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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

12 May 2023

Dear Ms Marshall,

Re: Communication ACCC/C/2022/194

Please see attached the United Kingdom's submission on the case referred to above. I have sent 48 annexes.

I would be grateful if you could confirm safe receipt of this response.

Yours sincerely,

Tom Fuller
UK Focal Point to the UNECE Aarhus Convention
Department for Environment, Food and Rural Affairs (DEFRA)
UK Government

B E F O R E:

THE AARHUS CONVENTION COMPLIANCE COMMITTEE
UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACCC/C/2022/194
(THE FREE TRADE AGREEMENTS CASE)

OBSERVATIONS ON BEHALF OF
THE GOVERNMENT OF THE UNITED KINGDOM

Introduction

1. By a communication (the "**Communication**") received by the Aarhus Convention Compliance Committee (the "**Committee**") on 10 August 2022, complaint is made by a coalition of NGOs (the **"Communicants"**) in relation to what is said to be the United Kingdom's ("**UK**") failure to comply with Articles 8 and 3(1) of the Aarhus Convention (the "**Convention**") during the negotiation of Free Trade Agreements ("**FTAs**") with third countries.

2. In summary, the complaint is that

   (i) FTAs are "*generally applicable legally binding norms*" which may have a significant effect on the environment through (a) offshoring environmental harm (b) eroding environmental regulation or (c) leading to regulatory chill: Communication paras. 9-17, 21-29, 31-32. They therefore fall within the scope of Article 8, and do so from the earliest stages: Communication para. 30.

   (ii) The public consultation processes provided for by the UK during the negotiation of FTAs, as summarised in Communication para. 5, fall short of the standard required by Article 8: Communication paras. 33-34, 38-40. In particular, time frames are not laid down to ensure effective participation,

draft rules and negotiating texts are not made public, and there is no opportunity for the public to comment either directly or through representative consultative bodies on drafts or final texts: Communication paras. 38-39. In that connection, the UK cannot rely on Parliamentary Scrutiny because parliament is acting in a legislative capacity: Communication paras. 35-37.

(iii) The fact that UK citizens cannot raise these issues before UK Courts or Tribunals raises questions as to whether the UK is in breach of Article 3(1) of the Convention.

3. In summary, the UK's response is:

(i) Article 8 does not apply to the negotiation of FTAs. To the extent that any Article of the Convention might apply to international agreements, it would be Article 3(7) not Article 8, but Article 3(7) does not apply to FTAs and this Communication does not, in any event, seek to allege any breach of Article 3(7);

(ii) If that is wrong, and it does apply, the requirements of Article 8 are clearly satisfied; and

(iii) The Article 3(1) complaint is manifestly ill founded.

(I) Application of Article 8 to FTAs

4. The UK reiterates its point, made at the preliminary admissibility stage, that Article 8 does not apply to the negotiation of FTAs.

Not an executive regulation or other generally applicable legally binding normative instrument

5. Article 8 applies to "*executive regulations and other generally applicable legally binding rules*" per its operative text. The heading refers to "*normative instruments*". While the heading might have some relevance to the interpretation of Article 8 it is not part of its operative text. A FTA is plainly not an "*executive regulation*" and the Communicants do not allege it is. The UK submits it also does not fall within the meaning of a "*generally applicable legally binding*" normative instrument or rule, applying the rules of interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT"**)[1].

6. First, this approach follows from the ordinary wording of the Convention. The following points should be noted from the wording of Article 8:

   (i) Article 8 applies during the "*preparation by public authorities*" of rules, norms etc. This strongly implies that the scope is limited to the drafting of regulations etc. by public authorities (that is to say, "*Government at national, regional and other level*", see Article 2(2)) within a state Party (if those regulations have a significant effect on the environment). On the ordinary meaning of the terms,[2] this language is not apt to cover the negotiation between states (one or more of which may not even be a party to the Convention) of international treaties.

   (ii) The references in Article 8 to the concept of "*normative instrument*" or "*rule*" must be read alongside the reference to the concept of "*executive regulations*", as (a) that is part of the context in which they appear (per Article 31(1) VCLT) and (b) through an application of the *ejusdum generis* principle.[3] Executive regulations are legally binding rules created by the executive with which the population of a state must comply. The broader

[1] Attached as **Annex 1**.
[2] Per Article 31(1) VCLT.
[3] Applicable in modern treaty interpretation: see Aust *Modern Treaty Law and Practice* (Cambridge University Press, 3rd Ed 2013), pages 220-221 attached at **Annex 2**.

references to norms or rules are intended to catch systems which use different nomenclature, and/or perhaps rules which are not immediately executable (such as, for example, policies which must be applied in decision making). But there is no indication that this is intended to go wider and apply to the negotiation of FTAs. So, for example, the *Implementation Guide*[4] at p. 182[5] suggests:

> "Because different legal systems may use different terminology for various forms of normative acts, the Convention uses wording to try to avoid any unnecessary narrowing of the concept of "executive regulations". In some legal systems this term might be interpreted to cover only immediately executable rules. Therefore, to erase all doubt, Article 8 refers to other generally applicable legally binding rules as well. The title also helps to explain what is meant by such rules by using the term "normative instruments" in the same manner. Such generally applicable legally binding rules include decrees, regulations, ordinances, instructions, normative orders, norms and rules." (p. 182)

What links all of these concepts together is the idea that the executive of a particular state Party has imposed a norm on the populace of the state concerned, with which they must comply. See e.g. ACCC/C/2010/53 (United Kingdom) (the Edinburgh Tram case)[6] [83] pointing out that one of the reasons a measure fell within the scope of Article 8 was because it created "*binding legal obligations*" (unlike, say, a plan or programme).

(iii) Third, that interpretation (that the executive has imposed a rule on the population with which it must comply) is supported by the use of the word "*generally*" in "*generally applicable*". Again on the ordinary meaning of the words[7], this indicates the norm has to be of general, rather than specific application.

7. None of those features apply to FTA negotiation:

[4] *The Aarhus convention: An implementation Guide* (2nd Ed, 2014).
[5] Attached at **Annex 3**.
[6] Attached as **Annex 4**.
[7] Per Article 31(1) VCLT.

