The Response of the Federal German Government to the Country Report and the Summary Report of the Study on access to justice

A. General comments on the Study on access to justice

The Federal German Government considers that the presentation and evaluation of the German legal situation in the Country Report for Germany and the Summary Report are untenable on a number of essential points.

In general, the manner in which the specifics of the German legal system have been described is not balanced, but incomplete and even erroneous in parts.

1. The comments on Article 9 (3) of the Aarhus Convention (AC) appear in particular most deficient, as they completely ignore essential instruments of the legal protection that is available in Germany to Germany individuals and associations.
   The presentation takes no account, for example, of the fact that Germany, in accordance with Article 9 (3) AC, has a whole package of effective mechanisms available through civil, criminal and administrative law enabling individuals and associations of individuals to enforce compliance with the environmental provisions of German law and to petition against any violations of such provisions by public agencies or private persons.
   - Civil law establishes the right to sue against third parties in the civil courts in order to obtain suspensory or prohibitory action or compensation for damages when such legal rights of third parties as enjoy absolute protection are impaired, including by a violation of environmental provisions intended to protect those concerned.
   - Anyone who can assert that his rights have been violated by the decision of a public agency or the failure of a public agency to act (and in some cases this may include associations) may seek remedy in the administrative courts. This also applies if a public agency omits to take measures against third parties who violate environmental rules.
   - Criminal law contains a number of provisions to protect the environment that penalise impairments of the environmental media (water, soil, air, also flora and fauna).

2. The Report conveys a misleading impression that the protection of individual ("subjective") rights in Germany is essentially confined to the protection of property. The case is, rather, that in Germany the protection of subjective rights provides a framework for censuring the infringement of any rules designed either exclusively or – alongside a public interest that is pursued – additionally to protect individual interests (Kopp/Schenke, VwGO[1], 15th ed., § 42, marg. 83, with further references). Under immission protection legislation, for example, anyone whose health is affected by the harmful environmental impact of an installation may claim that there has been a violation of the rules designed to protect him. The German legal protection system, therefore, serves not only owners of property but above all citizens who – without having property – are physically affected by harmful environmental impacts.
   For associations there are, in addition to this, other remedies before the courts which do not require a claim that one's own rights have been violated, as for example under the scope of Article 9 (3) AC in the fields of nature protection and environmental damage in the meaning of Directive 2004/35/EC.
   Moreover, everyone has the option of reporting violations of environmental law by private persons to the environment authority; German law on administrative procedure provides that the environment authority must then *propio motu* decide what action to take.
   Finally, the right of petition enshrined in Article 17 of the German Constitution (Basic Law) ensures that anyone may at any time address a written request or complaint to the competent bodies and to a democratically elected parliament.

3. All these notwithstanding, the institution of legal aid is of crucial significance for access to justice in Germany. This was not mentioned at all, however, in the Study's description of the German legal system.

In this respect, the Study does not, from a German perspective, offer an objective, neutral or pertinent basis for a comprehensive evaluation of the legal systems in Europe, nor does it bear out the conclusions drawn on p.18 ff of the Summary Report.

With regard to individual points in the Study, the Federal German Government wishes to observe the following:

[1] Code of Administrative Court Procedure

B. Country Report in the Study on access to justice

I. Under "1. Introduction"

1. *Item 1.1.1. "Legislative competences in the areas relevant for the Study", p. 7*

   The Study is in part obsolete, as the reform to federal structures of September 2006, which amended the Constitutional attributions of competence, has not been taken into account. These reforms abolished framework legislation. The relevant substantive law was transferred into concurrent legislation. As a consequence, the federal legislative is now able to resolve matters of detail in these fields. Nevertheless, the *Länder* still have legislative competence, as before, where and when the federal institutions have made no use of their legislative competence. Moreover, even when the federal institutions have made use of their legislative competence, the *Länder* may – in certain fields explicitly defined in Article 72 (3) of the Basic Law – adopt provisions that differ from federal law.

