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)

COMMUNICANTS' REPLY TO THE OBSERVATIONS OF

THE GOVERNMENT OF THE UNITED KINGDOM

---

1. The Communicants make the following observations in reply to those presented by the UK Government in its Response attached to a letter to the Secretariat dated 12 May and received on 15 May. The Communicants address the following issues:
    a. The significant environmental effect of FTAs (paras 16-19 of the UK Response)
    b. The feasibility of meeting the Requirements of Article 8 of the Convention in the context of FTA negotiations; (paras 9, 47 and 50 of the UK Response)
    c. The incompatibility of the current arrangements with the requirements of Article 8 of the Convention
    d. The Relevance to the Complaint of Article 3(7) of the Convention (para 8 of the UK Response)
    e. Interpretation of Article 8 of the Convention in the light of the Vienna Convention on the Law of Treaties (paras 5-15 of the UK Response)
    f. Breach of Article 3(1) of the Convention distinct from breach of Article 8 (para 51 of the UK Response);

2. The purpose of submitting this Reply is (1) to seek to narrow the issues which fall for determination by the Committee before the hearing; and (2) to correct factual inaccuracies. The Communicants maintain all the submissions presented in the Communication and will address the Committee further on the legal interpretation of the Convention, in particular as to the interpretation and application of Articles 8 and 3(1) of the Convention, at the hearing. The Communicants reserve the right to make further written submissions on these issues if the Committee should decide not to hold a hearing.

3. Documents referred to in this Reply are either contained in the original bundle of documents provided to the Compliance Committee with the Communication dated 10 August 2022 (hereafter referred to as "CB/Annex [X]/p [X]") or they are contained in the bundle of documents provided with this Reply (hereafter referred to as "RB/Annex [X]/p [X]").

4. In summary, the Communicants make the following observations in Reply:
    a. The evidence as to the significant environmental effect of FTAs is overwhelming, both as regards those negotiated, or to be negotiated, by the

UK as well as those negotiated by the European Union and other states. It is not plausible for the UK to suggest that the FTAs referenced in the Communication do not have any significant environmental impact. The Communicants therefore invite the UK to accept that FTAs 'may have a significant effect on the environment' within the meaning of Article 8 of the Convention (without prejudice to their case that Article 8 does not apply to FTAs for other reasons). See further below (para's 4-23);

b. The evidence as to the feasibility of meeting Article 8 requirements in the context of FTA negotiations is also compelling, having regard to the established practice of other states and the European Union. Again, the Communicants invite the UK to confirm that it accepts that it would be feasible to meet the full requirements of Article 8 in practice. See further paras 25-28 below;
c. The current arrangements set in place by the UK do not meet the requirements of Article 8 for the reasons set out in the Communication. The Communicants note, in particular, that the UK does not claim that the current arrangements allow for effective public participation 'while options remain open' or that the views of the public are sought or taken into account at any stage after the negotiating objectives have been published. Furthermore, there are a number of factual inaccuracies in the Response which relate to the current arrangements for consultation and which are addressed in this Reply;
d. The Communicants have not alleged a breach of Article 3(7) for the purposes of this Communication, but they do rely on Article 3(7) as relevant to the interpretation of Article 8. The Committee may wish to draw its own conclusions as to the UK's compliance with Article 3(7) in this context, bearing in mind that the UK does not accept that Article 3(7) applies to FTA negotiations in any event (para 32 below);
e. The Parties agree that the Convention falls to be interpreted in line with the rules and principles laid down in the Vienna Convention on the Law of Treaties (VCLT). In this regard, the Communicants note that the primary general rule of interpretation is that laid down in Article 31 of the VCLT which requires that a treaty be interpreted '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.' This taken with the broad scope of the wording of Article 8 as reaffirmed by the Implementation Guide, indicate that the Article is apt to cover FTAs. In relation to Article 18 VCLT, that provision obliges states to refrain from acts which would frustrate the object and purpose of a treaty when it has signed the treaty (until it makes clear its intention not to become a party). This is relevant to FTAs and their implications for domestic regulation and policies (paras 33-46 below);
f. The Communication refers to Article 3(1) as well as Article 8 on the basis that, even were the Committee to find that the UK's current practice complies with Article 8, there would still be a breach of the Convention since Article 3(1) requires that the UK take the necessary legislative, regulatory and other measures, to establish and maintain a clear, transparent and consistent framework to implement Article 8 of the

Convention. Accordingly, the reference to a breach of Article 3(1) is not 'parasitic' or manifestly unreasonable as claimed by the UK (para 45 below).

