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## Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Seventy-second meeting

Geneva, 18–21 October 2021

Item 9 of the provisional agenda

#### Communications from members of the public

## Findings and recommendations with regard to communication (ACCC/C/2016/137) concerning compliance by Germany\*

Adopted by the Compliance Committee on 23 July 2021

### I. Introduction

1. On 10 February 2016, WWF Germany (the communicant) submitted a communication to the Compliance Committee alleging that Germany failed to comply with its obligations under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) with respect to the criteria for standing of environmental non-governmental organizations to have access to justice in environmental matters.
2. More specifically, the communicant alleges that the criteria for recognition established in the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) are overly restrictive and have a discriminatory effect, and, moreover, impede access to justice, in violation of articles 2 (5), 3 (4) and (6) and 9 (2) of the Convention.
3. At its fifty-second meeting (Geneva, 8–11 March 2016), the Committee determined on a preliminary basis that the communication was admissible.<sup>1</sup>
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties (ECE/MP.PP/2/Add.8), the communication was forwarded to the Party concerned on 3 August 2016 for its response.
5. The Party concerned provided its response to the communication on 3 January 2017, and, on 7 February 2017, the communicant provided comments thereon.

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\* This document was submitted late owing to additional time required for its finalization.

<sup>1</sup> ECE/MP.PP/C.1/2016/2, para. 63.

6. On 8 February 2017, Greenpeace Germany submitted a statement as an observer.
7. On 12 March 2018, the Committee sent questions to the communicant and, on 17 April 2018, the communicant submitted its answers thereto.
8. The Committee held a hearing to discuss the substance of the communication at its sixty-first meeting (Geneva, 2–6 July 2018), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
9. The Committee completed its draft findings through its electronic decision-making procedure on 8 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded on that date to the Party concerned and the communicant for their comments. Both were invited to provide comments by 20 July 2021.
10. On 14 and 15 July 2021, respectively, the Party concerned and the communicant provided comments on the Committee’s draft findings.
11. The Committee proceeded to finalize its findings in closed session, taking account of the comments received and adopted its findings through its electronic decision-making procedure on 23 July 2021. The Committee agreed that they should be published as a formal pre-session document to its seventy-second meeting.

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. National legal framework

#### Forms of environmental non-governmental organizations

12. Environmental non-governmental organizations (NGOs) can take a number of different forms in the Party concerned. The term *Vereinigung* is an umbrella term that can, in principle, encompass “associations, organizations or groups”, including groups without legal capacity.<sup>3</sup> The English term “organization” is henceforth used for the German word *Vereinigung*, whilst noting that this term is used in an informal sense since: “there is no term in English able to satisfactorily render the comprehensive nature of the umbrella term *Vereinigung*”.<sup>4</sup> The types of organization of most relevance to the communication are outlined below.

#### *Associations*

13. The registration of associations (*Vereine*) is governed by the Civil Code (*Bürgerliches Gesetzbuch*) and the Law on Associations (*Vereinsgesetz*).<sup>5</sup> An association can be established if at least two members agree on its by-laws. In order to be entered in the register of associations, it must have seven members and pay a fee of 75 euros.<sup>6</sup>

14. Unlike a *Vereinigung*, a *Verein* is a recognized legal form in the Party concerned. A *Vereinigung* is not to be confused with a *Verein* within the meaning of the Law on Associations.<sup>7</sup>

#### *Foundations*

15. Under the law of the Party concerned, a foundation is an organization established by one or more founders which is to make use of the assets devoted to the foundation in order

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<sup>2</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>3</sup> Party’s response to communication, p. 13.

<sup>4</sup> *Ibid.*, p. 14.

<sup>5</sup> Observer statement by Greenpeace Germany, 8 February 2017, p. 2.

<sup>6</sup> Party’s response to communication, pp. 23–24.

<sup>7</sup> *Ibid.*, pp. 9 and 13–14.

to fulfil a purpose established by its founders. It is a legally independent set of assets with legal personality.<sup>8</sup>

16. A foundation does not have any members, but must, pursuant to section 26 (1) of the Civil Code in conjunction with section 86 of that Code, have a board, which is the legal representative of the foundation, and may have a supervisory body if provided for by its by-laws. A foundation may itself become a member of a *Vereinigung* of a different legal form, such as a *Verein*.<sup>9</sup>

#### *Cooperative societies*

17. Section 15 of the Cooperative Societies Act (*Genossenschaftsgesetz*) provides that cooperative societies allow anybody who shares the objectives of the society to participate in the society.<sup>10</sup> Section 43 (3), first sentence, of that Act provides that each member has one vote.<sup>11</sup>

18. Further ways in which environmental organizations may form in the Party concerned include:

- (a) Non-profit limited liability companies;
- (b) Non-profit incorporated companies;
- (c) Citizens' initiatives, which lack legal capacity.<sup>12</sup>

#### **Federal Nature Conservation Act**

19. Since 1976, the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) has governed the participation mechanisms open to recognized nature conservation organizations in administrative procedures under nature conservation law. Originally, section 29 (2), sentence 2, No. 5 of the Federal Nature Conservation Act prescribed the requirements for nature conservation organizations to be recognized, including that "membership is open to anyone who supports the association's objectives".<sup>13</sup>

20. The Act was amended in 2002 to include in section 59 the possibility for certain associations to lodge a "representative action" at the federal level. Associations had to meet various requirements in order to qualify, including a requirement that: "full voting rights in the association's general meeting are open to any citizen who supports its nature conservation objectives".<sup>14</sup>

21. The provisions on recognition for nature conservation organizations contained in the Federal Nature Conservation Act were abolished in 2009. Since that time, recognition has been exclusively granted in accordance with section 3 of the Environmental Appeals Act.<sup>15</sup>

#### **Recognition under the Environmental Appeals Act**

22. The Environmental Appeals Act (EAA) came into force on 15 December 2006.<sup>16</sup> The requirement for full voting rights in section 59 of the Federal Nature Conservation Act was included in almost identical terms in section 3 (1) EAA.<sup>17</sup> The major reform introduced by the EAA was to expand the representative action found in the Federal Nature Conservation Act to additional specified decisions under environmental law.<sup>18</sup> While initially only applying to matters covered by article 9 (2) of the Convention, the EAA was amended in 2017 to additionally include matters falling within the scope of article 9 (3).<sup>19</sup>

<sup>8</sup> Ibid., p. 3.

<sup>9</sup> Ibid.

<sup>10</sup> Communication, p. 5.

<sup>11</sup> Party's response to communication, p. 24.

<sup>12</sup> Communication, pp. 2 and 11.

<sup>13</sup> Party's response to communication, pp. 16–17.

<sup>14</sup> Ibid., p. 17.

<sup>15</sup> Ibid., p. 18.

<sup>16</sup> Ibid., p. 4.

<sup>17</sup> Ibid., p. 18.

<sup>18</sup> Ibid., p. 4.

<sup>19</sup> Communicant's comments on draft findings, 15 July 2021, para. 2.

