**B E F O R E:**

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

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

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# OBSERVATIONS ON BEHALF OF THE GOVERNMENT OF THE UNITED KINGDOM ON PRELIMINARY ADMISSIBILITY

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## Summary

1. The United Kingdom (the "**UK**") submits that Communication PRE/ACCC/C/2022/194 is inadmissible for the following reasons:
    1) **In relation to the complaint made under Article 8 -** it is inadmissible within the meaning of paras. 20(c) and/or (d) of Decision I/7 because Article 8 of the Convention does not apply to the negotiation of Free Trade Agreements ("**FTAs**");
    2) **In relation to the complaint made under Article 3(1) -** it is inadmissible because it is parasitic on the Article 8 complaint, and therefore falls away.

## Article 8

2. It is the UK's case that the negotiation of, and entering into, FTAs does not fall within the scope of Article 8 of the Convention.

3. 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 be relevant 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**").

4. <u>First,</u> 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. On the ordinary meaning of the terms,[1] this language is not apt to cover the negotiation between multiple states (one 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 Art. 31(1) VCLT) and (b) through an application of the *ejusdum generis* principle.[2] Executive regulations are legally binding rules created by the executive with which the population of a state must comply. The broader 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*[3] at p.182 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 <u>imposed</u> a rule on the populace of the state concerned, with which they must comply.

[1] Per Art. 31(1) VCLT

[2] Applicable in modern treaty interpretation: see Aust *Modern Treaty Law and Practice* (Cambridge University Press, 3rd Ed 2013) and p.221 attached at Annex 1.

[3] *The Aarhus convention: An implementation Guide* (2nd Ed, 2014) https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition

(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[4], this indicates the rule has to be of general, rather than specific application.

5. None of those features apply to FTA negotiation:

(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 different states (one 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 Communicant e.g. Australia), over which no single party has control. So, it is not the product of a unilateral act by a state Party as envisaged by Article 8.

(ii) In a dualist system such as the UK, FTAs do not create rules or norms of general domestic application. Nor do they ordinarily require there be a change to domestic environmental law. Steps must be taken at national level to implement international conventions. The Communicants, at Communication paras. 27-28 suggest ways in which FTAs might have direct effect and suggest that FTAs should be considered "draft rules" (Communication paras. 31 and 32). This, too, is wrong:

(a) The UK is, as the Communicants acknowledge, a dualist system. So, 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[5] at p. 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."
>
> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the

[4] Per Art 31(1) VCLT
[5] Attached at Annex 2

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."

Accordingly, signing and ratifying an FTA does not create a "*generally binding*" rule for the citizens whose right to participate is being asserted.

(b) 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 <u>looked at or construed</u> in domestic law (not, to be clear, when it might be taken to create obligations). As summarised in ***Heathrow Airport Ltd v HM Treasury*** [2021] EWCA Civ 783[6] [155] they are:

> "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 statue. 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

[6] Attached at Annex 3

> 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."

(iii) The Communicants argue that the rules created are binding on the UK at international level. Whether or not this is so, such rules are not of general application within a state Party – i.e., they do not bind the general populace - and it is that with which Article 8 is concerned. A norm binding on specific parties (the parties to an FTA) can only ever be said to be of specific application.

6. Second, the Convention itself distinguishes between the obligations placed on parties at the national and international level[7]:

(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 Article 3(7). Otherwise, every other obligation imposed by the three pillars in Articles 3, 4, 5, 6, 7 and 9[8] imposes obligations on Parties at a national level.[9] Article 8 does not say, in terms, that it applies to international environmental decision-making and it would be anomalous to find that it does so in the absence of express wording (in contrast to Article 3(7)) given all of the points made above.

(iii) It is suggested that Article 3(7) of the Convention and the Almaty Guidelines indicate Article 8 must apply to the negotiation of FTAs (Communication para. 4).[10] That is wrong. The mere presence of Article 3(7), alongside the national scope

[7] Again, part of the context of the wording per Article 31(1) VCLT
[8] Article 8 is excluded from this list purely because it is what is being argued over.
[9] The Communicants refer to Articles 4(4) and 5(5) (Communication para. 23) however, Article 4(4) provides reasons for refusing requests for Environmental Information at national level, and Article 5(5) is a national obligation to disseminate international materials.
[10] 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.

of the remainder of Convention obligations, strongly supports the view that Article 8 does not, in fact, apply when states are acting internationally. Article 8 is not mentioned in the Almaty Guidelines at all.

7. 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 an artful enterprise with a constant balancing of benefits and burdens bearing in mind not just what is within the public domain but what is not. The nature of international negotiations between governments means they are simply not amenable to public consultation in the same way as domestic regulations, which are drafted by the executive. While this does not, of course, prevent Parties choosing to undertake extensive consultation, 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.

8. Fourth, this 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."

9. However, 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 are important. International treaties are 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 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.

10. The Committee's jurisprudence, as set out in Communication paras. 41-43, does not materially move matters forward. They do not address the question before it today and do not help the Communicants.

**Article 3(1)**

11. The UK understands the Communicant's Article 3(1) complaint to be entirely parasitic on their Article 8 concerns and focused exclusively on the negotiation of international agreements (Communication para. 44). For the reasons set out above, this is wrong, and the Article 3(1) complaint falls away.

**Conclusion**

12. For the reasons set out above, the UK submits the Communication is inadmissible.

**JAMES MAURICI Q.C.**
**NICK GRANT**

**8 September 2022**