5. **(a) The significant environmental effect of FTAs (paras 16-19 of the UK Response:** Article 8 of the Convention refers to other generally applicable legally binding rules 'that may have a significant effect on the environment'. In its response, the UK states that the Committee cannot assume that FTAs have, or may have, a significant effect on the environment and that the environmental effect of each FTA has to be assessed individually. The UK then seeks to downplay, or even dismiss, the scale of the environmental effect of various individual FTAs.

6. Evidence of Significant Environmental Effect of FTAs: The UK does not specifically address most of the evidence referred to in the Communication as to the significant environmental effect of FTAs (Communication, paras 9-17)The UK relies in the main on certain findings of the TAC Report on the Australia FTA and a general rebuttal as to the significant environment effect of FTAs (see Response, paras 16-19).

7. The Communicants submit that the evidence as to the environmental impact and implications of FTAs in general, as well as in the specific cases to which they have referred, is clear and on that basis the Communicants invite the UK to accept before the hearing that FTAs have, or may have, a significant effect on the environment. As set out in the Communication, the scope of existing FTAs, the recognised (including by the TAC) impacts of trade liberalisation in certain sectors and the practices associated with their negotiations (even in the UK), all confirm that FTAs in general have an environmental impact. The Communicants make a number of further submissions on this issue below.

8. The fact that FTAs generally have environmental impacts is evidenced by the UK's own practice of commissioning a report into environmental impact (see Response, para 34) , as well as an initial scoping impact assessment which deals with environmental issues. If FTAs did not generally have significant environmental impacts, there would be no point in requiring an impact assessment into the environmental impacts of every agreement, which is what the UK Government has committed to doing (see CB/Annex 3/p 6).). The UK is of course not alone in acknowledging the environmental impacts of FTAs. The EU also recognises that FTAs have environmental impacts: it commits to publishing a Sustainability Impact Assessment for every trade negotiation (for example, see RB/Annex 7/p 19).

9. As recognised in the CPTPP's initial impact assessment: "FTAs can impact the environment by changing patterns or techniques of production, the types of goods and services that are traded and the commitments made by countries in respect of environmental policies and outcomes" (see RB/Annex 5/p 12). Further, in practice, the decision of the UK to agree to lower tariff measures on Malaysian palm oil to 0% is a concrete example of environmental impacts

arising from FTAs, given widespread evidence of unsustainable palm oil production there which may be imported into the UK going forward without tariff (see further para 26 below).

10. Furthermore, the UK's final Impact Assessment into the Australia FTA states that:

> *The economic improvements and increased trade arising from FTAs can also entail consequences for the environment. Other things equal, increased economic activity is typically associated with environmental implications for greenhouse gas emissions and other environmental outcomes such as air pollution, water quality and biodiversity*. (see RB/Annex 6/p 14)

11. This is a comment from the UK Department for Trade on FTAs in general. The Impact Assessment then includes a specific chapter on environmental impacts (Chapter 6) which states that: 'The agreement could impact on the environment through a variety of channels' (RB/Annex 6/p 15). Chapter 6 then addresses potential impacts on greenhouse gas emissions and climate change, trade-related transport emissions, carbon leakage, impacts on natural capital and nature loss, air and water quality, forests and the marine environment, as well as biodiversity and ecosystems and waste management. The Impact Assessment also points out that the FTA has a dedicated chapter on the environment.