23. Following the abolition of the relevant provisions of the Federal Nature Conservation Act in 2009, recognition of environmental organizations is provided for in section 3 EAA exclusively. Since 2009, section 3 (1), second sentence, EAA provides that:

The *Vereinigung* shall be recognized if:

- (1) According to its by-laws, it ideationally, and not only temporarily, encourages the objectives of environmental protection;
- (2) It has existed for at least three years at the time of recognition and has been active as defined in number 1 during that period;
- (3) It offers guarantees of proper performance of its duties; the type and scope of its previous activity, its membership and the effectiveness of the *Vereinigung* shall be taken into account in that regard;
- (4) It promotes public-benefit purposes as defined in section 52 of the German Fiscal Code (*Abgabenordnung*);
- (5) It allows any person who supports the objectives of the *Vereinigung* to become a member; members shall be deemed to be persons who are given full voting rights in the general meeting of the *Vereinigung* upon joining; *Vereinigungen*, at least three-quarters of whom are legal persons may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfil this requirement.<sup>20</sup>

24. In 2009, article 3 (1), second sentence, No. 5 was “recast” in the above form. Prior to its 2009 recast, the fifth criterion stated that:

Recognition shall be granted if membership of the *Vereinigung* with full voting rights in the general meeting is open to anyone who supports the *Vereinigung*’s objectives; the requirement stipulated in clause 1 may be waived with regard to *Vereinigungen* the members of which are exclusively legal entities insofar as the majority of these legal entities satisfies this requirement.<sup>21</sup>

25. Environmental organizations that are only active in a single federal province (*Bundesland*) apply for recognition at the responsible ministry of that federal province, in accordance with section 3 (3) EAA. Those that are active in two or more federal provinces apply for recognition at the Federal Environment Agency pursuant to section 3 (2), first sentence, EAA.<sup>22</sup>

#### **Standing to bring challenges in court**

26. The general rule for standing in legal proceedings concerning acts by public authorities is regulated by article 19 (4) of the Constitution, or Basic Law (*Grundgesetz*), which guarantees the right of judicial review of an unlawful interference by the State with one’s own subjective rights but not of violations of public (objective) law.<sup>23</sup> Section 42 of the Administrative Court Procedure Code (*Verwaltungsgerichtsordnung*) also limits access to administrative proceedings to cases involving subjective rights.<sup>24</sup>

27. Section 2 of the EAA provides for recognized organizations to file appeals against specified administrative decisions in environmental matters without having to assert that their own rights have been violated. However, in order to qualify for the purposes of section 2 (1) EAA, an organization must be recognized pursuant to section 3 (1) EAA (see paras. 22–24 above).<sup>25</sup> An action is also admissible if the environmental organization has lodged a request with the competent authority for recognition under section 3 (1), the requirements for recognition are satisfied, and a decision regarding recognition has not yet been made for reasons for which the organization is not responsible. Foreign environmental organizations

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<sup>20</sup> Communication, pp. 3 and 13; Party’s response to communication, p. 5; Communicant’s opening statement at the hearing, 3 July 2018, p. 2.

<sup>21</sup> Party’s response to communication, p. 18.

<sup>22</sup> Communication, p. 3.

<sup>23</sup> *Ibid.*, p. 7; Party’s response to communication, pp. 8–9.

<sup>24</sup> Communication, p. 7.

<sup>25</sup> *Ibid.*, pp. 2–3; Party’s response to communication, pp. 4 and 8.

must also apply for recognition under section 3 (1) EAA to have standing under section 2 (1) EAA, but do not need to demonstrate why the recognition procedure has not yet been completed.<sup>26</sup>

#### Further constitutional provisions

28. Several other provisions of the Basic Law are also relevant:

- (a) Article 3 (1) of the Basic Law enshrines the principle of non-discrimination;<sup>27</sup>
- (b) Article 20 of the Basic Law prevents competent authorities and courts from acting against the express wording in a law itself;<sup>28</sup>
- (c) Article 93 (1), No. 4a, of the Basic Law entitles any person to bring a constitutional complaint on the ground that one of his or her basic rights has been infringed by a public authority.<sup>29</sup>

## B. Facts

#### Environmental non-governmental organizations in the Party concerned

29. Environmental non-governmental organizations are set up in various legal forms in the Party concerned, the most common being a registered non-profit association with legal capacity (see para. 12 above). Less common, but still widespread, are associations with legal capacity that are not acting on a non-profit basis. The official register of associations shows that, as of 2011, 8,497 associations (either non- or for-profit) were registered in the field of environmental and nature protection. Since a reform of the Basic Law, environmental organizations are increasingly being constituted as non-profit foundations (there were over 1,800 in February 2016).<sup>30</sup> As of February 2016, at least 282 environmental organizations were recognized under the EAA.<sup>31</sup> As of mid-2018, 327 environmental organizations were recognized.<sup>32</sup>

#### The communicant's status in the Party concerned

30. The communicant operated as a registered association (*Verein*, see para. 13 above) from its establishment in 1963 until 1973.<sup>33</sup> In 1973, (i.e. before the introduction of the recognition criteria in the Federal Nature Conservation Act and the EAA), it was transformed into a foundation with legal capacity.<sup>34</sup>

31. Forty-five percent of the communicant's 2017 annual budget was funded by "membership" fees, provided by "promotional members" who do not qualify as "members" within the meaning of the law of the Party concerned.<sup>35</sup> As of February 2016, it had a permanent staff of 247 individuals and was supported by over 500,000 promotional members.<sup>36</sup> As of 2020, the communicant had 702,000 "promotional members".<sup>37</sup> Measured by its number of promotional members, its turnover and number of staff, the communicant is one of the largest environmental organizations in the Party concerned.<sup>38</sup>

<sup>26</sup> Party's response to communication, p. 27.

<sup>27</sup> Party's comments on preliminary admissibility, 1 March 2016, pp. 2–3.

<sup>28</sup> Communicant's reply to Committee's questions, 17 April 2018 p. 2.

<sup>29</sup> Ibid. For an English translation of the Basic Law, see the Party's response to communication, footnote 6.

<sup>30</sup> Communication, p. 2.

<sup>31</sup> Ibid., p. 6; Party's response to communication, p. 9.

<sup>32</sup> Party's opening statement at the hearing, 4 July 2018, p. 2.

<sup>33</sup> Party's response to communication, p. 3.

<sup>34</sup> Communication, p. 6; Party's response to communication, p. 3.

<sup>35</sup> Party's response to the communication, pp. 3–4; Communicant's comments on the Party's response to communication, 7 February 2017, p. 4.

<sup>36</sup> Communicant's comments on the Party's response to communication, 7 February 2017, p. 5.

<sup>37</sup> Communicant's comments on draft findings, 15 July 2021, para. 4.

<sup>38</sup> Communication, p. 8.