(i) No public authority within a state Party has complete control of the final text of a FTA. The entire process is by definition a negotiation between two or more different states (one or more of which may well not even be a party to the Aarhus Convention as is the case with some of the examples cited by the Communicants e.g. Australia, over which no single party has control). So, it is not the product of a unilateral act by any state Party to the Convention.

(ii) In the UK's dualist legal system, FTAs do not create rules or norms of general application. There are a number of sub-points:

a. The UK is a dualist legal system. As a matter of internal constitutional law, the power to negotiate, conclude, consent to be bound by, amend and withdraw from treaties is exercisable by the executive – without the need for parliamentary authority. However, by the same token, a treaty cannot itself create, modify, or abolish rights or obligations under domestic law. Where the implementation of a treaty necessitates a change in domestic law, legislation is required: *Halsbury's Laws of England: International Law and Foreign Relations* (Vol 61, 2018) at paras. 19-26[8]. This is acknowledged by the Communicants. As set out by the House of Lords in ***J.H.Rayner (Mincing Lane) Ltd v Department of Trade and Industry*** [1990] 2 AC 418[9] at page 500:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in ***Cook v. Sprigg*** [1899] A.C. 572 , 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in ***Secretary of State in Council of India v. Kamachee Boye Sahaba*** (1859) 13 Moo. P.C.C. 22, 75:
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> > "The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

[8] Attached as **Annex 5**.

[9] Attached as **Annex 6**.

> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see ***Blackburn v. Attorney-General*** [1971] 1 W.L.R. 1037 . The Sovereign acts
>
>> "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:" ***Rustomjee v. The Queen*** **(**1876) 2 Q.B.D. 69 , 74, per Lord Coleridge C.J.
>
> That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

b. The dualist orthodoxy has been strongly restated more recently by the UK Supreme Court in ***R (Miller) v Secretary of State for Exiting the European Union*** [2018] A.C. 61[10]; ***R. (DA) v Secretary of State for Work and Pensions*** [2019] 1 W.L.R. 3289[11] and ***R. (SC) v Secretary of State for Work and Pensions*** [2022] A.C. 223[12]**.** Whether a legal system is monist or dualist is recognised, as a matter of international law, to be a matter that a state decides for itself according to its own legal traditions. Both monist and dualists states are able to ensure compliance with international law in their own ways. A number of the state Parties to the Aarhus Convention have dualist legal systems including Ireland and Sweden.

c. Although in the United Kingdom the negotiation of treaties is a matter for the executive, the Constitutional Reform and Governance Act 2010

[10] Attached as **Annex 7**.
[11] Attached as **Annex 8**.
[12] Attached as **Annex 9**.

("**CRAG 2010**")[13] provides that a treaty cannot be ratified unless (a) a copy has been laid before Parliament alongside an Explanatory Memorandum (b) a copy of the treaty has been published in a way the Minister thinks appropriate[14] and (c) 21 sitting days[15] has expired without either House of Parliament resolving that the treaty should not be ratified. If the House of Commons resolves a treaty should not be ratified the Minister must lay a statement before Parliament explaining why she considers the treaty should nevertheless be ratified, and it may so be if another 21 sitting days then passes without the House of Commons resolving it should not be ratified. If the House of Lords resolves it should not be ratified but the House of Commons does not take the same view then the treaty may nevertheless be ratified but the Minister must provide a statement explaining why.[16]

d. Ultimately, therefore, if Parliament is not content with a trade deal it could resolve against, and thus prevent, ratification indefinitely. Furthermore, as discussed in para 7(ii)(a) above, the UK's dualist legal system means that legislation is required where the implementation of an FTA requires changes to domestic UK law. Parliament therefore has a further opportunity - via the legislative process - to delay or prevent an FTA from taking effect. This is acknowledged by the Written

[13] Attached as **Annex 10**.

[14] This was explained during the passage of the Bill where the Minister for Europe, Chris Bryant, said "Attention has been drawn to the words 'in a way that a Minister of the Crown thinks appropriate'. This simply means that one could publish a treaty as a Command Paper, or by depositing it in the Library of the House. Equally, one could publish it on the Order Paper, or as a White Paper. There is no way in which a treaty could be published in a way that was secretive, or designed to mislead the House. These are simply the customary words-they are used in many other pieces of legislation as well-that allow Ministers to decide whether a Command Paper or a White Paper is appropriate. I am certain of that." See Hansard, HC Vol.504, col.216 (January 19, 2010), attached at **Annex 11**.

[15] This can be extended by another 21 sitting days: see s. 21 CRAG 2010. "Sitting Day" means a day on which both Houses of Parliament sit.

[16] For completeness, as the Committee will see there is an exception to the statutory parliamentary period in "exceptional circumstances". However this has only been used on one occasion (for the ratification of the Finland and Sweden NATO accession protocols in 2022).

Ministerial Statements provided by the Communicants at Annexes 1 and 2 of the Communication[17], each of which states:

> "Ultimately if Parliament is not content with a trade deal, it can raise concerns by resolving against ratification and delay any implementing legislation indefinitely."

e. The Communicants, at Communication paras. 27-28 suggest ways in which FTAs have direct effect and suggest that FTAs draft should be considered "*rules*" (Communication paras. 31 and 32). With respect, this is wrong:

(1) The exceptions referred to by Lord Oliver in ***J.H. Rayner***, adverted to by the Communicants in Communication para. 27, are limited. The relevant passage from Lord Oliver in ***J.H. Rayner*** concerned when an international treaty could be looked at in domestic law (not, to be clear, when it might be taken to create obligations). The relevant principles are helpfully set out in ***Heathrow Airport Ltd v HM Treasury*** [2021] EWCA Civ 783 [155][18]:

> "First, where a statute was enacted to give effect to the UK's obligations under a treaty it could have to be considered and, if necessary, construed to resolve any ambiguity or obscurity as to the meaning or scope of the implementing statute. Secondly, where parties had entered a domestic contract in which they had chosen to incorporate the terms of an unincorporated treaty the court could interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under the contract. Thirdly, where domestic legislation, although not incorporating the treaty, nevertheless required, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation then the court could do so. Fourthly, where the exercise of the royal prerogative directly affected an extension or contraction of the jurisdiction without the constitutional need for internal legislation the court could have regard to the international law measure. Fifthly, since the conclusion of an international treaty and its terms were matters of fact the treaty could be referred to where necessary as part of the factual background against which a particular issue arose."

