THE COMPATIBILITY OF GERMANY'S LEGAL FRAMEWORK FOR FRACKING WITH THE AARHUS CONVENTION

Study commissioned by Aarhus Konvention Initiative

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OEKOBUERO – ALLIANCE OF THE ENVIRONMENTAL MOVEMENT

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OEKOBUERO is the Alliance of the Austrian Environmental Movement. It is comprised of 16 Austrian organizations engaged in environmental, nature and animal protection, including FOUR PAWS, GLOBAL 2000 (Friends of the Earth Austria), Greenpeace and WWF). OEKOBUERO works on the political and legal level for the interests of the environmental movement.

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I. INTRODUCTION

In 2016-2017 Germany adopted the so-called "Fracking Law, "[1] which apparently limits the possibility of fracking in that country significantly, at least for a specific span of time. Concerns about the adequacy of this law persist, however, both respect as to content as well as the real-world effect of such changes. Furthermore, there are concerns about the possibilities for public participation and access to justice with regards to fracking activities which these legislative changes do not appear to have addressed. In particular, **the Aarhus Konvention Initiative** would like to know whether this new framework conforms to the requirements of the Aarhus Convention.

II. EXECUTIVE SUMMARY

The present study analyzes the conformity of Germany's legal framework and practice with regards to fracking with the provisions of the Aarhus Convention concerning public participation and access to justice. To recall, Germany ratified the Convention on 15 January 2007; the Convention entered into force on 15 April 2007. Thus, the present analysis will limit itself to the events of 2007-present, and will focus largely on the post-reform German legal framework as it existed in early 2017.[2] It might well be that significant changes have taken place since this date; but the major aspects of this analysis should remain valid.

Our analysis concludes that the "Fracking Law" itself, or rather, the process by which it was developed, is not likely a promising basis for a communication to the Aarhus Convention Compliance Committee (ACCC), or similar such attacks on the national level.

However, federal state spatial planning instruments should fall under article 7, and there appear to be valid concerns about the conformity of such instruments and the procedures (including the participation afforded to the public) with this article in conjunction with provisions of article 6, most particularly its paras. 4 and 8, which relate to the possibility for early and effective public participation and the obligation for decision-makers to take due consideration of the outcome of public participation, respectively.

Licenses and extraction permits likely fall under article 6 directly, triggering all the substantive provisions of this article for such procedures, yet this is not reflected in the current domestic legal

[1] This is meant as a short-hand only. In fact, there is no "single" law; rather, this involved amendments and extensions to numerous laws and regulations including inter alia, laws on water (Wasserhaushaltsgesetz), nature (Bundesnaturschutzgestz), and for mining (Bundesberggesetz, Allgemeine Bergverordnung, UVP-VO Bergbau)

[2] For a more recent analysis of the requirements for access to justice in general under the Convention and according to CJEU case law, see J&E's most recent Comments on the Commission's Notice on Access to Justice in Environmental Matters, available at: http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2018/JE_Comments_EC_Notice_A2J_FINAL.pdf

framework. Participation at yet later procedures, which clearly fall under article 6, would not sufficiently address any such deficits.

With regards to access to justice, our analysis identified several problems. First, the newly enacted Environmental Appeals Act's (EAA) exclusion from its scope spatial plans related to resource use, which appears problematic considering article 9, para. 3. Individuals furthermore face a number of hurdles which seem inconsistent with both article 9, paras. 2 and 3.

Generally, it might be observed that there are problems currently with Germany's legal framework as a whole, considering not just legislation, but case-law and practice, which brings compliance with article 3, para. 1 into question.

Finally, fracking may indeed qualify as the sort of activity for which participation and access to justice rights should be accorded to a larger circle of the public, including possibly in the transboundary context. In addition to the substantive provisions of the Convention earlier discussed, in particular articles 2, paras. 4 and 5 (defining the public and public concerned respectively) and article 3, paragraph 9 (regarding discrimination) are of key importance in this regard.

III. PRESENTATION OF THE PROBLEMS

Concerned with the perceived inadequacy of public participation with regards to fracking at stages prior to the final permitting level, and the possibilities to bring comprehensive legal challenges, the **Aarhus Konvention Initiativ** would like to know:

- At what stage(s), precisely, is public participation required with respect to fracking activities in Germany, and what are the key provisions (and attendant obligations) triggered?
- At what stage(s) and with respect to which objects (planning instruments, licenses, permits, etc.) should access to justice be afforded?
- What – if any – limitations are there with regards to any such rights for individuals (as opposed to NGOs)?
- What – if any – requirements are there for transboundary involvement for fracking cases?

IV. LEGAL FRAMEWORK

What follows is a very brief introduction to the relevant legal framework as it stood as of early 2017. It is explicitly not intended as a thorough analysis of the situation in Germany, but is intended to give the reader only enough information so have some background and be able to assess the compatibility of this framework with the Aarhus Convention. This overview also aims to indicate potentially fruitful avenues for future research to fully communicate the relevant factual and legal background, including any changes since 2017.

A. Introductory Remarks

It should be clarified at the outset that the German legislative framework in this area is characterized by a strong degree of tiered decision-making. This has led to considerable criticism, particularly with respect to lack of transparency and coordination between the levels of law, inadequate consideration of spatial planning and environmental law, public participation, and access to justice.[3]

B. Planning Instruments

1. At the Federal Level

Germany promulgated a major national plan related to energy in 2015 (Germany's Net Development Plan), for which a strategic environment assessment was undertaken.

However, this plan applies to the dispersment and transport of energy only, not to its sources. Hence fracking and related activities were entirely omitted from this plan and were as a result, not analyzed in the strategic environmental assessment and could not be subject to public participation. In fact, the very question whether strategic energy planning concerning energy sources or generation is needed has been the subject of a long-standing dispute in the country. By contrast, other countries have conducted SEAs (with associated public participation) at the federal planning level, which not only included fracking as a component, but indeed focused entirely on fracking. For example, the Dutch Government conducted a SEA specifically for shale gas development. An additional SEA was done for other subsurface activities in the country. Based on both of these SEAs, a national strategic spatial plan for the sub-surface was completed in 2016 with regard to sub-surface activities, including shale gas developments. However, this level of decision-making is deemed not so pertinent for present purposes and will not be explored in much detail further.

2. At the Federal State[4] Level

The German legal framework foresees the preparation of regional spatial plans, called either ("LROPs"), or development plans ("LEPs") in the federal states[5]. Historically, in many instances, however, such preparation has been at least partially voluntary; the law either provides in crucial contexts involving fracking that no regional spatial plan need be provided, or the need to do so has been ignored in practice.[6] As of early 2017, there was a pending legal dispute about whether it was always admissible to plan underground uses. Environmental lawyers and activists have thus urged the establishment of mandatory spatial planning for underground uses, including a SEA.

[3] There is a long history of criticism. See e.g. UBA Position Paper: Umweltverträgliche Nutzung des Untergrundes und Ressourcenschonung: Anforderung an eine Raumordnung unter Tage und ein modernes Bergrechts, November 2014 (henceforth "UBA Position Paper")
[4] I.e., the Bundesländer
[5] Unless otherwise noted, the term "spatial plans" is meant to cover both LROPs and LEPs
[6] Study on the application in relevant member states of the Commission recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing; National Report: Germany; December 2015; Milieu Law and Policy Consulting, (henceforth "2015 Milieu Study"), p. 5

Legal Functions and Effects

Regional spatial development plans form the federal state-wide entire concept of the government for the spatial structure and long-term development of the region and its areas. They generally create, on the basis of an evaluation of the condition of nature and landscape with the existing settlement structures, the principles and objectives of spatial planning and development, in particular in the area of ecology, economy, settlements and industry.[7] With regards to lignite mining federal states of interest (namely NRW, Sachsen, Sachsen Anhalt) have special planning laws to require spatial planning, however. These plans are an important step in the overall procedure, as they determine the "need" for the mining. These plans are developed with a full SEA.

As indicated directly above, the situation is less clear in other cases, because some states have assumed spatial plans apply only to over-ground uses, with the result that such plans do not address fracking or do so only minimally.

Environmental Aspects

As is clear from all applicable wording and issues raised, these plans involve significant environmental aspects. This issue is not explored further in this analysis.

Public Participation and Access to Justice

Public participation – whether in the context of a SEA or otherwise – is not contemplated at earlier strategic phases (such as at the federal level) under the German laws for fracking. The national report prepared for the EU Commission in 2015, e.g. concluded that no SEA (or public participation) had to that date occurred.

SEAs and public participation at the planning level are rather, in principle, provided for in its legal framework in the course of the drawing up of regional plans.

Germany has expressed its view that this is the mechanism by which it provides public participation at the strategic level for fracking in its 2015 reply to the European Commission, and deems itself to fulfill the Commission's Recommendations that a strategic assessment, including public participation, be carried out before the issuance of any licenses for fracking.

Per §10 of the Federal Spatial Planning Law ("ROG"),[8] the public is to be informed about the preparation of spatial plans and be given an opportunity to comment on the draft. According §9 ROG and §14b and Annex 3 of the German EIA Law ("UVPG"), a strategic environmental assessment is to be undertaken in the course of preparing or changing spatial plans, though in the case of limited changes to existing spatial plans, no such assessment need be performed under some circumstances.[9] Where an environmental assessment per §9 is to be carried out in the course of the preparation of the LROP/LEP, the draft plan with reasoning, the environmental report, and other relevant documents are to be made available for at least one month and the public is to have an opportunity to comment on these as well.

[7] See, e.g. §3 of the L-PIG of Saxony
[8] In conjunction with the applicable federal states' spatial planning laws
[9] §9, para. 2. ROG

Two distinct factual problems are identifiable at this level, however.

First, in some notable cases – namely for the Damme 2 and the 2008 HVHF[10] drilling well at Damme 3 – it seems that no actual spatial plan was adopted, with the consequence that no related SEA (or any associated public participation) was carried out before the activity took place.[11] In this latter case it should be further noted that no public participation *at any level* took place.[12]

Second, some spatial plans which were in fact prepared and for which even a strategic environmental assessment was undertaken, do not address fracking/under-ground uses, with the result that public participation at an early planning stage with respect to such underground activities could not take place. In this context we note, for example, that many comments relating to these activities to the draft Lower Saxony change to its LREP were disregarded; this alone does not entail a lack of proper public participation in general, but may raise certain questions as to full compliance.[13]

The federal state of Nordrhein-Westfalia has a new spatial development plan which came into force in January 2017. This plan was itself done with a SEA. According to this plan, essentially unconventional fracking is ruled out; but any other such uses are not deemed as subject to public participation requirements or any further SEA requirements. So, by virtue of the effect of the federal laws, shale gas and coal bed methane are included. However, tight gas fracking is not covered and other projects involving gas drilling are not covered or given limitations. It seems that according to this plan, fracking in unconventional deposits is suspended;[14] conventional natural gas extraction, however, may continue.[15]

The federal state of Schleswig Holstein was as of early 2017 on track to exclude all fracking on the basis of a new spatial planning act.

Critics have pointed out the need to have a strategic environmental assessment specifically for fracking as being the only effective way to ensure public participation with respect to fracking issues at a sufficiently early stage in planning.