32. Since its establishment, the communicant has been pursuing the same non-profit environmental objectives that it had been pursuing when a registered non-profit association (*Verein*). Only its legal form has changed.<sup>39</sup>

33. To date, the communicant has not submitted a request for recognition as an environmental organization under section 3 (1) EAA.<sup>40</sup>

#### **The status of observer Greenpeace in the Party concerned**

34. Observer Greenpeace Germany was founded in 1980 and is also one of the largest environmental organizations in the Party concerned, in terms of its number of supporting members, its staff and turnover. As of February 2017, it had a staff of 230 individuals, more than 5,000 volunteers, and over 580,000 “supporting members”, who provide donations but lack voting or other membership rights.<sup>41</sup> It has been a registered association (*Verein*) with non-profit status since 1980.<sup>42</sup>

35. Greenpeace Germany is a membership organization, yet not every supporting member is automatically afforded a voting right. However, any supporter can acquire such a right at its general assembly by becoming an active member in one of the over 100 local groups.<sup>43</sup>

36. Greenpeace Germany’s application of 22 April 2015 for recognition under section 3 (1) EAA was refused on 1 March 2016 on the ground that it did not satisfy the criterion under section 3 (1), second sentence, No. 5 EAA (see para. 23 above).<sup>44</sup> On 5 April 2016, Greenpeace Germany lodged an administrative appeal against this refusal.<sup>45</sup> On 1 August 2016, Greenpeace Germany’s appeal was rejected, and on 1 September 2016 it sought judicial review, arguing, inter alia, that section 3 (1), second sentence, No. 5 EAA was incompatible with European Union law and article 9 of the Convention.<sup>46</sup>

37. Those proceedings were suspended on 5 March 2017 pending the Committee’s findings on the present communication.<sup>47</sup>

### **C. Domestic and international remedies and admissibility**

38. The communicant claims that it has not submitted a request for recognition or used any domestic remedies because it would be futile to do so.<sup>48</sup> It considers it a matter of “common sense” that foundations are not covered by section 3 (1), second sentence, No. 5 EAA and that any request would “definitely be rejected ... due to the clear wording of the law”.<sup>49</sup> The communicant submits that, during the legislative process for section 3 (1) EAA, the request of one political group to include foundations among those organizations that could be recognized was explicitly rejected.<sup>50</sup> It claims that the clear wording of section 3 (1), second sentence, No. 5 and its legislative history mean that national authorities and the courts have no discretion to interpret that provision to recognize foundations, due to article 20 of the Basic Law (see para. 28 (b) above).<sup>51</sup>

39. The communicant claims further that its situation is not comparable with that of Greenpeace Germany, as the latter is a registered association with members, some of which have special voting rights, whilst the communicant is a foundation and can under no

<sup>39</sup> Communication, p. 6.

<sup>40</sup> Party’s response to communication, p. 6.

<sup>41</sup> Observer statement by Greenpeace Germany, 8 February 2017, pp. 2–4.

<sup>42</sup> *Ibid.*, p. 2.

<sup>43</sup> *Ibid.*, p. 4.

<sup>44</sup> *Ibid.*; Party’s response to the communication, p. 6.

<sup>45</sup> Observer statement by Greenpeace Germany, 8 February 2017, pp. 3–4.

<sup>46</sup> Party’s response to communication, pp. 6–7; Observer statement by Greenpeace Germany, 8 February 2017, p. 3.

<sup>47</sup> Communicant’s reply to questions, 17 April 2018, p. 4.

<sup>48</sup> Communication, pp. 9–10; Communicant’s reply to Committee’s questions, 17 April 2018, pp. 2–3.

<sup>49</sup> Communication, p. 10; Communicant’s reply to Committee’s questions, 17 April 2018, p. 2.

<sup>50</sup> Communication, p. 10.

<sup>51</sup> Communicant’s reply to Committee’s questions, 17 April 2018, p. 2.

circumstances meet the internal democracy requirement in section 3 (1), second sentence, No. 5 EAA as it does not have members.<sup>52</sup>

40. The communicant submits that only the Federal Constitutional Court can repeal or declare invalid a law (or certain parts of it) as unconstitutional.<sup>53</sup> Private natural and legal persons have the possibility to bring a legal challenge to the Constitutional Court under article 93 (1), No. 4a, of the Basic Law after the exhaustion of all national remedies and only when they meet the “high requirements for admissibility.”<sup>54</sup> Administrative courts cannot change the law or apply an interpretation that is at odds with the words of the legislation.<sup>55</sup>

41. The communicant alleges further that the Constitutional Court’s review is limited to alleged violations of national fundamental rights, and thus does not assess the interpretation of international treaties or the interpretation of European Union law by the legislator. The communicant acknowledges that the non-discrimination principle under article 3 of the Basic Law is such an example of a fundamental national right, yet claims that this provision is only infringed in cases where the discrimination by the legislator is arbitrary (that is, lacking any objective reasons). It submits that the difference in the legal structure of a registered association and a foundation would be considered itself a sufficient distinguishing criterion to justify discrimination under national law.<sup>56</sup>

42. The communicant also claims that the rejection procedure, including the mandatory administrative appeal procedure, would take a very long time, as demonstrated by the more than 15 months it took after Greenpeace Germany’s lodgement of its request for recognition until the final administrative decision confirming the rejection of recognition was finally received (see para. 36 above).<sup>57</sup>

43. The communicant submits further that the possibility to obtain a preliminary ruling from the Court of Justice of the European Union is not an effective remedy under the law of the Party concerned. The communicant states first that, under German procedural law, parties cannot apply to submit a legal question to the Court of Justice of the European Union at any level of the administrative courts. Only the Federal Administrative Court, as a court of last resort, is bound by article 267 (3) of the Treaty on the Functioning of the European Union to refer a question, but the parties themselves have no direct means to initiate a preliminary ruling of the Court of Justice of the European Union. Only after the Federal Administrative Court’s final decision may the parties lodge a constitutional complaint for a failure to refer. The communicant submits, however, that in practice this appeal is limited, and if the constitutional claim is successful, the Constitutional Court will refer the case back to the court of last resort for a new decision.<sup>58</sup>

44. The Party concerned points out that the communicant has never submitted a request for recognition pursuant to section 3 (1) EAA and that, should any such request be rejected, the communicant could challenge the rejection on the grounds that there is no reasonable justification for section 3 (1), second sentence, No. 5 EAA under domestic, European Union or international law, or that it is incompatible with such law.<sup>59</sup>

45. The Party concerned acknowledges that Greenpeace Germany is a registered association and the communicant is a foundation, but submits that both organizations have in common that they do not satisfy the precondition of the “democratic internal structure” provided for in section 3 (1), second sentence, No. 5 EAA. The Party concerned submits that Greenpeace Germany’s case shows that national law provides for an effective and sufficient means of redress.<sup>60</sup>

46. More specifically, the Party concerned states that, in such a challenge, an administrative court would have to examine whether section 3 (1), second sentence, No. 5 EAA is compatible with, inter alia, article 3 (1) of the Basic Law, which sets out the

<sup>52</sup> Communicant’s comments on the Party’s response to the communication, 7 February 2017, pp. 1–2.

<sup>53</sup> Communication, p. 9; Communicant’s reply to Committee’s questions, 17 April 2018, p. 2.

<sup>54</sup> Communicant’s reply to questions, 17 April 2018, p. 2.

