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COMMUNICANTS' COMMENTS ON THE REPLY BY THE COMMISSION TO THE QUESTIONS FROM THE ACCC IN CASE ACCC/C/2015/128

Vienna, July 19 2018

Dear Ms. Marshall,

We would like to thank the Committee for its Questions to the Party concerned, and for this opportunity to comment on the Party Concerned's Reply¹ (henceforth, "Reply"). We have tried as far as possible to track the structure of the Questions posed and the Reply itself so as to assist the Committee in its evaluation of this case. Should any further clarification or exemplification on our part be useful, we would of course gladly provide this.

A. CLARIFICATION REGARDING THE BACKGROUND OF THE CASE

1. At the outset we would like to make a small yet important clarification regarding the background of the case: Yes, the Hinkley Point Decision² was the impetus for our

¹ [Reply to the ACCC questions from June 26, 2018](#)

² Commission Decision C(2014) 7142 final corr. on aid measure SA.34947 (2013/C) (ex 2013 N) (henceforth "The Authorising Decision")

Communication. However, our concerns deal with the inability to challenge acts and omission in the field of state aid more generally.³

B. COMMENTS CONCERNING THE EU'S GENERAL ARGUMENTS

2. We would like to begin by responding to some of the assertions the Party concerned made in its introductory arguments.⁴ We will try to keep our responses brief, as we are of the opinion that many of these issues have been raised, responded to, and argued quite extensively in the past.
3. First, we insist again that our case is admissible and the fact that the Decision which served as the impetus for our Communication took place in the context of state aid law is irrelevant.⁵ Furthermore, we are not attacking policy decisions as such and it is a gross mischaracterisation to suggest that in seeking access to justice in matters dealing with state aid law we are pursuing such a purpose.⁶ With our Communication we aim for one thing and one thing only: That we are allowed to challenge acts and omissions which contravene national (in this case EU) laws related to the environment. Nothing more, nothing less.
4. Second, the Commission's invoking the EU Declaration and EU case-law in this context is misplaced. It seems quite true that upon signing and ratifying the Convention the EU clarified (and thereby limited) certain obligations. And indeed these provisions have been analysed and respected by the Committee, which has taken care to take the particular institutional and legal framework of the EU into account.⁷ Yet these restrictions do not at all pertain to the present case which concerns the ability to challenge acts and omissions of the EU institutions directly, and which, under the very terms of the EU's declaration, were made subject to review. Thus the EU is bound as a matter of both EU and international law to uphold its obligations under the Convention.

³ See our [Update](#) from 23.2.2017 and the references therein (most notably in fn. 8 of the [Communication](#) at pp 4-5, including fn 9 in Section V. "Nature of alleged non-compliance", pp 3, 15, 16, including fn 85, 18 and 19; and our [Additional Information](#) of 20.5.2015; our [Comments on the Party Concerned's Challenge of Admissibility](#), dated 07.09.2016)

⁴ See the Response at Pt. III, paras. 9-14.

⁵ See Communication at p. 16, Comments on the Party Concerned's Challenge of Admissibility, from 7. September 2016 at paras. 4-11, [Communicant's Opening Statement](#) at 1-2 and references stated therein

⁶ As the Party concerned would seem to suggest in its Reply at p. 10

⁷ See for example ACCC/C/2014/101 (European Union), ECE/MP.PP/C.1/2017/18, and ACCC/C/2014/123 (European Union), ECE/MP.PP/C.1/2017/21

5. With regard to the Commission's argument that remedies are available against state aid decisions, we feel we have demonstrated already quite decisively that no such remedies are available, including under Article 263(4) TFEU. This matter has been argued exhaustively, and indeed, the Party conceded at the hearing that this avenue was closed. We discuss below in particular the issue of access to justice via the preliminary reference procedure.
6. We have also already addressed the issue of intervention, and explained Case T-57/11, *Castelnou*. To briefly repeat: It must first be said that the status of an intervenor in no way meets the requirements of article 9, paras. 3 and 4. Second, the criteria required to intervene are incredibly strict and, as we pointed out already NGO intervention was denied in that case on the basis of Article 2(2) of the Aarhus Regulation.
7. Finally, we insist that the fact that a decision which authorises State aid is independent from and does not entail that the project will actually be realised is completely immaterial to the question of whether we should have access to justice to challenge state aid decisions as such.