C. Licensing[16] Levels

The first step generally at this level is the application for a license ("Erlaubnis") per § 7 of the Federal Mining Act (BBergG) to explore. An application for the permission ("Bewilligung") per § 8 of the BBergG

[10] High Volume Hydraulic Fracturing
[11] 2015 Milieu Study, page 11
[12] See the 2015 Milieu Study for further details
[13] Cf. Art. 6, para. 8 of the Convention
[14] See LEP, Goal 10.3.4, pp. 120-123, available in English at: https://www.land.nrw/sites/default/files/asset/document/lep_englisch.pdf
[15] The LEP justifies this exclusion on the basis that "(S)afe technologies for extracting natural gas have been in use in Germany since the 1960s."
[16] The licensing level is the key aspect of this analysis. For the reasons laid out below this should most likely be called a "license" according to the domestic nomenclature, yet such procedures might nonetheless fall under article 6. But here the German wording used can also cause confusion. Thus a distinction is made between an "Erlaubnis" and a "Bewilligung" as directly follows. For the sake of clarity this analysis tries to use the terms "license" and "permission" throughout, while granting that the very question of whether any of this constitutes a "permit" or "decisions within the meaning of article 6 is the very object of contention.

to extract mineral resources can be made at the same time if the applicant is in the position to do so,[17] or subsequently, i.e., after successful exploration has been carried out. Both the exploration license and the extraction permission require the second step of an approved operational plan before actual activities can occur, though as noted above, there is evidence that this requirement has been ignored in practice.

Legal Functions and Effects

The exploration license grants the holder (i.e. a specific natural or legal person) the exclusive right, or title, to explore the specified mineral resources in a particular field, as well as the right to extract and apply for ownership over those resources which must be stripped or released as part of the normal planned activities. It also allows the collection and analysis of existing literature data.

The actual exercise of the rights, that is, the exploration activity itself, requires a second step, namely the approval of an operational plan (discussed below). For this reason, it appears that the prevailing view in Germany has been that any such license neither precludes nor permits any activities which could have an impact on the environment – and thus this licensing procedure requires no EIA. At the same time the license is not viewed as a "plan or programme" and is deemed as not triggering any SEA obligations either.

Notwithstanding, the issuance of the exploration license/granting of the extraction permit is a legally binding decision, and it confers upon the holder a legal position that has effects for subsequent authorization procedures.

The effects of this legal position are multiple and arise in various procedures and phases throughout the tiered decision-making process. First, and perhaps most obviously, only those who hold such licenses can apply for an actual permit/operational plan under the BBergG. Indeed, both the exploration license and the extraction permit qualify as constitutionally protected property rights per Article 14 of the GG. This in turn means that the possession of such a license in the first place will be given weight in the determination of whether subsequent regulatory measures prescribing limits or ruling out the actual exploration or extraction activities are permissible as balanced against these constitutionally protected property rights, which come on top of the holder's constitutionally protected right to engage in business. These rights come also to bear in the balancing of interests as between the holder and any affected property owners, generally to the effect that the latter have little chance of success in any legal challenges against the proposed activities.[18]

With regards to exploration licenses, it should be clarified that it is not merely the interest in the exploration which is protected, but also the future possession of later-won property derived via any subsequent extraction.[19] Also, where the exploration is declared to have a scientific purposes (which does not rule out the issuance of a license for exploration declared to have a commercial purposes[20] or a permission to extract over a partial or fully overlapping territory,[21] the public interest in fulfilling that scientific purpose will be deemed to weigh in favor of the exploration in subsequent authorization procedures.[22]

[17] For example, the applicant already possesses enough information to demonstrate that the specified mineral resources exist in the location and can, in fact, be extracted. See §12, para. 1, point 3
[18] UBA Position Paper
[19] BBerG Kommentar, p. 118
[20] See §7, para. (2)
[21] See §8, para. (3)
[22] BBergG Kommentare, p. 118

The further legal details of this (under the BBergG, particularly §§ 11, 12, and 55) at this stage will not be analyzed in detail: **Yet the real crux of the problem seems to be: Regardless of the result of any EIA, there is no actual weighing process undertaken, but rather the license holder holds the presumption of certain legal rights (is entitled) to get its operational plan approved as long as it meets all legal requirements (which includes *inter alia* certain provisions under water law, nature protection, etc.). This would appear to be despite the results of an EIA.**

With regards to extraction permits, it should also be noted that the exclusivity of the holder's extraction rights can be enforced against third parties as a matter of civil law.[23]

Environmental Aspects

Decision-making at this level does entail consideration of environmental aspects. Specifically, §11, point 10 of the BBergG provides that the application for a license or permit is to be denied when "overriding public interests exclude the exploration *in the entire field*". Such a determination is quite difficult to make on the basis of the information required to be provided by the applicant at this stage, however, which need not be very concrete. In the case of an exploration license, the applicant's submitted working program, namely, has merely to indicate that the planned exploration activities are adequate in nature, extent and purpose and will be carried out in an appropriate time frame.[24] The additional grounds for refusing a permit for exploration per §12 do not greatly enhance the information available to the permitting authority at this stage either.[25]

The grounds for refusal must, rather, generally be judged per the comments submitted by those authorities responsible for the given area of public interest that falls within their respective spheres – such as a water or nature authority, or an affected municipality in charge of local land use. According to §15 BBergG, the mining authority, which is responsible for the license/permit, has to invite these expert authorities to submit comments and is to take these comments into consideration when making its determination as to §11, point 10 as a ground for refusal. The expert authorities, however, bear the burden of proof to demonstrate to a sufficient degree of precision that overriding public interests exclude the exploration/extraction *over the entire field in question*, and the mining authority has no discretion but to issue the license/permit if the expert authority has failed to satisfy this burden.[26] In other words, by the mere filing of an application the applicant enjoys a strong presumption under German law that the application will, in fact, be granted.

Given the lack of specificity required in the plans submitted by the applicant and resultant difficulty in assessing the potential environmental impacts of such plans, some commentators have suggested that the exploration license (and possibly even the extraction permit) should not be considered the start of a tiered planning decision, which just has to be made more concrete during the operational plan procedure. However, the UBA has found that this level indeed relates directly to the subsequent authorizing procedures, as the **if** and the **where** components of the project are largely determined at this level, leaving merely the **how** to be determined at the operational plan procedure level.

Public Participation and Access to Justice

[23] See §8, para. (2)
[24] See §11, point 3
[25] See e.g. Greifswald, Urteil vom 16 April 2015 – 5 A 1620/12 --, Rn, 32, juris), in which not even the Federal Defense Ministry was allowed to go against a license on the basis of § 11.
[26] BBergG Kommentar, p. 147

There is no public participation whatsoever at this level. Neither for NGOs, nor for individuals, such as neighbors (tenants and owners of the surface property or others who might be affected by *inter alia* degraded water quality). Only the expert agencies, including affected municipalities are to be given information and the opportunity to comment, and even there, cases are reported in which authorities that should have been consulted per §15 were in fact merely informed.[27] There is also no access to justice at this level.

D. Further Tiered-Decision-Making Levels

Approval of Operational Plans

The approval of operational plans is the second level required to authorize mining activities. German mining laws foresee four different types of operational plans which a project proponent has to submit to the mining authority for approval: (1) the framework operational plan (2) main operational plans; (3) special operational plans; and (4) the operational plan for the closure of the mine. Only the first two types are discussed at length here; the third type is briefly mentioned as it has some relevance particularly with respect to the public participation rights of property owners.

Legal Functions and Effects

The **framework operational plan** provides an overview of the entire mining project, and serves as the basis and framework for the individual main operational plans. In the case the project is subject to an EIA, a framework operational plan is required.

The amendments to the German EIA laws ("UVPG" and UVP-VO Bergbau) have had the effect of making fracking and associated activities, including the drilling of exploratory wells for scientific purposes, subject to a mandatory EIA. It follows then, that such activities will always require a framework operational plan. This in turn entails that the mining authority must conduct a **plan determination procedure** per §57a BBergG in which the approval of the framework operational plan is to take place. Indeed, the plan determination procedure serves as a so-called carrier procedure ("Trägerverfahren"), in which also the EIA is to be conducted, and in which all parallel decision-making, including decisions under diverse environmental laws, is fully concentrated.[28]

Approval of the framework operational plan was earlier described as having only declaratory effect,[29] meaning that the approval of (a) main operational plan(s) is required for the actual execution of the mining activities. However, certain specific issues decided in the approval of the framework operational plan have a legally binding character for the main and special operational plans (as well as the operational plan for the closure of the mine) which are needed to implement the framework operational plan.[30]

[27] See Germany: legal aspects of shale gas exploration and extraction, Helmholtz Center for Environmental Research GmbH – UFZ, Leipzig, Germany, March 14, 2012, p. 3 (citing Borschardt, 2011 and OVG Sachsen-Anhalt, 2003, Rn. 68)
[28] Article 52. para. 2a BBergG in conjunction with article 75, para. 1, sentence 1 of the German General Administrative Procedure Act ("AVG")
[29] See e.g. Germany: legal aspects of shale gas exploration and extraction, by Grit Ludwig, March 14, 2012 (henceforth "Ludwig") at, p. 7, available for download at: http://www.shale-gas-information-platform.org/pl/categories/prawodawstwo/artykuly-ekspertow/germany-legal-aspects-of-shale-gas-exploration-and-extraction/
[30] See §57a, para. (5) of the BBergG

As the UBA has observed, the plan determination procedure constitutes a very late stage in the chain of decisions regarding any planned activities. Accordingly, the questions of **if** the planned activity (in light of the already provided exploration license and extraction permit for designated fields, in addition to further property rights (Bergwerkseigentum) and the activities in investments of the business in exploration) can hardly be questioned. Even the question of **where** such activities might occur is significantly limited, namely, within the limits of the area covered by the license/permit. Only the question of **how** the activity is to be undertaken remains a subject of any serious debate and even there, it is quite uncertain how meaningful a role other interests – whether they relate to spatial planning or other public interests – can play at this stage.[31] To emphasize: Here is furthermore to be noted that it is not merely a question of the stage in terms of decision-making. Thus, the "if" is indeed normally decided at the spatial planning procedures level; yet even at that earlier stage there is little to no discretion to review such questions at all, as outlined above.

An application submitting a framework operational plan also might trigger the need for a spatial planning procedure by the spatial planning agency per §15 ROG, according to which the compatibility of the applicant's proposed measures with the goals of spatial planning are to be examined, if the project itself is deemed of importance.[32]

This unclarity (as to whether such a compatibility assessment was needed) has required some grappling of the matter by the German courts, and is one reason why there were as of early 2017 some proposed new amendments, particularly concerning §15 ROG and §48 BBergG.

According to a proposed amendment of §15,[33] the public is to be provided with a mandatory opportunity to participate in a procedure undertaken per §15, para. 3, point 1 ROG-E and there is to be an examination of alternatives[34] (not including the null scenario, I believe). However, the UBA considers that any §15 spatial planning procedure is occurring too late to be able to effectively bring spatial planning concerns to bear, or allow for a meaningful consideration of alternatives. It recommended, therefore, that the need for such a procedure also be triggered already by the application for a license to explore. It follows that any newly-created public participation rights which might arise, should this proposed amendment have been/be adopted, would similarly occur too late to meaningfully exert an influence. Note that the legislative explanation of the proposed amendment would seem to confirm that this represents no real change to the status quo, as it notes it is essentially codifying (making mandatory) what is already general practice in the provinces. And again, this involvement in the §15 procedure only happens if and when the procedure itself happens.

The **main operational plan(s)** forms the technical base for the mining project's installation and execution. The approval of such plans constitutes the final authorization of the activity in question. Such approval is generally limited to a term of 2 years. For any given mining project, there might be the need for multiple operational plans. There is currently no new EIA and thus no public participation attached to these procedures.