12. The environmental and climate impact of trade and trade agreements is also evident from the 2022 Progress Report of the UK Climate Change Committee which considered the impact of trade in general as well as the three new FTAs in this regard (see RB/Annex 8). The Committee referred to the adoption of the three FTAs with Australia, New Zealand and Singapore and stated:

> *The most notable climate action within these trade agreements has been for the partners to reaffirm their commitment to all the aims of the Paris Agreement, although it is not clear whether these clauses will have any substantial effect on climate change action. A greater impact of the trade agreements may be the impact on trade flows and subsequently UK production and consumption emissions*.
> (RB/Annex 8/p 29,, *emphasis added)*

13. ***The TAC Report***: The UK claims that the TAC Report on the Australia FTA supports its contention that the Australia FTA has no significant environmental impact in so far as it finds no "offshoring of environmental harm", "race to the bottom" and "erosion of environmental regulations" (Response, para 18(ii)). However the TAC is not required to address these issues. The remit of the TAC's Report is laid down in section 42 of the UK Agriculture Act which provides that the report:

> *…must explain whether, or to what extent, the measures referred to in subsection (1) are consistent with the maintenance of UK levels of statutory protection in relation to: (a)human, animal or plant life or health, (b)animal welfare, and (c) the environment.* (see RB/Annex 1/p 1)

14. While a section 42 TAC Report can analyse if the FTA is consistent with existing UK legislation on the environment, it cannot take into account the long-term effect on regulation of the competitive pressure that can result from the FTA. Further, the TAC does not have any remit under section 42 to analyse whether the FTA offshores environmental impacts, as confirmed in the UK government publication on the report (RB/Annex 9/p 31).[1] A further limitation in the UK approach of relying on the TAC is that current regulations may not regulate all environmental impacts arising from an FTA such as land use change.

15. Nonetheless, the Communicants note that the TAC Report acknowledges its own limited remit and points towards environmental impacts of trade which are due to competitive pressure, rather than regulatory changes directly resulting from the trade agreement. For example, the TAC Report finds that the FTA has no effect on the UK's existing WTO rights to regulate the import of products produced using pesticides that are harmful to UK animals, plants, or the environment, but also states that the FTA is likely to lead to increased imports of products that have been produced at lower cost by using pesticides in Australia that would not be permitted in the UK' (RB/Annex 9/p 32) .

16. ***ISDS:*** One important feature of many FTAs which has clear and well documented environmental impacts relates to the inclusion of Investor State Dispute Settlement (ISDS) mechanisms (see Communication para 17). The UK government's position is that they will consider ISDS in FTAs on a case-by-case basis, and it has been included in the CPTPP trade agreement, for example. This reaffirms the need for considering the environmental impacts of ISDS and the need to consult on its inclusion in trade agreements, though the Communicants recognise ISDS does not form part of the Australia FTA which is the focus of the Communication.

17. The UK in its Response states that there has never been a successful ISDS claim against the UK, and denies that the threat of potential claims affected the Government's legislative programme (Response, para 18(iii)). However, the independent evidence as to the significant impact that ISDS can have on environmental law and policy is clear as outlined below.

18. In September 2022, UNCTAD issued a report stating that:

> *The risk of investor–State dispute settlement (ISDS) being used to challenge climate policies is a major concern*. (RB/Annex 11/ p 38)

19. The UNCTAD report cites many examples of cases directly impacting states' ability to combat climate change (see the 175 environment related cases listed

[1] Report pursuant to Section 42 of the Agriculture Act 2020 S.42 Report criteria which refers to 'the maintenance of UK levels of statutory protections'

in Annex 1 to the Report and the 192 fossil fuels cases listed in Annex 2 – RB/Annex 11/p 40-51). The Report states:

> *While not all claims brought by investors under IIAs are successful, ISDS is costly. In general, the disputing parties – including the respondent States – incur significant costs for the arbitrators' work, the administration of proceedings and legal representation, all of which usually amount to several million dollars or more. In addition, claimants and respondent States face several years of uncertainty while ISDS proceedings concerning the challenged measures are ongoing. The amounts at stake in ISDS proceedings can be hundreds of millions and even billions of dollars. Moreover, ISDS proceedings may have reputational costs for the respondent States. (*RB/Annex 11/p 39)

