

Communication to the Aarhus Convention Compliance Committee

The UK's non-compliance with Article 8 of the Convention

when negotiating international free trade agreements

I. Information on the Correspondent submitting the Communication

The Communicants in this case are:

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II. The Party concerned

The party concerned by this Communication is the United Kingdom.

III. Facts of the communication and relevant background

1. The Aarhus Convention was signed by the United Kingdom (UK) on the 25th of June 1998 and ratified on 23 February 2005. Public participation is one of its three “pillars” as set out in Article 1:

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, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

2. At no point since ratification has the UK fully incorporated the Convention into UK domestic law. In particular, with regards to this communication, it has never introduced a statutory legal requirement that mandates Article 8 compliant public participation when negotiating free trade agreements (FTAs).
3. As a result of the UK's withdrawal from the European Union (the EU), the UK is now in a position to negotiate FTAs with third countries independently of the EU and has done so with a number of countries and is in the process of doing so with a number of others.
 - signed and ratified: EU, Japan
 - signed but not ratified: Australia, New Zealand, and a digital trade agreement with Singapore

- rolled-over many of the existing agreements that it had when a member of the EU¹,
 - some of the rollover agreements will also be renegotiated, e.g. the UK is currently negotiating new agreements with Canada and Mexico.
4. Article 8 of the Convention applies to the negotiation of FTAs on the basis that, and to the extent that, these involve the negotiation of 'generally applicable legally binding rules that may have a significant effect on the environment'. In this regard, the requirements of Article 8 are reinforced by those of Article 3(7) of the Convention, taking into account the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums (The Almaty Guidelines), adopted by the Parties to the Convention in 2005 (Decision II/4). The latter state that:

The opportunity to participate in a given international decision-making process should be provided at a stage when options are still open and effective public influence can be exerted

5. Current public participation arrangements for FTAs in UK: The current arrangements for public participation in relation to the negotiation and ratification of FTAs in the UK are seriously inadequate and do not comply with Article 8. To the extent that limited information is provided at certain stages of the negotiation this is not sufficient to meet the requirements of Article 8 as set out below:
- negotiating mandates: Government practice is to consult on its negotiating mandate before the commencement of negotiations: this is clearly not sufficient to satisfy Article 8 in itself (or as read with Article 3(7)) because it pre-dates any substantive negotiation between the parties which will determine the final text and therefore, the scope of the general rules to be agreed and the impacts which the FTA may have on the environment (Annexes 16 and 17). Further, the published negotiating objectives are frequently brief and high level which impedes effective public scrutiny and participation (even for the most expert reader) (Annex 15 and Annex 17).²
 - updates: updates on negotiations provided by the UK Government are insufficient because the Government does not invite comment on them, nor does it make any commitment to take into account any comments which may be received. These updates are also very high level and frequently say nothing about the substance of the negotiating drafts, thereby rendering effective participation impossible (Annex 18).
 - stakeholder groups: The Department for International Trade (DIT) has established a number of stakeholder engagement groups, including the Strategic Trade Advisory Group (STAG), Trade Advisory Groups (TAGs), and Thematic Working Groups (TWGs). These groups do not provide a basis for the public participation required under Article 8 for the following reasons:
 - members of the STAG, TAGs and TWGs are routinely required to sign confidentiality agreements meaning they would break the law if they were to share information more widely. Even with restrictive confidentiality agreements in place, the information that they receive is very limited;
 - while the STAG contains representatives of wider civil society, the discussions about trade agreements under negotiation are often at a high level and follow a timetable that is set by DIT. The STAG discussed the Australia agreement only a few times before it was signed, and there was no scope for detailed discussion of the text after it was finalised;
 - whilst the role of the TAGs includes individual trade negotiations, the membership is unrepresentative of wider society – see for example the agri-food group (which