Special operational plan(s) may be requested by the permitting authority to address specific activities, such as for planned hydraulic fracturing activities or certain specific activities using explosives. In this context it bears mention that there is an important Federal Administrative Court decision related to this issue. It does not concerns special operational plans "as such" as much as the subjective rights

[31] UBA Position Paper p. 14
[32] There could thus be changes to is § 48 BBergG and § 15 ROG in the detail. Clarification here would be helpful and it could well be that events post 2017 have helped in this regard
[33] Entwurf eines Gesetzes zur Änderung raumordnungsrechtlicher Vorschriften Drucksache 656/16 from 04.11.16
[34] Though not considering the null alternative, I believe

afforded by § 48 BBergG generally.[35] Some have potentially recognizable legal interests that may be compromised by the activity, namely affected property owners, and should be able to voice their concerns. The procedure for evaluating this type of plan can happen before or parallel to the main operational plan.

Environmental Aspects

As indicated above, the major examination of environmental aspects of mining projects are to occur within the context of the framework plan approval procedure, which serves as the carrier procedure for the authority's evaluation of the project proponent's framework operational plan, and is the stage in which an EIA is conducted.

As outlined above, however, there are concerns that the evaluation of environmental concerns (as well as the details with regards to the proposed activities and the participation of both expert authorities and the public) is occurring at too late a stage to exert a truly meaningful influence in the overall process.

The UBA says these are to be examined as public interests within the meaning of §48 para. 2 of the BBerg. Their claim is, though, that the way these interests are incorporated within the mining law they have only a marginal effect, and the interests of exploration and extraction projects regularly push through this. Ultimately, the UBA concluded this weighing of the public interests was inadequate.

Public Participation and Access to Justice

It follows from what was observed directly above that – with respect to fracking and oil and gas exploration generally -- public participation has not been extensive at all. These activities up to early 2017 at least have not been subject to a special planning act. With respect to lignite mining and coal mining, there are indeed special plans which need to be enacted on the base of the federal land law(s), however.

With the exception of a possible role for affected neighbors in the context of the review of special operational plans requested specifically for the purpose of addressing such concerns, no public participation is foreseen with regards to any of the other operational plans, including the main operational plans, which again, serve as the final authorization of activities, and cover the final technical aspects.

In terms of access to justice, one must distinguish between recognized organizations on the one hand, and individuals on the other.

The former has the possibility to challenge the EIAs...permits, plan approval procedures...per the EAA, as amended. Regarding individuals: Only property owners have standing, and the exercise of these rights is restricted further via the so-called causality jurisprudence.[36] Furthermore, even when standing is granted, an objective violation of the law can only form the basis of a successful claim where this violation at the same time violates the claimants own rights. This latter feature of German law (§113, para. 1 sentence 5 §42, para.2 VwGO) was specifically deemed to conform with EU law in the CJEU decision in *Commission v. Germany*, C-137/14.

[35] BVerwG U.v. 16.03.1989 4 C 36.85
[36] BVerwG, Urteil vom 10. Oktober 2012 – 9 A 19/11 --

Individuals cannot, as a result, raise a claim due to groundwater contamination.[37] Specifically in the field of mining, such as lignite coal mining and fracking projects, but also by conventional oil and gas drilling, an individual's subjective right will not – as a rule – be violated. The only exception is where property rights are directly affected. Only when such a property right, anchored in Article 14 GG, can claims be raised. Regarding the latter, the Garzweiler decision is indeed of some help, as it did confer subjective rights per § 46 of the BBergG on property owners. Yet this does not seem to address all concerns raised in this analysis. Yes, protected property interests can be claimed at the level of framework operational plans and must be investigated and balanced in a consideration of the interests at this procedural level. However, the factual decision as to "if" the deconstruction is to take place is often made at an earlier point in time and legal remedies against the resettlement of affected parties with the background of an already running mining operation hardly has any prospects of success.[38]

As of early 2017 there were two further pending cases of possible interest; both concerned lignite planning acts (Nochten and Welzow Süd), in which the claimants argue that there is indeed no access to justice against these plans even if a SEA is done for the plans. Neither the NGO nor the private individual is afforded judicial rights, the justification being that they can have access to justice in the permitting phase under the BBergG (framework operational plan). The implication being, access to justice at this latter stage suffices.

Past Illegally Approved Activities not Subject to Improved Public Participation Rules

As a final note one should add that the transitional provision[39] of the amended UVPG states that operational plans which have already been approved will not require an EIA (and consequently not be subject to public participation). This covers a huge amount of licenses/permits – to recall, according to the 2015 Milieu study NRW already granted licenses covering fields that cover almost 50% of the entire province. Furthermore, in many of these cases, the failure to conduct even a screening was in violation of the EIA Directive and are therefore unlawful to begin with.

V. LEGAL ANALYSIS

A. Provisions of the Convention Potentially at Issue

Article 3, para. 1; Article 6, paras. 2-9; Article 7, Article 8; Article 9, paras. 2 and 3.

B. Nature of Potential Noncompliance

[37] BVerwG, Urteil vom 20.12.2011 – 9A 30/10, NVwz 2012, 573, Rn 19
[38] Az: 7 C 11.05) from 2006, confirmed by the Constitutional Court in the Garzweiler decision of 2013 (Az:1 BvR 3139/08; Az: 1 BvR 3386/08)
[39] See §4 UVP-Verordnung, as amended, particularly the inserted para. 5: "For projects in §1 sentence 1 number 2, letter b, number 2a, 2b, 2c, 8, 8a, and 10, for which a permitted operational plan lies by the competent authority, the regulation as effective until 5. August, 2016, shall apply."

1. Public Participation

As a preliminary matter it must be clarified that the Convention does not require environmental assessment, be it at either the strategic or project level. The Convention's second pillar requires, rather, public participation for certain types of decision-making. This is not the same. Any potential communication must respect and reflect this difference.

That being said, the Committee has acknowledged, in principle, "the importance of environmental assessment" at both levels "for purposes of improving the quality and the effectiveness of public participation."[40] Furthermore, the Committee has clarified that, while an EIA is not a necessary part of public participation, public participation is a necessary part of an EIA. In other words, where the national framework provides for an EIA procedure, including public participation, the public participation requirements of the Convention must be met.[41]

Two important conclusions can be drawn from this which are particularly relevant for present purposes:

First, even where a SEA or EIA is provided for according to national law, this does not mean that the national system is Aarhus-compliant. It is quite possible that a legal system which would provide for both a SEA and an EIA specifically for fracking would still fall short of satisfying the requirements for public participation under the Convention.

Second, any arguments based specifically on the Convention – particularly any arguments presented in the form of a Communication to the Compliance Committee against Germany – must not be formulated as a specific critique regarding the lack of these specific instruments (SEA or EIA) in the context of fracking. It can only be demonstrated that the legal framework fails to provide the requisite degree of public participation and suggested indirectly, that a ready and likely effective means of fulfilling public participation requirements would be within the context of a SEA/EIA.

a. Determining which (if any) Article Applies

The Convention imposes slightly differentiated public participation requirements depending on the nature of the act or decision-making at issue; in other words, whether in the framework of decisions on specific activities (Article 6); plans, programs and policies (Article 7); or executive regulations and/or generally applicable legally binding normative instruments (Article 8).[42] The form of decision-making at issue likely also has meaningful implications for the access to justice requirements posed by the Convention, as will be discussed below. Consequently, the starting point in our analysis must be to determine the nature of the relevant decision-making.

As the Compliance Committee has observed on numerous occasions, the label in domestic law is not decisive. Rather, **whether a given activity falls under Article 6, 7, or 8 is determined by its legal functions and effects**[43]. Thus, the fact that a legislature was the decision-maker in one case, and that the resultant decision was labelled as a "law" did not persuade the Committee that the decision in question was subject to Article 8. The decision in that case had the legal effect of authorizing a very specific project – namely Crossrail – which meant not only that the legislative procedure leading up to

[40] Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010 (henceforth "C-24 (Spain)"), para. 83.
[41] Ibid; see also Annex I, para. 20 of the Convention
[42] United Kingdom ACCC/C/2010/53; ECE/MP.PP/C.1/2013/3, 11 January 2013 (henceforth "C-53 (UK)"), para. 82
[43] Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007 (henceforth "C-12 (Albania)"), para. 65

this decision was subject to the Convention,[44] but also that any public participation duties arose *not* by virtue of Article 8 (which applies in the case of generally applicable legally binding instruments), but rather Article 6 (which pertains to decisions to permit specific projects).[45]

By contrast, the Committee concluded that a local authority's "Traffic Regulation Order," which had the legal function and effect of providing "direction on how traffic would be organized in a certain area" and was "not an act permitting a specific activity, but has general application to all persons that are in a similar situation and unlike a plan or programme, creates binding legal obligations" was an act within the scope of **Article 8**.[46]

The Committee has further noted on multiple occasions that it is particularly **difficult to establish a precise boundary between Article 6 and Article 7 decisions**. In some instances, a given decision (or set of decisions) may be deemed to have both Article 6 and Article 7 characteristics.

To cite one particularly relevant example, a "concept" for the exploration of certain mining deposits could have been considered a regional development strategy and sectoral planning (which would fall under Article 7 of the Convention), or it could have been considered as the first phase (expressed as an "intention") for a planned activity (in which case it would fall under Article 6). In this case, too, the Committee reiterated the necessity to look beyond national labels. However, on the facts presented, the Committee was unable to make a final determination as to the proper classification of the decision-making in that case. A review of the Compliance Committee's case law does provide some guidance in distinguishing between Article 6 and Article 7-type decision-making, however.

Article 6 decision-making is characterized by a greater degree of specificity – it should concern carrying out a specific activity in a particular place by or on the behalf of a specific applicant.[47] It should be more specific than a land use designation would normally be, like awarding leases to individual named enterprises to undertake quite specific activities,[48] and authorizing a project to be located in a particular site and setting the basic parameters of the project.[49] All such decision-making is most appropriately categorized as falling within the scope of Article 6, regardless of whether national law designates its result as a "decree", "plan", etc.

Nor does the fact that other permitting decisions may still be needed for the actual execution of the activity necessarily remove the decision-making from Article 6's ambit or suggest it is best analyzed under Article 7.[50] According to the ACCC's consistent case-law concerning tiered decision-making, discussed below there may be a series of Article 6 decisions, and it is often not enough to ensure public participation with respect to only one (or a few) of the decisions in this series.

The most clearly relevant case demonstrating the force of this conclusion is C-43 (Armenia).[51] There the Committee found that the issuance of a mining license fell under Article 6, despite the Party Concerned's argument that, according to its national legislation, a mining license does "not award the right to undertake mining operations, but only initiates a multiphase process for the establishment of

[44] And was therefore not excluded from the scope of the Convention by Article 2, as the Party Concerned in that instance had argued
[45] United Kingdom ACCC/C/2011/61; ECE/MP.PP/C.1/2013/13, 23 October 2013 (henceforth "C-61 (UK)"), para. 56
[46] C-53 (UK), para. 83
[47] C-12 (Albania), para. 67
[48] Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006 (henceforth "C-8 (Armenia)"), para. 28
[49] Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008 (henceforth "C-16 (Lithuania)"), para. 58
[50] C-12 (Albania), para. 67
[51] Armenia ACCC/C/2009/43; ECE/MP.PP/2011/11/Add.1, 12 May 2011 (henceforth "C-43 (Armenia)")

such a right."[52] Noting that the license had legal effects, including an impact on operating conditions for an activity (as to duration, as the license was only valid for a set period of time) and could provide the basis for a later concession agreement, for which domestic law provided a number of possible operating conditions, such as the possibility of limited liability on environmental matters, the Committee found the license to fall under Article 6 of the Convention and that the Party Concerned had to ensure the public participation with respect to the licensing procedure.[53]

Although not binding in and of themselves, the **Maastricht Recommendations** provide particularly useful guidance here.[54] There it is recommended to identify all activities which potentially may have an effect on the environment (and thus fall under **article 6, paragraph (1)(b**)...[such activities may include...any activity which under national legislation requires an environmental permit **or license** (such as noise permits....**fracking permits, mining permits, exploratory drilling permits)**]"etc.

