Aarhus Convention Compliance Committee communication: PRE/ACCC/C/2022/194

Admissibility hearing - 13 September 2022

Communicants' speech

Introduction

1. My name is JW. I am head of legal for A&C at WWF-UK. I appear on behalf of the Communicants in relation to the communication [PRE/ACCC/C/2022/194] to the Committee concerning non-compliance by the UK with Article 8 of the Convention. The Communicants argue that Article 8 applies to the negotiation of free trade agreements (**FTAs**) on the basis that, and to the extent that, these involve the negotiation and adoption of 'generally applicable legally binding rules that may have a significant effect on the environment'. We contend that the UK is in breach of Article 8 as set out more fully in the Communication.
2. The purpose of these remarks is to give the Committee a brief overview of our concerns and address the admissibility of the complaint, taking into account the admissibility criteria set out in paragraph 20 of the annex to Decision I/7.

Background

3. The Communicants consist of a number of NGOs including Greenpeace, Trade Justice Movement and the Tenant Farmer's Association who, like many members of the public in Britain, are concerned about the risk which FTAs pose to environmental laws and standards in the UK.
4. This makes the arrangements for public participation in relation to those agreements very important. Yet the Communicants contend that those arrangements are inadequate and unlawful because contrary to Article 8 (summarised at para 5 of the Communication).
5. As fully set out in the Communication (paras 9-17), it is well established that FTAs can impact the environment – for example by offshoring environmental harm (to countries with lower environmental standards). Further, specific mechanisms such as Investor State Dispute Settlement, can create regulatory chill by deterring states from maintaining or improving environmental laws because of the risk of investor claims against them under the terms of the FTA.
6. The UK government concedes the environmental impact of FTAs – see for example its impact assessment of the Australia FTA on which our communication focusses. We point to examples such as the use in Australia of neonicotinoid pesticides, which harm pollinators and are banned in the UK, as well as Australia's poor record on deforestation linked to cattle grazing (which is the worst in the OECD).

Summary

7. We contend that, taking account of the broad language of Article 8, as well as Article 3(7), 4(4), 5(5) and the object and purpose of the Convention, Article 8 applies to the negotiation of, and rules adopted in, FTAs insofar as these relate to and/or have an impact on the environment. We recall that the requirements of Article 8 are reinforced by those of Article 3(7) of the Convention which requires states party to "promote the application of the principles of the Convention in international environmental decision making processes". This duty is further underlined by the Almaty Guidelines which 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."

8. Finally, as set out in the Communication (paras 5-6, 33) the current arrangements in place in the UK do not meet the standard of "striving" to ensure public participation laid down in Article 8 since they do not provide for meaningful, timely or effective public participation.

Admissibility / UK govt arguments

9. The UK seeks to argue that the Communication is manifestly unreasonable (para 20(c)) or incompatible with the provisions of the Convention (para 20(d)) and has set out an interpretation of Article 8 contrary to that put forward by the Communicants in a 7 page submission received on 9 September.
10. Clearly the communicants have had limited time in which to consider the UK's arguments. However, we would make two preliminary points in response: **first** it is clear that the question of the interpretation of A8 in this context merits detailed consideration at a full hearing, given the undisputed public importance of the issues raised and of the implications of the Committee's decision on this issue. S**econd**, the UK submissions themselves indicate clearly the room for discussion as to the correct interpretation of the language and intent of the Convention on this important issue. In particular, it is evident that the issues of interpretation are tied to the implications of FTAs under international and domestic law and the relationship between these in the light of A8 of the Convention. These issues are not susceptible of resolution in a short preliminary hearing.
11. The UK takes a different view of Article 8 to the communicants (UK paras 6-9) but, again, the interpretation of Article 8 in the context of the Convention as a whole, having regard to its language and to the object and purpose of the Convention, clearly requires consideration at a merits hearing. The UK has not demonstrated that it is 'manifestly

unreasonable' to adopt the interpretation set out by the Communicants, simply that it takes a different view (see para 9).

12. Notwithstanding the equivocal language in the UK's Submissions (para 5(iii)), the UK has not disputed that the current and future FTAs will be binding on the UK under international law. Indeed it would be surprising if it took any other position before this Committee. The distinction the UK seeks to draw between a rule that is 'generally applicable' within the meaning of Article 8 and one which binds the general population is another issue that requires examination at a merits hearing. The UK does not dispute that FTAs bind UK Ministers, which means they are bound to respect the terms of the FTAs, including in relation to provisions relating to or impacting on the environment, when performing all their legal functions. The communicants say that this "general application" across the range of ministerial functions is sufficient for the purposes of Article 8. If it were not, the requirement to consult "whilst options are still open" would be defeated.
13. The UK concedes that FTAs may have legal effects in domestic law, albeit 'limited' (see UK para 5(ii)(b)). The importance of the exceptions summarised in the recent *Heathrow* judgement of the UK Court of Appeal (cited by the UK) indicate clearly that even within these exceptions, provisions of FTAs could have important implications for domestic environmental law (see judgment para's 155, 164). Yet the UK has nothing to say on the degree to which it is bound in national (ministerial code) and international (Article 18 VCLT) to adhere to the FTA. Again these are issues that should be addressed before a full hearing on the interpretation of A8.
14. The Communicants also point out that Article 3(7), which the UK does not dispute is directly applicable to FTA negotiations, does not undercut the importance of Article 8 in this context. Our case is that the two provisions, A3(7) and A8, reinforce and complement each other. Both allow a degree of discretion to state parties in the manner of their implementation (C paras 30,33,37) but this does not detract from the need to meet their core requirements in fulfilment of the objective of the Convention. The UK concedes that it is perfectly possible to consult on international negotiations (UK para 7). The Communicants point out that this is, for example, EU practice. Any interpretation of A8 based on the impossibility of doing this is clearly unsustainable (and beside the point given the question before the committee is one of legal interpretation).
15. In relation to paragraph 20(d) of Decision I/7, we contend that for the purposes of Article 8, international agreements are "adopted" at the time the text is finalised by the parties. After that point, options are not meaningfully "open" within the meaning of Article 8 and the discretion of the state as regards implementation of the agreement is

constrained under both international law (Article 18 of the Vienna Convention) and domestic law (the UK Ministerial Code). Furthermore, the implementation of the FTA may be secured through secondary legislation which allows for only very limited public participation (C paras 30 and 40).

16. 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 FTAs determine rule-making at the national level. This would undermine the effectiveness of the Convention as a whole. Public participation in FTA negotiations has the potential to promote standards of environmental regulation, whilst guarding against regulatory chill and regression. Where there are significant grounds for concern that the adoption of FTAs will lead directly to the lowering of a wide range of environmental standards without sufficient opportunity for meaningful and effective public participation, compliance with Article 8 is imperative.
17. **In conclusion**, **the Communication is neither manifestly unreasonable nor is it inconsistent with the Convention. The issues raised are of general importance and are not the subject of any prior ruling by the Committee. They should be addressed at a substantive hearing during which both parties can present more detailed arguments to the Committee for their full consideration**.