[17] Attached at **Annexes 12 and 13**.
[18] Attached as **Annex 14**.

(2) Insofar as the Communicants argue that treaties are binding on Ministers (Communication para. 28): the issue here is whether treaties are 'rules' within the meaning of article 8. Treaties do not create any legally binding rules in domestic law but need to be implemented through domestic legislation[19].

(iii) The Communicants argue that the norms created are binding on the UK at international level. Whether or not this is so, such norms are not of general application within the legal system of the UK[20] as a state Party to the Convention, and it is that with which Article 8 is concerned. A norm binding on specific parties (e.g. the states who are parties to an FTA) can only ever be said to be of specific rather than general application.

8. Second, the Convention itself distinguishes between the obligations placed on parties at the national and international level[21]:

(i) Article 5(5) distinguishes very clearly between (1) legislation and (2) international treaties.

(ii) More broadly, the Convention spells out clearly where it intends to impose obligations on Parties in how they interact at international level: see e.g. Article 3(7).

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[19] See on the relevant legal principles applicable here ***R (Hurst) v London Northern District Coroner*** [2007] 2 AC 189 at [56], attached as **Annex 15**; ***R (Friends of the Earth Ltd) v Heathrow Airport Ltd*** [2021] 2 ALL ER 967 at [118] attached as **Annex 16** and *Halsbury's Laws of England: International Law and Foreign Relations* (vol 61, 2018) at para. 24, attached at **Annex 5**.
[20] The Supreme Court noted in the ***SC*** case (referred to above in paragraph 7(ii)(b) and attached at **Annex 9**) [78] "*the proposition that international law and domestic law operate in independent spheres*".
[21] Again, part of the context per Article 31(1) VCLT.

(iii) It is suggested by the Communicants that Article 3(7) of the Convention and the Almaty Guidelines in some way support the view that Article 8 must apply to the negotiation of FTAs (Communication para. 4).[22] That is wrong.

(a) Article 3(7) relevance to the issue of the applicability of Article 8: The mere presence of Article 3(7), alongside the national scope of the remainder of Convention obligations, strongly supports the distinction drawn between national obligations and international obligations as set out above. Were it otherwise, the presence and wording of Article 3(7) would be otiose: instead of imposing an obligation on the parties to "*promote the application of the principles*" of the Convention (Article 3(7)) the Convention would have simply said that it applies when negotiating international instruments.

(b) The Almaty Guidelines[23]:

(1) It is noted that the UNECE website[24] in introducing the Almaty Guidelines states (emphasis added):

> "While the Aarhus Convention primarily addresses issues at the national level, its Parties have committed themselves, through article 3, paragraph 7, of the Convention, to promote the application of the principles of the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.
>
> At their second meeting (Almaty, 25-27 May 2005), the Parties adopted, through decision II/4, a set of guidelines on promoting the principles of access to information, public participation in decision-making and access to justice in international forums dealing with matters relating to the environment. The primary purpose of these guidelines, known as the "Almaty Guidelines", is to provide general guidance to Aarhus Parties. They may also be of wider interest to those involved in forums that deal with environmental matters."

[22] Notably, The Communication does not allege a breach of Article 3(7) itself, nor the Almaty Guidelines (see Communication paras. 18-19). This choice, by a selection of well-informed environmental NGOs is, the UK submits, entirely correct.
[23] Attached at **Annex 17**.
[24] Attached at **Annex 18**.

(2) The first meeting of the Expert Group[25] which prepared the first draft of the Almaty Guidelines also distinguished between Article 3(7) (paras. 12, 52) and obligations "*at the national level (arts. 6 to 8 of the Convention)*" (para. 33). Article 8 is not mentioned in the Almaty Guidelines at all.

(3) It is clear that the Almaty Guidelines in particular were not intended to apply to bilateral Free Trade Agreements. This is clear from both their wording and the legislative process. First, the definition of "international forum", to which the Almaty Guidelines apply: "*any multilateral international environmental decision-making process*" (Article 9). Many FTAs are bilateral. Moreover, that same definition excludes from "*international forum*" "*any regional economic integration organization or forums*". The purpose of economic integration organizations is to foster trade, even though – if the Communicants are right – that could have an environmental effect. An FTA does the same thing and – again if the Communicants are right – have the same result. Second, an earlier draft of the Almaty Guidelines explicitly included reference to Free Trade Agreements in Article 4(b)[26], but this was removed during the legislative process.

(c) In any event breach of Article 3(7) and the Almaty Guidelines has (rightly) not been alleged in this Communication.

9. Third, furthermore, stepping back and giving this a 'sense check', given the nature of FTA negotiations, it simply makes sense that Article 8 would not apply. Any person who has ever been involved in a negotiation will understand it is a complex enterprise with a constant balancing of benefits and burdens bearing in mind not

[25] Attached at **Annex 19**.
[26] Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, draft guidelines attached at **Annex 20**.

just what is within the public domain but what is not. It would make negotiations infinitely more difficult (indeed well-nigh impossible), could undercut the representatives of national government, and would involve a vast expenditure of resources, if public comment has to be continually sought and taken into account at every stage. While this does not, of course, prevent Parties choosing to do so, the question here is whether the Convention compels them to so do. It is not accepted that this was in any way the intention of the parties.

10. Fourth, the above point is clearly recognised elsewhere in the Convention. So, in relation to the first pillar – access to environmental information – Article 4(4) provides that *"[a] request for environmental information may be refused if the disclosure would adversely affect: … (b) International relations, national defence or public security"* (emphasis added). The *Implementation Guide* (p. 86)[27] points out that the Convention *"does not define the terms "international relations", "national defence" or "public security", but it is implicit that the definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law"*.