2. *Item 1.2. "Environmental protection within that context" / "Developments in the context of the ratification of the Aarhus Convention", p. 10*

   The explanation of the *Umwelt-Rechtsbehelfsgesetz* (Environmental Appeals Act) is too cursory here and might be misunderstood. A point is made that environmental protection associations may "only" bring claims for a breach of provisions that protect the environment and establish rights for individuals. There is no mention that this law actually privileges environmental protection associations over private individuals in terms of access to justice, because they need not – as German law demands of the private individual – claim that their own rights have been violated (cf. C. II. 2 for more details). To this extent, a rather more detailed description seems appropriate:

Recognised domestic and foreign associations may, without needing to claim that their own rights have been violated, seek remedy under the Code of Administrative Court Procedure if the following conditions apply:
The association must demonstrate that (1) the contested decision by the public agency contravenes rules which serve the protection of the environment, establish rights of individuals and may be relevant to the decision, (2) it is affected by the decision with regard to tasks reflected in its own bylaws that serve the objectives of environmental protection and (3) it had the right to participate in a procedure under Article 1 (1) of the *Umwelt-Rechtsbehelfsgesetz* and it expressed its views on the matter in accordance with the applicable rules or else it was denied this option in contravention of the rules.

The description of suspension of decisions due to a flawed application of the procedural rules is also too cursory and hence open to misunderstanding. Here again, it seems appropriate to provide greater detail:

Apart from the general rules of the law on administrative procedure, petition may be made for a decision to be overturned if a mandatory environmental impact assessment (EIA) or a preliminary review of the case by means of an EIA was not carried out at the appropriate time or retrospectively.

According to its Article 1 (1), the *Umwelt-Rechtsbehelfsgesetz* applies to all legal remedies against decisions enumerated there, so that it primarily serves the enforcement of Article 9 (2) AC. It may, however, likewise acquire relevance for Article 9 (3) AC by means of an action for the issue of an administrative act.
This relevance is particularly likely in the context of the *Umweltschadensgesetz* (Environmental Damage Act), which enters into force in November 2007. This refers in Article 11 (2) to associations

seeking legal remedies under the *Umwelt-Rechtsbehelfsgesetz*. The *Umweltschadensgesetz*, which is not mentioned at all in the Country Report of the Commission's study, applies to environmental damage and the immediate threat of such damage caused by occupational activities that are explicitly listed in the Act, and to the impairment of species or natural habitats caused by other unlisted activities if the person responsible has acted maliciously or negligently.

It should, furthermore, be noted that the expropriation procedure plays a role of its own in the German legal protection system and does not fall within the competence of the administrative courts (Article 14 (3) of the Basic Law). However, procedures for the authorisation of projects with environmental relevance usually have prior implications for title, so that the correct application of environment law is no longer a factor.

II. Under "2. Access to justice in environmental matters"

1. *Item 2.1. "Administrative procedure"*
   The deadline under Article 74 of the Code of Administrative Court Procedure is one month, not four weeks (cf. p. 12 4th bullet).

2. *Item 2.2.2. "Legal standing and participatory status", p. 13*
   Apart from the "*Verbandsklage*" (a legal action instituted by an association) under the Nature Protection Act, there are the other above-mentioned exceptions to the otherwise customary requirement that the plaintiff's own rights be impaired, viz. the legal remedy for associations under the *Umwelt-Rechtsbehelfsgesetz* and the legal remedy under the *Umweltschadensgesetz*.

III. Under "3. Assessment of the legal measures...", p. 17

Recognised associations not only have access to the courts under Germany's nature protection legislation, but also within the scope of the *Umwelt-Rechtsbehelfsgesetz* and the *Umweltschadensgesetz*.

IV. Under "4. Conclusions", p. 18

It is not only under nature protection legislation, but also within the scope of the *Umwelt-Rechtsbehelfsgesetz* and the *Umweltschadensgesetz*, that associations have access to review procedures without needing to claim an infringement of their own rights.