¹ <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries>

²See Annex 15, p 69 and Annex 17, p 71

is of particular relevance as regards environmental impacts) which comprises almost entirely business groups and representatives.³ In 2021 a number of businesses complained publicly about the information being shared by government in relation to trade negotiations (Annex 7);

- **the Communicants note that the Implementation Guide makes clear that “authorities can ask for the assistance of particular experts or expert bodies, but the participation of experts is no substitute for the participation of the general public”⁴. The communicants contend the bodies referred to are primarily expert in nature and are therefore no substitute for the public participation required by Article 8.**
- publication of the final text of the FTA: The publication of the final text does not meet the requirements of Article 8 because the government does not give any indication that it seeks the views of the public on the final texts, nor that it would take views received into account.
 - publication of impact assessments: Although these are published, the same analysis applies since the UK does not consult on impact assessments. In any event, previous assessments have been criticised as inadequate, in particular because they did not include emissions from deforestation in their calculation of overall CO2 emissions caused by the FTA, even though the assessment itself recognised that deforestation in Australia was a concern (Annex 13).
 - status of current practices: The Communicants note that none of the steps referred to above are set out in legislation but are simply referred to in various written ministerial statements (Annex 1 and Annex 2) and in an exchange of letters between Parliamentarians (Annex 3). Such policy statements and correspondence do not give rise to enforceable statutory duties on government to take action and may be amended or revoked rapidly and without public or parliamentary scrutiny. This is not a sufficient basis for ensuring compliance with the requirements of Article 8 of the Convention and falls short of the duty to implement in Article 3(1).
 - Arrangements for the scrutiny of FTAs in the UK have been widely criticised including by Parliamentarians (Annex 4), civil society representatives (Annex 5 and 13), academics (Annex 6) and businesses (Annex 7). Little substantive change or improvement to the arrangements for public participation has been put in place in the last 3 years, despite the UK embarking on a series of trade negotiations following its exit from the EU.
 - Practice in other countries: the UK arrangements fall short of scrutiny practice in other countries. For example, the EU has far greater transparency arrangements, publishing the texts it puts forward in trade negotiations. The US has over 20 advisory committees which participate in reviewing the trade agreements it negotiates (see Annex 25 for more detail).
6. As set out further below the current arrangements do not meet the standard of “striving” to ensure public participation laid down in Article 8 since they do not provide for meaningful, timely and effective public participation (see sections 4 and 5 below). Furthermore, the UK has failed to address in any meaningful way the significant concerns raised by Parliamentarians and civil society.
 7. Parliamentary scrutiny: the definition of public authority in Article 2(2) of the Convention carves out bodies or institutions acting in a judicial or legislative capacity. This means that the general duties applied to public authorities do not apply to Parliament acting in a legislative capacity (see page 182 of the Guide). It follows from the terms of the Implementation Guide and decided cases (see section 5 below), that Article 8 aims to address the issue of public

³ <https://www.gov.uk/government/publications/trade-advisory-groups-tags/trade-advisory-groups-membership> The only representative of civil society on the TAG agri-food group is the National Farmer’s Union.

⁴ Implementation Guide – p.184 : [Aarhus Implementation Guide interactive eng.pdf \(unece.org\)](#)

participation prior to or separate from the consideration of draft rules by the legislature.⁵ Article 8 applies where measures are adopted as executive regulations and/or where public authorities have prepared drafts of legally binding rules to be submitted to the legislature. Article 8 of the Convention is intended to add an additional (to parliamentary scrutiny) opportunity for the public to participate when draft rules are prepared. Parliamentary scrutiny is clearly different from public participation and does not therefore avoid the need for good faith implementation of the (separate) requirements Article 8.

8. Public concern: the current arrangements for public participation exist within a context in which there is significant concern on the part of the general public as to the potential impact of FTAs on environmental law and policies in the UK (Annex 10).⁶ There is particular concern that the UK will come under pressure to lower its existing regulatory standards and/or will agree to do so. Furthermore, the risk that such agreements lead to ‘regulatory chill’ in the context of environmental regulation has been widely raised, including by a coalition of civil society organisations that issued a joint statement on their concerns with the UK- Australia FTA (Annex 13).