20. A recent example of the impact that ISDS (can have on environmental policy is *Rockhopper v Italy* (RB/Annex 4, p 9). In that case, the claimant companies sought arbitration of their claims for compensation arising from Italy's alleged violations of the ECT in respect of their investments in the putative Ombrina Mare oil and gas field located off the Italian coast in the Adriatic Sea. As the Arbitration Tribunal noted in the award:

> *…this came about because Italy decided to pass a law in late 2015 which banned offshore production within a certain distance of Italian shores. That was a sovereign decision made by Italy and the Tribunal indicates at the very outset that it should not be taken in any way to either criticize or deprecate that decision from either a political or environmental standpoint. Italy's sovereign choice to proscribe such offshore production, based on its own inherent authority and dignity, was its to make. <u>However, that sovereign choice or act or decision (the label is not important) of Italy may carry with it a concomitant consequence to pay certain compensation pursuant to internationally-binding promises it made to foreign investors arising from its being a party to the ECT at the material time (emphasis added) (para 6)</u>*

21. The ICSID Tribunal held that there had been an unlawful expropriation and awarded Rockhopper 184 million euros in damages, 6.7 million euro in decommissioning costs, plus interest. Rockhopper had applied for a production concession from the Italian Government prior to the introduction of the ban, and was claiming for both the funds spent and for anticipated profits (RB/Annex 4/p10.

22. In August 2022, in light of the concerns as to the adverse impact of ISDS mechanisms, the Special Rapporteur on Human rights and the Environment recommended that states:

> *(j) Negotiate the removal of investor-State dispute settlement mechanisms from international trade and investment agreements or terminate the agreements (because such mechanisms constrain States from taking immediate and effective action to address the climate crisis, biodiversity loss and pollution)…*
> (RB/Annex 13/p 62)

23. The Special Rapporteur had outlined the concern with ISDS, including in the context of climate change:

> *The fossil fuel industry is especially litigious, having brought to international arbitration tribunals more than 230 cases in which they have asserted that government actions have decreased the value of their investments. Fossil fuel corporations have been successful in nearly 75 per cent of cases, forcing Governments to pay billions of dollars in compensation… The average amount awarded in fossil fuel cases – over $600 million – is almost five times the amount awarded in non-fossil fuel cases. Governments acting to fulfil their commitments under the Paris Agreement may be liable for hundreds of billions of dollars in future investor-State dispute settlement cases, which discourages climate action…There is a deeply disturbing contradiction between human rights obligations (and the Sustainable Development Goals) and investment agreements that require Governments to compensate foreign corporations for stopping activities that exacerbate the climate crisis and result in human rights abuses.* (RB/Annex 13/p 61))

24. Some states have acknowledged publicly that the possibility of being sued by investors under ISDS stopped them from implementing more ambitious environmental policies, for example as regards the phasing out of fossil fuels to meet climate change goals. By way of example, Denmark has set a 2050 deadline for ceasing exploration projects for fossil fuels, which is expected to affect only one fossil fuel licensing agreement. The Danish climate minister is reported to have acknowledged that an earlier target would have resulted in the Danish government needing to provide significant and costly compensation to investors under ISDS. New Zealand is reported to have been impacted by concern that it would face action from investors: it reportedly did not join the Beyond Oil and Gas Alliance which required that members should, at a minimum, be "implementing the guidance of the International Energy Agency to cease development of new oil and gas fields", because it was concerned that this would lead to it cases brought by investors (see RB/Annex 12/p 54).

25. **(b) The feasibility of meeting the Requirements of Article 8 of the Convention in the context of FTA negotiations (paras 9, 47 and 50 of the UK Observations)** The UK Government has pointed to the complexity of negotiations as a basis for arguing that 'public comment' cannot be continually sought and taken into account at every stage. (Response paras 9, 47).