11. The exception for disclosure in relation to international relations is reflected in the Environmental Information Directive (Directive 2003/4/EC) in Article 4(2)(b). The Directive gives effect to the first pillar of the Aarhus Convention (see recital (5)) and which was transposed in the United Kingdom via the Environmental Information Regulations 2004[28] and which are retained EU law for the purposes of the EU (Withdrawal) Act 2018 as amended. There is CJEU case-law on this exception which is useful in understanding some of the issues raised by this Communication. Thus in Case C-612/18 ***ClientEarth v Commission*** ECLU:EU:C:2020:223[29] the CJEU had to consider an appeal from the General Court in relation to the Commission's refusal to disclose access to certain documents (legal advice) in relation to the Investor-State Dispute Settlement and the Investment Court System in EU trade agreements. The CJEU noted that:

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[27] Attached at **Annex 3**.
[28] Attached at **Annex 21**.
[29] Attached at **Annex 22**.

"9. The Commission explained that disclosure of the requested documents could undermine the public interest as regards international relations, in that disclosure would reveal the "legal considerations underpinning the Commission's negotiating proposals in ongoing negotiations on [the Transatlantic Trade and Investment Partnership] and other agreements". That would weaken the Commission's negotiating position by giving to the Commission's "negotiating partners … an insider look into the Union's strategy and negotiating margin of manoeuvre". That disclosure would negatively affect the Commission's effectiveness in the negotiations, "in a realistic and non-hypothetical way".

10. Furthermore, the Commission considered, relying on the judgment of 19 March 2013, ***In 't Veld v Commission*** (T-301/10, EU:T:2013:135), that "public disclosure of [parts of the requested documents] would reveal an assessment of the legal options in relation to [Investor-State Dispute Settlement] and the [Investment Court System] and how this could be achieved by the EU with regard to [Investor-State Dispute Settlement] and the [Investor Court System]" [and that] public disclosure thereof would therefore reveal the European Union's negotiating margin.

11. In conclusion, the Commission stated that:

> "The [parts of documents not disclosed] concern the issue of the relationship between [Investor-State Dispute Settlement] and EU domestic courts in the light of the principle of autonomy of EU law. These documents were specifically prepared in relation to the ongoing [Transatlantic Trade and Investment Partnership] negotiations, but they are also relevant in connection with other ongoing trade and investment negotiations with third countries. Making available the withheld parts of these documents to the public would seriously prejudice the negotiating position of the Union in all those ongoing negotiations, as the considerations they contain remain valid for all ongoing trade and investment negotiations with other third countries"."

12. These arguments about the dangers of making public matters relevant to the negotiating position of a party in free trade negotiations are also applicable here. The CJEU upheld the arguments of the Commission finding that:

"61 Since, before the General Court examined ClientEarth's argument that disclosure of the requested documents furthers rather than undermines the public interest, it had found, in paragraph 46 of the judgment under appeal, that the disclosure of those documents might reveal the strategic objectives pursued by the European Union in the ongoing negotiations and concluded, in paragraph 48 of that judgment, that the Commission had not erred in considering that disclosure of the requested documents would weaken its negotiating position and its negotiating margin and would, therefore, undermine the protection of the public interest as regards international relations, the General Court was fully entitled, by referring in particular to that finding and to that conclusion in paragraph 55 of the judgment under appeal, to reject ClientEarth's argument."

13. The CJEU thus accepted that the release of information that discloses one party's objectives and strategy will be to the advantage of its negotiating partner. There is thus in the Convention itself and beyond a generally recognised acceptance that there are strong arguments for confidentiality during negotiations of trade agreements. The end-product of trade talks is a compromise between parties that follows a back and forth of detailed suggestions. If negotiators must continuously

disclose these processes to the public and persuade the public as well as each other, it is unlikely that they will ever reach agreement.

14. Fifth, the above analysis also fits with the object and purpose of the Convention. The Object of the Convention is set out in Article 1. The Communicants argue that Article 1 indicates an expansive reading should be taken of the Convention (Communication para. 25) and suggest at Communication para. 20 that, unless they are right, the Committee:

> "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."

15. However:

    (i) As set out above what is agreed in a FTA does not make rules at the domestic law level in the UK. In the dualist system of law a FTA must be implemented before it has effect in domestic law. The suggestion otherwise at Communication para. 32 by reference to Article 18 of the VCLT overstates the operation of that provision.[30]

    (ii) Moreover, and in any case, this begs the very question that the Committee is required to answer. The suggestion that finding against a communicant will lead to a lacuna will always lead to a more expansive approach. The VCLT requires interpretation to be undertaken in good faith "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*" (Article 31(1)). The words used by the drafters of the Convention are important. International treaties are themselves the products of negotiation – of give and take between sovereign states. They will, always, be the product of compromise. That implies there will be limits to any international instrument, and those must be reflected in the interpretative exercise. So, where the ordinary wording

[30] See Aust p. 107- 109, attached at **Annex 2**.

is clear (as here) and where that clearly indicates there are limits on where the parties have agreed obligations will bite, there is no reason to prefer an expansive reading simply because it might cover more.

"May have a significant effect on the environment"

16. The Communicants make a large number of points regarding the alleged potential negative effects of FTAs on the environment e.g. offshoring of harm, erosion of environmental regulation, and regulatory chill: see paras. 8-17 of the Communication.

17. The UK does not intend to get drawn into specifics of a given deal, as the Communication concerns the UK's system *generally* rather than a specific FTA. The fact is that each and every FTA is individual and – even taking the Communicants' case it its highest – whether an individual FTA could (if otherwise within the scope of Article 8 at all – see above) have a significant effect on the environment would have to be examined in relation to any particular FTA. The Committee cannot, therefore, assume as the Communicants invite them to, that FTAs have, or may have, a significant effect on the environment.

18. Moreover, the UK strongly disputes the alleged concerns expressed by the Communicants with respect to the UK-Australia Free Trade Agreement, for example:

    (i) There are a range of provisions included that cut against the suggestion there will be a lowering in the standards of UK environmental laws or regulatory chill. See, for example, Articles 22.2(1),[31] 22.3(4)[32] and 22.3(6)[33].