C. COMMENTS REGARDING THE PARTY CONCERNED'S ANSWERS TO THE QUESTIONS FROM THE ACCC

Question 1

"Are the environmental impact or climate change impact of State aid measures taken into account in the European Commission's evaluation of a State aid measure proposed by a member State?"

8. This question must be answered in the affirmative, and, in our view, the limitations suggested in the Party concerned's Reply are misguided.
9. The Party Concerned correctly notes that Article 11 TFEU can serve as a justification for state aid pursuing an environmental aim.⁸ The Reply goes on to observe that, where the measure in question has an environmental aim, this requires an assessment of the positive impact of the measure on the environment.⁹ Yet this falls quite short of explaining the full effect of Article 11 TFEU and the nature of the Commission's duty to evaluate the environmental or climate impact of a state aid measure, including pursuant to the balancing test under 107(3)(c). Indeed, there is long-standing CJEU

⁸ See Pt. 17 of the Reply

⁹ Ibid.

case-law according to which the review of state aid requires an assessment of whether the aid measures “contravene the general principles of Community law.”¹⁰

10. Article 11 TFEU applies not only to Member States; nor is its effect limited to serving as the basis for a justification for otherwise unlawful state aid (as the Reply with regards to this question seems to suggest)¹¹. Rather, this provision applies also to the EU and its institutions and requires integration of environmental protection requirements “into the definition and implementation of the *Union’s policies and activities*, in particular with a view to promoting sustainable development.”¹² Indeed, this was “the first and for a long time, the only integration clause” in Community law.¹³ It is also from its very wording amongst the strongest of such clauses which have since emerged, and applies broadly across all policy areas, including those concerning the internal market and competition.¹⁴ That environmental issues and the internal market have been historically and intrinsically linked (which appears stronger than the wording of article 9, para. 3 of the Convention, namely “related”) is further borne out by the fact environmental measures were adopted under the internal market competence in the past before an explicit and direct competence for environmental matters was created under the Treaties.

11. The obligation that Article 11 imposes (as well as further provisions of the Treaties discussed below, in particular those concerning the prevention and polluter pays principles¹⁵) is not limited to those measures with an environmental aim; nor should it be limited to an assessment of positive impacts. Rather, those measures pursuing an environmental aim should be assessed in terms of both their positive and negative effects, and moreover, those measures which do not (expressly or otherwise) pursue an environmental aim should not be exempted from this same review – they must also be reviewed in terms of their environmental impacts, both positive and negative. To fail to evaluate these aspects in any assessment of state aid measures would run afoul of the Treaties and their requirement that all aims of the EU are evaluated equally and appropriately.

12. We would add that, while the focus of this case has primarily been Article 107(3)(c), which lays out a balancing test, it should not be forgotten that this balancing only

¹⁰ See e.g. Case C-309/06 *Nuova Agricast*, para. 51

¹¹ See Pt. 17 of the Reply, in particular the statement that: “Hence, it is up to Member States to invoke a justification for the aid”

¹² Article 11 TFEU (ex Article 6 TEC), emphasis added

¹³ *Environmental Integration in Competition and Free-Movement Laws*, Julian Nowag., ed Oxford Studies in Environmental Law, 2016, p. 15 (henceforth “Nowag”)

¹⁴ Nowag at p. 15

¹⁵ The Commission has tried to integrate the polluter pays principle in state aid analysis since the 1970’s. See European Commission, *4th Report of Competition Policy* (n 110), 101 ff para. 176

occurs when other state aid provisions have been evaluated. Thus it must first be determined whether the measure in question falls under Article 107(1) and qualifies as state aid. This is not a completely simple exercise and can itself implicate integration of environmental laws and policies.¹⁶ Yet this is not the focus of our immediate concern.

13. Rather, should the measure be deemed as a state aid measure, it is clear that some sort of further evaluation and consideration is required, either under 107(2) or 107(3), or both. Indeed, the Hinkley Decision is a clear example of this; 107(1) was evaluated at length, as were possible applications of 107(2) and (3). Environmental considerations were explicitly considered under both 107(2) and (3) and properly so.¹⁷
14. We are compelled to add that we find the Party concerned's emphasis of the analysis undertaken upon application of the Member State (as opposed to an *ex officio* review) rather misleading.¹⁸
15. In the first place, it must be recalled that any state aid not properly notified and authorised is illegal. Thus where a measure qualifies as state aid, such an analysis must be undertaken by the Commission. Without this, the state aid may not be given. This is analogous to any number of activities subject to permitting regimes. When a particular activity is contemplated that falls under certain rules, the actor hoping to undertake this activity must submit a proper application to the authority charged with upholding the rules for an authorisation, which undertakes a careful review. Without this, the activity may not proceed and serious penalties can be levied. Thus in this regard the emphasis on any *ex officio* character of the Commission would seem misplaced; at least under many national legal systems this would seem to presume a lack of duty to notify, register, and receive a permit under the applicable legal system. Yet this is not at all the case under the legal system concerning state aid.¹⁹
16. Finally, the Party concerned quite correctly notes that Member States can invoke more than one justification.²⁰ And indeed the final decision appears to have more than