26. The Communicants recognise that there are complexities and sensitivities in conducting international negotiations, including for FTAs. However there is ample evidence of existing systems and practice in the negotiation of FTAs by states and the EU which provide for public consultation throughout the process, including at an early stage while options are still open. The Communication refers to a number of examples (see CB/Annex 25/p 108-110), including that of the EU, which consults the public on an impact assessment

conducted prior to starting negotiations, and again later during major negotiations as part of the Sustainability Impact Assessment. In the US, the Trade Promotion Authority requires the Government to engage in public consultation, and provide detailed information and regular consultation events during the negotiations, while publishing a series of impact assessments including on the environment (RB/Annex 15/p 65-68). US negotiators are also well known to invoke the need to gain domestic approval of trade deals as a leverage point in negotiations, which shows that the requirement to consult domestically can in fact be a useful tool in negotiations, rather than undercutting them as the UK asserts the Response.

27. In its Response, the UK states that a comparison between the UK's approach to public participation in FTA negotiations and that of other countries is not 'legitimate' and not an issue for the Committee (Response, para 50). This is clearly not correct if the UK's position is based on an argument that public participation required under Article 8 is not feasible. The argument as to what Article 8 requires is a matter of interpretation of the Convention but it is entirely legitimate to refer to broader international practice, particularly of other parties to the Convention, to counter an argument that public participation is simply not feasible. It would be helpful to clarify whether the UK maintains that public participation in the form which the Communicants submit is required under Article 8 is not feasible in the light of the international practice to which the Communicants have referred.

28. The UK currently limits public consultation to the period before the publication of the negotiating objectives, and there is no public consultation later in the negotiation process. In any event the broad phrasing of the negotiating objectives renders it difficult to know the extent to which consultation has influenced their framing or the conduct of negotiations (CB/Annex 15/p 69). In marked contrast to the EU, there is no public consultation on the initial scoping assessment (published alongside negotiating objectives) (see RB/Annex 5/p 12 and CB/Annex 25), nor on the full impact assessment published alongside the completed deal[2]. The importance of conducting public consultation beyond the stage of setting negotiating objectives is confirmed by the fact that circumstances can change significantly after this stage. Key issues can arise during the negotiation of the FTA and circumstances can change significantly which underlines the importance of public consultation during the different stages of the negotiation in order for it to be effective and meaningful. For example, when the UK was consulting on the CPTPP FTA, Malaysia had still not ratified the agreement, but it did ratify the CPTPP during the process of negotiations with the UK (on the 30.09.2022). In the final agreement, the UK agreed to lower tariff measures on Malaysian palm oil to 0%, which was a contentious environmental issue and underlines the environmental impacts

[2] The absence of public consultation on the initial scoping assessment for the UK-Australia FTA is evidenced at CB/Annex 17 and CB/Annex 3, whilst the EU's practice on public participation is set out in CB/Annex 25

which FTAs have (RB/Annex 10). With trade negotiations lasting several years, conducting public consultations only at the start of the process does not provide effective public consultation, contrary to the requirements of Article 8.

29. **(c) The incompatibility of the current arrangements with the requirements of Article 8 of the Convention- The Response makes a number of assertions which are factually inaccurate or incomplete and these are addressed here.**

30. The UK Response is factually inaccurate in two respects. First, some of the Thematic Working Groups referred to at paragraph 32(i) of the Response have been "under review" since September 2022. The Thematic Working Group concerned with sustainability has not met since October last year and the development group, of which one of the Communicants (Trade Justice Movement) is a member has not met since June last year (see RB/Annex 14/p 63). The Communicants are therefore not aware of the Sustainability TWG being "relaunched", as the Response claims (para 32(ii)). Government's arguments around the willingness, or otherwise of groups or individuals to sign up to non-disclosure agreements (which they were required to sign by government order to join the meetings) are beside the point therefore, since these groups have not met for approximately a year.