Environmental impact of FTAs:

9. The environmental impacts of rules adopted under FTAs are acknowledged in the UK’s impact assessments of trade deals it has already negotiated.⁷ For example, the impact assessment for the Australia-UK FTA (Annex 20) indicates that the agreement will have a negative impact on UK farming industries (with an estimated reduction of 0.7% in primary agriculture relative to baseline growth in the sector) (Annex 20, p 80), while recognising the risk that Australia’s agricultural activities pose for deforestation (Annex 20, p 81). Potential environmental impacts include:
 - a. their impacts on shifting production leading to an offshoring of environmental harm by encouraging production in countries with lower environmental standards to the disadvantage of countries with higher standards;
 - b. the long-term effect of a “race to the bottom” whereas increased competition leads to the erosion of environmental regulations in the country with higher standards;
 - c. impacts due to institutional mechanisms that they set up, such as Investor State Dispute Settlement (ISDS), which can lead to “regulatory chill”- the reluctance to regulate for higher environmental protections- or regression on environmental standards, for fear of being challenged by international investors that such measures contravene the agreement.

(a) offshoring of environmental harm

10. The agreements that the UK has negotiated with Australia and New Zealand involve a complete reduction of tariffs on key sensitive agricultural sectors with significant environmental impacts, such as beef and lamb (Annexes 17 and 19). Even with transitional

⁵ Page 181 of the Implementation Guide states: “The term “rules” is here used in its broadest sense, and may include decrees, regulations, ordinances, instructions, normative orders, norms and rules. It also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Article 8 establishes public participation in the preparation of such rules as a goal of the Convention, and sets forth certain requirements that Parties should meet in reaching it

⁶ Which?, Are the UK’s trade deals reflecting consumer priorities, December 2021

⁷ Australia-UK FTA: <https://www.gov.uk/government/publications/uk-australia-fta-impact-assessment>; New Zealand-UK FTA: <https://www.gov.uk/government/publications/uk-new-zealand-fta-impact-assessment#:~:text=The%20impact%20assessment%20on%20the,economic%20impacts%20of%20the%20agreement>; Japan-UK FTA: <https://www.gov.uk/government/publications/uk-japan-cepa-final-impact-assessment>

safeguard mechanisms in place, this significantly increases their competitiveness and likely presence on the UK market, and ultimately is likely to bring about increased market access for these products.

11. By way of examples:

- a. Australian beef production contributes to deforestation in Australia, which remains a significant issue, tree cover loss having risen by 34% between 2016 and 2018, which is in part driven by the need to clear space for livestock. Australian beef and lamb also perform significantly worse in terms of water use (weighted by scarcity) (Annex 9, p 40-41);
- b. the Agreement with New Zealand is likely to offshore environmental harm, as it allows tariff and quota-free import of foods from industrial agriculture that has significantly higher nitrogen and pesticide use than UK agriculture (Annex 10). Amongst other environmental harms this leads to severe water pollution, threatening New Zealand freshwater species.⁸

12. There is also great concern that recent FTA negotiations set a precedent in terms of parties' expectations as to what it is possible to agree with the UK in future FTAs with the United States, or Brazil (as part of MERCOSUR) both of which have much lower environmental standards of production. The potential for liberalisation of tariffs with no environmental conditionality for these trade partners could lead to significant offshoring of environmental harm. The EU-Mercosur Agreement indicates the significant environmental risk posed by increasing market access to Brazilian agriculture. A number of EU states and members of the European Parliament have indicated that they will not support the current version of the EU agreement due to the climate and deforestation risk it entails. Several studies have shown the likely impact of this agreement on increasing deforestation and other environmental harm.⁹ The UK negotiations face similar risks to those which led to the stalling of the EU agreement.

