Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

12th March 2018

Dear Ms Marshall,

Re: PRE/ACCC/C/2017/156: Response to UK comments on admissibility

Thank you for forwarding a copy of the UK's letter dated 9th March 2018 challenging the admissibility of the above Communication. We will keep our response necessarily brief given that the Committee will consider this issue today.

The UK considers communication PRE/ACCC/C/2017/156 to be inadmissible on the basis that: (i) it is manifestly unreasonable; (ii) it is an abuse of the right to bring a communication; and (iii) the communicants have not themselves taken steps to make use of the available domestic remedies.

Before we address the UK's specific criticisms, we consider it helpful to repeat the criteria for the admissibility of Communications in Decision I/7 Review of Compliance adopted at the first meeting of the Parties in 2002 (own emphasis added):

> *20. The Committee shall consider any such communication unless it determines that the communication is:*
> *(a) Anonymous;*
> *(b) An abuse of the right to make such communications;*
> *(c) Manifestly unreasonable;*
> *(d) Incompatible with the provisions of this decision or with the Convention.*

Unless the UK can demonstrate that our Communication satisfies one or more of the above criteria, the Committee is obliged to find it admissible.

A central point the Party Concerned asserts, is that the Communication appears to it to be generic and without specific examples. That totally ignores commentary at the beginning of the Communication, which explicitly identifies a longstanding judicial practice that places the UK in continuing breach of the Convention. Key specific cases are then outlined in the following pages:

> *"Although general jurisprudence and numerous examples are given, it does not refer to a specific current case of non-compliance. What we refer to here is a continuing judicial*

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practice (including in cases brought by ourselves) and legal principle, and an ongoing resistance to change that approach when requested, that places the UK in breach of the Convention." (page 1)

Therefore: a) it is necessary to set out some of that jurisprudence for the committee, as we have done; and b) it is not necessary to identify a specific current case (this being a continuing breach). Furthermore, it is this judicial practice and current common law legal principle which means there is no reasonable, timely or effective domestic remedy for us to avail ourselves of. Finally, we note that this route allows the committee to look at the UK approach in the round and not just look at whatever particular sub-problem was thrown up by a particular case.

We make the following comments against each ground by way of further response:

- **The Communication is manifestly unreasonable** – the UK believes it is evidently clear this communication is manifestly unreasonable, due to its general nature. We believe the cases cited demonstrate a clear pattern of prolonged and ongoing practice of non-compliance. Notably, the UK does not dispute either (1) our characterisation of judicial review in the UK, or (2) how the UK courts have responded to the many attempts to challenge that approach. That clearly leaves open the question of whether that approach complies with the Convention, and, if not, what needs to happen to make it compliant. The fact that the Compliance Committee has previously held that it is not convinced that the UK meets the standards for review required by the Convention as regards substantive legality[1] further supports our argument that this is an issue worthy of examination. It is not manifestly unreasonable in substance or the way we have presented it for the Committee's attention.

- **Abuse of the right to bring a Communication before the Committee** – the UK also maintains that: (i) the failure to detail a current example of why the UK may have failed to implement one of the requirements of the Convention; and (ii) the provision of what it calls "*a lengthy paper which simply details the UK's case law throughout the years*", is an abuse of the right to bring a communication before the Committee. The UK does not explain what it is about the Communication which is alleged to be an abuse. It is plainly not an abuse. We provide not one, but numerous, cases in which claimants/petitioners have attempted to argue that a more intense standard of review is needed in environmental cases (including in cases run by ourselves). The required format for submitting a Communication to the Committee recognises that they can concern "*a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention*[2]". Moreover, it is not the first time that a Communication has referred to an established pattern of jurisprudence as an illustration of non-compliance (see, for example, Communication C32 concerning the compliance of the European Union with the provisions of Article 9(3) of the Convention). The UK appears to have either ignored the content of our Communication, or does not yet fully understand the nature of its breach of the Convention.

- **The communicants have not utilised or exhausted domestic remedies before approaching the ACCC** – we note that this is not a relevant criterion for determining admissibility under Decision

1 See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, paragraphs 123-127

2 See the required format for submitting a communication available via the UNECE website here, section VI (Nature of alleged non-compliance)

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1/7. Paragraph 21 of the Annex to Decision I/7 simply states: "*The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress*[3]" (underlining added). Similarly, paragraph 6(b) states: "*That the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies, in accordance with paragraph 21 of the annex to decision I/7*[4]". Neither of these provisions supersedes the Committee's obligation to consider admissibility against the criteria listed in Decision 1/7. Furthermore, as outlined above and in the Communication itself, there is no effective or timely remedy available to us domestically in the UK. In any event, as noted above, the UK does not dispute our characterisation of judicial review in the UK; nor does it dispute our characterisation of how the courts have responded to challenges to that approach; nor, critically here, does it suggest that there is any reason to think the UK courts might behave differently. The UK does not suggest what domestic approach it says could or should now be taken. That is not surprising because there is none. Even if the "exhaustion of domestic remedies" were a refusal criterion, there would be no possible basis for its application here.

- **Other points** – In raising the communication in the first place we were under no obligation to "*provide any details of specific measures the UK would need to ensure compliance with their generic allegations*" (paragraph 4). As it happens, we have suggested some possible ways in which compliance may be pursued (and can provide further clarification or information if that would be of assistance) but it is not our responsibility to direct the UK to specific measures. The purpose of bringing the Communication is to determine whether there has been, or (as in this case), there continues to be a breach of the relevant provisions of the Convention. It is the UK's responsibility alone to comply with the Convention, which they are not doing. They cannot shift that responsibility onto us.

Please let us know if the Committee would welcome any further information or clarification on any of the points in this letter before the discussion today.

Yours sincerely

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Mary Church, Friends of the Earth Scotland
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[3] See here
[4] See here

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