The most typical form of **Article 7-type decision-making** are spatial plans, both general and detailed,[55] and other types of zoning activities, "i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not)."[56]

Though the particular body responsible for the type of decision-making is by no means determinative,[57] it might be noted that more strategic (i.e., Article 7) issues are often promulgated by bodies distinct from (and perhaps superior to) those bodies charged with ultimate permitting.

One last feature which distinguishes Article 6 from Article 7 bears brief mention. The scope of the former is a great deal more restrictive; to come under Article 6 it must be demonstrated that either an annex I activity is at issue,[58] or that significant effects are likely and that other requirements are met.[59] Article 7 is much broader, as the test is merely whether the decision-making is "environmentally related". It is unlikely that this distinction will be an obstacle considering Germany's current legal framework, however.[60]

Finally, there are of course some forms of decision-making that do not fall under either Article 6, 7, or 8. A mere study for the selection of possible locations for a nuclear power plant and making proposals

[52] Ibid. at para. 39
[53] Ibid. at para. 58. To be precise the "renewal" of a license was at issue in that case (as the original license was issued before the Convention entered into force), meaning that it was Article 6, para. 10 (which relates to changes or updates) that specifically brought the renewal into the scope of Article 6. But it follows as an inescapable logical consequence that also any original licenses, which would create, rather than alter, such legal effects
[54] See in particular paras. 43-47; emphasis added
[55] See e.g. Bulgaria ACCC/C/2011/58: ECE/MP.PP/C.1/2013/4, 11 January 2013, para. 75 (henceforth "C-58 (Bulgaria)), para. 62
[56] C-12 (Albania), para. 68; see also C-8 (Armenia), para. 23 (decisions on a general type of activity (e.g. manufacturing, agriculture) fall under Article 7, whereas decisions including specific activities (watch-making factory, construction of a diplomatic complex) and the names of individuals or enterprises that would undertake the activities fall under Article 6)
[57] As discussed above, parliaments are fully capable of issuing Article 6-type decisions, e.g.
[58] See Article 6(1)(a)
[59] See Article 6(1)(b). The precise scope of the latter provision is currently rather unclear. The CJEU offered its own view in C-243/15 and C-664/15, and the ACCC will most likely elucidate matters in the future. A possibly key element both bodies might insist upon is the existence of at least one authorizing procedure/the presence of an environmental license or permit.
[60] This is because all EIA fracking activities are now subject to a mandatory EIA, which in turn requires public participation. This fact means that Article 6(1)(a) in conjunction with Annex I, point 20 should apply to all such activities. The one conceivable limitation might be for exploratory drilling for scientific purposes (such as the still permitted 4 test drillings) per Annex I, point 21, which provides that for activities carried out for research and development purposes, applicability of Article 6 further depends on a positive screening. However even that limitation is only operative for those activities conducted within 2 years. Of course Article 6(1)(b) remains an alternative/additional mechanism to bring fracking within Article 6.

for the preferred location(s) is one such example.[61] Similarly, a resolution regarding a contract with a private company concerning a waste disposal plant did not fall under any of these provisions. "Although it narrowed down the scope of options allowed under applicable plans, crucially there was no legal effect on the plans, nor did it confer any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of applicable planning instruments."[62]

Applying this guidance to Germany's legal framework sketched out above, it should first be noted that the adoption of **Germany's new "Fracking Law"** – that is, the changes to the EIA law, WHG, etc. in no way appears to be a case of a legislature acting as a virtual permitting agency authorizing a very specific project, as was the case of Crossrail. Accordingly, these legislative procedures do not fall under Article 6. It has general application to all persons that are in a similar situation, and creates binding legal obligations in a manner distinguishable from plans, programs, and policies. Thus this legislative procedure **falls under Article 8**, not Article 7.[63]

For the reasons[64] laid out above, the NEP undertaken at the federal level is likely not relevant for present purposes.

Regarding **the LROPs and LEPs and the federal state level**, upon a first examination, they seem to be rather classic planning instruments, and therefore should **likely be categorized as Article 7 decisions.** Note that there does not seem to be evidence that adoption of these plans substitutes for further permitting, leads to a bypassing of the EIA procedure, has the legal function or effect of "authorizing" the activity, or in any way "amounts to a permit to actually carry out the activity" in the manner outlined by the case law cited above.[65] Unless persuasive facts can be produced to demonstrate that these plans legally achieve the effect of "lifting up"[66] what is normally understood to be decision-making on specific projects to a higher level of the administrative or legal hierarchy, these plans will be considered to fall within the scope of Article 7. It is conceivable to argue that, given the fact the real "if" question has been answered at an earlier stage, for which there is no actual planning discretion given the wording of the BBergG, precisely such a lifting up legal effect takes place. If one were to pursue this further, one must clearly demonstrate that these plans are so specific as to resemble permitting decisions. That being said, on the basis of the facts as presented, these decision-making processes seem to fall under article 7.

That of course does not mean that the legal framework is Aarhus-conform, either with respect to its public participation or access to justice provisions. Rather, one must be precise as to which provision(s) are indeed at issue.

The exploratory licenses and extraction permits appear to be Article 6 decisions. As in the case law cited above – as well as the Maastricht Recommendations cited to, they concern not general types of

[61] Romania ACCC/C/2010/51; ECE/MP.PP/C.1/2014/12, 14 July 2014, (henceforth "C-51 (Romania)", para. 73
[62] France ACCC/C/2007/22; ECE/MP.PP/C.1/2009/4/Add.1, 8 Febru*ary 2011,* (henceforth C-22 (France)", para.
[63] It is useful here to contrast the Convention with the SEA Directive, as interpreted by the CJEU at point 53 of its judgment in C-290/15, where it concluded that the notion of "plans and programmes" under the SEA Directive can cover normative acts adopted by legislatures.
[64] In short: dispersement and transport is covered by this NEP, not sources, such as those derivied via fracking
[65] In particular C-16 (Lithuania), C-58 (Bulgaria), C- 8 (Armenia); see also Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, (henceforth "C-11 (Belgium)", particularly paras. 26 and 29
[66] See Effective Justice? Synthesis report of the study on the implementation of Articles 9(3) and (4) of the Aarhus Convention in the Member States of the European Union, by Prof. Jan Darpö (henceforth, "Darpö Report"), p. 10

activities (like agriculture, or even mining) but more specific activities (the exploration and/or extraction of specifically enumerated mineral resources) within a specific field (even if that field may be rather large), for a specifically stated purpose (scientific, commercial, etc.). They also identify the specific person or enterprise to be ultimately authorized to undertake these activities. And further, **as in the case of the licenses in C-48 (Armenia), these licenses and permits appear to have real legal effects**, including the creation of a constitutionally-protected property right. **And crucially, as in that case, the fact that no actual operations are yet allowed to be undertaken should be not an obstacle to determining that these decisions fall within the scope of Article 6**. These two aspects are absolutely key, and result in a situation wherein it seems that the national law appears to diverge from the requirements of the Convention, particularly as interpreted in C-48 (Armenia).

Also it should be noted that the body charged with the ultimate authorization of any fracking activities (which also involves being in charge of all permitting concentrated in the plan determination procedure, in which the nature and water-law agencies are merely to provide their agreement) is the very same body in charge of issuing exploratory licenses and extraction permits. The fact that this takes place under the aegis of a single authority, but amongst different bodies and/or under consultation with other bodies may inform (weigh against) the determination that such licenses comprise the exercise of bodies acting under separate powers, as apparently has been the view under domestic German law, but from the perspective of international law this is absolutely not determinative. Particularly considering the ACCC's long-standing approach to tiered-decision making. At any event, while not as conclusive as the legal functions and effects of such decision-making, this ultimate singular identity of the authority in charge lends credence to the idea that this level of activity falls safely within the ambit of Article 6.

In discussions with German experts it was said that the licensing procedures would fall under the new EAA. It would be most interesting to investigate whether is in fact reflected in the final adopted version. At any rate this would seem to weigh strongly in favor of the view that such licenses, contrary to traditional literature on the subject, are recognized as having legal effects. A most interesting line of research for the future would be to evaluate whether this is seen (domestically) as falling under article 9, para. 2 or para. 3 – though obviously this designation would not be determinative from an international law perspective.

Taken as a whole, we view the licensing procedure itself being capable of encompassing environmental aspects and having important legal effects and should thus fall under article 6 (likely 6(1)(b)). **If upon further examination, however, it is really determined that the license is truly empty**, that the prevailing position under domestic analyses is correct – which this author rather doubts, in light of the above arguments – **then it is all the more crucial to ensure adequate public participation with respect to any operational plan to do with exploration or extraction. Ultimately, we would contend that public participation with respect to both sorts of procedures is warranted.**

The plan determination procedure, in which the framework operational plan is to be evaluated for approval (as well as subsequent procedures for approvals of the main operational plans) is clearly Article 6 decision-making, and this seems undisputed in Germany. Note that the label "*plan* determination procedure" is irrelevant;[67] nor is (as discussed at length above) the fact that further

[67] In fact, this nomenclature is even a bit misleading in terms of domestic law; it is the project proponent's plan that is evaluated in the context of this authorizing procedure. I think it unlikely that many domestic lawyers would consider this to belong to the strategic level of plans, programmes or policies, but would rather automatically assume this is part of a specific permitting procedure, albeit a complex one in which several elements are concentrated

decision-making, namely the approval of the applicant's main operational plan(s), is required before actual fracking activities can be undertaken determinative.

What is indicative of Article 6 decision-making here is that (a) it is at this level that an EIA (with associated public participation) is performed; and that (b) the approval of the framework plan contains decisions on specific issues which are legally binding for the main and special operational plans, such as to *how* the activity is to be undertaken, leaving mainly the final technical aspects of the activity to be determined in the course of approval of these later operational plans. It is possible that some procedures made within or in connection to that larger framework have elements of Article 7 decision-making (particularly those relating to assessing the conformity of certain plans and measures with the goals of spatial planning, per §15 ROG). Yet on the whole, this procedural level is best characterized as having the legal functions and effects of Article 6 decision-making.

Interim Conclusions:

(1) The legislative procedure leading to the adoption of Germany's new "Fracking Law" (i.e., the changes to the UVP-VO, WHG, etc.) falls under Article 8.

(2) The federal state-level planning instruments such as the LROPs and LEPs fall under article 7.

(3) The exploration licenses and extraction permissions likely fall under Article 6, especially 6(1)(b), triggering public participation and related rights under the Convention, even if they are not subject to the EIAD.

(4) The decision-making made in the framework/at the level of the plan determination procedure clearly falls under Article´6, triggering related participatory rights.

b. The Differentiated Requirements for Public Participation

The requirements of Article 8 are quite vaguer than in the Article 6 and 7 contexts, being rather more based on efforts than on results. Yet the Convention does prescribe certain minimum requirements[68] and recent findings in a case involving another article which similarly focuses on efforts than on results suggests the Committee is prepared to give such provisions some teeth.[69]

For both projects (Article 6) and (via incorporation) plans, programs, and policies (Article 7), certain substantive Article 6 provisions apply. With respect to the latter (those falling under Article 7) these are specifically article 6, para. 3 (providing for reasonable time times), para. 4 (providing for early and effective public participation), and para. 8 (requiring that the due account of the outcome of public participation is given). As will be made evident in section (d) below, Article 6, para. 4 seems to be particularly crucial for assessing the compatibility of Germany's legal framework with the Convention.[70]

[68] See C-53 (UK), para. 84
[69] See Germany ACCC/C/2013/92; ECE/MP.PP/C.1/2017/15, 8 September 2017, concerning Article 3, para. 2
[70] Of possible interest, however, is Article 6, para. 6, which concerns giving the public concerned access to information, including alternatives assessed. Some have assumed this not to be a requirement in the context of plans, programmes, and policies, as this paragraph is not included by reference in Article 7. However, others have argued that a purposive reading of the Convention should be favored. See ACCC/C/2014/100 (UK)

c. A Brief Application in the Article 8 Context

From a first glance at the legislative procedures leading up to the adoption of the new Fracking Laws, the public participation afforded likely meet the Convention's standards, as there were fairly extensive opportunities to comment and successive drafts seemed to reflect such comments.

d. Tiered Decision-making in the Article 6 and 7 Contexts

As indicated above, Germany's legal framework in the field of mining/fracking activities involves tiered decision-making and multiple permitting decisions. The Compliance Committee has developed an important body of case law specifically to address the legal issues that arise under the Convention in such contexts.