13. The US has significantly lower environmental standards in its food production than the UK. This was raised by stakeholders responding to the public consultation prior to the opening of the negotiations between the UK and the US (Annex 11). Concerns were raised as to the overuse of pesticides, and the risks to antimicrobial resistance due to use of growth-promoting hormones and antibiotics. There is a significant difference between the US's system for approving pesticides and other substances, and that applied in the UK. In the US, the so-called "science-based" approach requires scientific proof of harm in order to ban a substance, whereas the "precautionary approach" allows products to be banned where there are concerns about potential harms, even when there is not yet strong scientific evidence.¹⁰ Trade agreements such as the one with the US risk compromising the UK's ability to adopt precautionary legislation, which is a key element of environmental protection, as well as protection of human health.

14. Minimum Residue Limits in pesticides - recent changes to the process for setting minimum residue limits (or MRLs) for pesticides in food are relevant here. These have resulted in fewer safeguards, no duty on ministers to take account of science and little if any scrutiny of the process (changes may now be prescribed without any legislative step at all) (Annex 24).

⁸ Ministry for the Environment & Stats NZ, New Zealand's Environmental Reporting Series: Environment Aotearoa 2019, <https://environment.govt.nz/publications/environment-aotearoa-2019/>, April 2019; Ministry for the Environment & Stats NZ, Our freshwater 2020 Summary, <https://environment.govt.nz/publications/our-freshwater-2020/>, April 2020

⁹ See for example: FERN, Measuring the impact of the EU-Mercosur trade deal on land use, forests, and the people who depend on them, <https://www.fern.org/publications-insight/measuring-the-impact-of-the-eu-mercosur-trade-deal-on-land-use-forests-and-the-people-who-depend-on-them-2266/> December 2020

¹⁰ Trade Justice Movement, A US-UK trade deal: issues from a civil society perspective, https://www.tjm.org.uk/documents/briefings/1253_TJM_US-UK-Trade-Deal-report_Jun20_final.pdf, June 2020

(b) erosion of environmental regulation

15. By opening market access to food produced to much lower environmental standards, UK farmers are forced to compete with producers operating to lower standards, which may lead to pressure from UK producers either to lower UK standards or decrease the volume of higher standard production in the UK. The use of pesticides sets a very clear example of this mechanism (Annex 12). The Australia FTA is likely to increase imports of products that have been produced at lower cost by using pesticides that would not be permitted in the UK, as recognised in the Trade and Agriculture Commission's report.¹¹ New Zealand also uses significantly more pesticides than the UK, and the UK's future negotiating partners including Brazil, operate to significantly lower environmental practices, and are demanding market access for their agricultural produce.¹²
16. There are also significant concerns about the standards regarding pesticide use in the countries which are partners to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). If the UK joins the CPTPP, which it plans to do by the end of 2022, it opens its market to 119 pesticides currently banned in the UK for health and environmental reasons.¹³

(c) regulatory chill

17. There is a risk that future FTAs could proliferate the use of mechanisms which may limit the Government's freedom to regulate on environmental issues, such as Investor State Dispute Settlement (ISDS). ISDS is part of the Comprehensive and Progressive Trans-Pacific Partnership for example and it will bind the UK unless a carve out is negotiated. ISDS has been used to bring claims against states that have sought to limit environmentally harmful activities on their territories.¹⁴ The link between trade and environment is also recognised by key UK advisory bodies such as the Committee on Climate Change (Annex 14).

IV. Provisions of the Convention alleged to be in non-compliance

18. Article 8 provides:

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

19. Article 3(1) requires that:

¹¹ Trade and Agriculture Commission's report on the UK-Australia trade deal, p. 37, <https://www.gov.uk/government/publications/uk-australia-fta-advice-from-trade-and-agriculture-commission>, April 2022. The Trade & Agriculture Commission is a body set up by government (under the Trade Act 2021) to advise it as to whether trade agreements are consistent with maintaining UK levels of environmental protection in relevant legislation.