¹⁶ See Nowag, pp 92-114

¹⁷ See the Authorising Decision at Sections IX.2 and 3 concerning objectives of common interest and market failures and need for State interventions. The latter specifically discusses the ETS. As discussed at length in our Communication, the Opening Decision deliberated extensively on the basis of further Treaty provisions and secondary legislation dealing with the environment

¹⁸ See para. 18 of the Reply

¹⁹ Indeed, the strongest *ex officio* characteristic seems to be the determination of a common interest: From the record it does not seem clear that the United Kingdom invoked Euratom as a common interest – indeed this justification seems to have been added or adjusted from the record. According to the record the UK specifically argued that the state aid for Hinkley Point C was “aimed at three common EU objectives, namely decarbonisation, security of supply and diversity of generation, and at addressing the related market failures.” The grounds of Euratom as pursuing a common interest, which formed a substantial basis for the final decision, was added later – the source of this argument being unclear

²⁰ Reply at para. 20

one basis – contrary to the Party concerned’s submission. In particular the Commission found “that aid measures aimed at promoting nuclear energy pursue an objective of common interest and, *at the same time, can deliver a contribution to the objectives of diversification and security of supply.*”²¹ Accordingly, it seems that indeed a justification based on security and diversity of supply was a basis, which finds its expression not in Euratom, but in 194 TFEU, which in turn as argued at length in our Communication, integrates environmental provisions and considerations expressly.

17. At any event, the justification chosen as the basis for finding a common interest does not change the fact that environmental and climate change impacts are – and in this particular case were – taken into account in the Commission’s evaluation of state aid measures.

Question 2

“Are EU environmental Regulations and Directives taken into account in the European Commission’s evaluation of a State aid measure proposed by a member State? Does the Party concerned consider that a State aid measure needs to comply with all EU environmental Regulations and Directives and if so, how is this assessed in the evaluation of a State aid authorization decision? If not, what is the legal reasoning for allowing a State aid measure to not be in compliance with secondary EU legislation?”

18. EU environmental regulations and directives are regularly taken into account, and in some circumstances, they must be. Indeed, we find the Reply’s answer to this question suggesting the contrary somewhat confusing.²² Thus, as it notes in its reply to Question 4, there is considerable case-law to the effect that the Commission *must* evaluate other provisions, including environmental provisions, where they are “so indissolubly linked to the object of the aid that it is impossible to evaluate them separately”.²³

19. Moreover, as the Party Concerned acknowledges,²⁴ the State aid Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)²⁵ references a huge number of secondary environmental EU legislative instruments, among them directives relating to water, waste, energy efficiency, environmental liability,

²¹ Authorising Decision, para. 374

²² Reply at para. 22

²³ See Reply at paras 23 and 29. The latter paragraph cites specifically Case 74/76 *Iannelli v Meroni*, Case C-225/91, *Matra* (indeed, the precise language used in the Reply can be found in *Matra*). See also Case 73/79 *Commission v Italy*, T-197/97 and T-198/97 *Weyl Beef Products and Others v. Commission*, T-57/11, *Castelnuovo Energia*, para. 182 (this case uses the term “inextricably linked”)

²⁴ Reply at para. 24

²⁵ OJ C 200, 28.6.2014, p. 1–55.

emissions, etc. The Guidelines not only “put particular emphasis on the obligation of Member States when granting the aid to observe certain EU environmental directives”,²⁶ but indeed lay out those provisions which should be taken into account by the Commission when evaluating state aid measures that fall within the scope of the EEAG.