Central to this case law is the requirement for "early public participation when all options are open and...", which arises specifically through Article 6, para. 4 of the Convention. As explained in Section (b) above, this requirement applies both in the context of Article 6 and Article 7 decision-making. Furthermore, it is precisely this requirement (and Article 6, para. 4) which is key to explaining the potential deficits of the German legal framework for public participation regarding fracking in terms of the Aarhus Convention, and which should likely be the primary basis or explanation for any Aarhus Communication alleging noncompliance with the Convention.

This requirement for "early public participation" relates to providing early effective participation both as to the entire chain of decision-making procedures, and with respect to each of the individual decisions in that chain. [71] Here it must be said that the Convention clearly foresees and tolerates a domestic legal framework in which "at each stage of decision-making certain options are discussed and selected with the participation of the public *and each consecutive stage of decision-making addresses only the issues the issues within the option already selected at the preceding stage.*"[72] In this regard, parties to the Convention enjoy a certain discretion.

"However, providing public participation at a later stage, when certain decisions have already been taken, cannot rectify the failure to provide public participation at an earlier stage when all options were open."[73] **Furthermore, a mere formal possibility, de jure, to turn down an application at the latter stage of a tiered decision-making is not sufficient to meet the criteria of the Convention if, de facto, that would never or hardly ever happen**."[74]

Even where a full environmental impact assessment is subsequently carried out, a failure to provide for earlier public participation can run afoul of Article 6, para. 4: "Providing for public participation only at that stage (an EIA) would effectively reduce the public's input to only commenting on *how the environmental impact of the (activity) could be mitigated, but precluding the public from having any input on the decision on* whether *the (activity) should (take place) in the first place, as that decision*

and the related European Union ACCC/C/2014/10; ECE/MP.PP/C.1/2017/18, 8 September 2017. There are as of 28.5.2018 no Draft Findings for the former case, however. Findings of no-noncompliance were issued for latter due to reasons irrelevant for present purposes (EU's declaration upon approval of the Convention).

[71] See Guide at p. 145

[72] Guide at p. 145; see also United Kingdom ACCC/C/2009/38; ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 81 (henceforth "C-38 (UK)")

[73] Guide at p. 145, citing C-12 (Albania).

[74] C-58 (Bulgaria), emphasis added; see also C-22 France, para. 38.

would have already been taken."[75] Thus all options, including the "zero option" must be subject to public participation.

The Compliance Committee has, in fact, specifically found that the assurance of public participation (in the framework of an EIA procedure) *only after* the issuance of a mining license (which did not authorize actual mining activities to be undertaken, but rather merely provided the legal basis for subsequent permitting decisions) violated Article 6, para. 4.[76] Such public participation "only after the license has been issued reduced the public's input to only commenting on *how* the environmental impact of the mining activity could be mitigated, but precluded the public from having input on the decision on *whether* the mining activity should be pursued in the first place, as that decision had already been taken. Once a decision to permit a proposed activity has been taken without public involvement, providing for such involvement in the other subsequent decision-making stages can under no circumstances be considered as satisfying the Convention (specifically Article 6, para. 4)".[77]

Applying the above to the present case raises serious potential compliance issues: The newly created public participation rights with respect to fracking that are to be derived from the fact that such activities should (only prospectively) be subject to a mandatory EIA cannot possibly remedy the failure to provide public participation in the earlier stage of issuing a license to explore and/or granting a permission to extract, or at higher strategic decision-making levels.

As studies from the Federal Environmental Agency have persuasively demonstrated, the questions of *whether*, and *where* fracking activities should occur have essentially been determined (without any public participation) at these earlier licensing/permitting stages (if not before), leaving only the possible question of *how* the activities should occur open and subject to any meaningful public participation.

In particular, in all permitting procedures where the applicant has a legal right (entitlement) for its application to be granted if all legal rights have been met, it would seem the zero option is entirely excluded. Where this is the case the authority in question has no discretion at all and there is limited or no *de facto* impact of the public participation in the context of the EIA. It should, however, be explored further to what extent the German BBergG is analogous to the Armenian licensing decision outlined above; in particular, can one argue effectively that the decision on *whether* the mining activity should be pursued in the first place has already been taken without public involvement.

The evidence indicates that on the basis of the earlier licenses and permits, the considerable capital already invested in even reaching the later EIA stage, and the constitutionally protected property rights of the holder of the license/permit, it is extremely unlikely that the competent agency will refuse to issue authorization for the project.[78] By way of a side note, this is likely precisely why § 13a WHG now prohibits unconventional fracking.

The above **appears to violate Article 6, para. 4**, and likely entails further violations.

The "New Fracking Laws" contain no clear mechanism by which early and effective participation can be achieved, let alone ensured. There is no public participation before or during the licensing/permitting procedure under the Federal Mining Act, for example. Only affected municipalities and expert authorities have the opportunity to provide comments and, as discussed

[75] Guide at 145, citing C-12 (Albania)
[76] C-43 (Armenia), para. 76
[77] Ibid.
[78] UBA Position Paper

above, this process has several shortcomings and has in practice been ignored in some cases. Indeed, this appears to be true for all resource use decisions under the BBergG.

There may be a counter argument: That under domestic law all options are "legally" open when an application for a framework operational plan is launched, and that all public interests are to be scrutinized in the context of §55 BBerG must be considered, but in light of the above and in particular the number of studies and caselaw produced on this question and the de facto situation involved, this argument seems indeed vulnerable, particularly considering the ACCC case law cited above (C-58 (Bulgaria) and C-22 (France)).

Germany has acknowledged that public participation is not provided for before the issuance of licenses and granting of permits according to its laws on mining, and instead points to its laws on spatial planning as providing the framework for this, namely during the course of a SEA as a part of the procedure to draw up spatial plans .[79] However, there appear to be at least two distinct problems with this.

First, it presupposes the preparation of a spatial plan, a process which in some cases is voluntary and may be omitted, as was the case of Damme 3 discussed above. Where one lacks the spatial plan preparation procedure, there is no SEA, and hence no public participation until the very much later stage during the course of the EIA. There appears to be nothing in the spatial planning law or the proposed amendments which would change this. Indeed, this may be a key source of the problem/a key point for any attack: It is the planning level where political decision-making is done, if it is indeed determined that the licensing level is rather "empty" apart from §7 Nr. 11 BBergG. Note however, that this environmental aspect in considerations under the BBergG remain indeed.

Such facts suggest there might simply be no plan, program, or policy at all for which public participation was denied. Such a plan, e.g., is simply nonexistent. But considering again the entire chain of decision-making procedures, this still means that the public participation afforded at the EIA level comes too late to be effective. Either the facts should be interpreted to mean there is no plan, program, or policy *at all* (at least with regards to fracking), or there are such plans but participation is lacking because not all environmental aspects relevant to this stage of decision-making are being considered and subject to public participation, and/or these aspects are being put off to such a late stage that de facto all options and meaningful participation with respect to these aspects are foreclosed.

To consider first the implications for article 7: It could be argued that, despite the fact that there are plans, programmes, and policies at issue, most particularly the LROPS or LEPs, these minimally cover fracking or leave this issue out entirely, this would mean no public participation could be undertaken on this. This would seem to be an article 7 violation in conjunction with article 6(4) – and likely at least 6(8), as there would then be no framework in which comments with respect to those issues could be fully considered.

To be 100% clear: Just as the Convention requires neither an EIA nor a SEA, I find it untenable to argue directly that you must have a plan, programme, or policy in place to precede the fracking license and subsequent permitting. However, you can perhaps point to earlier decision-making procedures and observe that at this certain point, even though the issue was not explicitly addressed, this decision-making essentially covered these significant aspects, that that is the point in which the issue was addressed, or at least that subsequent treatment of that question (and participation thereon) was foreclosed. If this line of argumentation were to be pursued further, you would need to establish how

[79] 2015 Milieu study

these other aspects (fracking, underground uses) were key aspects foreclosed for purposes of later decision-making and/or were somehow ancillary to the decision-making at issue. Thus it could be argued by analogy, fracking activities would be ancillary to the realization of a given energy—related planning instrument, just as say, filling a wetland would be ancillary to the construction of a factory.

This could indeed ultimately lead to pragmatic conclusion that a policy, programme, or plan which adequately addresses these environmental aspects is needed, for which public participation is required. But note this would be an indirect effect, and further fact-finding and case-law would be useful.

One important remark: Even if one can[80] adopt this strategy, in which Article 7 does come into play, and chooses to do so, **one should nevertheless likely *also* argue that – as a "pure" Article 6 issue, public participation is required as part of the decision-making procedure specifically performed for the issuance of the license/granting of the permit**. To fail to do so would run the risk that, even if one "won" public participation at the level of spatial planning procedures and thus at this higher level of strategic decision-making, and even if one arguably now "has" public participation at the plan determination procedure/EIA stage, one still lacks public participation at a possibly important intervening link[81] in this chain of decision-making. According to the application of the significance test to the known facts about this licensing/permitting procedure, public participation here, too, seems justified and should be sought.

Ultimately, the most apt choice of (a combination of) these strategies depends on further fact-finding beyond the scope of this study. What the above suggests, however, is that ensuring public participation specifically on fracking activities and their associated environmental impacts *at the very least in one stage prior to the issuance of an exploratory license/granting of an extraction permit* seems required under the Convention.[82]

A brief review of recent procedures which were undertaken to prepare or amend spatial plans suggest that they either fail to include or address fracking at all (as in the case of the NEP), or do so only minimally, which in turn seriously undermines or even denies effective public participation at these strategic levels. As to the latter type of cases, one can point again to the draft changes to Lower Saxony's LREP, in which many comments concerning the potential impacts of fracking in that province where disregarded as irrelevant, as the plan did not discuss fracking, and to the new spatial development for Nordrhein-Westfalia, according to which tight-gas fracking and other projects involving gas drilling are not covered, meaning effective public participation with respect to these activities was not possible. Again, the fact alone that these comments were rejected does not entail noncompliance with article 6 (in particular its para. 8), but if that decision-making essentially concerned those environmental aspects or was the appropriate or only phase in which to submit comments as to these environmental effects, then there the duty to duly consider these comments attaches. This does not mean these comments must be accepted or the plans changed, but somewhere

[80] I.e., if the facts regarding the planning procedures support the theory

[81] I understand some have claimed this is a more or less "empty" phase, but I am not so sure and would advise including this also

[82] As a brief side note we add that §25, para. 3 of the Administrative Procedures Act (Verwaltungsverfahrensgesetz) and the applicable provincial laws there is a possibility for an "early public participation for projects that can have some impacts on the concerns of a greater number of third parties. This is a means of providing a means of enabling a transfer of information, interventions and concerns of the public in the cases of major projects. However, in practice this comes in too late...is not mandatory...and has never provided a satisfactory means for public participation in the context of mining."

in the chain of decision-making there should have been a chance to submit comments as to these environmental aspects and have them considered properly.

e. A Brief Note on the Need for Sufficient Legislative Clarity

Finally, should it appear that the current legal framework – particularly with respect to the public participation opportunities in spatial planning procedures – might be capable of meeting the Convention, it is **possible to argue, based on past experience and current practice, that it is still lacks sufficient clarity** to truly ensure that public participation take place. This would essentially be an **Article 3, para. 1 claim**, made in conjunction with Article 6 and/or 7. Particularly if the matter is unclear, or legislative developments uncertain, this argument should be raised. This especially so given that the legal situation in Germany and the EU in general is in the process of great changes. But such allegations require thoughtful and considered substantiated evidence – citations to general legal provisions, case-law interpreting these, etc.