C. Summary Report of the study on access to justice

I. General comments

The Study and the resulting assessments of countries (cf. Table, p. 18) seem on the whole to focus on access to justice for associations. This focus does not reflect the wording of Article 9 (3) AC. For one thing, Article 9 (3) AC leaves determining the target group to domestic rules ("...where they meet the criteria, if any, laid down in its national law..."). For another, there is an explicit reference to "the public", defined in Article 2 (4) AC as "...one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups" and not, as in Article 9 (2) AC to "the public concerned" with the concomitant definition in Article 2 (5) AC.

II. On the various items ("2. Summary on conclusions from each of the 25 countries studied")

1. Item 2.1. "Administrative remedies versus judicial remedies..."/ "Judicial remedies", p. 5

In Germany, too, the civil courts offer opportunities for legal protection in the form of suspensory or prohibitory rulings or compensation for damages against third parties who impair such rights of third parties as enjoy absolute protection, including by violating environmental provisions intended to protect those concerned. (cf. A above on objects of legal protection). Moreover, certain

actions that have damaging effects on the environment or violate environmental regulations are prosecuted under criminal law and subject to its penalties.

2. Item 2.2. "Legal standing"

a. "Strict interpretation", p. 7

The Study creates the impression that is it must in general be extremely difficult in Germany to obtain access to judicial remedies. That is not the case: in a suit against the conduct of an administrative agency, the plaintiff merely has to claim that there is at least a possibility that his rights will be infringed. This means that the legal provision that the plaintiff claims is being violated must at least also serve to protect individuals. If this is the case, the option for legal proceedings is already established. Whether or not the law has in fact been contravened is a matter for the court to decide after giving thorough consideration to the merits of the claim.

It seems appropriate to cast more light on the foundations of the German legal system at issue here and the German position to which this gives rise:

Constitutional and administrative law in Germany are founded on the system for the protection of individual rights that is enshrined in the Basic Law. This protection of individual rights is the core function of Germany's administrative courts. Under the country's procedural law (Article 42 (2) of the Code of Administrative Court Procedure), therefore, a plaintiff only has access to the administrative courts if he can claim that his **own** rights have been impaired by the conduct of the state. German administrative courts are not obliged – indeed, may not – admit suits that are based merely on a general or fundamental interest in reviewing the decision of an administrative body. This (by comparison with other states) "limited" access to the courts is "mirrored", however, in particularly intense scrutiny. The administrative courts have a duty, not only to consider the object of litigation in admissible suits in the broadest legal terms, but also *propio motu* to investigate comprehensively all the facts required for the purpose of judgment. Consequently, there is a close and carefully balanced relationship

between access to the courts and depth of scrutiny. Hence, any question concerning access to the courts must always be considered in the light of the principles underlying the legal system implemented by each Member State.

The study does not consider this context at all. That is why it fails to recognise that universally extending access to justice to anyone who is merely pursuing an "interest", and not a legally anchored subjective "right", would not be compatible with the rather high standards of judicial scrutiny enshrined in German constitutional law.

The study also fails to recognise that subjective legal protection in Germany is not confined, as asserted in several places and in Table v of the Summary Report, to protecting property rights, but that it also embraces all legal provisions protecting third parties, including all basic rights, such as the right to health acknowledged in the constitution, as well as the rights of neighbours (cf. under A above).

b. "Countries with a system granting 'privileged' status to environmental NGOs", p. 9

This section names countries which grant environmental organisations general or specific rights to challenge administrative bodies. Footnote 18, p. 10, explains that Germany was not included here because the criteria for access to justice only apply in very specific cases, notably relating to nature protection. Firstly, there is no mention here at all of the cases that fall under the scope of the *Umwelt-Rechtsbehelfsgesetz* and the *Umweltschadensgesetz*, nor of the provisions made by the *Länder* with regard to nature protection. Secondly, it is not clear what criteria have been used to name some countries as granting NGOs limited standing and others not (given that the Study describes, for example, Slovenia as only granting access to justice in cases of nature conservation and applying very strict criteria across the board; cf. Footnote 21, p. 11). Moreover, the criteria for the recognition of associations defined in German law – federal and *Länder* law on nature protection and the *Umwelt-Rechtsbehelfsgesetz* – are, in the opinion of the Federal German Government, not unreasonable.

c. "2.2.2. Conclusions"

As elaborated above, granting the power to challenge to individuals is not a significant obstacle to suits against the conduct of administrative bodies, and in the cases described environmental organisations also have recourse to administrative and judicial review.