<sup>55</sup> Communication, p. 10.

<sup>56</sup> Communicant’s reply to questions, 17 April 2018, pp. 2–3.

<sup>57</sup> *Ibid.*, p. 2.

<sup>58</sup> *Ibid.*, pp. 3–4.

<sup>59</sup> Party’s comments on preliminary admissibility, 1 March 2016, p. 2.

<sup>60</sup> Party’s response to communication, pp. 6–7.

constitutional principle of non-discrimination. If the court concluded that there may be a possible violation, it would have to put the matter before the Federal Constitutional Court. The Party concerned further submits that the administrative court would have to consider whether article 3 (1) complies with the European Union Directives transposing the Convention into European Union law. Should the court find a possible violation, it could ask the Court of Justice of the European Union for a preliminary ruling; a court of last resort would be obliged to do so.<sup>61</sup>

47. Observer Greenpeace Germany agrees with the communicant that it would be legally impossible or at least completely futile for the communicant to apply for recognition, in the light of article 20 of the Basic Law and the differences in structure between the two organizations.<sup>62</sup>

## D. Substantive issues

### Article 3 (4) in conjunction with article 2 (5)

48. The communicant submits that the Convention aims to include the widest range of environmental organizations within its remit as bearers of rights so that the objectives of the Convention will be adequately implemented. The communicant claims that this is further conveyed by the reference in article 3 (4) of the Convention to “associations, organizations or groups” regarding the circle of entities that should be afforded recognition. It claims that Parties should support various types of organization, not only those with a particular legal constitution.<sup>63</sup>

49. The communicant adds that article 2 (5) of the Convention requires only that NGOs promote environmental protection in order to be deemed to have an interest in environmental decision-making and thus fall under the definition of “the public concerned”, and that the reference in that provision to “requirements under national law” should not be misused. The communicant claims that this term does not introduce flexibility in the extent to which the obligation must be met but only in the means of implementation. It submits that Parties may not introduce or maintain national legislation that undermines or conflicts with the obligation in question and refers to *The Aarhus Convention: An Implementation Guide* (Implementation Guide) in this regard.<sup>64</sup>

50. The communicant accepts that the term *Vereinigung* itself in section 3 EAA covers all forms of groups and organizations. It submits that the non-compliance it alleges has nothing to do with that term, but rather with the fact that not only must a group have members and a democratic constitution to be recognized, it must cumulatively fulfil all five criteria under section 3 (1), second sentence, EAA (see para. 23 above).<sup>65</sup>

51. The communicant submits that, as evidenced in practice, the present legal framework means that only a registered association (or a cooperative society in what it calls “the unlikely case” that such a society is organized as a non-profit) would fulfil all of the requirements.<sup>66</sup> It claims that cooperative societies in the Party concerned mostly exist in the fields of consumer protection, the building and banking sectors, or as sales or producers’ cooperatives, and are not environmental organizations.<sup>67</sup> It notes that recognition under section 3 (1) EAA is only possible for organizations with legal personality, which thus excludes citizens’ initiatives from recognition.<sup>68</sup>

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<sup>61</sup> Party’s comments on preliminary admissibility, 1 March 2016, pp. 2–3.

<sup>62</sup> Statement by observer (Greenpeace Germany), 8 February 2017, p. 3.

<sup>63</sup> Communication, pp. 5 and 8.

<sup>64</sup> *Ibid.*, p. 5, and communicant’s opening statement at the hearing, 3 July 2018, p. 4, both citing United Nations publication, Sales No. E.13.II.E.3, pp. 44–45.

<sup>65</sup> *Ibid.*

<sup>66</sup> Communication, p. 4; Communicant’s opening statement at the hearing, 3 July 2018, p. 2.

<sup>67</sup> Communication, p. 5.

<sup>68</sup> *Ibid.*, pp. 4–5; Communicant’s opening statement at the hearing, 3 July 2018, p. 3.

52. The communicant claims that the ratio of potential to issued recognitions (see para. 29 above) shows a considerable imbalance regarding the potential of environmental organizations in the Party concerned to exercise their rights under the Convention.<sup>69</sup>

53. The communicant also submits that, contrary to what the Party concerned claims, it is very burdensome to fulfil all the requirements under section 3 EAA, in particular for local groups. It asserts that for organizations such as Greenpeace it would mean an absolutely disproportional restructuring of a well-established and professional entity, and for foundations such as the communicant a restructuring is not even possible under German corporate law.<sup>70</sup> It submits that section 3 (1), second sentence, No. 5 EAA results in a situation whereby the two biggest environmental organizations in the Party concerned, which “the public” has chosen to support as “their associations”, each with a promotional or supporting membership of over 500,000 individuals, are excluded from being recognized.<sup>71</sup>

54. The communicant claims that section 3 (1), second sentence, No. 5 EAA breaches the principle of equivalence, since there is no equivalent requirement to have recognition in other sectors, such as consumer protection or disability rights.<sup>72</sup>

55. Lastly, the communicant alleges that the restrictive recognition requirements set out in section 3 (1) EAA have a discriminatory effect against foreign environmental NGOs that have official recognition in their respective jurisdictions but that do not satisfy the formal requirements for recognition pursuant to section 3 (1) EAA. For example, the Austrian animal welfare foundation VIER PFOTEN is recognized in Austria but would not be in the Party concerned.<sup>73</sup>

56. The Party concerned submits that section 3 (1) EAA, including its second sentence, No. 5, contains objective criteria in line with articles 2 (5) and 3 (4) of the Convention.<sup>74</sup> It submits that Parties have discretion when forming their national provisions on recognition, subject to the following criteria drawn from the relevant pages of the Implementation Guide:

- (a) The requirements may not be overly burdensome or politically motivated;
- (b) The requirements are consistent with the Convention’s principles, such as non-discrimination and the avoidance of technical/financial barriers;
- (c) The requirements must be objective and not unnecessarily exclusionary;
- (d) The national legal system encourages the formation of NGOs and their constructive participation in public affairs.<sup>75</sup>

57. The Party concerned submits that the communicant is not complaining about the last of the above criteria, which relates to the establishment of environmental organizations and support to their activities in general. Rather, the communicant’s claim concerns the allegedly overly restrictive requirements for the recognition of environmental organizations, which allegedly negatively affect the ability of organizations to exercise their article 9 (2) rights. The Party concerned states that it supports environmental associations, organizations and groups in a manner in line with article 3 (4) of the Convention.<sup>76</sup>

58. The Party concerned points out that the definition of *Vereinigungen* in section 3 EAA is extremely broad, encompassing all environmental organizations regardless of their degree of structure or of their legal form. This term was chosen by the legislature to cover all “associations, organizations or groups” within the meaning of article 3 (4) of the Convention, including associations without legal capacity and citizens’ initiatives, provided that they have a certain degree of internal organization and a statute.<sup>77</sup>

<sup>69</sup> Communication, p. 6.

<sup>70</sup> Communicant’s opening statement at the hearing, 3 July 2018, p. 5.

<sup>71</sup> Communicant’s comments on Party’s response to communication, 7 February 2017, p. 3.