Interim Conclusions:

(1) Germany almost certainly complied with Article 8 of the Convention with respect to the public participation provided with respect to the creation of its Fracking Laws;

(2) Germany's federal states' spatial planning procedures may fail to comply with Article 7, especially in conjunction with Article 6, para. 4 of the Convention, as these procedures may not always ensure adequate public participation with respect to underground uses, including fracking, as such aspects are not always made subject to evaluation and public participation at the strategic level;

(3) Germany may furthermore be in noncompliance with Article 6 (most likely triggered by 6(1)(b)) and all of its substantive provisions, particularly article 6, para. 4 because it fails to ensure adequate public participation before the issuance of licenses (and possibly also permits) for underground uses such as fracking.

(4) Finally, Germany's current legal framework may lack sufficient clarity so as to ensure public participation actually takes place when it should.

d. Good Practices

By way of comparison it should be repeated that Netherlands reports having conducted a SEA specifically for shale gas development and a SEA for other sub-surface activities. A national strategic spatial plan with regard to subsurface activities, including shale gas activities, was completed in 2016, based on these two SEAs. These SEAs involved extensive public participation particularly as to the potential effects associated with such fracking activities. This involved transboundary public participation. In the UK a SEA is supposed to be carried out before onshore oil and gas licensing rounds are launched. The latest round report was the 14th Licensing Round.[83] This planning process is also subject to public consultation.

2. Access to Justice

[83] https://www.gov.uk/government/consultations/environmental-report-for-further-onshore-oil-and-gas-licensing

a. Determining which Article Applies

There are differences between Article 9, para. 2 and its para. 3. Therefore, it is again of key importance here to determine as a threshold matter which of these two provisions applies.

Regarding violations of **"pure" article 6 violations** (i.e., those in connection to a specific activity/project level) it is **clear that article 9, para. 2 applies**. This provision states explicitly that it requires 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."[84]

Yet note that article 9, para. 3 states specifically that it is "in addition and without prejudice to" the other paragraphs of that article, meaning that the applicability of article 9, para. 2 might possibly not affect the possibility that article 9, para. 3 also (simultaneously) applies. Other experts, however, have viewed article 9, para. 2 as a sort of *lex specialis*. According to that reasoning, article 9, paragraph 3 would not apply where the conditions for article 9, para. 2 are fulfilled. At any event, it is advisable to considering arguing for access to justice rights under both, possibly along a "in the alternative" line of analysis.[85]

Further, with respect to **article 7, it seems relatively clear that article 9, para. 3 is the provision foreseen or interpreted to provide access to justice** (though there is **some room for an alternative interpretation** in a more limited context here). C-58 (Bulgaria) is the clearest ACCC case on point, but there is additional jurisprudence to the same effect. Academic literature has made similar observations. Moreover, the language of Article 9, para. 2 itself, after explaining the direct and necessary link to Article 6, goes on to say "and, *where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions* of this Convention." Based on this wording in Article 9, para. 2, the Guidebook describes the application of Article 9, para. 2 review in the context of plans, programs, and policies as requiring an "opt-in" by the Party Concerned.

However, this raises a possible problem as to interpretation: What constitutes an "opt-in" precisely? In other words, how can one argue that a party "so provided for under national law" in terms of this clause in Article 9, para. 2? The fact that EU law qualifies as part of national law and that the EU law on this issue has been developing so much in this area makes the question of an "opt in" yet more subtle.[86] There is no guidance on this issue.

Possibly one could accordingly argue that this clause is so vague as to be impossible of real application; what is needed is therefore a more purposive interpretation of the Convention, particularly in cases where Article 6 is specifically at issue by virtue of incorporation in Article 7. Consequently, one could try to argue Article 9, para. 2 should be the applicable appeals mechanism also as to plans, programs, and policies where Article 6 comes into play.[87]

[84] See C-8 (Armenia), para.35; C-11 (Belgium), paras. 26 and 29; and Germany ACCC/C/2008/31; ECE.MP.PP/C.1/2014/8, 4 June 2014, (henceforth "C-31 (Germany)"), para. 82

[85] This is particularly the case concerning national and EU-level developments, in which it is yet clear what falls under article 6 (and therefore article 9, para. 2)

[86] See C-243/15, C-664/15, e.g.

[87] One should nonetheless seriously evaluate the German legal framework – particularly the EEA and its draft amendments – to consider whether one could construe this as an "opt-in", as an additional or alterative argument.

Some have suggested, e.g. that a compelling argument can be made that challenging the (procedural) legality as to acts and omissions made in the procedures during the preparation of plans, programs, and policies should be possible under Article 9, para. 2.

This line of argument begins with the observation that the ACCC's case law on the difference of application between Article 9, para. 2 and para. 3 generally hinges on the concept of what qualifies as "a decision", and that this is to be interpreted narrowly in such a way would seem to preclude "a decision" to adopt a plan, program, or policy (absent a party's opt-in). Yet Article 9, para. 2 applies not merely to "decisions", but also to "acts" and "omissions". Thus this case law perhaps cannot be interpreted as *exhaustively* defining the scope of Article 9, para. 2's application – to do so might render the two words "acts" and "omissions" meaningless, which surely is contrary to the legal thinking and drafting.

These words must have the purpose *and* the consequence of going beyond the concept of a "decision on whether to permit", as is used in the sense of the first sentence of Article 6. The question thus arises, "what is the meaning of these two words"? These two words cannot be interpreted to distinguish between procedural and substantive aspects; to the contrary, Article 9, para. 2 provides that review is to be provided as to both procedural *and* substantive legality with respect to each of the three individual categories: (1) decisions; (2) acts; and (3) omissions.

Noting that the incorporation of the Article 6 elements into Article 7 is made within a procedural framework, this could possibly mean that (procedural) acts or omissions during the preparation of (i.e., within the framework of this procedure) plans, programs, and policies are subject to relevant Article 6 requirements and, as a result, such acts and/or omissions should be subject to Article 9, para. 2.

The very wording of Article 9, para. 2 might suggest such an interpretation, as it crucially does *not* state that it is the review mechanism for permitting decisions and the procedures for such permitting. Rather, it states that it governs the requirements for review "to challenge the substantive and procedural legality of any decision, act or omission *subject to the provisions of article 6*". Given that a number of acts and omissions can arise in the procedural framework for plans and programs, which are, in fact, *subject to* the provisions of article 6 (i.e., the need to provide for early and effective public participation, give due consideration to comments, etc.), it would seem from the express wording of this provision that Article 9, para. 2 might be the applicable mechanism for appeals of violations with respect to such issues.[88]

This theory is indeed interesting, and merits further analysis. However, at least two possible concerns arise.

First, Article 7, as mentioned above, has a much broader application, requiring public participation not merely with respect to activities that are listed in Annex I, or determined to be capable of having significant effects, but also in all cases for plans, programs, and policies that "relate to the

[88] An alert reader would notice that the same interpretation of the express wording for Article 9, para. 2, should apply with equal force to "decisions" which are subject to Article 6, yet are made within the Article 7 overall procedural framework. At first blush there seems to be nothing in the wording of these provisions which would foreclose such an interpretation. However, the ACCC, as well as academic literature, would seem to have answered the question of the applicability of Article 9, para. 2 in the context of decisions on plans, programs, and policies, decisively in the negative. Accordingly, in the interests of suggesting the most promising lines of argumentation the present analysis concentrates only on acts and omissions. Yet it should be asked and evaluated whether such an analysis – if even promising with respect to acts and omissions regarding plans, programs and policies – shouldn't be at least explored, despite the ACCC case law and academic sources to the contrary.

environment". This broader application – and indeed this very particular wording – seems to track both the express formulation of Article 9, para. 3 which (as opposed to Article 9, para. 2), establishes the requirement for review mechanisms for violations of national laws "related to the environment", as well as the intent which might be derived from this wording. This might suggest Article 9, para. 3 is truly the most appropriate appeals mechanism to engage at the strategic level of plans, programs, and policies, with respect to not only any decisions to adopt such, but also with respect to any acts or omissions, be they procedural or substantive in nature.

Moreover, and most pertinently for present purposes, the Guidebook goes on to note that some articles, Article 7 among them, "do not use the term the 'public concerned'. Accordingly "in applying article 9, paragraph 2, to these provisions,[89] a Party must decide how to determine the scope of the public concerned[90] in those cases.[91] This would seem to negate main potential advantage of achieving the application of article 9, para. 2, as opposed to para. 3 – as described below, the main difference lies in the fact that the former grants less discretion to the parties in defining standing. If this is true – which would merit further scrutiny – this would mean that even the theoretical application of article 9, para. 2 in such contexts would be of little practical value.

Ultimately, it is most likely that the ACCC would refuse to find Article 9, para. 2 applicable in the context of plans, programs, and policies based on its earlier case law, most particularly C-58 (Bulgaria).[92]

Applying the above: regarding the plan determination procedure, EIA, permitting, and the licensing – all should be challengeable under article 9, para. 2. As established above, these procedures (and the decision-making related thereto) appear to have the legal functions and effects of Article 6-decision-making. Based on the case law cited, Article 9, para. 2 would be the appropriate (main) mechanism for appeals. Article 9, para. 3 might be an alternative or additional grounds for review.

The spatial planning instruments, like the federal state LROPs, and LEPs, appear to be Article 7 procedures – as discussed earlier, it seems hard to argue, based on the legal nature of these procedures, that they truly involve Article 6-like decisions. Although there may be some room for arguing that aspects, particularly related to acts and omissions in the context of such procedures, should be subject to review under Article 9, para. 2, it is far more likely that review procedures at this strategic level are only challengeable under Article 9, para. 3.

As our analysis has suggested the "fracking laws" themselves are not the immediate target, means of challenging these legal instruments are not pursued further.

Interim Conclusions:

(1) Decisions, acts, and omissions related to the plan determination procedure, EIA, as well as the issuance of a license to explore/granting of a permission for extraction should be challengeable, most likely under article 9, para. 2. Currently licenses can't be challenged in this way, but insofar as they fall under article 6(1)(b) as described above, article 9, para. 2 would seem applicable. Otherwise, or in addition, under article 9, para. 3.

[89] I.e., either in the case of an "opt-in" or in the case of an interpretation requiring at least acts and omissions in the context of plans, programs, or policies, as outlined above
[90] As suggested directly below, this is a truly meaningful distinction, which could nullify any benefit in coming under Article 9, para. 2, rather than Article 9, para. 3
[91] See Guidebook, p. 193
[92] See para. 63

(2) Decisions to adopt federal state spatial planning instruments such as LROPs or LEPs should be challengeable under Article 9, para. 3; the same is most likely true of (procedural) acts and omissions made within the procedures undertaken in preparation for these, though in such cases it might be possible to argue Article 9, para. 2 as an additional legal basis for appeal. There is currently no means of challenge, however, even under the new EAA, according to my understanding, given certain exclusions carved out for resource uses.

b. The Differentiated Requirements for Access to Justice

Again, there are some differences between Article 9, para. 2 and para. 3. In particular, the former can provide some benefits, particularly with regards to the lesser degree of party discretion in determining *who* can bring appeal. This is valuable when considering the opportunities for individuals (natural persons) to bring suit.