[31] *"The objectives of this Chapter are to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation"*

[32] *"Neither Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement."*

[33] *"the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise*

Copies of the relevant chapter are attached at **Annex 23**. This is borne out by the independent scrutiny of the Trade and Agriculture Commission (**"TAC"**): see Headings II and III[34].

(ii) Nowhere does the relevant s. 42 Report[35] indicate there will be significant "*offshoring of environmental harm*" nor a "*race to the bottom*" with "*erosion of environmental regulations*" as a result. There is insufficient evidence presented by the complainants that this is the case. To the contrary, independent bodies such as the TAC have addressed these concerns and found them unfounded. The TAC Opinion on the UK-Australia Free Trade Agreement[36] stated, for example:

> "We have been provided with no evidence to support the notion that agricultural production in Australia of products likely to be imported at an increased rate into the UK under the FTA is more emission-intensive than comparable products in the UK, and in particular whether if this might occur, that Australian producers would be at a cost advantage compared to UK producers. We do on the other hand have evidence that increased emissions due to transport of these products to the UK is likely to be negligible."

And

> "Deforestation may occur in some years and in some parts of Australia, even though overall, on a net basis, Australia has been reforesting rather than deforesting. It cannot be excluded that in some cases deforested land is used to produce agricultural products which will be imported in greater quantities into the UK, such as beef and cereals. In the event of any deforestation with an impact on agricultural exports to the UK, the UK has a limited set of legal options. As under WTO law, the FTA does not give the UK a right to protect Australian resources, including its forests. The situation is, however, different in the event of any net deforestation, if this contributes to climate change, a question which itself involves complicated factual and legal issues. While this is still untested, it is likely that the UK is entitled under WTO law, and the FTA, to restrict trade in order to combat climate change, to the extent that this can be seen as conserving an 'exhaustible natural resource' which is either a UK natural resource or part of the global commons. In any event, the UK would be able to raise the issue of deforestation with Australia in the FTA's Environment Working Group."

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derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties";

[34] Attached at **Annes 24**.

[35] Attached at **Annex 25**, see below on the nature of these reports.

[36] Attached at **Annex 24**.

See too the evidence from TAC Chair Prof Lorand Bartels to the Environment, Food and Rural Affairs Committee on 11 May 2022 (Q347) (attached at **Annex 26).**

(iii) With regard to Investor state dispute settlement ("**ISDS")** mechanisms, these cannot overrule the sovereignty of Parliament, overturn or force any changes to law although they can award compensation if a foreign investor's rights under the treaty have been breached. The Government is clear where ISDS provisions are negotiated, the UK maintains its right to regulate in the public interest, including in areas such as the environment. This right to regulate is recognised in international law. The United Kingdom has investment agreements with ISDS provisions with over 90 trading partners. There has never been a successful ISDS claim brought against the UK, nor has the threat of potential claims affected the Government's legislative programme, including with respect to climate change mitigations and adaptation.

(iv) There is some suggestion in Communication para. 12 that FTA negotiations 'set a precedent' for future negotiations. No single deal sets a blueprint for future deals. All deals represent negotiated outcomes, meaning they are bespoke and are tailored to the relationships and markets of the countries involved - and each is the product of a negotiated outcome. Negotiators take care to ensure that negotiations do not affect one another, which is part of the reason for the need for security and confidentiality.

19. A more fulsome response on the particular examples raised by the Communicants can be provided if thought helpful to the Committee, but in light of paragraph 16 above and mindful of the Committee's previous requests to keep submitted documents to a minimum, it is not thought necessary to do so now.

<u>(II) Satisfaction of Article 8 requirements</u>

20. The UK's primary case is thus that Article 8 is inapplicable to FTAs.

21. In the alternative the UK submits that the procedures followed satisfy the requirements of Article 8 in any event.

(A) Factual background: FTAs in the UK

22. The negotiation of FTAs is a long and complex processes, and each one is different depending on the counterparties involved. The UK's trade deal with Australia, for example, involved four rounds of negotiation over 170 sittings between July 2020 (when its approach to negotiating a free trade agreement, taking into account consultation, was published) and June 2021 (when agreement in principle was reached). It is not uncommon that, prior to each round of negotiations, each party shares text and additional proposals.

23. Below, the UK takes the negotiation of the UK-Australia FTA by way of example of the negotiation of a trade deal and the stages involved. Information on other trade deals can be provided if it would help – the UK is simply mindful of requests by the Committee previously to endeavour to keep documentation to a minimum.

24. There is a single web page outlining which FTAs are (1) in force (2) signed but not in force (3) in negotiation and (4) being consulted upon.[37] Moreover, there are a range of public commitments to transparency and scrutiny contained in letters and written ministerial statements from the UK Government: see Statement of Liz Truss MP 7 December 2020[38]; an exchange of letters between Lord Grimstone of Boscobel (Minister for Investment) and Baroness Hayter (Chair of the House of Lords International Agreements Committee) (the "**Grimstone/Hayter Letters"**)[39]; and the 15 September 2022 letter from Kemi Badenoch MP (Secretary of State for

[37] Available at: https://www.gov.uk/government/collections/the-uks-trade-agreements, and **Annex 27**.

[38] In Written ministerial statement on transparency and scrutiny arrangements for new trade agreements – 7 December 2020, available at **Annex 13**.

[39] Available at **Annex 28**.

International Trade).[40] There is some suggestion in Communication para. 5 that there has been little change in the UK's arrangements over the past 3 years. With respect that is not right, a number of the steps outlined have only come in since the UK's exit from the EU.

25. Prior to commencing negotiation of new FTAs the UK opens a public consultation seeking input on which aspects of the current trading arrangements to improve or amend. This informs the starting point of negotiations. This has been accompanied by explanatory documents to help the public and interested parties navigate the potential areas of interest in the FTA, and will often include reference to the intention to seek agreement in respect of environmental protections etc. An example Information Pack from the UK's Australia Trade Deal is attached at **Annex 30.** The UK uses the gov.uk website to ensure the consultation has reach and is accessible, and will promote the publication to encourage responses, e.g. on social media. The UK will also use discussion fora to engage interested parties on key issues during the consultation process. By way of example the consultation ahead of negotiation of the UK-Australia FTA was open for 14 weeks, and attracted 146,188 responses.