¹² PAN-UK, Sustain, and Dr Emily Lydgate Toxic Trade Brazil, <https://www.sustainweb.org/publications/feb22-toxic-trade-uk-brazil/>, Feb 2022

¹³ Financial Times, UK hopes to conclude deal with Pacific trade bloc this year, <https://www.ft.com/content/e667e5cf-cea7-4a1a-a4b1-f009a93190f9> May 2022

¹⁴ <https://www.italaw.com/cases/1606>

Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

20. **The Communicants note that a finding that Article 8 does not apply to the negotiation of draft rules under FTAs would open up a major lacuna in the system of protection afforded under the Convention and undermine the effectiveness of public participation provisions applied at later stages of implementation of those rules, given the degree to which rules under FTAs determine rule-making at the national levels. This would undermine the effectiveness of the Convention as a whole and the prospects that state parties will deliver the objectives set in Article 1 of the Convention. Public participation in FTA negotiations has the potential to promote standards of environmental regulation, whilst guarding against regulatory chill and regression. This in turn protects the standards laid down in international environmental agreements.**

First issue - Article 8 applies to FTAs

21. 'generally applicable': The rules laid down under FTAs are clearly of general application rather than being confined to specific individuals or activities. FTAs will be implemented through generally applicable measures and regulations, as discussed above.
22. 'legally binding': The Communicants recognise that Article 8 does not expressly refer to the negotiation of international trade agreements (including bilateral agreements) however, Article 8 expressly applies in broad terms to 'other generally applicable legally binding rules that may have a significant effect on the environment'. As indicated above, FTAs address environmental regulation and standards and to this extent are covered by Article 8. The fact that these are international agreements does not prevent their being covered by Article 8 on the basis that:
1. the Convention expressly requires the principle of public participation to be respected at the international level including in bilateral negotiations (see second issue below);
 2. these agreements are binding under public international law and this has some direct legal consequences under UK domestic law (see below);
 3. under the Ministerial Code, Ministers commit to comply with international legal obligations (see below);
 4. the UK will have to implement the requirements of the FTA in domestic law and this may result in a lowering of environmental standards and/or regulatory chill (see above).
- (1) express provision of Convention
23. The Communicants note that other provisions of the Convention, in particular Article 3(7), address international decision-making and international relations. International relations are also referenced in articles 4(4) and agreements by article 5(5). These facts are underlined by the Almaty Guidelines which appear to take public participation in international decision making as a function of the Convention, as read (see above section II).
24. These provisions confirm that the principles and standards of the Convention are to be applied in relation to decision-making by state parties at the international level. This also follows from a purposive interpretation of the Convention in view of the significant implications of international agreements, and in particular FTAs, for the lowering of standards set by environmental laws at the national level.
25. Turning to standard methods of construction of international law, the object and purpose of the Convention are set out in Article 1. Given these facts, the broad language used in Article 8 and the significant implications of FTAs for the protection of the environment (see above), it follows from Article 31(1) Vienna Convention on the Law of Treaties that Article 8 should be interpreted so as to address rules which flow from or form part of FTAs also. The purpose of

Article 8 is clear – to ensure that the public are entitled to participate in environmental law making which meets the formulation in Article 8 (see above) but is not caught by Articles 6 and 7. It follows that a broad construction should be adopted.

26. The fact that the environmental impacts identified arise from international rules rather than domestic law is irrelevant – the primary consideration is that environmental impacts arise as a result of the proposed law. In any event, Article 8 does not distinguish between domestic and international law (the Convention clearly applies to international negotiation and decision making) and its purpose would be frustrated if it did.

