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Statement on preliminary admissibility concerning the communication of PRE/ACCC/C/2024/208 (Germany),

Dear members of the Committee,

We thank you for the opportunity to comment on the admissibility of our communication. The communication is directed against several provisions of the LNG Acceleration Act and its lacking public participation in the drafting process. In our opinion, it does not meet any of the criteria for inadmissibility set out in the Annex to Decision I/7.

On the application of Art. 6.1 AC

Art. 6.1 lit. a states that "Each Party [...] shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I". The activities under Section 2 para. 1 n° 1 and 2 are installations for gasification listed in N°1 of annex I AC.

The activities under Section 2 para. 1 n° 4 LGG are listed under n° 9 of Annex I as far as they concern trading ports or piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1350 tons.

As to the activities under Section 2 para. 1 n° 5 LGG boiler systems that are required for the operation of the systems referred to in n° 1 or n°2, are listed under n° 1 of annex I AC, as far as they concern thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more.

Other than most LNG projects listed in Section 2 para. 1 and 2 LGG, LNG connection pipelines under the scope of Section 8 para. 1 no. 1 LGG do not fall under the scope of Art. 6.1 lit. a AC. No. 14 of Annex I only applies to pipelines for the transport of gas with a diameter of more than 800 mm and a length of more than 40 km. Section 8 para. 1 sentence 1 no. 1 LGG does only apply to planning approval decisions for LNG connection pipelines that do have a diameter of more than 300 millimeters (Section 43 para. 1 sentence 1 no. 6 EnWG) but are also below the threshold of a length of more than 40 kilometers and a diameter of more than 800 millimeters.

However, these pipelines fall under Art. 6.1 lit. b AC, since they may have a significant effect on the environment. This results from the fact that under national law construction and operation of LNG connection pipelines from a length of less than 5 km and a diameter of more than 300 mm require a site-specific screening of the individual case. Pipelines from a length of 5 km to 40 km and a diameter of more than 300 mm require a general screening of the individual case (no. 19.12 of the Annex 1 to the UVPG). Such obligations indicate a significant effect of these pipelines on the environment. Since national law does provide for such screening decisions, Germany has determined that these activities may have a significant effect on the environment according to Art. 6.1 lit. b AC.

Finally, none of the aforementioned decisions are subject to an exemption under Art. 6 (1) lit. c AC. Since exemptions due to national security and defense can only be made on a case-by-case basis, it is not possible to exempt a (legally defined) group of projects from the requirements of Art. 6 AC.¹ Other exemptions are not provided for in the Convention.

On the exhaustion of domestic remedies

Domestic remedies are either not available or do not provide an effective and sufficient means of redress.

Under claim IV. 2 we allege a violation of Art. 8 of the Convention. There is no domestic remedy against the lack of public participation in the drafting of a legislative act. This procedure is governed by an internal administrative rule, Section 47 of the Joint Rules of Procedure of the Federal Ministries, which has no external effect and is therefore not subject to judicial review. This has also been discussed – with a different legal question on the merits– in communication ACCC/C/2023/203.

Our other claims do not relate to specific LNG projects and their individual approvals, but to the law itself. The only domestic remedy would be the abolishment or change of the wording of the provisions in question. Apart from a constitutional complaint to the Federal Constitutional Court, which would only review compliance with formal constitutional law, there is no possibility to challenge a law in Germany.

As regards incidental or indirect review, domestic remedies have already been sufficiently exhausted. We did not file a lawsuit ourselves since we do not have legal standing under the Environmental Appeals Act.

Since the compliance review mechanism is not a redress mechanism, if other members of the public have already exhausted domestic remedies available to challenge the alleged non-compliance, then this may be taken into account by the Committee for the purposes of paragraphs 21 of the annex to decision I/7. Other environmental organizations and individuals brought several actions against LNG projects.

All the actions decided so far, mostly concerning LNG connection pipelines, have been dismissed by the highest and only instance. In these decisions, the Federal Administrative Court does not consider the LGG to be incompatible with EU law. On the contrary, the Court explicitly states that Section 4 paragraph 1 LGG, which exempts LNG projects from the application of the EIA law and Directive 2011/92/EU (EIA Directive), was in conformity with EU law, specifically Art. 2 paragraph 4 (BVerwG, Judgment of 22 June 2023, 7 A 9.22, ECLI:DE:BVerwG:2023:220623U7A9.22.0, Rn. 23 ff.; BVerwG, Judgment of 12 September 2023, 7 VR 4.2, ECLI:DE:BVerwG:2023:120923B7VR4.23.0, Rn. 19). As a result, domestic courts will not incidentally review the compatibility of the provisions discussed in this communication with the EIA directive. Pending domestic remedies are therefore irrelevant, as the Federal Administrative Court is not expected to change this fundamental position on conformity with the EIA Directive.

Claim IV. 3 is directed against a statutory determination of need. Unlike in communication ACCC/C/2020/178, the statutory determination of need in section 3 sentence 2 LGG is not a plan that is later adopted by formal law but the adoption of a formal law without a plan. Since there is no preparation of a plan and no strategic environmental assessment involved, the Directive 2001/42/EC (SEA-Directive) does not apply. Incidental review is limited to constitutional principles. The only existing court decision on this question concerning LNG terminals found no evidence that the determination of need for the LNG pipeline in question was not in line with these constitutional principles.

¹ *Epiney/Diezig/Priker/Reitemeyer, Aarhus-Konvention Handkommentar, 2018, Art. 6, 6bis para. 19.*

A complaint to the European Commission is not an effective domestic remedy. Like it is the case for the reference to the Court of Justice of the European Union for a preliminary ruling, the claimant cannot require the European Commission to start infringement procedures against the Party concerned. The European Commission has a large margin of discretion. The Commission may decide not to open formal infringement procedure, even if it considers that a breach of EU law has occurred.² Furthermore, such proceedings would be unreasonably prolonged. Like the EU Commission states itself on its website: "If the Commission brings the case before the Court of Justice of the European Union, it may take several years for the Court of Justice to hand down its judgment."³ Therefore, it could not be considered as an effective domestic remedy.

Further remarks

Furthermore, the LGG is not a singular and contemporary phenomenon that was only applied once because of an extraordinary situation. Since the LGG, there has been a significant trend in Germany and in the whole European Union to curtail public participation and access to justice for the sake of acceleration of infrastructure projects. Not without reason, the LGG was and is still often referred to as a blueprint for other laws. Moreover, this trend is not just about legislation to speed up renewable energy projects to mitigate climate change, but also to speed up projects that hinder climate protection, like the expansion of motorways. Therefore, there is a wider problem with the legal framework or judicial practice of the Party concerned with respect to the implementation of the Convention.

² Website of the EU Commission: https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en

³ Website of the EU Commission: https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en