses of the Party concerned. The Committee does not consider the allegation that in the context of article 9, paragraph 2, NGOs can request review only with respect to legal provisions that establish personal rights for individuals, since the communicant and the Party concerned have agreed that this issue has been resolved by the CJEU decision in *Trianel*, subsequently reflected in the case law of the German courts and by the 2013 amendment of the EAA. The Committee further decides not to deal with the allegations concerning the new requirements introduced by the 2013 EAA amendment with regard to judicial review in environmental matters. Without any practical examples of how these new EAA provisions are applied by the courts, the Committee is not in a position to examine their compliance with the Convention.

#### **Standing of environmental NGOs in review procedures relating to public participation under article 6 (art. 9, para. 2)**

69. As summarized above (paras. 40–53), the communicant alleges that a number of the standing conditions stipulated by the EAA for environmental NGOs to have access to review procedures to challenge decisions, acts and omissions subject to article 6 of the Convention do not comply with article 9, paragraph 2, of the Convention. The Committee evaluates the provisions contested by the communicant, one by one, on the basis of the general principles mentioned in paragraphs 64–67 above.

- (a) *Requirement for environmental NGOs to assert that the challenged decision affects their objectives, as defined in their by-laws*

70. The communicant claims that the EAA condition that an environmental NGO must assert that promotion of the objectives of environmental protection in accordance with its

field of activity, as defined in its by-laws, is affected by the challenged decision is not in compliance with the Convention. According to the communicant, all environmental NGOs meeting the general conditions of EAA section 3 should have access to review procedures without further restrictions. The Party concerned claims that this condition does not infringe article 9, paragraph 2, of the Convention, because it constitutes a reasonable and legitimate “requirement under national law” according to article 2, paragraph 5, of the Convention.

71. It follows from article 2, paragraph 5, that NGOs “promoting environmental protection” shall be deemed to have an interest in environmental decision-making. According to article 9, paragraph 2, of the Convention, any NGO meeting the requirements referred to in article 2, paragraph 5, should be deemed to have sufficient interest and thus granted standing in the review procedure. Hence, a criterion in national law that NGOs, to have standing for judicial review, must promote the protection of the environment is not inconsistent with the Convention per se. However, in order to be in accordance with the spirit and principles of the Convention, such requirements should be decided and applied “with the objective of giving the public concerned wide access to justice” (see findings on communications ACCC/C/2006/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 27, and ACCC/C/2009/43 (Armenia) (ECE/MP.PP/2011/11/Add.1), para. 81). This means that any requirements introduced by a Party should be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.

72. The criterion in the law of the Party concerned that environmental NGOs must demonstrate that their objectives are affected by the challenged decision amounts to a “requirement under national law”, as set out in article 2, paragraph 5, of the Convention. The criterion is sufficiently clear and does not seem to put an excessive burden on environmental NGOs, since this can be easily proven by the objectives stated in its by-laws. Moreover, NGOs have the possibility to (re-)formulate their objectives from time to time as they see fit. No information was submitted to the Committee to show that the authorities and courts of the Party concerned use this criterion in such a manner so as to effectively bar environmental NGOs from access to justice.

73. Since the application of this requirement by the Party concerned does not seem to contravene the objective of giving the public concerned wide access to justice, the Party concerned does not fail to comply with article 9, paragraph 2, of the Convention in this respect.

(b) *Convention’s requirement for the review of the “substantive and procedural legality of any decision” not transposed into German law*

74. The communicant asserts that since there is no explicit transposition into German law of the Convention’s requirement that members of the public concerned shall have the right to challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, the Party concerned is in non-compliance with article 9, paragraph 2, of the Convention. The Party concerned argues that it is possible for members of the public concerned to challenge both the substantive and procedural legality of decisions under the EAA, and also that Parties are not obliged to transpose the exact wording of the Convention into national legislation.

75. The fact that the exact wording of any provision of the Convention has not been transposed into national legislation is in itself not sufficient to conclude that the Party concerned fails to comply with the Convention. The communicant’s allegations concerning the impacts of the Party concerned not explicitly transposing the “substantive and procedural legality” requirement into German law have not been substantively corroborated by relevant practice. Therefore, the Committee does not conclude that the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect.

(c) *Requirement to assert that the challenged decision violates legal provisions “serving the environment”*

76. The communicant argues that by limiting the scope of judicial review to alleged contraventions of statutory provisions “serving the environment” (“*dem Umweltschutz dienen*”), the EAA imposes a limitation not found in article 9, paragraph 2, of the Convention, thus narrowing the range of administrative decisions that can be challenged by members of the public concerned. The communicant adds that in many cases it may be questionable whether a provision “serves the environment” or not and this may lead to unacceptable uncertainty as to whether the conditions for standing are met. According to the Party concerned, the decisions subject to judicial review under the EAA are clearly defined in EAA section 1 and are not limited by the requirement in question. Moreover, the Party concerned asserts that restricting the scope of judicial review to alleged infringements of legal provisions “serving the environment” would be in compliance with the Convention in any event, taking into account the Convention’s objective and focus on environmental decision-making. There is also no indication that this condition would in any way limit access to courts in practice.