Article 9, para. 2

With regard to the question of ***who*** should have standing for review procedures pursuant to Article 9, para. 2, the Convention provides that, as a minimum, such rights are to be ensured for the "public concerned", as defined in Article 2, para. 5,[93] either having a sufficient interest (Art. 9, para. 2(a)) *or* maintaining impairment of a right in (Article 9, para. 2(a) and 2(b)). Though the public concerned is a subset of the public at large,[94] it is still to be understood as a broad category.[95] NGOs enjoy in this context special recognition – where they meet the requirements of Article 2, para. 5 (that is, they promote environmental protection and meet national requirements), they are to be deemed as having a sufficient interest or right capable of being impaired.[96]

By contrast, Parties have the discretion to require sufficiency of interest or impairment of a right for individuals.[97] That being said, the Parties' discretion is limited. As the Guidebook has explained, "the determination of what constitutes a sufficient interest and impairment of a right must be 'consistent with the objective of giving the public concerned wide access to justice within the scope of the Convention'...they should interpret their national law requirements in the light of the general obligations of the Convention found in articles 1, 3 and 9."[98]

According to reports from Germany, the EAA fails to reflect this, and thus should be subject to its own complaint.

[93] "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."
[94] Czechia ACCC/C/2010/50; ECE/MP.PP/C.2012/11, 2 October 2012 (henceforth "C-50 (Czechia)"), para. 13
[95] Ibid.
[96] See Guidance book p. 194
[97] Ibid
[98] Guidebook at p. 195; see also Austria ACCC/C/2010/48; ECE ACCC/C/2010/48; ECE/MP.PP/C.1/2012/4, 17 April 2012 (henceforth "C-48 (Austria)"), para. 61

This reference to Article 1 is particularly key, as this provision is the clearest expression of the human rights-based rationale of the Convention;[99] it mandates the Parties provide guarantees "in order to contribute to the protection of *the right of every person* of present and future generations to live in an environment adequate to *his or her* health and well-being."[100]

The Convention's preamble[101] also underscores this human rights element, and often links this term specifically to *the individual*, suggesting that the rights and duties with respect to the environment is not merely or exclusively to be understood in the sense of a collective right. The need for an expansive interpretation of standing is also supported by the Sofia Guidelines, in para. 26. This document's own preamble states further in point 8 that "all persons *both* ***individually and*** *in association with others*, have a duty to protect and preserve the environment," and in point 9, that "practicable access to the courts and administrative complaints for ***individuals and*** *public interest groups* will ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped."

In light of the above, it seems **clear that a strict or narrow interpretation of the criteria for having an interest or a right that can be impaired is incompatible with the Convention**.[102]

For example, restricting standing to those with private property rights would be inconsistent with Article 9, particularly in conjunction with Articles 1 and 3. This was stated expressly in a case involving another Party which has traditionally followed a restrictive interpretation of the impairment of rights doctrine.[103] In that case, the ACCC observed that the Convention contemplates further social and environmental rights, which are also capable of being impaired, and should thus be defendable in court. The ACCC discussed tenants by way of example as individuals whose social or environmental rights may be affected by an activity.[104] The ACCC emphasized that this could particularly be the case of long-term tenants, where the tenants' interests would to a certain extent "amount to the interests of the owners".[105] However the ACCC took care to point out that even short-term tenants might be affected.

Similarly, in an Austrian case the ACCC observed with concern that the definition of "neighbors" in the applicable standing provision could wrongfully exclude the rights of tenants or individuals who work in the vicinity, unless they could claim that they may be threatened or disturbed through the construction, the operation or existence of a project.[106]

The ACCC failed to find the Party noncompliant with Article 9, para. 2 in either, as the communicants failed to provide the necessary proof of a strict interpretation of standing, particularly by a lack of reference to case law. The need to provide the ACCC with jurisprudence is also evident in C-11 (Belgium). This evidentiary burden is perhaps unsurprising, given that standing for individuals is often left for the courts to decide on a case-by-case basis.

[99] Ebbesson, J. A Modest Contribution to Environmental Democracy and Justice in Transboundary Contexts: The Combined Impact of the Espoo Convention and Aarhus Convention, 12.2.2012, Blackwell Publishing Limited
[100] Article 1, emphasis added
[101] To that effect see, in particular, preambular paragraphs 1, 3, 5, 6, 7, 8, and 18 and the Guidebook commentary thereto
[102] Guidebook at p. 195
[103] C-50 (Czechia), para. 76
[104] Ibid. at para. 67
[105] Ibid.
[106] C-48 (Austria), para. 63

As a side-note, it should be said that the ACCC has historically appeared more ready to review strict interpretations of such national criteria than the ECJ, though the stance of the latter has changed quite remarkably in the course of 2016-2017.[107]

With regard to the question of ***what***, the **ACCC has rejected attempts to limit the scope of review**. In this context the ACCC has stated: "the range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5, and article 9, paragraph 2 (a) and (b), of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision."[108]

This conclusion should be hardly surprising, given that Article 9, para. 2 provides that "*any* decision, act, or omission subject to the provisions of article 6" should be subject to review. Notably this conclusion is not limited to the question of whether procedural and substantive arguments may be brought, but eliminates other restrictions on the scope of claims which can arise through a strict interpretation of the *Schutznormtheorie*, according to which even a member of the public who is granted standing may put forward only arguments that concern their individual or subjective public rights. Thus **the ACCC has explained that, were courts to adopt a general line in which they refused to take up more general environmental issues that went beyond an individual neighbor's rights regarding property and well-being, this would be noncompliant with Article 9, para. 2**.[109]

Applying the above indicates that Germany's legal framework with regards to Article 9, para. 2 generally and particularly in the area of fracking is **clearly deficient**. This holds with respect to both the question of *who* can ask for review and of *what* can be reviewed.

Setting aside the issue of NGOs,[110] judicial interpretation of Germany's version of the *Schutznormtheorie*, according to which an individual only has standing when a legal provision of public law at least also has the purpose of serving to protect the individual interests, such that the protected person can require compliance with the law, is extremely strict. For example, only property owners have the possibility of review of a "permit"[111]or plan determination procedure approval, and even this is further constrained by jurisprudence[112] concerning the so-called "causality principle". In the specific context of mining projects, like lignite opencast mining and fracking, as well as conventional oil and gas drilling – apart from possibly "direct impacts" on property right-holders – the Federal Administrative Court has ruled out that individuals have standing with regards to pollution of groundwater. Except in the possible case of direct impacts on property right-holders, such pollution cannot constitute a violation of an individual's subjective rights and therefore provided a basis for standing under domestic law.[113]

Yet the ACCC has consistently observed that this fails to provide the necessary wide access to other members of the public concerned, notably tenants and those working in the area, whose social and

[107] Contrast the above ACCC case law with the ECJ ruling in Grüber C-570/13, 16.04.2015; however, there is much in C-243/15, C-664/15, and also in particular Gert Folk, Case C-529/15
[108] C-31 (Germany), para. 78; see also C-33 (UK)
[109] C-48 (Austria), para. 66
[110] Aspects concerning standing for NGOs not already addressed by the findings in C-31 are presently the object of a new pre-hearing case C-137 (Germany) at any event.
[111] In this instance I use the word "permit" very narrowly to describe the final authorization of a project, or other permitting decision towards the very end of the chain of administrative decision-making. This does not include the licenses to explore and permits to extract, in other words.
[112] See e.g. BVerwG, Judgment from 10 October 2012 – 9A 19/11
[113] BVerwG, Judgment from 20.12.2011 – 9 A 30/10, NVwz 2012, 573, Point 19

environmental rights might also be affected. Limiting standing according to property and other *in rem* rights is not an acceptable interpretation of national criteria. It should be obvious that tenants or people working in the area of groundwater contamination or other negative environmental impacts, such as land rising or subsidence, or dust, might, too, be affected.

Second, Germany's *Schutznormtheorie* is far too restrictive as to the claims that can be made, as judicial interpretation of the applicable legal provisions[114]prevent bringing general or objective claims regarding violations. Thus even supposing an individual were granted standing on the basis of violations of his/her individual subjective public rights, he/she could not bring any other claims alleging violations of laws (§ 113 VwGO). Yet again, the Committee (unlike the ECJ perhaps)[115] has made clear that precisely such a constellation fails to conform to Article 9, para. 2, specifically in C-48 (Austria) discussed above, and that this applies not merely to NGOs, but to individuals.

A few remaining issues deserve mention. First, as discussed above, the procedures for the exploration licenses and extraction permits appears to fall directly under Article 6. Yet not even property owners have standing for review of these decisions. This, too, appears incompatible with Article 9, para. 2. Second, a number of procedures and determinations which some experts have assumed to fall outside the scope of Article 6, might now be viewed as falling within that provision even in the absence of an attendant EIA procedure, specifically by force of Article 6, para. 1 (b).[116] Thus certain of violations of environmental law provisions, notably those related to nature protection and water law, might require review under Article 9, para. 2, *as well as* Article 9, para. 3. Finally, as discussed above, there is an argument that Article 9, para. 2 should apply with respect to at least some (procedural) violations in the context of the preparing of plans, programs, and policies. And again, there is no harm in alleging the need for review under both Article 9, para. 2, as well as Article 9, para. 3.

Finally, given the importance the ACCC has placed on evidence in the form of judicial interpretation in this context, any communication alleging noncompliance with Article 9, para. 2 must contain extensive case law. One or two cases will likely not suffice; evidence of a consistent line of judicial interpretation is needed. The ACCC has been very clear and refused to make findings of noncompliance in the absence of such proof. The ACCC is even increasingly inclined to reject outright the admissibility of such cases where corroborative evidence has not even at this earliest stage not been brought forth.

Interim Conclusions

(1) For those decisions, acts and omissions established under article 6 above, the German legal framework appears to fall short of its article 9, para. 2 obligations with respect to access to justice. This is particularly noteworthy in terms of the standing limitations imposed on individual claimants (as opposed to NGOs) who have been limited to claims alleging infringement of their subjective rights, and face further hurdles, such as causality;

(2) There are further impermissible restrictions regarding claims that individuals (or perhaps even NGOs under some cases) can bring; i.e. affected property owners can only claim infringements of their subjective rights, but cannot at the same time allege objective violations of the law;

[114] See §113, para. 1, sentence 5 and §42 para. 2 VwGO
[115] See Commission v. Germany C-137/14; but to compare see Protect C-664/15
[116] See to that effect the ECJ's decision in C-243/15

(3) Any communication to the Compliance Committee must be thoroughly supported by corroborative evidence, not only to have any success on the merits, but also to survive the preliminary admissibility determination

Article 9, para. 3

As suggested above, Article 9, para. 3 "applies to a broad range of acts and omissions", namely all those which contravene provisions of national law "relating to the environment". At the same time, this provision also confers greater discretion on Parties when implementing it."[117] Crucially this discretion pertains *only as to the question of who* has standing, *not the question of what* claims are subject to the scope of review,[118] even though a number of Parties have taken a different line on this.