<sup>72</sup> Communication, p. 6.

<sup>73</sup> Ibid., pp. 7–8.

<sup>74</sup> Party’s statement on admissibility, 1 March 2016, p. 4; Party’s response to communication, p. 12.

<sup>75</sup> Party’s response to communication, pp. 10–12.

<sup>76</sup> Ibid., pp. 12–13; Party’s statement at the hearing, 4 July 2018, p. 1.

<sup>77</sup> Party’s comments on preliminary admissibility, 1 March 2016, pp. 4–5; Party’s response to communication, pp. 13–15.

59. The Party concerned claims that article 2 (5) of the Convention, when read in conjunction with article 2 (4), makes it clear that the Convention presumes that environmental organizations are combinations of persons, a point that it submits is made particularly clear by the French-language version of the Convention. It submits that foundations are not combinations of natural or legal persons, but a collection of assets with legal independence. It claims therefore that the use of the term *Vereinigungen* goes beyond the requirements of the Convention, even though it excludes foundations.<sup>78</sup>

60. The Party concerned claims that the democratic internal structure criterion in section 3 (1), second sentence, No. 5 EAA is not politically motivated. Rather, the requirement of a democratic internal structure reflects the “self-perception” of the Convention as an instrument of environmental democracy and is in harmony with the stipulations of the Convention on the recognition of environmental organizations. The Party concerned contends that the democratic internal structure criterion ensures the legitimacy of environmental organizations as representatives of the interests of the general public interest, strengthening the functioning of the democratic state based on the rule of law. The criterion prevents improper influences, serves to ensure that the environmental organization actually pursues environmental objectives after its recognition, and prevents an environmental organization, once it has been recognized, from subsequently pursuing purposes that do not serve environmental protection.<sup>79</sup>

61. The Party concerned contends that section 3 (1) EAA is not overly burdensome as it neither entails administrative effort nor depends on external circumstances that are partly or entirely beyond the control of the environmental organization. It claims that the fact that a large number of environmental organizations were recognized as of the end of 2016 (a total of 312 recognized organizations, including at both the federal and provincial levels) indicates that the requirement of section 3 (1), second sentence, No. 5, is not unduly difficult.<sup>80</sup>

62. The Party concerned contends that the communicant’s argument that the low number of recognized environmental organizations demonstrates that section 3 (1), second sentence, No. 5 EAA is too restrictive misses the point. First, all organizations, with the exception of foundations, can, as a matter of principle, be recognized pursuant to section 3 (1), second sentence, No. 5 EAA. Second, the communicant wrongly suggests that all environmental organizations have an interest in being recognized under section 3 EAA. The Party concerned submits that it is revealing that 98 out of 149 requests filed at the federal level between 2006 and November 2016 were approved, and only 3 were rejected. It states that 18 requests were still being processed, and the remaining requests were withdrawn. It submits that, as far as can be ascertained, only one application was withdrawn because of the fifth criterion in section 3 (1), second sentence, and that none of the rejections by the provinces was based on this requirement. It claims that, in most cases in which the Federal Environment Agency was the competent authority for recognition, the organizations withdrew their applications after having been informed that they failed to adequately document that they met either the first criterion (“predominantly promoting objectives of environmental protection”) or the second criterion (“proper performance of duties”) in section 3 (1), second sentence (see para. 23 above).<sup>81</sup>

63. The Party concerned points to a number of organizations that have been recognized, including both small and large organizations, such as the Nature and Biodiversity Conservation Union (NABU) and Friends of the Earth Germany (BUND).<sup>82</sup>

64. The Party concerned further claims that the requirements for recognition in section 3 (1) EAA do not discriminate against foreign environmental organizations. It states that the recognition requirements apply equally to German and foreign environmental organizations and that foreign environmental organizations are not treated less well when lodging appeals, since section 2 (2) EAA provides that administrative appeals are admissible for organizations that have lodged an application for recognition and that satisfy the criteria for recognition but have not yet been granted recognition for reasons for which the organization is not responsible. It claims that section 2 (2), second sentence, explicitly provides that foreign

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<sup>78</sup> Party’s response to communication, p. 14.

<sup>79</sup> *Ibid.*, pp. 16 and 19–21.

<sup>80</sup> *Ibid.*, pp. 21–22.

<sup>81</sup> *Ibid.*, pp. 22–23.

<sup>82</sup> *Ibid.*, pp. 25–26; Party’s opening statement at the hearing, 4 July 2018, p. 3.

environmental organizations are deemed to meet the requirement of not being responsible for a failure to request recognition at an earlier date. The Party concerned rejects the idea that it has an obligation under the Convention to recognize any organization that has been recognized by another State.<sup>83</sup>

65. The Party concerned states that, as the Committee recognized in its findings on communication ACCC/C/2008/31 (Germany), environmental organizations can be expected to formulate or reformulate their by-laws to satisfy the requirements of the EAA.<sup>84</sup> Moreover, an environmental organization organized as a foundation may establish a “support association” (*Förderverein*) with a democratic internal structure with minimal administrative burden and financial cost. It submits in this regard that the laws on establishing associations are not rigorous.<sup>85</sup>

66. Observer Greenpeace Germany submits that the position of the Party concerned that the communicant could create a “support association”, and thus a different legal personality that could be recognized under the EAA, must be rejected. It submits that members of the public place their trust in the communicant and Greenpeace Germany, who work on and understand environmental issues and fulfil all the other criteria under section 3 (1) EAA. It claims that a new association with membership and full voting rights would not be recognized immediately under the EAA and probably not at all if it worked simply as a shell for other legal entities. It also claims that such a newly created association would not automatically represent the same members of the public, who may or may not choose to become members.<sup>86</sup>

67. Lastly, Greenpeace Germany submits that it is not possible for the communicant to change back into a membership organization and neither is it simple for Greenpeace to change its statutes. It states that the communicant and Greenpeace Germany existed well before the EAA and have justified reasons for their fashion of incorporation. It suggests that the criterion of a democratic internal structure may have been construed with these two organizations in mind to exclude them from the rights afforded by the EAA.<sup>87</sup>

### Article 3 (6)

68. The communicant alleges that the amendments to the Federal Nature Conservation Act and EAA of 2002, 2006 and 2009 (see paras. 20–23 above) entailed a “further tightening” of the recognition criteria and thus violate article 3 (6) of the Convention. The communicant claims that previously a “simple membership” for supporting the organization, without formal voting rights, would have been sufficient, an arrangement that permitted a wider range of organizations to claim recognition.<sup>88</sup>

69. The Party concerned submits that article 3 (6) “does not contain an absolute anti-deterioration clause” and notes that the Meeting of the Parties has not endorsed any findings and recommendations that would indicate otherwise, recalling the Committee’s findings on communication ACCC/C/2004/7 (Hungary) in this regard. It submits that the 2009 amendment did not tighten the requirements for recognition but was rather a clarification in the light of previous case law and does not fail to meet the minimum standard set by the Convention in any event.<sup>89</sup>

### Article 9 (2)

70. The communicant claims that the Party concerned’s failure to grant recognition to environmental organizations in line with article 3 (4) of the Convention leads to a violation of article 9 (2). The communicant submits that the EAA as amended makes it clear that article 9 (2) rights are to be exercised through environmental organizations.<sup>90</sup>

71. The communicant claims that no member of the public can bring a challenge for violations of environmental laws under the general rules for standing in the Party concerned

<sup>83</sup> Party’s response to communication, pp. 26–29.