(2) international agreements are binding

27. Although the mere fact of ratification of a treaty by the executive at the international level does not serve, itself, to create rights or obligations at the domestic level *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at pages [499]-[500] (per Lord Oliver), unincorporated international treaties can nevertheless have domestic legal consequences under UK law, as discussed recently by the Court of Appeal in *Heathrow Airport Limited v HM Treasury* [2021] EWCA Civ 783. In that case, the Court referred to five non-exhaustive examples laid down by Lord Oliver in the *Tin Council* case (para 155).

(3) Ministerial Code

28. Furthermore, whilst treaties (without further implementation) are not generally justiciable in domestic courts in the UK, they are nonetheless binding on ministers. FTAs are legally binding on the basis that, even without further implementation, they bind ministers across their (broad) scope, because UK ministers commit to comply with their international law and treaty obligations under the Ministerial Code, see *R (on the application of Gulf Centre for Human Rights) v Prime Minister and another* [2018] All ER (D) 108 (Aug) [2018] EWCA Civ 1855.

(4) FTAs may have environmental impact

29. Section 3 above addresses this point.

Stages of negotiation at which Article 8 applies

30. Set out below are the stages of negotiations to which Article 8 applies, taking into account Articles 3(7), 4(4) and 5(5) of the Convention. All these stages directly influence the adoption of the eventual FTA and are therefore relevant to the implementation of Article 8. The Communicants recall that Article 8 requires public participation when such rules are “under preparation”. Given the nature of international law making, it follows preparation in this context includes negotiation since that is how international conventional law is prepared. The duty therefore extends to negotiating drafts and mandates as indicated below.

- Article 8 applies to negotiating mandates/objectives as these frame the proposed rules which the state party is aiming to enshrine at the international level albeit subject to negotiation (and in practice are generally highly influential as to the final outcome since they lay down a framework for negotiations). In any event the further stages of negotiation are clearly covered by Article 8 for the reasons set out below;
- Article 8 also applies to negotiating drafts on the same basis. The Communicant recognises the potential sensitivity of publishing negotiating positions (although the EU does now do this in relation to FTAs) but this concern is accommodated in the softer language used to frame Article 8: Parties ‘shall strive to promote...the following steps should be taken’ (as compared to Articles 6 and 7 for example) which allows for some discretion. It does not follow, however, that Article 8 does not impose a requirement on State Parties to take concrete measures. As stated in the Implementation Guide:

This area of activity is covered by a comparatively soft obligation to use best efforts, and uses indicative rather than mandatory wording for the steps to be taken. Nonetheless, article 8 should be interpreted as obliging the Parties to take concrete measures in order to fulfil the objectives of the Convention (page 181, emphasis added)

The UK has failed to use best efforts to implement Article 8 in the context of FTA negotiations for the reasons set out above.

- In relation to the application of Article 8 to final texts of FTAs, these fall within its scope of Article 8 on the basis that these are rules which will be both binding under international law and which will require implementation (as binding rules) at the national level. In relation to future FTAs entered into by the UK, implementation may take place through the adoption of secondary legislation which is not generally made subject to parliamentary debate (using the negative procedure) and frequently not subject to any public consultation at all. These arguments are underlined by the Almaty Guidelines which make clear that public participation in international decision making processes should be *“provided at a stage when options are still open and effective public influence can be exerted (emphasis added)”*

Second issue: legal implications of FTAs prior to domestic implementation.

31. The communicants recognise there will be some differences as to the way in which Article 8 is implemented as between monist and dualist state parties to the Convention but in all cases the key elements of Article 8 as outlined below will have to be met by all state parties. In the case of the UK, a dualist state, Article 8 is relevant to the negotiation of FTAs on the basis that UK negotiating mandates and texts result in the adoption of agreed articles and final texts of FTAs. In practice, these often confer very limited discretion on a state as regards implementation (see for example tariffs which, by definition, tend towards a “copy out” approach to implementation).
32. International law further constrains the discretion of the state in this regard, since Article 18 VCLT requires the UK to refrain from acts which defeat the object and purpose of the FTA. This indicates that relevant provisions of the FTA in relation to environmental standards constitute draft rules falling within the scope of Article 8. The implications of Article 18, even prior to ratification, can be said to close down options which would arguably defeat the object and purpose of the FTA. Thus, if Article 8 is to be applied when options remain open, and in a way which does not disadvantage one type of legal system over another, it should apply prior to signature of the FTA. The Communicants reserve their position on the way in which Article 8 applies to the draft rules arising under an FTA post signature.