Even with respect to the question of ***who***, the "criteria" for standing, if any, laid down in national law, these must always be consistent with the objective of the Convention to ensure wide access to justice. While not requiring the Parties to establish an actio popularis, they may not take the clause "'where they meet the criteria, if any, laid down in its national law' as an excuse for introducing or maintaining such strict criteria that they effectively bar *all or almost all members of the public, including* environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment.[119] Again, access "should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public*, including organizations*, so that its legitimate interests are protected and the law is enforced."[120]

Notably, "*Article 9, paragraph 3, does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories*. Rather, article 9, paragraph 3, applies to contraventions of any provision of national law relating to the environment. While what is considered a public or private interest or an objective or subjective right may vary among Parties and jurisdictions, access to a review procedure must be provided for all contraventions of national law relating to the environment.[121] Again, "a strict application of this principle (of the *Schutznormtheorie*) in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, of the Convention, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right."[122]

At this point it is critical to note the ACCC's language in this particular case. The Committee, namely, repeatedly takes pains to use such language as "member of the public, *including environmental NGOs/associations*" in its analysis of the compatibility of Germany's legal framework with Article 9, para. 3. This *entails* – as to merely suggests or implies – that NGOs, while understood as being a component of what constitutes "a member of the public" within the meaning of Article 9, para. 3, cannot comprise its whole. Note that the ACCC ended its conclusion regarding the noncompliance of such an interpretation with a period – that is, a full stop. In other words, there must be room for individuals within the definition of "a member of the public", and the ACCC's determination that a

[117] C-31 (Germany), para. 92
[118] See European Union ACCC/C/2008/32 Part II; ECE/MP.PP/C.1/2017/7, 2 June 2017 (henceforth "C-32 (EU) Part II"). The findings and recommendations for this case, however, have not been adopted by the MOP
[119] Ibid
[120] Ibid., emphasis added, citing Findings in Denmark ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, 29 April 2008 (henceforth "C-18 (Denmark)", paras. 29-30 and C-48 (Austria), paras. 68-70
[121] Ibid
[122] Ibid

strict application of the *Schutznormtheorie* is not in conformity with this provision should apply with equal force to individuals. That it went on to elaborate its concern that NGOs could never fulfill the conditions of such a strict interpretation should in no way lead to a contrary conclusion. Rather, this observation serves two purposes.

First, this serves as one, among other, compelling bases for critique of strict interpretations of the *Schutznormtheorie* generally, as it runs contrary to the Convention's recognition of the (supplementary or even special) role NGOs can play.

Second and yet more critical for present purposes, this observation and the Committee's Findings as to noncompliance in this regard, which are limited specifically in terms of NGO standing, must be understood in the specific procedural posture of this case. The communicants in this case were NGOs; in their pleadings they complained that the infringement of rights doctrine prevented *them* from possibly bringing suit in a number of instances. That was the question presented to the ACCC, and therefore the ACCC's findings addressed this narrow question. This cannot be construed to mean that a strict interpretation of the impairment of rights doctrine/*Schutznormtheorie* is acceptable in the case of the standing of individuals. This is particularly so given, as just discussed, the careful language used by the ACCC. Note also that in expressing its concern that NGOs would be denied standing in the majority of cases due to a strict interpretation of the national criteria, it said this would be because NGOs "engage in public interest litigation." Yet there is nothing to prevent the idea that individuals, too, can engage in public interest litigation. Accordingly, there is nothing in C-31 (Germany) that endorses a strict application of the *Schutznormtheorie* for individuals. **That "members of the public" cannot possibly be understood as including only "NGOs" as opposed to also individuals, especially in the context of Article 9, para. 3 implementation, was made clear in recent findings.**[123]

It should be further noted that, while Parties enjoy more discretion in defining "members of the public" for purposes of Article 9, para. 3 than in defining "members of the public concerned" for purposes of Article 9, para. 2, the former description is inherently broader; as again, the public concerned is to be understood as a subset of the public. In light of this it may well be asked: how great a difference is there between the two categories, really?

The purpose and scope of Article 9, para. 2 versus para. 3 is also perhaps telling. The latter seems perhaps even more forcefully addressed to not merely to create a means of review for those possessing *rights* but rather to put a focus on addressing *wrongs*, namely the contravention of laws relating to the environment. Accordingly, the issue of whether a right has been specifically granted to an individual (or indeed, whether environmental rights are an individual right, a group right, or a so-called third-generational right) have less or little application in this context. In this place we should mention, however, that in terms of EU law, both the defense of a right, and the ensurance that obligations are met apply equally. The clearest expression of this is most likely in the recent *Protect* case,[124] and AG Sharpston's opinion in this case in particular.

Finally, as briefly stated above, Parties enjoy no discretion in terms of ***what*** Article 9, para. 3 review can concern. This should include among other things, planning laws, environmental taxes, control of chemicals or wastes, exploitation of natural resources, and even certain criminal provisions regarding the treatment of individual animals.[125]

[123] C-32 (EU) Part II, paras. 85-86
[124] Case C-664/15
[125] Guidebook at p. 197; see also Austria ACCC/C/2011/63; ECE *ECE/MP.PP/C.1/2014/3, 13 January 2014;* C-58 (Bulgaria)

In applying the above Germany again falls drastically short of fulfilling its Aarhus obligations. As described above, individuals lack access to review mechanisms for acts and omissions that contravene national laws relating to the environment. Only directly affected property owners have limited access and they can, moreover, only present limited claims pertaining to the violation of their subjective public rights, and only do so at a very late stage in the chain of procedural decision-making. These claims are limited further by the jurisprudence concerning causality, as outlined above, and it can be seriously doubted whether they can be effective, given the very late stage in which they can be exercised and the accumulated weight in favor of the activity's realization by virtue of legal (constitutional), political and economic forces.

This review also excludes entirely from the scope of review violations of nature laws, water law, mining law, and a host of other national law provisions relating to the environment. Particularly relevant in this context are laws to protect against groundwater contamination.

Notably also certain plans, programs and policies are excluded from judicial review by individuals. For example, an affected party in an area planned for per a lignite mining plan is apparently not sufficiently affected in the meaning of §47, para. 2 of the VwGO.[126] Also the recent draft amendments to the UVPG entirely exclude spatial plans relating to resource use (such as lignite) and wind energy generation from the scope of possible review,[127] as well as the NEP discussed above and related construction plans;[128] that is, not merely for individuals but also for NGOs. These exclusions seem entirely unjustifiable in light of Article 9, para. 3.

More research and more case law is likely needed here. Evidence particularly concerning the causality requirement and burdens of proof with regards to environmental liability could also be key. [129]Generally, evidence that organizations which could, in principle, bring suit are disinclined to do so in light of other priorities and limited resources (financial and otherwise), would also lend strong credence to the proposition that access to justice rights should be provided not only to NGOs, but also to individuals.

Interim Conclusions:

(1) With respect to individuals, there seem to be also be again extreme restrictions both in terms of standing and the scope of violations subject to review, both of which are problematic under article 9, para. 3;

(2) Even the new EAA appears to exclude entirely from its scope spatial plans relating to resource use and wind generation, regardless of the status (NGO or individual) of the claimant; this appears unjustifiable considering article 9, para. 3.

C. The Need for Nation-Wide/Transboundary Participation

Briefly, the strongest arguments in favor of nation-wide and/or transboundary procedures regarding fracking, are based on the definition of the public (Article 2, para. 4) and (Article 2, para. 5), in conjunction with article 3, paragraph 9. The Committee has noted increasingly that these definitions

[126] OVG Saxony, Judgment from 09.04.2015 – 1 C 26/14 juris; to contrast, a property owner has access to justice with regards to a spatial planning decision (subject to a SEA), which could potentially block his/her potential to build
[127] §16 section 4 UVPG
[128] Ibid at §1 subsection 1, sentence 3, number 3
[129] See, for example, the Federal Administrative Agency's analysis of Mining Law, p. 3

depend primarily upon the nature of the activity at issue. Thus certain ultrahazardous activities[130] would require the participation of the public over a vast area, likely crossing many national boundaries, while a tannery, for example, may mean that the public (concerned) is comprised of more local entities and individuals.[131]

Fracking would seem to be an activity that could, in principle, fall within this definition of "ultrahazardous" activities, considering the potential impacts on groundwater, evidence of increased seismic activity in the United States, etc. Research and substantiation would be needed here.[132]

In this context it should be noted that the ECJ has also specifically said with respect to exploratory drilling in one case that the issue of cumulative effects must not be unnaturally limited by national, regional or local boundaries. Thus the ECJ, seems likewise very prepared to accept the possibility of wide-ranging effects with respect to fracking activities. This would support the conclusion that the public (concerned) should be interpreted broadly, which would in turn necessitate nation-wide and/or transboundary procedures or other measures to ensure such broad-level participation.

This analysis limits itself to the relevant provisions of the Aarhus Convention; obviously considering any potential transboundary aspects, the Espoo Convention[133] and Kiev Protocol[134] should be considered and researched further.

Interim Conclusions:

There is a basis in existing ACCC case-law (especially to the extent that fracking can be considered sa o-called "ultrahazardous activity") that such fracking, including the plans, programmes, policies, as well as permitting decisions therefore, should be subject to transboundary public participation (with concomittant access to justice rights;

VI. CONCLUSIONS AND RECOMMENDATIONS

In brief, we conclude that the adoption of Germany's new "Fracking Law" fall under article 8 of the Convention. It would seem the requirements of this provision have been met and are therefore not inspected further in this analysis.

By contrast, regional (federal state) spatial planning instruments such as the LROPS and LEPs fall under article 7. Despite the fact that these have been developed with a full SEA and public participation, there

[130] Nuclear installations were at issue in which this line of case-law have developed (namely Czechia ACCC/C/2012/71; ECE/MP.PP/C.1/2017/3, 29 December 2016; United Kingdom ACCC/C/2013C-91 (UK); ECE MP.PP/C.1/2017/14, 24 July 2017, and C-92 (Germany))
[131] To that effect compare the ACCC discussion in C-50 (Czechia) with C-71 (Czechia)
[132] In this context consider the reference that the ACCC originally used to explain its ultrahazardous activity doctrine, namely: the Yearbook of the International Law Commission, 2001, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, commentary to article 1, para. 2. This source is available at:
http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf
[133] Concerning transboundary EIAs
[134] Concerning transboundary SEAs

are real concerns that significant environmental aspects relating to underground uses (fracking) have not been addressed and that as a result of this these issues were not adequately considered and nor could the public participate in any meaningful way at this strategic level. This raises considerable doubts concerning compliance with article 7, particularly in conjunction with article 6, paras. 4 and 8, which are included by reference.

Moreover, it seems the newly adopted EAA excludes entirely from its scope spatial plans relating to resource use and wind generation, making it impossible for individuals or NGOs to legally challenge these. This seems at the very least at odds with article 9, para. 3.

Licenses and extractions permits likely fall under article 6(1)(b), triggering all substantive provisions of article 6 with respect to such procedures. The provision of public participation in later permitting stages (including expanded EIA applications) does not seem to resolve this problem. The later procedures, including those at the level of plan determination clearly fall under article 6. All of these decisions should be challengeable under article 9, para. 2 (and possibly article 9, para. 3, as well), yet this is not always the case: The licenses being a clear example.

The analysis identified further problems related to access to justice: Individuals have still faced standing limits according to which they can only "get a foot in the door" on access to justice in this sector where they are property owners who can prove the infringement of a subjective right and even there, they have faced huge hurdles concerning causality. A related issue – even when such individual claimants can achieve standing, they have not been able to bring at the same time violations of objective laws.

With regards to article 9, para. 3, it seems that, again, the domestic legal system, which restricts individual rights to the defense of their subjective rights (which can only be considered at a very late stage), are also prevented from bringing a range of violations related to the environment (water, nature, mining, etc.), and face the same hurdle mentioned above concerning causality.

It must be also said that Germany's current legal framework seems unclear and inconsistent at points, and especially considering the rapid development of EU law, more guidance and clear legislative/regulatory action is called for. This raises article 3, para. 1 considerations.

Finally, fracking might be deemed an ultrahazardous activity and at any event require transboundary participation and access to justice rights.

Before any further action is taken, it is recommended to:

- review this analysis thoroughly, and consider any changes and developments in the laws or practice since then;
- conduct further fact-finding and case-collection;
- exhaust any available remedies before bringing anything to the Compliance Committee.