3. *Item 2.4. "Cost and length..." / "Legal aid scheme and pro bono assistance" and Item 2.4.2. "Conclusions", p. 15, 16*

There is no explicit mention of the German legal aid scheme in the Study. Germany is then listed in the Conclusions as one of the countries where the costs of litigation pose an obstacle to access to justice, although prior to this the fixed schedule of lawyers' fees is accurately described.

It may be appropriate to provide a brief explanation at this point of the conditions under which legal aid is granted:

Individuals and legal personalities, and also such associations as are eligible as parties in a suit, may, if based or resident in Germany or in a Member State of the EU or EEA, claim legal aid (Article 116 clause 1 no. 2 of the Code of Civil Procedure, where appropriate in conjunction with Article 166 of the Code of Administrative Procedure). Individuals must show that the suit or defence they intend to pursue offers sufficient prospects of success and is not apparently mischievous. Legal personalities and associations eligible as parties must also show, not only that they lack the financial resources, but that failing to pursue the action would be contrary to general interests. There are precise legal rules for assessing income and wealth. The overall impression created by the Study on this matter is that a legal system largely free of cost is a good legal system. That, however, is neither realistic nor desired. Levying appropriate, predictable costs for legal protection is, after all, an instrument serving the fair and effective use of limited resources.

4. *Item 3. "Assessment of the legislative measures...", p. 17, 18*

The comparative assessments in the table of countries on page 18 do not, from the perspective of the Federal German Government, appear to be well founded.

In the specific case of Germany, the country's disproportionately negative evaluation is not justified by the yardsticks for evaluation described in the Study. As explained on page 17, a negative assessment is given if the requirements defining legal interest are interpreted in a very narrow way, the costs of litigation are high and there is no legal aid scheme or else only one confined to individuals. As legal standing is the most important element in the Study, a country is assessed as particularly poor if the criteria for legal standing lead to all or almost all environmental organisations being barred from access to justice. On the other hand, a country is rated as "+ (could be better)" if there is limited access to justice for specific issues or groups, which is certainly the case in Germany. The score "++ (satisfactory)" is granted where associations are able to claim an interest (which must not be too narrowly defined) in accordance with certain criteria, like members of the public, where interim legal protection is easily obtained and where the costs are not extremely high (or organisations can also apply for legal aid). If properly argued, the German system might equally be subsumed under this category, given that it performs very well, for example, in the explicit evaluation (p. 11) of interim relief (although this is not directly reflected in the table).

III. The Conclusions, p. 18

For the most part the Conclusions summarise the findings already described in the study in general terms. Occasionally they refer to entirely new aspects.

In the middle of page 20 there is an observation that the criteria for recognising organisations seem designed to make sure that only organisations well known to the public have access to judicial remedy rather than aiming primarily at optimising the protection of the environment. This fails to note that criteria of this kind prevent the abuse of litigation in pursuit of particular interests and are ultimately designed to ensure that this instrument provides effective environmental protection.

In the middle of page 21 ("Overall...") there is a further clear reflection of the general gist of the Study, which fails to recognise the interplay between the various elements it has evaluated (standing, litigation costs, length of procedure and interim relief) within

an effective, fair and well functioning legal system, which must establish a practical balance between all these components.

IV. Tables in the Annex

1. "Table 1", p. v

There is no mention here of the legal remedies in the German judicial system provided under the *Umwelt-Rechtsbehelfsgesetz* and *Umweltschadensgesetz* and in civil and criminal law. Nor is there any reference to provision made by the *Länder* in their nature protection legislation.

When comparing countries, the Table does not make it clear whether the research on a particular country has included the transposition of Article 9 (2) AC or not.

2. "Table 3", p. xviii

Reference to legal aid in Germany is completely missing here.