77. As mentioned above, the Party concerned is not obliged to literally transpose the text of the Convention into its national legislation. However, when using its discretion in designing its national law, the Party concerned should not impose additional requirements that restrict the way the public may realize the rights awarded by the Convention, if there is no legal basis in the Convention for imposing such restrictions.

78. Article 9, paragraph 2, requires each Party to ensure access to review procedures in relation to any decision, act or omission subject to article 6 of the Convention. The range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5, and article 9, paragraph 2 (a) and (b), of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision.<sup>24</sup> While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for building and construction, economic aspects of investments, trade, finance, public procurement rules, etc. Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law “serving the environment”, “relating to the environment” or “promoting the protection of the environment”, as there is no legal basis for such limitation in the Convention.

79. When there is a clear contradiction between the provisions of national law and the requirements of the Convention, as in the present case, it is for the Party concerned to bring evidence to show that its courts interpret those provisions in conformity with the Convention (see para. 67). However, this has not been shown by the Party concerned with respect to the requirement of “serving the environment”. The Party concerned, in its comments on the draft findings, referred to a number of court decisions that it claimed showed that the term “serving the environment” is interpreted in a broad manner. These cases show that the courts include, for example, protection of human health or flood protection in their considerations. These issues are, however, within the scope of what

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<sup>24</sup> Similarly CJEU in the *Altrip* case, para. 36, said: “In providing that the decisions, acts, or omissions referred to therein must be actionable before a court of law through a review procedure to challenge their substantive or procedural legality, the first paragraph of Article 10a of Directive 85/337 has in no way restricted the pleas that may be put forward in support of such an action.”

relates to the environment. The Committee is thus not convinced that these cases show that issues other than those relating to environmental concerns can be successfully raised under the clause “serving the environment”.

80. For these reasons, the Committee finds that by imposing a requirement that an environmental NGO to be able to file an appeal under the EAA must assert that the challenged decision contravenes a legal provision “serving the environment” (*dem Umweltschutz dienen*), the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

(d) *Requirement to assert that the challenged decision violates legal provisions which could be of importance for the decision; and review of procedural errors*

81. The communicant alleges that the EAA requirements that the environmental NGO must assert that the contested decision contravenes a legal provision which “could be of importance” for the decision (“für die Entscheidung von Bedeutung sein können”) and that the appeal can be justified only if the court finds that legal provisions contravened “are of importance” for the decision (“für die Entscheidung von Bedeutung sind”), imply a limitation which is contrary to article 9, paragraph 2, of the Convention. In particular, the communicant points out that the application of these requirements considerably limits the possibility for environmental NGOs to challenge the procedural legality of decisions issued under the EAA. The Party concerned argues that, in general, the fact that only alleged violations of provisions which could be relevant for the decision are considered by the courts is not contrary to the Convention. It argues that according to German law, the substantive legality of a decision by a public authority is subject to a complete review by the court, while procedural errors are of secondary importance. According to the Party concerned, the possibility for the court to assess whether a procedural error could influence the substantive legality of the decision, and to cancel the decision only if the answer is affirmative, is in compliance with the Convention. It also emphasizes that the alleged violations of essential procedural rights granted by article 6 of the Convention are considered by the German courts as “fundamental errors of procedure”, with respect to which the possibility to review and cancel the decision is ensured.

82. The Committee recalls that article 9, paragraph 2, of the Convention is directly linked to article 6, which grants the rights of the public concerned to participate in permitting procedures for specific activities. The Parties must ensure that in such procedures, members of the public concerned can fully exercise their participatory procedural rights set out in article 6 of the Convention.

83. Article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention requires Parties to provide members of the public concerned with access to effective judicial protection should their procedural rights under article 6 be violated. Therefore, it would not be compatible with the Convention to allow members of the public to challenge the procedural legality of the decisions subject to article 6 of the Convention in theory, while such actions were systematically refused by the courts in practice, as either not admissible or not well founded, on the grounds that the alleged procedural errors were not of importance for the decisions (i.e., that the decision would not have been different, if the procedural error had not taken place).

84. On the basis of the above, the Committee examines the information provided by the communicant and the Party concerned as to whether the courts of the Party concerned systematically refuse review applications as non-admissible or ill-founded when the applicants allege that procedural rights under article 6 of the Convention have been infringed.