<sup>84</sup> *Ibid.*, p. 23, citing ECE/MP/PP/C.1/2014/8, para. 72.

<sup>85</sup> *Ibid.*, pp. 23–24.

<sup>86</sup> Observer statement by Greenpeace Germany, 8 February 2017, p. 6.

<sup>87</sup> *Ibid.*

<sup>88</sup> Communication, p. 7.

<sup>89</sup> Party’s response to the communication, pp. 32–33.

<sup>90</sup> Communicant’s opening statement at the hearing, 3 July 2018, p. 3.

unless he or she can show that they are individually affected, in accordance with section 42 of the Administrative Procedure Code (see para. 26 above). In this regard, it claims that no member of the public can challenge general (objective) violations relating to groundwater pollution from the use of fertilizers, damage to ecosystems due to climate change, or for permitting fraudulent cars.<sup>91</sup>

72. The communicant further claims that the EAA excludes both many small organizations and two of the largest and most capable organizations (i.e. the communicant and Greenpeace Germany) from exercising their rights under article 9 of the Convention. As a result, millions of Germans engaged in citizens' initiatives and/or large environmental organizations are effectively barred from the rights conferred on them by article 9 of the Convention. While they can participate in permitting procedures, they cannot go to court either themselves or through their "associations, organizations or groups".<sup>92</sup>

73. The communicant claims that, if the Party concerned has decided to implement article 9 of the Convention mainly through representative action via associations (i.e. rather than through individuals being able to access the courts directly), the applicable recognition criteria need to ensure that organizations and citizens' initiatives are recognized as representing the public that has chosen them as its representatives.<sup>93</sup>

74. The Party concerned submits that the Convention does not require that Parties extend rights under article 9 (2) of the Convention to all members of the public. More specifically, with respect to NGOs, Parties may make the rights deriving from the Convention conditional on "meeting any requirements under national law" under article 2 (5) of the Convention.<sup>94</sup>

75. As noted in paragraph 57 above, the Party concerned understands the communicant's primary complaint under article 9 (2) to refer to the effect of the criteria in section 3 (1), second sentence, No. 5 EAA. Accordingly, its position as laid out in paragraphs 56–65 above applies with respect to article 9 (2) as well.

76. Lastly, the Party concerned submits that the communicant's claim that environmental organizations are de facto the "exclusive representatives" of the public that have rights under article 9 (2) of the Convention in the Party concerned is flawed. First, any person whose rights are violated has a constitutionally enshrined claim to legal protection under article 19 (4) of the Basic Law. Second, the Convention does not require that Parties provide rights under article 9 (2) of the Convention to all organizations that are supported, financially or otherwise, by parts of the public. Such a position would render the wording in article 2 (5) of the Convention meaningless, since it is intended to allow Parties to establish prerequisites for the assertion of the rights derived from the Convention.<sup>95</sup>

### III. Consideration and evaluation by the Committee

77. Germany ratified the Convention on 15 January 2007. The Convention entered into force for Germany on 15 April 2007, being 90 days after the deposit of its instrument of ratification.

#### **Admissibility and domestic remedies**

78. The Party concerned claims that the communication should be found inadmissible on the basis that the communicant has not applied for recognition under section 3 (1) EAA and, as such, has not exhausted domestic remedies, including by appealing any negative outcome to an application for recognition in the domestic courts and by seeking a reference for a preliminary ruling to the Court of Justice of the European Union. The Party concerned cites the rejected application and subsequent court appeal by the observer, Greenpeace Germany, as demonstrating the availability of these remedies.

79. The Committee notes that the communicant is a foundation (unlike Greenpeace Germany, which is an association) and that the Party concerned has, itself, stated that

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Communication, p. 7; Communicant's opening statement at the hearing, 3 July 2018, p. 4.

<sup>94</sup> Party's opening statement at the hearing, 4 July 2018, p. 1.

<sup>95</sup> Ibid. pp. 7–8.

foundations are excluded from the scope of section 3 (1), second sentence, No. 5 EAA, namely that “the German term “*Vereinigung*” within the meaning of the Environmental Appeals Act ... itself excludes foundations”.<sup>96</sup> In more detail, the Party concerned stated that:

Foundations such as the communicant are environmental organizations, but do not satisfy the criterion of section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act since they are not democratically organized in terms of their legal form. Because of the legal form voluntarily selected by the founder, foundations do not enable citizens to participate. Citizens can only act as supporters of a foundation and contribute their money in the shape of donations. They are however prevented from the outset from taking part in the will-formation which takes place in the foundation, and this also cannot be granted to them.<sup>97</sup>

80. Given these statements by the Party concerned, it is clear to the Committee that any application by the communicant for recognition under section 3 (1), second sentence, no. 5 EAA would be refused. In this regard, the Committee notes that the problem faced by the communicant differs markedly from that faced by Greenpeace Germany, as the latter is seeking a more expansive interpretation of the relevant provision, whereas no possible interpretation of section 3 (1), second sentence, No. 5 could include the communicant. As such, the only domestic remedy to the communicant’s concern would be a change to the wording of section 3 (1), second sentence, No. 5 EAA itself.

81. On this point, the Party concerned has not put before the Committee any case law to show that the communicant could have successfully requested the Federal Constitutional Court to set aside section 3 (1), second sentence, No. 5 EAA for being inconsistent with the provisions of the Convention.

82. The Committee does not consider that a reference to the Court of Justice of the European Union for a preliminary ruling on the compatibility of section 3 (1), second sentence, No. 5 EAA with the European Union Directives transposing the Convention constitutes a domestic remedy since the claimant cannot require the domestic court to request the ruling.

83. Accordingly, since the available domestic remedies do not provide an effective and sufficient means of redress, the Committee determines the communication to be admissible.

### **Scope of consideration**

84. This communication concerns the right of NGOs promoting environmental protection to challenge decisions under article 6 concerning specific activities in accordance with article 9 (2) of the Convention, and in particular whether the criteria in section 3 (1) EAA for such organizations to have standing comply with the Convention’s requirements.

85. While the communication refers to the “criteria” in the EAA, the Committee considers that the allegations in the communication essentially concern the fifth criterion in section 3 (1), second sentence, and the Committee accordingly decides to focus specifically on that issue. This is in line with the Committee’s general discretion to examine compliance issues if and as it considers appropriate.<sup>98</sup> Hence, the Committee will examine whether, by having in place a criterion that denies all organizations that do not have an open membership with full voting rights for members from access to review procedures under article 9 (2), the Party concerned complies with article 9 (2) of Convention; and closely related to that, whether the Party concerned complies with article 3 (4) of the Convention.