26. This consultation process informs the starting point of negotiations. It helps build the evidence base to inform the UK's negotiating mandate. The process provides the public and stakeholders with an opportunity to say which areas the UK should prioritise in negotiations, and any challenges when attempting to trade in the partner country. Responses have regularly been received from Non-Governmental Organisations and members of the public in respect of the environment. The consultation is undertaken at an early stage so that it may properly inform the process to follow. Consultation at this time is clearly appropriate.

27. When the consultation responses are analysed, they inform advice to Ministers regarding what key priorities should be pursued when negotiating a new FTA.

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[40] Available at **Annex 29**.

28. Ahead of negotiation of an FTA, the UK has then published a suite of documents including (1) a consultation response (a sample for the UK's Australia FTA is attached at **Annex 31** (and it is worth noting the consultation methodology is also published, see **Annex 32**)), (2) an explanatory document outlining why the UK is negotiating an agreement, what it is trying to achieve, and how the consultation responses have influenced the strategic approach (an example of this document is *UK-Australia Free Trade Agreement: the UK's Strategic Approach* (the Communicants provided extracts, see the full version at **Annex 33** and in Particular Chapter X), and (3) a scoping assessment, the aim of which is to provide Parliament and the public with a preliminary assessment of the broad scale of the potential long run impacts of an eventual FTA.

29. In terms of Parliamentary engagement, should the House of Lords International Agreement Committee, or House of Commons International Trade Committee, publish a report on the UK objectives in an FTA, the UK Government will not only consider that report, but (if requested) facilitate a debate on the objectives subject to the parliamentary time available: see the Grimstone/Hayter letters. The UK Government has also committed to private discussions with the House of Commons International Trade Committee and House of Lords International Agreement Committee before negotiations are launched: see **Annex 28**.

30. Moreover, during the negotiations, the UK takes a number of steps to keep the public involved.

31. First, the public are kept updated through various reports published at regular intervals during negotiations. See for example the list of published documents regarding the UK's trade deal with Australia at **Annex 34**[41]. These are both published online and, when Parliament is sitting, in Parliament as Written Ministerial Statements. Again, this is set out in the Grimstone/Hayter Letters (attached at **Annex 28**).

[41] Available at: https://www.gov.uk/government/collections/uk-australia-free-trade-agreement.

32. Second, the UK ensures appropriate ongoing engagement with the public. By way of example in relation to the Australia and New Zealand negotiations:-

i. At the strategic level, the UK established the Strategic Trade Advisory Group ("**STAG**"). This considers wider trade issues and includes a cross section of members of civil society. It has included representatives from environmental stakeholders, including one of the Communicants, Green Alliance[42]. Summaries of its discussions are published though these are, necessarily, high level.[43] STAG members are updated on the progress of various ongoing trade deals. The Membership of STAG is made public.

ii. Furthermore, the UK has a number of Thematic Working Groups ("**TWG**"). Again, these include relevant stakeholders including another Communicant, the Trade Justice Movement. A sustainability TWG has recently been re-launched (having been slowed down by members refusing to sign confidentiality agreements). At each TWG meeting the UK Government provides an update on the progress of FTAs and seeks views from its expert members.

iii. The UK also established a network of Trade Advisory Groups ("**TAG**") which provide ongoing strategic and technical expertise during the course of negotiations. Group members sign confidentiality agreements, allowing the UK Government to provide sensitive updates and confidential information during live negotiations, to allow candid discussions. The membership of each group is publicly available online.[44]

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[42] Membership of STAG is available at https://www.gov.uk/government/groups/strategic-trade-advisory-group#membership, also attached at **Annex 35**.

[43] See, for example, a summary of discussions 16 October 2020 at **Annex 36** and a summary of discussions 13 June 2022 at **Annex 337**.

[44] See https://www.gov.uk/government/publications/trade-advisory-groups-tags/trade-advisory-groups-membership and **Annex 38**.

(To provide some figures on steps (1)-(3), the environmental implications of the Australia and New Zealand FTAs were covered 6 times at TAG meetings and 5 times at "*All Advisory Group Update*".).

iv. The UK Government holds Quarterly Stakeholder Briefing events with stakeholders (including some of the above mentioned Aarhus complainants) to update on FTA developments. This is not a membership based platform (unlike STAG, TAGs, and TWGs) and so invites can be extended to further and could include NGOs such as Greenpeace and Sustain.

v. Regular roundtables with civil society organisations to provide an update on negotiation progress, listen to concerns. Again, Communicants WWF, TJM and Green Alliance amongst others are regular attendees.

vi. The UK Government is committed to close engagement with relevant parliamentary select committees. The Chief Negotiator will usually provide both private and public evidence, and the UK Government will make relevant senior level Civil Service experts available to brief the committees on the technical detail of negotiations. This may be done in private where necessary. Again this is set out in the Grimstone/Hayter letters.

33. If the parties are progressing toward an Agreement in Principle (which is a matter of negotiation in itself) once this is reached it is published. See the Australian version at **Annex 39**.

34. Thereafter, the parties prepare draft texts and once completed, the deal is signed. As soon as is practicable after a deal is signed, it is published alongside explanatory material, and an independently scrutinised Impact Assessment[45], with an extended period for scrutiny of these documents prior to laying the treaty before Parliament to commence the statutory 21-day scrutiny period under CRAG 2010. In the case of the Australian trade deal, the text was published six months ahead

[45] A copy of the UK-Australia Impact Assessment is at **Annex 40**.

of formal parliamentary scrutiny commencing under the Constitutional Reform and Governance Act 2010. In the case of the New Zealand trade deal, it was eight months. Prior to publication, where time allows, the draft text, explanatory material and Impact Assessment will be provided in confidence to the IAC or ITC (see the Grimstone/Hayter letters).