20. In this context it should be noted that the EEAG itself has a very broad scope, as it “sets out the conditions under which aid for energy and the environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty”. Furthermore, it in many respects codifies and fleshes out existing requirements under this provision of the Treaty.
21. Accordingly, it is potentially misleading to say that the Hinkley Point C Decision was approved on the basis of this Treaty provision directly and suggest thereby that it somehow did not involve any assessment of the project’s compliance with EU environmental rules, or that it would be unnecessary to do so.²⁷ This ignores the link between the Guidelines and Article 107(3)(c), the duty established under the extensive case-law cited directly above, and the fact that the Commission is also obligated under Article 17(1) TEU to ensure that EU law is applied. It also ignores the fact that the Commission did actually undertake an assessment of whether the state aid proposed for Hinkley Point C complied with environmental secondary legislation. Indeed already in its analysis of whether state aid existed (and therefore the rules applying to state aid were triggered), the Opening Decision examined the Electricity Directive, which references the environment no less than 18 times, and makes the environment and environmentally sustainable energy its very core.²⁸
22. Moreover, a critical part of the Commission’s analysis –regardless of any purported aim -- is whether EU and national laws and policies sufficiently address any alleged market failure. In this regard, an analysis of the ETS is required. This is a necessary and unavoidable part of many state aid analyses: It must be determined that any purported market failures cannot be sufficiently addressed by other EU or national laws and policies; within the environment and energy sector, the ETS and environmental taxes levied at the national level are highly relevant and must be considered in terms of whether they adequately address any market failures. Only where the ETS, other relevant environmental and energy-related EU provisions or other provisions at the national level fail to correct a market failure, and the measure meets other stringent requirements, is the measure deemed permissible under the state aid rules.

²⁶ Ibid.

²⁷ Reply at 25

²⁸ [See Directive 2009/72/EC](#)

Question 3

"With respect to Treaty provisions, do State aid measures have to comply with articles 11 and 191 to 193 of the TFEU? If so, how is this assessed in the evaluation of a State aid authorization decision?"

23. **Yes, state aid measures have to comply with Articles 11 and 191 to 193 of the TFEU.** The need for state aid measures to comply with Article 11 was preliminarily laid out above and follows from the very wording of this provision, which says “environmental considerations *must* be integrated into the definition and implementation of the Union policies and activities.” The fact this provision goes on to say “in particular with a view to promoting sustainable development” may be seen as an additional confirmation of the link and need to establish compatibility between environmental considerations and those dealing with economic affairs, the internal market and competition matters in particular.
24. Articles 191 to 193 in turn embody and define the Union’s “environmental protection requirements”, as referenced in Article 11. They, including their codification of the pre-existing prevention and polluter pays principles, which have specifically been acknowledged as a general EU aim,²⁹ must be complied with.
25. **An assessment for a state aid authorisation** to evaluate compliance with Article 11 TFEU and Articles 191 to 193 (which provide the substance of Article 11’s “environmental protection requirements”) **requires a balancing test in cases of conflicts.** This flows from the requirements in Articles 2 and 3 TEU which establish that “all goals of the EU are on an equal footing and need to be balanced in case of conflict.”³⁰ In the vast majority of state aid cases, this balancing assessment is carried out pursuant to Article 107(3)(c). Indeed, this provision has been the main basis for integrating environmental considerations³¹ even before even Article 11 was created.³²
26. **In concrete terms, the major part of the assessment will proceed under Article 102 or 103.** Article 103 is by far the most common, but it is not exclusive, that is, an examination under Article 102 is commonly undertaken before Article 103.

²⁹ See, e.g. T-392/02 *Solvay Pharmaceuticals v. Council* regarding the precautionary principles; regarding the polluter pays principle, the Commission took the position years ago that this principle would “ensure that environmental protection and competition are mutually supportive”. See Nowag, p. 182, fn 16 and references cited therein

³⁰ See Nowag, p. 30, and the case-law cited at fn 109

³¹ See Nowag, p. 191, fn 85 and references cited therein

³² Nowag, p. 182

Question 4

"Do State aid measures need to comply with other articles of the TEU or the TFEU besides article 107 TFEU? If so, how is such compliance assessed in the evaluation of a State aid authorisation decision?"

27. **Yes, state aid measures must comply with other articles of the TEU and the TFEU.** This follows from the case-law cited above, and the need for all the aims of the EU to be balanced properly.
28. In this context we would particularly mention Articles 2 and 3 TEU, which make clear that the Union is not merely concerned with the internal market as such. We would in particular highlight Article 3, para. 3 TEU, which says that the "Union shall establish an internal market...that will work for sustainable development...aiming...at a high level of protection and improvement of the quality of the environment."
29. We would also highlight Article 26(2) TFEU, which makes quite clear that the internal market is to be ensured not merely with respect to those provisions concerning the internal market as such, but "in accordance with the provisions of the *Treaties*",³³ which obviously includes all of the other relevant Treaty provisions we have mentioned above, including notably, those concerning the environment.