31. Second, the contention in paragraph 38 of the Response, that it will accommodate a request for a Parliamentary debate in relation to a free trade deal overlooks the reality as to how this process played out in practice in relation to the Australia FTA. The debate took place after the formal process of Parliamentary scrutiny (under the Constitutional Reform and Governance Act 2010) had come to an end meaning that Parliament could not resolve against the trade deal under the CRAG rules (because no resolution or vote was permitted). Whilst government asserts (in paragraph 48 of the Response) that the House of Commons may resolve against a treaty under CRAG 2010, preventing the Executive from ratifying it, in reality, no such resolution was possible in the case of the Australia FTA, because the debate took place outside the CRAG process. The Communicants contend that this omission fundamentally impairs the effectiveness of the Parliamentary scrutiny in the case of the Australia deal.

32. **(d) Relevance to the Communication of Article 3(7) of the Convention:** The Presence of Article 3(7) in the Convention underscores the application of the Convention to international environmental fora (Communication, paras 4, 23, 30). The Communicants submit that the presence of Article 3(7) in the Convention forms part of the context for interpreting the distinct provisions of Article 8 which applies to other legally binding rules that may have a significant effect on the environment. The UK appears to suggest in its Response that Article 3(7) of the Convention, rather than Article 8, applies to the negotiation of FTAs but then immediately states that it does not apply. If the reason for that

position as to Article 3(7) is that FTAs have no significant environmental impact, this is strongly refuted (see above), and if it is because FTAs may be bilateral this is also refuted. The Aarhus Convention Implementation Guide states in relation to Article 3(7) that: 'The definition of international forums implicitly includes both multilateral and bilateral decision-making processes'.[3]

33. **(3) Interpretation of Article 8 under the principles laid down in the Vienna Convention on the Law of Treaties:** The Communicants rely on the rules of interpretation as laid down under the VCLT (Communication, para 25) including that Article 8 should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Convention in their context and in the light of its object and purpose. The UK makes only cursory reference to the object and purpose of the Convention (Response, para 15) and does not examine its specific implications for the interpretation of Article 8. The object and purpose of the Convention is stated in Article 1 as being: to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. In the light of the significant effects on the environment that FTAs may have (see above) it is important to have regard to this objective together with the terms of Article 8, as the starting point in considering the interpretation of Article 8. The UK contests the effects of FTAs on the environment and thereby appears to sidestep considering Article 8 in the context of the object and purpose of the Convention. This is not an acceptable approach to the interpretation of the scope of Article 8.

34. By contrast the UK starts its analysis of Article 8 by reference to the principle of *ejusdem generis*, a subsidiary rule which is not relevant in this case (see further below).

35. In relation to the ordinary meaning of the terms of Article 8 in its context (Article 31(1) VCLT), the Communicants note the broad terms of Article 8 in relation to 'other generally applicable legally binding rules that may have a significant effect on the environment.' This phrase should be seen in the context of the Convention as a whole, and in particular the provisions for public participation and the way in which these provisions contribute to the objective of the Convention as set out in Article 1.

36. The considerations set out in the preamble confirm the direct relationship between the provisions on public participation, including those set out in Article 8, and securing the object and purpose of the Convention, particularly in a context where the public has clear concerns as is the case with the negotiation of FTAs.

[3] The Aarhus Convention: An Implementation Guide 2014 at page 69.

37. The UK refers to the Implementation Guide and seeks to argue that this in some way narrows the scope of Article 8. In the first place that is not the purpose or effect of the Implementation Guide and second, the references made by the UK (in particular at para 6(ii) of the Response) do not indicate a narrowing of the scope of Article 8, quite the contrary. The reference to 'preparation by public authorities' is clearly broad enough to encompass the negotiation of FTAs, having regard to the generality of the phrase 'other legally binding rules which may have a significant effect on the environment' and the object and purpose of the Convention. The breadth of the language referred to in the Implementation Guide which includes 'norms and rules', rather emphasises the breadth of the scope of Article 8 than otherwise (Response, para 6(ii)).

38. The obligation is framed as one of 'striving' which reflects the breadth of the scope of Article 8 and the different types of measures it encompasses.

39. The *ejusdem generis* rule cannot override the primary rule laid down in Article 31 or the supplementary rules laid down in Article 32. In discussing the application of this rule, the UK again disregards the object and purpose of the Convention. This is fatal to its argument since unless the application of the rule is integrated with a consideration of the object and purpose of the Convention it does not elucidate the meaning of Article 8. In any event the intended breadth of the language is confirmed by the Implementation Guide.