86. The Committee notes that the communicant also raised concerns regarding the second and third criteria in section 3 (1), second sentence, EAA at the hearing at the Committee’s sixty-first meeting. In addition, the communicant indicated at the hearing that, following the EAA’s 2017 amendment to address article 9 (3) of the Convention, it alleged non-compliance with article 9 (3) as well.<sup>99</sup> In line with its general practice, the Committee does not examine any new issues or allegations raised by the communicant at the hearing. In addition to prolonging the management of the Committee’s cases, due process requires that the

<sup>96</sup> Party concerned’s response to communication, p. 14.

<sup>97</sup> *Ibid.*, p. 21.

<sup>98</sup> Decision I/7, annex, ECE/MP.PP/2/Add.8, para. 14.

<sup>99</sup> Communicant’s opening statement at the hearing, 3 July 2018, p. 2.

allegations are presented at the outset so that the Party concerned has a fair chance to comment on them in its original reply. Since these concerns were framed as additional allegations of non-compliance for the first time at the hearing, the Party concerned did not have a proper opportunity to prepare its response to the communicant's arguments on these points. The Committee will thus not examine the second and third criteria in section 3 (1), second sentence, EAA or article 9 (3) of the Convention in the present findings.

87. As regards the communicant's claim that the legislative amendments in 2002, 2006 and 2009 introduced further restrictions on the recognition of environmental NGOs and that this amounted to a breach of article 3 (6),<sup>100</sup> the Committee notes that the Convention entered into force for Germany on 15 April 2007. The 2002 and 2006 amendments precede the date on which Germany became bound by the Convention and the Committee will accordingly not examine those amendments. Regarding the 2009 amendment, the communicant bases its allegation entirely on the wording of the legislator's explanatory memorandum and has not referred the Committee to any particular change in the wording of the legislative criterion itself.<sup>101</sup> Moreover, the communicant itself asserts that the relevant wording of the legislator's explanatory memo was identical to those for the 2002 and 2006 amendments. In these circumstances, the Committee will not examine this allegation further.

88. Lastly, the communicant's claim that the criteria in section 3 (1) EAA discriminate against foreign NGOs, while raised in the communication, was not returned to at all by the communicant during the hearing. Noting that this is, moreover, not at the core of the communication, the Committee decides that it will not examine this issue in the context of the present communication.<sup>102</sup>

#### **Article 9 (2)**

##### *Non-governmental organizations meeting the requirements of article 2 (5) deemed to have standing*

89. Article 9 (2) obliges each Party to: "ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right ... have access to a review procedure ... to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6".

90. Article 9 (2), second paragraph, provides that: "What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention."

91. The second paragraph states that: "The interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above".

92. This means that any NGO meeting the requirements of article 2 (5) is deemed to have standing under article 9 (2). To put it another way, a Party cannot exclude any NGO meeting the requirements of article 2 (5) from standing under article 9 (2).

93. Article 2 (5) defines the "public concerned" as: "The public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest". "The public concerned" is thus a subset of "the public", which is defined in article 2 (4), and includes, in accordance with national legislation and practice, associations, organizations and groups.<sup>103</sup>

94. Article 2 (5) entitles Parties to set out criteria in their law as to what constitutes a "non-governmental organization promoting environmental protection" and any requirements that need to be met to "be deemed have an interest" in the environmental decision-making.

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<sup>100</sup> Communication, p. 7.

<sup>101</sup> Ibid.

<sup>102</sup> Decision I/7, annex, ECE/MP.PP/2/Add.8, para. 14.

<sup>103</sup> See Committee's findings on communication ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para. 65.

The latter might, for example, be that the NGO is active in a region likely to be affected by the environmental decision-making. Importantly, any criteria that a Party sets in its law for the purposes of article 2 (5) must be in keeping with the objectives of the Convention and the recognition in the Convention's thirteenth preambular paragraph of the important role that NGOs can play in environmental protection.

95. In addition, with respect to the Convention's objectives, since NGOs meeting the requirements of article 2 (5) are deemed to have standing under article 9 (2), any criteria set out in a Party's law for the purposes of article 2 (5) must be consistent with the "objective of giving the public concerned wide access to justice within the scope of this Convention", as stated in article 9 (2).

96. On this point, in its findings on communication ACCC/C/2005/11 (Belgium), the Committee held that:

Environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention.<sup>104</sup>

97. In this regard, in its findings on communication ACCC/C/2008/31 (Germany), the Committee held that "the objective of giving the public concerned wide access to justice" 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.<sup>105</sup>

98. Furthermore, in its findings on communication ACCC/C/2009/43 (Armenia), the Committee held that Parties "may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention".<sup>106</sup>

99. Lastly, the Committee recalls its findings on communication ACCC/C/2014/111 (Belgium), where it held that:

When evaluating compliance with article 9 of the Convention, it 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."<sup>107</sup>

100. In the light of the above findings, when examining the requirements set by a Party in its national law for an association, organization or group to constitute a "non-governmental organization promoting environmental protection" and "to be deemed to have an interest in the environmental decision-making" under article 2 (5) and thus to have standing under article 9 (2) comply with the Convention, the Committee pays particular attention to whether those requirements in national law:

- (a) Are clearly defined;
- (b) Are consistent with the objectives of the Convention, including the objective of giving the public concerned wide access to justice; and thus that they are not unreasonably exclusionary;<sup>108</sup>

<sup>104</sup> ECE/MP.PP/C.1/2006/4/Add.2, para. 27; See also Committee's findings on communication ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 81, and on communication ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 71.

<sup>105</sup> ECE/MP.PP/C.1/2014/8, para. 71.

<sup>106</sup> ECE/MP.PP/2011/11/Add.1, para. 75.

<sup>107</sup> ECE/MP.PP/C.1/2017/20, para. 65.

<sup>108</sup> *The Aarhus Convention: An Implementation Guide* (United Nations publication, Sales No. E.13.II.E.3), p. 58.

(c) Do not cause excessive burden on environmental NGOs.

101. The burden of proof falls on the Party concerned to demonstrate that any requirements in national law are consistent with the above criteria.

*The requirement for open membership with full voting rights for members*

102. In the Party concerned, the “requirements under national law” are set out in the second sentence of section 3 (1) EAA. Of the requirements set out in section 3 (1), second sentence, it is the fifth criterion that is the focus of the Committee’s examination in this case. The Committee thus examines that criterion in the light of the points listed in paragraph 100 above.

103. It follows from the fifth criterion in section 3 (1), second sentence, that an organization can only be recognized if:

It allows any person who supports the objectives of the *Vereinigung* to become a member; members shall be deemed to be persons who are given full voting rights in the general meeting of the *Vereinigung* upon joining; *Vereinigungen* at least three-quarters of whom are legal persons may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfil this requirement.<sup>109</sup>

104. In their submissions to the Committee, the Party concerned and the communicant each refer to the above criterion as the “democratic internal structure” requirement. Since that phrase could be understood in various ways, the Committee will itself instead use the phrase “open membership with full voting rights” to more closely reflect the content of the fifth criterion of section 3 (1), second sentence, EAA.