Question 5

"Do State aid measures have to comply with international obligations of the European Union related to the environment?"

30. **Yes, state aid measures (and the authorisation for these) have to comply with international obligations of the European Union related to the environment.** This follows *both* as a matter of EU *and* international law.
31. In terms of EU law, Article 216(2) TFEU provides that: "[International] Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States." By force of this provision, such agreements are themselves part of primary law and all EU institutions and national bodies charged with implementing EU law are obliged to comply with these. This means that both the state aid measures themselves as pursued by the Member States, as well as the Commission in its capacity as a body authorising such measures, are bound to comply with international agreements related to the environment.

³³ Emphasis added

32. We also find relevant in this context Article 3(5) TEU, according to which: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to...the sustainable development of the Earth...the strict observance and the development of international law.”
33. As a matter of international law, it must be said that no party to an international agreement, including the EU, can invoke provisions of its internal law as a justification for non-compliance with its Treaty obligations.³⁴ Performance in good faith is further required of parties to international agreements.³⁵

Question 6

"The Party concerned submits that the preliminary reference procedure under Article 267 of the TFEU allows national courts to refer a question on the validity of a state aid decision to the Court of Justice of the European Union (CJEU).³⁶ Please provide the Committee with examples of cases in which the CJEU has examined the validity of a State aid decision adopted by the Commission on the basis of a preliminary reference from a national court under article 267 of the TFEU. Please specifically highlight those cases, in which the plaintiff/applicant in the national proceeding was an NGO."

34. The Party concerned submitted many cases in its annex. We reviewed these in detail.
35. At the outset, we would underscore that these cases involve challenges and questions regarding the actual state aid provided, i.e., the measures and effects related to such, as opposed to any state aid decision itself. Thus these cases must be seen as challenging or raising questions of interpretation in connection to at best an implementing measure, that is, not the “act” or “omission” of a decision to authorise or not state aid itself under article 9, para. 3 of the Convention. Again, it is precisely this act or omission that we would like to challenge.
36. Moreover, a number of the cited decisions relate to “interpretations” of the underlying state aid decision, and are thus of diminished relevance in the present context – they cannot serve as examples in which the CJEU examined “the validity of a State aid decision”, and thus fail to address the specific call of this question. This question is formulated quite properly; indeed, we are calling for an ability to challenge certain state aid decisions.

³⁴ Article 27 of the Vienna Convention on the Law of Treaties (henceforth “VCLT”)

³⁵ Ibid at Article 26

³⁶ Party's response to the communication, 20 May 2016, paragraphs 39, 40 and 42.

37. A further and absolutely vital point is that none of the cases³⁷ cited by the Commission indicate that NGOs or the public concerned have appropriate access to justice to challenge acts or omissions in state aid cases which relate to the environment, which is the very thrust of our present Communication.
38. Indeed, these cases only serve to underscore that NGOs and others trying to serve the public interest are entirely blocked. Rather, the claimants in these cases are almost exclusively competitors, beneficiaries of state aid who disputed the amount of aid owed or complained of having to return such aid, or states and their bodies. This should come as no surprise, given that for preliminary review cases there must always be a pending lawsuit at the national level, and standing is generally only accorded to those having an economic interest (or suffering an injury) related to such aid.

Question 7

"How can NGOs challenge a decision by the Commission not to authorize state aid?"

39. The Party concerned would seem to support our position: "Parties concerned (e.g. competitors of the aids' beneficiaries") can challenge the Commission decisions not to open the formal procedure under Article 108(2) TFEU...and at the same time, "natural and legal persons can challenge a Commission decision not to authorize a state aid, under the same terms of Article 263(4)TFEU."³⁸
40. For the reasons laid out in our previous submissions in detail, no NGOs have real access to these provisions. Indeed, the Commission goes on to say that a decision to not authorise state aid "cannot even theoretically be an act adversely affecting environmental NGOs, not even in their wide reading of the rights granted under the Aarhus Convention. If state aid allowing for a project is not authorised, there is no impact at all on the environment."³⁹
41. In our view, the above Response to the ACCC's question demonstrates a lack of understanding of the Convention, and indeed of the very purpose of state aid law, which is to allow otherwise impermissible state support for those measures which serve a common good, such as environmental protection. To begin with, article 9, para. 3 clearly covers not only acts but omissions. Decisions "not to authorize state aid" can, depending on the circumstances, be acts or omissions under the Convention.