Third Issue: Minimum requirements of Article 8

33. The softer language used in Article 8: Parties ‘shall strive to promote...the following steps should be taken’, means that state parties enjoy a measure of discretion as to the measures which they should take in this context, provided that they meet at least the minimum requirements as laid down in Article 8. It follows that, in the context of rules arising from FTAs, the UK must be able to show that it has ‘striven’ to take the steps specified in Article 8 ‘at an appropriate stage and while options are still open’ in the context of negotiating those FTAs. Article 8 sets out what are described in the Guide as the ‘minimum’ three elements that must be implemented in order to promote effective public participation:
 - a. time frames should be fixed that are ‘sufficient for effective participation’;
 - b. draft rules should be published or otherwise made publicly available; and
 - c. the public should be given the opportunity to comment, directly or through representative consultative bodies
 - d. finally, the result of the public participation shall be taken into account as far as possible.
34. As indicated above, the current arrangements do not meet these requirements as regards time frames for sufficient effective participation, publication or the opportunity to comment.

Fourth Issue-Relationship between Article 8 and Parliamentary Scrutiny

35. The definition of a public authority in Article 2(2) of the Convention does not include bodies or institutions acting in a judicial or legislative capacity. This means that the general duties applied to public authorities do not apply to Parliament acting in a legislative capacity (see page 182 of the Guide). It follows from the terms of the Implementation Guide and decided cases (see section 5 below), that Article 8 aims to address the issue of public participation prior to or separate from the consideration of draft rules by the legislature. Article 8 applies where measures are adopted as executive regulations and/or where public authorities have prepared drafts of legally binding rules submit to be submitted to the legislature.
36. It is not sufficient, in order to meet the requirements of Article 8, for the UK to rely on parliamentary scrutiny to fulfil those obligations in the context of the negotiation of FTAs. As indicated above, those arrangements do not enable the public at large to comment on the process of negotiation and do not allow for public consultation on draft or final texts. Parliamentary scrutiny is wholly separate from public participation as conceived in the Convention and Article 2 suggests parliament is not within scope of the Convention in any event. Article 8 of the Convention is intended to add an additional (to the parliamentary scrutiny) opportunity for the public to participate when draft rules within its scope are prepared.
37. In the light of the exclusion for bodies acting in a legislative capacity laid down in Article 2(2) and given the implications of FTAs for generally applicable rules relating to the environment, the UK must strive to ensure that the minimum three elements set out in Article 8 are met prior to /in addition to Parliamentary scrutiny.

V. Nature of alleged non-compliance

38. This is addressed above in sections 3 and 4. In summary, the current arrangements for effective public participation in the negotiation of FTAs do not to meet the elements laid down in Article 8 in the following respects:
 - a. time frames for effective public participation are not laid down so as to ensure that these are 'sufficient for effective participation' (there is limited public consultation and time frames are not fixed)
 - b. other than in the form of the negotiating objectives (which are expressed in very general terms), the draft rules are not published. Negotiating texts are not published;
 - c. there appears to be no opportunity for the public to comment directly or through representative consultative bodies on drafts or on final texts.
39. It follows from the language of Article 8, taken in the context of the Convention as a whole and bearing in mind the duty to implement and interpret the Convention in good faith as set out in Articles 26 and 31 VCLT, that the UK must be able to show that it has 'striven' to take the steps specified in Article 8 at 'an appropriate stage and while options are still open' in the context of negotiating FTAs. The UK has consistently failed to meet these requirements of Article 8 in relation to the negotiation of FTAs with potentially adverse implications for a wide range of environmental laws, policies and impacts more broadly.
40. In a context where there are significant grounds for concern as to the lowering of a potentially wide range of environmental standards without the opportunity for public participation before the finalisation of FTAs and before the adoption of secondary implementing legislation (which itself may be the subject of only very limited parliamentary scrutiny or consultation), the implementation of Article 8 should secure the effective fulfilment of the objective of the Convention and the public participation principles provided in Article 8 should be respected.