85. EAA section 2 does not establish any criteria for determining when a contravention of a legal provision could be “of importance” for a challenged decision. EAA section 4 specifies that the reversal of a decision can be requested if (a) an EIA, or (b) a preliminary assessment of a project concerning the requirement for an EIA, required in accordance with the EIA Act, was not carried out. The Committee notes that there is disagreement between the communicant and the Party concerned as to whether the errors listed in EAA section 4 “can” lead to reversal of the challenged decision, as the communicant asserts, or “must” have this effect, which is the position of the Party concerned.

86. Based on the information provided to it, the Committee understands that for its appeal to be admissible, an NGO must assert that the allegedly violated provision “could be” of importance for the contested decision, while to find an appeal justified, the court must conclude that the violated provisions “are” of importance for the decision.

87. The possibility for national courts to evaluate whether the allegedly infringed provisions could be of any importance for the merits of the case, is not, in general, contrary to the requirements of article 9, paragraph 2, and to the objectives of the Convention.<sup>25</sup> This possibility, as such, would not prevent environmental NGOs from challenging both substantive and procedural legality of the decisions.

88. The information provided by the communicant and the Party concerned relating to the scope of judicial review for alleged procedural errors raises doubts as to whether the legal system of the Party concerned ensures adequate access for environmental NGOs to review the procedural legality of the decisions subject to article 6 of the Convention. This is so namely because the question of the possible “importance of the provision for the contested decision” is, according to section 2, paragraph 1, of the EAA, considered by the court already when deliberating on the admissibility of the case, i.e., not in the full judicial review procedure.

89. The Party concerned has submitted relevant recent case law showing that German courts consider violations of procedural rights granted under article 6 of the Convention as fundamental errors of procedure that would require review and eventually annulment of the decision, and that courts are ready to apply the Convention directly in that respect (“direct effect of article 9, paragraph 2, of the Convention supplements the provisions of section 2, paragraphs 1 and 5, of the EAA”).<sup>26</sup> The request for a preliminary ruling made by the Federal Administrative Court to CJEU in the *Altrip* case (see para 35 above) indicates that there may be uncertainty as to how German courts should deal with procedural errors concerning decisions subject to article 6 of the Convention. The communicant has not, however, sufficiently substantiated, e.g., by reference to recent case law, that the courts when applying the EAA in practice refuse to deal with appeals and/or arguments of environmental NGOs concerning alleged procedural errors with respect to decisions subject to article 6 of the Convention. Moreover, it follows from the CJEU ruling in *Altrip* that the German courts should take procedural errors into account in environmental cases. Therefore, the Committee does not conclude that the Party concerned fails to comply with article 9, paragraph 2, of the Convention with respect to the scope of judicial review regarding the procedural legality of decisions subject to article 6 of the Convention.

90. The Committee nevertheless raises a concern about the lack of clarity of the legal system of Party concerned as to whether a violation of the procedural rights prescribed under article 6 would be considered as a fundamental error of procedure to allow for fulfilment of the rights prescribed under article 9, paragraph 2, of the Convention. The

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<sup>25</sup> CJEU comes to similar conclusions in the *Altrip* case, para. 57.

<sup>26</sup> Federal Administrative Court, Case No. 4 C 9/06, judgment of 13 December 2007.

Committee emphasizes that if German courts in practice were to deny review of the appeals and/or arguments of members of the public concerned, including environmental NGOs, regarding the procedural legality of decisions subject to article 6, this would amount to non-compliance with article 9, paragraph 2.

**NGO standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)**

91. The communicant alleges that, beyond the scope of the EAA, standing to challenge acts and omissions of private persons and public authorities which contravene provisions of environmental law is granted only to persons who claim that their own personal rights are injured. This applies also to environmental NGOs. Such a situation is, according to the communicant, not in compliance with the requirements of article 9, paragraph 3, in conjunction with paragraph 4, of the Convention. The Party concerned contends that the requirement in its legislation that a person has to claim that his or her own rights have been infringed when lodging an administrative appeal constitutes a legitimate criterion in line with article 9, paragraph 3, of the Convention. In addition, the Party concerned emphasizes that under its national law environmental NGOs have access to review procedures beyond the scope of the EAA, without having to assert an infringement of their own rights, in the areas of nature conservation. It also refers to the jurisprudence of national courts interpreting the “impairment of right” condition in a broad manner, namely, the recent judgment of the Federal Administrative Court of 5 September 2013,<sup>27</sup> which interpreted the term “impairment of the subjective right” broadly with regard to the possibility for environmental NGOs to challenge air quality plans (see para. 58 above).

92. Unlike article 9, paragraphs 1 and 2, article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (findings on communications ACCC/C/2005/11 (Belgium), paras. 34–36; ACCC/C/2006/18 (Denmark), paras. 29–30; and ACCC/C/2010/48 (Austria) (ECE/MP.PP/C.1/2012/4), paras. 68–70).