(a) Clearly defined

105. The communicant has not claimed that the fifth criterion of section 3 (1), second sentence, EAA is ambiguous and unclear. The Committee indeed considers that it is sufficiently clearly defined.

(b) Consistent with the objectives of the Convention, including the objective of wide access to justice, and not being unreasonably exclusionary

106. The Party concerned submits that the fifth criterion in section 3 (1), second sentence, responds to an alleged risk of a legitimacy deficit of NGOs in representing the public interest and acting as “advocates of the environment”.<sup>110</sup> It argues that such a requirement is in line with the Convention being an instrument of “environmental democracy”.<sup>111</sup>

107. The Committee considers the argument that open membership and full voting rights for members somehow ensure that an NGO acts as an effective advocate of the environment to be unconvincing. As the communicant points out, organizations must already demonstrate that they pursue environmental goals under the first of the five criteria listed in section 3 (1), second sentence, EAA.<sup>112</sup> In addition, organizations requesting recognition for standing are required to prove that they work for the public benefit under the fourth criteria in section 3 (1), second sentence, EAA. The Committee considers that the first and fourth criteria thus already address the wish of the Party concerned to ensure that, to qualify for recognition, NGOs work as “advocates for the environment” and in the public interest.

108. The Committee moreover fails to see how open membership with full voting rights prevents environmental organizations once recognized from pursuing “extraneous” objectives, since members can also vote to modify an organization’s objectives.<sup>113</sup>

109. The Committee is furthermore not convinced that open membership and full voting rights for members necessarily contribute to the objective of ensuring that an organization

<sup>109</sup> Communication, p. 13; Party’s response to communication, p. 5; Observer statement by Greenpeace Germany, 8 February 2017, p. 4; Communicant’s opening statement for hearing, p. 2.

<sup>110</sup> Party’s response to communication, p. 21.

<sup>111</sup> Ibid., p. 20.

<sup>112</sup> Communicant’s opening statement at the hearing, 3 July 2018, p. 4.

<sup>113</sup> Party’s response to communication, p. 16.

works for the public benefit of environmental protection. Important environmental claims are not necessarily always popular. They may sometimes serve the rights of affected minorities or of future generations, and they frequently conflict with the interests of certain members of the public.

110. The Party concerned does not dispute that the communicant and Greenpeace Germany are two of the most active, long-established, experienced and widely supported organizations promoting environmental protection in Germany. Except for the above arguments on “environmental democracy”, the Party concerned has not provided any convincing argument as to why these organizations should be deprived of standing under article 9 (2) of the Convention.

111. The exclusion of two of the most active and widely supported environmental organizations in Germany is not compensated for by the fact that many other, mostly smaller, environmental organizations are granted recognition. The Party concerned does not claim that the communicant and Greenpeace Germany are not legitimate environmental organizations working for the public benefit. Rather, its submissions indicate that it considers that each would, in principle, be suitable candidates for recognition – so long as they changed their entire legal structure or set up a separate legal vehicle through which to pursue environmental litigation. This further supports the Committee’s view that the fifth criterion is unreasonably exclusionary and not consistent with the objective of giving the public concerned wide access to justice.

112. Based on the foregoing, the Committee considers that a criterion that prevents organizations promoting environmental protection that do not have open membership with full voting rights for members from having access to justice under article 9 (2) of the Convention is unreasonably exclusionary and not consistent with the objective of giving the public concerned wide access to justice.

(c) Does not cause an excessive burden on environmental non-governmental organizations

113. To support its submission that the fifth criterion in section 3 (1), second sentence, is not overly burdensome, the Party concerned submits that:

Moreover, all environmental organizations which wish to assert the rights awarded in accordance with the Environmental Appeals Act can as a matter of principle adjust their structure in line with the requirement contained in section 3 subsection (1), sentence 2, No. 5 of the Environmental Appeals Act.

...

Environmental organizations which are organized as a foundation are furthermore free to establish a support association (*Förderverein*) with a democratic internal structure. The administrative requirements and the costs involved are minimal. Associations can be established in Germany if at least two members agree on by-laws. If the association is to be entered in the register of associations, it must have seven members, and fees of €75 are charged for making the entry. Added to this is the cost of having the signatures certified by a notary; the fee rate is between €20 and €70 in a normal case. Added to these are expenditure for the announcement of the entry. The procedure takes roughly four weeks from the time of registration, depending on the court district.

Finally, foundations may also become members of a *Vereinigung* which has an internal democratic structure or of an environmental organization recognized in accordance with section 3 of the Environmental Appeals Act.<sup>114</sup>

114. With respect to the above arguments, the communicant states that:

Contrary to what the Party concerned argues in its response, it is very burdensome to fulfil all of the requirements set out by [section] 3 EAA – especially for local groups. For others such as Greenpeace it would mean an absolutely disproportional

<sup>114</sup> Ibid., pp. 23–24.

restructuring of a well-established and professional entity. And for foundations like the communicant, a restructuring is not even possible under German corporate law.<sup>115</sup>

115. The fact that it would not even be legally possible for a foundation such as the communicant to restructure as an association reveals to the Committee that the fifth criterion is overly burdensome. It would also be overly burdensome for other organizations promoting environmental protection that were established in a particular form to have to re-structure themselves just to meet the fifth criterion.

116. The Committee, moreover, does not consider it appropriate that an organization should have to set up a separate legal entity or become a member of another association in order to have access to review procedures under article 9 of the Convention. In fact, the suggestion by the Party concerned on this point seems in direct contradiction to the transparency and environmental democracy that it asserts the fifth criterion aims to achieve. Based on the foregoing, the Committee considers the fifth criterion in section 3 (1), second sentence, of the EAA to be overly burdensome.

*The Committee's conclusion regarding article 9 (2) in conjunction with article 2 (5)*

117. In the light of the above, by applying a criterion that effectively bars NGOs promoting environmental protection that do not have open membership with full voting rights for members from access to a review procedure of decisions under article 6, the Party concerned fails to comply with article 9 (2) in conjunction with article 2 (5) of the Convention.

#### **Article 3 (4) – appropriate recognition**

118. Having found that the Party concerned fails to comply with article 9 (2) in conjunction with article 2 (5) of the Convention, the Committee does not consider it necessary to examine compliance with article 3 (4) in the context of this case.

## **IV. Conclusions and recommendations**

119. 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**

120. The Committee finds that, by applying a criterion that effectively bars NGOs promoting environmental protection that do not have open membership with full voting rights for members from access to a review procedure of decisions under article 6, the Party concerned fails to comply with article 9 (2) in conjunction with article 2 (5) of the Convention.

### **B. Recommendations**

121. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, recommends that the Meeting of the Parties recommend that the Party concerned remove the requirement in section 3 (1), second sentence, No. 5 of the Environmental Appeals Act or any legislation that supersedes it that, to have access to review procedures under article 9 (2) of the Convention, NGOs promoting environmental protection must have open membership with full voting rights for members.

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<sup>115</sup> Communicant's opening statement at the hearing, 3 July 2018, p. 5.