35. The UK Government's Impact Assessment are subject to independent review by the Regulatory policy Committee ("**RPC**").[46]

36. Before the FTA can be laid before Parliament for formal scrutiny under the Constitutional Reform and Governance Act 2010, a further report must be published and laid before Parliament pursuant to section 42 of the Agriculture Act 2020 (the "s. 42 Report")[47]. This statutory report must examine whether the deal is consistent "*with the maintenance of UK levels of statutory protection in relation to (a) human , animal or plant life and health, (b) animal welfare, and (c) the environment*". s. 42(4) of the Agriculture Act 2020 further states that "*In preparing the report, the Secretary of State may seek advice from any person the Secretary of State considers to be independent and to have relevant expertise*." Pursuant to s. 42(4) the Government, in producing its s. 42 Report, seeks the advice of the independent Trade and Agriculture Commission (TAC). The TAC was set up with the sole purpose of providing expert advice on the impact of the signed FTA text on the statutory protections listed in s. 42 of the Agriculture Act, with the exception of human health and life. The Trade Act 2021[48] includes provision to amend the Agriculture Act 2020 to introduce a statutory underpinning for the TAC, whose advice would be a statutory requirement in producing the s. 42 Report, but these provisions have not yet been commenced. The Government has however implemented those provisions in full on a non-statutory basis. With regards human health and life, the Government seeks the advice of the independent regulators, the Food Standards Agency ("FSA") and Food Standards Scotland ("FSS"). The advice produced by

[46] A copy of the RPC's opinion on the UK-Australia FTA is attached at **Annex 41**.
[47] Attached at **Annex 42**.
[48] Sections 8 – 11 attached at **Annex 43**.

the TAC, FSS and FSA is published in full, and laid before Parliament. The TAC commonly run public 'calls for input' to inform their advice. The Government's request for TAC advice, the TAC advice received, and the Government's own s. 42 Report will be laid before Parliament.

37. These assessments help inform public and parliamentary understanding of the trade deal and support robust scrutiny. A copy of the TAC Report and the s. 42 Report for the UK-Australia Trade Deal are attached at **Annexes 24 and 25**.

38. The UK Government has publicly committed that if Parliament requests a debate on the final treaty, it will seek to accommodate that subject to available parliamentary time.[49] So, for example, a debate on the UK-Australia and UK-New Zealand FTAs was held on 14 November 2022, prior to ratification. An extract from the relevant copy of Hansard is attached at **Annex 44**[50].

39. The Government has now further committed that (1) there will be at least 10 sitting days between the publication of the s. 42 Report and the Treaty being laid before Parliament pursuant to CRAG 2010; (2) within two weeks of a signature of a new FTA the Department for International Trade will offer dates to meet with a DIT Minister; (3) will provide an indicative timeline for ratification of each new FTA once signed, including indicative timeframes for publishing the TAC advice and s. 42 Report, and commencing laying the treaty before parliament.[51]

40. Once signed, the treaty must be put before Parliament before it can be ratified pursuant to the CRAG 2010 process.[52] This has been outlined above.

41. That is not, of course, the end of the matter. The UK is, as already stated, a dualist system. So ratifying trade agreements do not give these effect in domestic law. Implementing legislation may be required – whether primary (acts of parliament)

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[49] Grimstone/Hayter letters

[50] There were also earlier debates e.g. on 19 July 2022. Copies of these other debates can be provided to the Committee if requested.

[51] See **Annex 27**.

[52] UK guidance Treaties and MOUs Guidance on Practice and Procedure, attached at **Annex 45**.

or secondary. The long-standing practice of UK governments is not to ratify a treaty until that treaty can be implemented in domestic law, so it is usual for any required implementing legislation to be passed *before* a treaty is ratified so that the treaty, and its domestic implementation, come into operation at the same time.[53]. Post ratification, civil society and stakeholder inputs are sought in relation to the implementation and monitoring of FTAs. This includes a dedicated independent Advisory Group, Civil Society Forums and/or Joint Dialogue with Civil Society. These groups are engaged as per the terms set out in FTA text and who have the opportunity to share with the UK any compliance concerns or areas of cooperation that the UK might raise under the FTA.

42. If the Committee considers that Article 8 does apply to the negotiation of a given FTA, the UK submits that its current participation and consultation processes are more than adequate to satisfy its requirements.

(B) What Article 8 requires

43. The following propositions should not be controversial.

44. The obligation on a Party is to "*strive to promote*" effective participation, (Article 8). There is no set formula (*Implementation Guide* page 119)[54]. It is an expression of a somewhat "*softer*" nature than, say, Article 6 or 7: ACCC/C/2014/120 (Slovakia)[103][55], *Implementation Guide* page 181). The measurement of the extent to which parties meet their obligation "*is not based on results, but on efforts*" (Ibid page 181[56]). As the Committee said in ACCC/C/2010/53 (United Kingdom) (the Edinburgh Tram case)[57]:

> "84. 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;

[53] Ibid para. 11.
[54] Attached at **Annex 3**.
[55] Attached at **Annex 46**.
[56] Attached at **Annex 3**.
[57] Attached at **Annex 4**.

publication of a draft early enough; sufficient timeframes 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."

45. The three steps and consideration of public participation are, it is accepted, a minimum the Convention imposes (*Implementation Guide* page 119). With regard to taking that into account, which is not of course a requirement to accept all comments, reservations or opinions submitted: ACCC/C/2014/120 (Slovakia) [106]-[107][58]. The *Implementation Guide* notes at page 185:

    "The phrase "as far as possible" acknowledges, however, that there is an element of politics in law-making that Parties will need to take into consideration. It is implicit in this provision that lawmakers and legislators bear ultimate responsibility for the outcome of law-making and rule-making processes, and that therefore some accommodation must be made for them."[59]

46. Where a legislative body is not acting in a legislative capacity, it does not fall within the legislative carve out of "*public authority*" in Article 2: see e.g. ACCC/C/2011/61 (United Kingdom) (the Crossrail Case)[60] [54] and ACCC/C/2014/120 (Slovakia) [98]-[100][61].