40. A requirement that any measure covered by Article 8 must derive from a 'unilateral' act would open a major lacuna in the Convention since states could thereby avoid public participation in the development of norms derived from those processes, as the UK seeks to do here. In any event the decision to agree an FTA that it has negotiated is that of the UK and is in that sense 'unilateral'.

41. The Communicants have addressed the implications of the UK's dualist system in the Communication (paras 27 and 31) and would only add at this stage that the UK does not deny that an FTA has legal effects within the domestic legal system, simply describing these as 'limited' (Response, para 7(2)(e)). The extent of those implications, in line with established caselaw, is clearly fact specific and given the potential scope and environmental effect of FTAs is potentially significant, even within the limits of the *Rayner* exceptions.

42. The Communicants do not understand the point being made as to the specific rather than general nature of the rules laid down by FTAs (Response, para 7(iii)). As stated in the Communication the rules are clearly of general application (para 31).

43. In relation to the 'sense check' (Response, para 9), that concerns the issue of feasibility addressed above and, again, the UK avoids addressing the object and purpose of the Convention and the implications of this for the interpretation of Article 8.

44. **Article 18 VCLT:** The Communicants note that the effect of Article 18 VCLT has been considered by the EU Courts. In the case of T-115/94 *Opel Austria GmbH v Council of the European Union*, the Applicants had argued that:

> *Article 18 of the First Vienna Convention and Article 18 of the Second Vienna Convention constitute an expression of the general principle of protection of legitimate expectations in public international law, according to which a subject of international law may, under certain conditions, be bound by the expectations created by its acts in other subjects of international law*. (see RB/Annex 3/p 6)

In finding for the Applicants, the CFI referred to Article 18 VCLT and then held:

> *In a situation where the Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force.* (see RB/Annex 3/p 7))

45. This reference to Article 18 VCLT was noted by Advocate General Francis Jacobs in Case C-129/96 *Inter-Environment Wallonie, Opinion 24 April 1997* (RB/Annex 2/p 4) in considering the legal effect of an EU directive which had been adopted but for which the deadline for transposition had not yet passed.

46. FTAs have a potentially far-reaching impact on UK law and policy and as indicated above they have clear and recognised environmental impacts. In that context the duty under Article 18 VCLT is also potentially far-reaching in terms of obligations placed on the UK.

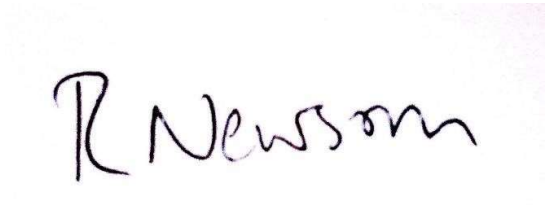
47. **Breach of Article 3(1) of the Convention distinct from breach of Article 8**: If, contrary to the view taken by the Communicants, the Committee were to find that current UK practice meets the substantive requirements of Article 8 of the Convention, the Communicants maintain that there would still be a breach of Article 3(1) of the Convention on the basis that the UK has not provided a clear legal framework for its implementation of Article 8 in this context as required by Article 3 .

3 August 2023

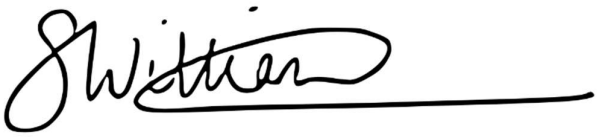
Signatories

Toni Pearce, Interim Director of Advocacy, WWF-UK

Rebecca Newsom, Head of Politics, Greenpeace-UK



Sarah Williams, Head of Unit, Green Alliance



Kath Dalmeny, Chief Executive, Sustain

George Dunn, CEO, Tenant Farmers Association

Ruth Bergan, Director, Trade Justice Movement

Rob Percival, Head of Food Policy, Soil Association

Dr Nick Palmer, Head of Compassion in World Farming UK