93. The Committee, when evaluating the compliance of the Party concerned with article 9, paragraph 3, of the Convention, considers the “general picture” described by the communicant and the Party concerned, i.e., both the relevant legislative framework and its application in practice (see para. 64 above). Therefore, the Committee takes into account whether national law effectively blocks access to justice for members of the public, including environmental NGOs, and considers if there are remedies available for them to actually challenge the act or omission in question.

<sup>27</sup> Case BVerwG 7 C 21.12.

94. Article 9, paragraph 3, does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories. Rather, article 9, paragraph 3, applies to contraventions of any provision of national law relating to the environment. While what is considered a public or private interest or an objective or subjective right may vary among Parties and jurisdictions, access to a review procedure must be provided for all contraventions of national law relating to the environment.

95. The Party concerned has adopted environmental laws at the federal level, and the *Länder* (states) have competence to implement and enforce that legislation. Access to justice in environmental matters is primarily regulated at the federal level. According to the well-enshrined principle in German procedural law derived from the “impairment of rights” doctrine (“*Schutznormtheorie*”), access to justice is granted on the basis of whether the applicant claims infringement of his/her subjective rights. A strict application of this principle in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, of the Convention, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right. The requirement of infringement of subjective rights would in many cases rule out the opportunity for environmental NGOs to access review procedures, since they engage in public interest litigation.

96. The Party concerned and the communicant agree that, apart from the rights of access to justice provided for in the EAA, which implements article 9, paragraph 2, of the Convention, the only other explicit legislative provisions which provide legal standing to environmental NGOs, are proceedings issued under the Federal Nature Conservation Act or the Environmental Damage Act. It follows that, apart from the rights on access to justice provided in the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, there is no apparent basis in the legislation for access to review procedures for environmental NGOs.

97. The communicant provided examples of recent judgements where it claimed standing was denied to environmental NGOs.<sup>28</sup> The Party concerned disputed these examples, alleging that the lawsuits of the NGOs were admissible, but refused on the basis of not being well-founded. The Party concerned also presented the judgment of the Federal Administrative Court of 5 September 2013, in which legal standing was granted to an NGO, in the area of air protection, beyond the scope of the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, with reference to article 9, paragraph 3, of the Aarhus Convention and relevant CJEU jurisprudence.

98. In its judgment of 5 September 2013, following the CJEU judgment in the “Slovak Brown Bear” case,<sup>29</sup> the Federal Administrative Court broadened the interpretation of the criterion of “impairment of a right”. This, however, was done in order to ensure the correct implementation of the relevant EU legislation (see paras. 20–26 and 46 of the judgement of the Federal Administrative Court) and does not imply that the same interpretation will be applied by the courts to those areas of national law relevant to the Aarhus Convention but not covered by EU law. Nor does it guarantee that this interpretation will be widely followed in future decisions. The Federal Administrative Court itself has indicated that for Germany to be fully in compliance with the requirements of article 9, paragraph 3, of the Convention, changes in the legislation would be needed (see para. 32 of its judgement).

99. If the broad interpretation of the term “impairment of subjective rights” reflected in the judgment of the Federal Administrative Court of 5 September 2013 was to become a

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<sup>28</sup> Oberverwaltungsgericht Nordrhein-Westfalen (case 2 B 940/12, decision of 29 August 2012); Verwaltungsgericht Kassel (case 4 L 81/12 ks, decision of 2 August 2012); Bayerische Verwaltungsgerichtshof (case 8 CS 12847, decision of 21 August 2012).

<sup>29</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255.

general practice of German courts in all areas of national law relevant to the Convention, this could amount to compliance with article 9, paragraph 3. However, in the absence of legislative guarantees for members of the public, including environmental NGOs, to have access to review procedures to challenge acts and omissions of private persons and public authorities in areas of national environmental law beyond the scope of the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, the Committee concludes that the conditions laid down by the Party concerned do not ensure standing to environmental NGOs to challenge acts or omissions that contravene national laws relating to the environment.

100. For these reasons, the Committee finds that, by not ensuring standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

#### **IV. Conclusions and recommendations**

101. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

##### **A. Main findings with regard to non-compliance**

102. The Committee finds that:

(a) By imposing a requirement that an environmental NGO, to be able to file an appeal under the EAA, must assert that the challenged decision contravenes a legal provision “serving the environment”, the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect (para. 80).

(b) By not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention (para. 100).

##### **B. Recommendations**

103. The Committee, pursuant to paragraph 35 of the annex to decision I/7 recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned that it take 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”;

(b) 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 revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EAA, the Federal Nature Conservation Act and the Environmental Damage Act.