(C) Submissions on satisfaction of Article 8

47. In this case, the UK submits that the steps it takes more than satisfies the requirements of Article 8. What that Article requires is of course contextual, and the Committee will of course be aware that international negotiations are never easy. They involve elements of give and take, and a need to keep matters confidential. Every state Party – including the UK – has a responsibility to protect its own interests in international negotiations and ensure it does not release information that would undermine negotiating positions or its partners' legitimate expectations of confidentiality. So, for example, a requirement to consult on sensitive information during negotiations would be inappropriate. This is not unusual in international relationships: New Zealand, for example, states that '*while negotiations are underway, we do our best to update New Zealanders on progress without giving away information which would hurt the national interest, such as New Zealand's*

[58] Attached at **Annex 46**.
[59] Attached as **Annex 3**.
[60] Attached at **Annex 47**.
[61] Attached at **Annex 46**.

negotiating bottom lines and information our negotiating partners have provided to us in confidence'.[62]

48. The Communicants seek to isolate each individual element of the course of engagement and criticise that for being insufficient of itself. That is not an acceptable approach: it is the totality of engagement that must be examined. The UK does not, therefore, respond to each individual point made on each individual stage. With respect to the totality of the process, it is clear the requirements of Article 8 are met. A member of the public will benefit from:

    (i) An initial consultation on the mandate of FTA negotiation. There is more than sufficient background information provided, a clear timeline for responses to be provided, and a document that then outlines how those responses have been taken into account. Consultation is taking place before negotiations even start. That is the right time – consultees have the opportunity to raise anything relevant which can be considered in good time when arriving at a negotiating mandate. All this needs to be considered early when strategic decisions are made.

    (ii) The objectives are then published, allowing the public to understand what approach is to be taken. The Communicants criticise these for being high level (communication, para. 5) – they are, but are also comprehensive. Their high level nature serves two functions: it allows them to be readily accessible and understood by a wide variety of readers; and protects the detail of negotiating positions.

    (iii) Thereafter, throughout the negotiating process the UK will continue to publish public updates after each round of negotiation, and consult with relevant parties such as advisory groups, parliamentary groups and ad hoc engagements with NGOs. The membership of parliamentary groups, and

[62] Available at https://www mfat.govt.nz/en/trade/nz-trade-policy/how-do-we-consult-on-free-trade-agreements/, attached at **Annex 48**.

advisory groups is made public, and NGOs are, obviously, active in relation to trade . While there are understandable issues of confidentiality during sensitive negotiations members of the public informed by the briefing papers, public objectives, and updates are more than able to contact these groups and make their views known. Moreover, the confidentiality agreements do not prevent advisory members from consulting with their networks on industry wants and needs and presenting this information to the Department to consider as part of the negotiations process.

(iv) The final text of the Agreement is published alongside further information to keep the public informed (the Impact Assessment, itself independently reviewed by the RPC[63]) and is subject to further appraisal in the form of the s. 42 Report and TAC Opinion. All of this has to occur before the FTA can move to the stage of ratification and implementation. The UK Government has committed to outlining its indicative timelines for progressing FTAs after publication, and this includes a minimum period of 3 months before the draft FTA is provided to Parliament for the CRAG 2010 procedure. Members of the public will be able to fully inform themselves of the text and implications, and make their views known to Parliamentarians.

(v) Thereafter the matter is subject to scrutiny by Parliament. There is some suggestion by the Communicants that this has no relevance to their Article 8 complaint. That is wrong: Parliament is not acting in a legislative capacity when it scrutinises draft FTAs ahead of ratification, only when it decides to actually make law. So scrutiny by MPs is directly relevant to the Article 8 process. Thus, at that stage:

(a) Members of the public can contact their constituency MPs;

[63] The Communicants allege impact assessments are deficient. That is not accepted – it should be noted the TAC also review the impact assessments as part of their work. In any case, we deal here with an alleged systemic issue.

(b) Members of the public can contact MPs who have a particular interest or expertise;

(c) Members of the public can contact members of the House of Lords;

(d) Members of the public can contact other NGOs who will undoubtedly have links to parliamentarians.

That is public participation, either of itself or at the very least via representative consultative bodies. It is perfectly open to the House of Commons at that stage to resolve against a treaty under CRAG 2010, preventing the Executive from ratifying the treaty. This links with (but is independent of) its legislative function, where it could also decide not to approve any implementing legislation in the form sought by the Government.

49. When that is viewed in totality, the UK submits that it is quite clear it has striven to promote effective public participation, and has met the mandatory minima required by Article 8.

50. The Communicants attempt to compare the UK's approach to that of other countries. That is not accepted as a legitimate approach – the issue is not whether other countries do it differently, but whether the UK has met the requirements itself. Here, it has. Some other countries may do more by way of consultation etc, some less. That is not the issue for this Committee. By the same token, the suggestion of the Communicants that the UK's arrangements have been "*widely criticised*" is not accepted (obviously, various groups with various agendas may well dislike the approach taken by a government with which they disagree), but that is not relevant to the instant question which is compliance with Article 8.

(III) Article 3(1)

51. This complaint is essentially parasitic on the Article 8 complaint and so falls away if the Committee accepts the UK's case as set out above on Article 8. The point made by the Communicants is that, assuming that Article 8 applies, policy statements and letters between parliamentarians (e.g. the Grimstone/Hayter letters "*do not give rise to enforceable statutory duties on government to take action*", may be amended without scrutiny, and so that is not a sufficient basis for ensuring compliance within the meaning of Article 3(1).

52. Article 3(1) provides that *"[e]ach 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*". It is well established that the "*other measures"* to which Article 3(1) refers can be "*strategies, codes of conduct, and good practice recommendations", or "political guiding principles*" (see the *Implementation Guide* (2nd Ed, 2014) p. 60) and that there is no need for such measures to be in a legally binding form: ACCC/C/2014/120 (Slovakia) [115][64].

(IV) Conclusion

53. For those reasons, the UK is not in breach of its obligations under Article 8 or 3(1) of the Convention.

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12 MAY 2022

[64] Attached at **Annex 46**.

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