Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with Free Trade Agreements (PRE/ACCC/C/2022/194)

The seventy-sixth meeting of the Aarhus Convention Compliance Committee

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NOTE OF THE ORAL PRESENTATION ON ADMISSIBILITY
By Nick Grant
On behalf of
THE GOVERNMENT OF THE UNITED KINGDOM

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1. Thank you chair, members of the Committee, for the opportunity to participate and for your kind words earlier.

2. The United Kingdom ("**UK"**) has submitted detailed observations on the admissibility of this complaint. We ask that those be looked at in deciding on preliminary admissibility. These short submissions highlight key points.

3. It is the UK's case that this communication is inadmissible. In line with the canons of construction set out in Articles 31 and 32 Vienna Convention on the Law of Treaties ("**VCLT**"), Article 8 of the Convention does not apply to the negotiation of Free-Trade Agreements ("**FTAs"**). The references to a failure to implement Article 3(1) are, we understand, parasitic on that Article 8 complaint, and therefore also fall away. This is a short point of construction, which is clear enough to be dealt with at admissibility stage.

4. By way of two preliminary points:

   (i) The UK does not accept that it has made the concessions the Communicants suggest in their opening. They may misunderstand our response – I won't deal with them all but ask the Committee simply to double check any suggestions from Communicants about what we have or have not said.

(ii) Our detailed response did not deal with a number of points, such as the allegations regarding the Ministerial Code. Again these are not concessions – the UK is reserving its position and, given it did not think those needed to be entertained in order to resolve this admissibility question, has tried not to burden the Committee with additional extraneous information.

5. Turning to interpretation:

6. First, with regard to **wording**, Article 8 applies

> "during the preparation by public authorities of executive regulations and other generally applicable legally binding rules"

7. While of course the heading to Article 8 refers to "norm", we understand that to be an attempt to ensure that state Parties cannot avoid the need to comply by using terms other than "rules" or "regulations". What it is not intended to do is expand the reach of Article 8 beyond the core concepts which the operative text covers.

8. From that text we note:

(i) That the rule in question must be "*prepared*" by public authorities. That implies they have control over the process. That is not the case with FTAs.

(ii) The meaning of "*generally applicable legally binding rules*" is limited to same class as "*executive regulations*" – applying the *ejusdum generis* principle. An executive regulation is a legally binding rule, unilaterally imposed, applicable to the population as a whole. "*[G]enerally applicable legally binding rules*" must therefore be of the same class or genus. The reference to them being "*generally*" applicable particularly reinforces this point. However, that is simply not apt to apply to FTAs - they do not create obligations which are generally applicable to the individual members of the population.

9. As to **context**: the UK's interpretation is clear from the context. The Convention itself distinguishes between national obligations and international treaties. The

international obligation placed on state parties is Article 3(7). The Communicants suggest a nebulous reading where Article 8 and Article 3(7) reinforce one another. This is a stretched reading, and would depart from the clear scheme set out in the Convention. This is a carefully calibrated Convention, negotiated over a period of years. If Article 8 steps were required by Article 3(7), or Article 8 were to be applied to FTAs, it would have been easy for the Parties to explicitly say so. The Convention contains no such wording. Moreover, the other three pillar obligations are national in scope.

10. As to **object and purpose**: Article 1 makes clear what the objective of the Convention is. The Communicant argues for an expansive reading of Article 8 and suggests there is a lacuna if their interpretation is not preferred. However:

    (i) Article makes clear that the objective is for the Parties to guarantee the three pillars "*in accordance with the provisions of this convention*". What is key, therefore, is what the convention itself guarantees, and for that one has to look at the wording. That supports the UK's view as set out above.

    (ii) The lacuna suggestion will always lead for an expansive reading but the question is what the parties agreed, and that is clear from the words used. *Even if* this Committee were to consider that the object of "*contribut[ing] 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*" would be *better* served if Article 8 applied to FTAs, the question is whether the Parties *agreed* to that expansive approach. The Convention provides an agreed minimum, not a maximum, and is the product of compromise. Accordingly, there are limits to what the Parties agreed and in this case there is simply no indication the Parties intended to go as far as the Communicants suggest.

11. Finally, of course, there is what we in our written response call the 'sense check'. This is set out in full in our written submissions.

12. For those reasons, the UK submits, Article 8 quite clearly does not apply to treaty negotiations and this complaint is inadmissible within the meaning of paras. 20(c) and/or (d) of Decision I/7.

NICK GRANT

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