Aarhus Convention Compliance Committee Jurisprudence

41. The ACCC has confirmed the broad scope of Article 8 more generally. In 2011 in relation to ACCC/C/2009/44 (Belarus) the ACCC stressed that:

...the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment, which should be considered as including acts dealing with procedural matters related to authorization of activities subject to environmental assessment, as well as to public participation in environmental matters (para 61, emphasis added)

42. The ACCC has confirmed in ACCC/C/2010/53 (United Kingdom) that:

The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient time frames for the public to consult a draft and comment). Parties are then left with some discretion as to the specificities of how public participation should be organized.

43. In the same case, the ACCC confirmed that Article 8 made it mandatory for the result of public participation to be taken into account as far as possible and ‘in practice it means that the final version of the normative instrument ... should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.’ (para 85, emphasis added) These findings were confirmed again in 2017 in relation to a request for clarification by Belarus.

VI. Use of domestic remedies

44. The UK has not directly implemented Article 8 of the Convention. There is therefore no way for UK citizens to raise these issues before UK courts or tribunals and assert their rights under Article 8. As set out above, this failure raises questions as to whether the UK is, in turn, in breach of the duty in Article 3(1) to implement the Convention. However, the Communicants have raised their concerns with UK ministers responsible for international trade on multiple occasions. In 2021, they wrote twice to the then Secretary of State for International Trade, Liz Truss, setting out how the scrutiny arrangements fell short. The criticisms were not taken on board in the government’s replies to these letters.

45. After observing no improvement on scrutiny arrangements, the Communicants wrote to the newly appointed Secretary of State, Anne-Marie Trevelyan on two further occasions (in March and May 2022). The second of these letters (Annex 22) set out the Communicants’ argument as to why the current approach may be breaching the Aarhus Convention. The government responded rejecting our criticisms and has not given any indication that they intend to improve the arrangements for public participation (Annex 23).

VII. Use of other international procedures

None available

VIII. Confidentiality

The Communicant does not request that confidentiality be maintained in this matter.

IX. Supporting documentation (copies not originals)

See list of enclosures attached.

X. Signature

Becky Spencer, Interim Director of Advocacy, WWF-UK

Handwritten signature of Becky Spencer in black ink.

Rebecca Newsom, Head of Politics, Greenpeace-UK

Handwritten signature of Rebecca Newsom in black ink.

Shaun Spiers, Executive Director, Green Alliance

Handwritten signature of Shaun Spiers in black ink.

Kath Dalmeny, Chief Executive, Sustain

Handwritten signature of Kath Dalmeny in black ink.

George Dunn, CEO, Tenant Farmers Association

Handwritten signature of George Dunn in black ink.

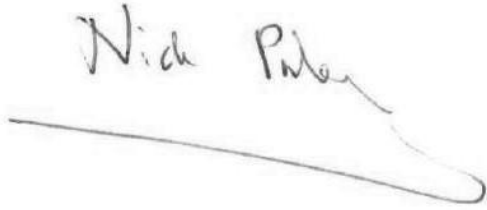
Ruth Bergan, Director, Trade Justice Movement

Handwritten signature of Ruth Bergan in black ink.

Rob Percival, Head of Food Policy, Soil Association

A stylized, handwritten signature in black ink, appearing to read 'Palmer'.

Dr Nick Palmer, Head of Compassion in World Farming UK

A handwritten signature in black ink, reading 'Nick Palmer', with a long horizontal line underneath.