³⁷ We are aware of one case, namely C-262/12 where an NGO was granted standing with respect to a state aid case. This case is however not indicative; in the first place because it concerns the interpretation of a state aid measure, rather than questions the validity of such, and comes from a jurisdiction that has considerably more relaxed standing requirements. Thus while this case is included for the sake of completeness, it cannot be taken as indicative of a means to challenge state aid decisions

³⁸ Reply at paras. 39-40, emphasis in original.

³⁹ Ibid at. 40

42. Furthermore, the Convention concerns not only negative or positive impacts. Article 9, para. 3 is quite clear: It encompasses national laws “relating to the environment”, which can cover more than positive or negative impacts. Thus consider a measure is proposed which would constitute state aid or some form of subsidy for renewable energy. This might be refused by a Member State or the Commission as being unlawful state aid. Yet it could absolutely be the case that NGOs and other members of the public feel impacted by such a decision, because i.e. it results in the continued operation and support of other sources of energy, which these NGOs and members of the public deem more damaging to the environment than alternative source of energy which would benefit from the proposed aid in question. Under the Convention, such a decision to not authorise state aid for such a measure deemed more environmentally friendly by NGOs should also be challengeable in court.

Question 8

"How was the decarbonisation impact of the Commission's authorization decision of 8 October 2014⁴⁰ assessed? Did the Commission examine the impact of the decision on the Emission Trading Scheme?"

43. As the Commission acknowledges, the decision for Hinkley Point C did indeed evaluate the decarbonisation impact and impacts on the ETS in particular.⁴¹ This was, moreover, not limited to the detailed evaluation undertaken in the Opening Decision,⁴² but evaluated also in the context of the Commission's analysis of claimed market failures and the need for state intervention.⁴³

D. CONCLUDING REMARKS

44. We hope the foregoing can assist the Committee in the evaluation of our case. At the same time, we wish to respectfully point out that the Commission's duty as a matter of national (EU law) to take into account environmental considerations in making certain state aid decisions more than surpasses the test under article 9, para. 3, under

⁴⁰ Commission Decision of 08.10.2014 on the aid measure SA.34947 (2013/c)(ex 2013/N) which the United Kingdom is planning to implement for Support to the Hinkley Point C Nuclear Power Station, C(2014) 7142. This is the “Authorising Decision” we have referenced above

⁴¹ Reply at 55-56

⁴² Opening Decision, pp. 38-39

⁴³ Authorising Decision, p. 51

which members of the public should have a means to challenge acts or omissions that contravene national provisions “related to the environment”.

45. Indeed, there might be any number of acts or omissions which contravene provisions related to the environment, even where there is no clear duty to consider or take into account provisions specifically related to the environment under national law. Thus while we take the position that state aid decisions as such can clearly fall within the ambit of the Convention, in particular its article 9, para. 3,⁴⁴ we in no way support a precedent according to which an assessment of or taking into account of environmental provisions is deemed as a requirement for falling under article 9, para. 3, or qualifying as “relating to the environment” within the meaning of that provision.

46. We maintain that the ACCC has already developed a consistent body of cases on this very issue, using the broad definition of the environment as provided under article 2, para. 3 of the Convention. Accordingly, the above information is provided to demonstrate that state aid decisions as such can clearly fall under article 9, para. 3; yet this information is in no way delimiting or suggesting a threshold that must be met for future cases.

We are indeed grateful to the Committee for its thoughtful consideration of our case.

With best regards,



Thomas Alge,
ÖKOBÜRO – Alliance of the Environmental Movement



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⁴⁴ In this respect, we find the Committee’s Findings in ACCC/C/2013/85-86 (United Kingdom), ECE/MP.PP/C.1.2016/10, 29 November 2016 with respect to nuisances very instructive. There the Committee took the view that the Convention need not “necessarily apply to each and every private nuisance proceeding”. Rather, this had to be assessed in actual practice, and “the principle criteria for assessing the Convention’s applicability to a specific private nuisance case would be whether the nuisance complained of affects the “environment” in the broad meaning of the term” (which hinges upon article 2, para. 3, and relevant case-law evaluating the term “relating to the environment” such as C-63.). See para. 73 and 70-71 of this case.