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

RE: COMMUNICATION ACCC/C/2019/168

OBSERVATIONS ON BEHALF OF THE GOVERNMENT OF ICELAND

(i) Introduction

Reference is made to a letter of 15 November 2019, in which the Icelandic Government was invited to submit to the Aarhus Convention Compliance Committee (the Committee) written explanations and statements clarifying the matter referred to in the Communication in ACCC/C/2019/168 Iceland and describe any response that may have been made in the meantime.

The Communication of 25 February 2018 concerns alleged breach of the Aarhus Convention, namely Articles 6, 8, and 9, and concerns Icelandic legislation for intensive fish farming, Article 21(2)c of Act No 71/2008 on Fish Farming as amended by Act No 108/2018.

Regarding the date of submission of the response the Government would like to extend gratitude for the consideration to recognize that the current situation with the COVID-19 is extraordinary and the circumstances exceptional. This unforeseen situation affected regular activity of both ministries to a large extent.

(ii) The Facts

The Icelandic Government agrees on the facts described in the Communication but would like to provide further information on the events leading up to the contested legislation and the purpose of Article 21(2)c and its legal effects.

Arctic Sea Farm hf. was granted operation licenses by the Icelandic Food and Veterinary Authority (MAST) and the Environment Agency of Iceland (UST) on 13 December 2017 for production of 6.800 tons of salmon in Patreksfjörður and Tálknafjörður. Fjarðalax ehf. was granted operation licenses by MAST and UST on 22 December 2017, for production of 10.700 tons of salmon in Patreksfjörður and Tálknafjörður. At that time Fjarðalax ehf. had operation licenses for fish farming operation in both fjords for 3000 tons (1500 tons in each fjord). Those licenses ceased to apply to the operation when the new licenses were issued.

Arctic Sea Farm hf. and Fjarðalax ehf. started the preparation for the abovementioned operations in 2013 and a public participation was provided for on various stages. In 2014 proposal on scoping document for operations of 19.000 tons of salmon and rainbow trout was submitted to the National Planning Agency (NPA). The proposal was put up for commentaries. In September 2014 the NPA approved the scoping document with comments. In September 2015 an initial environmental impact statement (EIS) was submitted to the NPA. The statement was published in the Legal Gazette, a national newspaper and presented by Arctic Sea Farm hf. and Fjarðalax ehf., calling for comments from the public, as well as eliciting the opinion of relevant institutions and other appropriate parties from 20 October to 2 December 2015.

The Environmental Impact Assessment Report for the production of 17.500 tons was handed in to the NPA in May 2016. In September 2016 the NPA issued its Opinion approving the report for the fish farm operations. On the bases of the approved statement and report both MAST and UST considered the environmental impact assessment to be satisfactory and granted operation licences as stated before.

The licences were challenged before Environmental and Natural Resources Board of Appeal (ÚUA) (In the Communication it is referred to as "the Complains Committee"). The complainants requested to the ÚUA to stop the operations while the matter was before the appeal board. The ÚUA rejected the request on the grounds that there were already fish farm operations in both fjords. However, the ÚUA annulled MAST's operating licences on 27 September 2018 and UST's operating licences on 4 October 2018 on the basis that the EIA was lacking sufficient discussion on alternatives in the NPA´s opinion and the environmental report. The annulment came almost ten months after the issuing of operating licences.

The licensees submitted a request to the ÚUA to defer the legal effect of the ÚUA rulings. On the 5th of October 2018 the ÚUA dismissed the request on the basis that the ÚUA did not consider it to have a legal competence to postpone the legal effects of its rulings. In its reasoning the ÚUA did acknowledge the great interest at risk and the need to prevent unnecessary waste of value, although it did not consider the ÚUA to have that competence. In its decision the ÚUA referred to the measures provided for in Art 6 of Act No 7/1998 on Health and Pollution Prevention and Art 21(1)c of the Act on Fish Farming, as means to defer the legal effect of its previous rulings. Firstly, the ÚUA suggested that the Minister for the Environment and Natural Resources could grant a temporary exemption from the requirement for an operating license from UST. Secondly, the ÚUA suggested that the Minister of Fisheries and Agriculture could postpone the legal effect of a decision by MAST to stop the operation as Art 21(1)c MAST is obliged to stop a fish farming operation with an invalid operating license.

When the operating licenses were annulled the licensees had already started their fish farming projects in accordance with their respective operating licenses. Fish farming is a form of aquaculture which involves raising live fish in enclosures. Such operations call for precise planning, organization and management along with considerable investments. Fish farming cannot realistically be stopped, even temporarily, without total loss to the fish currently being farmed. A decision to suspend a fish farming operation would entail the slaughtering and disposal of fish, removal of equipment and other necessary measures. Article 21(1)c is unconditional and requires MAST to stop fish farm operation if a fish farm operation is established without a valid operation license and if a fish farming operation licence has been revoked due to violations of the licensee. After assessing the provision the Minister of Fisheries and Agriculture considered the provision not suitable to cases where an operation licence had been revoked due to procedural error by decision of the ÚUA as was the case with the fish farm operations of Fjarðalax ehf. and Artic Sea farm hf. It was deemed more suitable to implement an interim measure similar to the effects of Article 6 of Act 7/1998. On this background the Minister of Fisheries and Agriculture submitted a draft bill to the parliament amending Act No 71/2008 to facilitate more suitable legal remedies when operating licenses are revoked. That is to make it possible for the Minister to issue a *temporary* operating license if the operating license is annulled because of a default in the licensing process. On the 20th November 2018 the Minister for the Environment and Natural Resources had issued temporary exemptions to hold an operation license from UST while the application for a new operating licence was being processed for Fjarðalax ehf. and Arctic Sea Farm hf. The Minister of Fisheries and Agriculture issued temporary operation licenses on the 5th November 2019. Fjarðalax ehf. was authorised to produce 3.400 tons of salmon in Patreksfjörður and Tálknafjörður and Arctic Sea Farm hf. was authorised to produce 600 tons of salmon in Patreksfjörður and Tálknafjörður. Therefore, during the validity of the temporary operating licenses, operations were scaled back significantly limited to the extend necessary to avoid irrecoverable loss of value, and therefore the production capacity was only a part of the capacity of the full impact assessment.

On the 16 May 2019 the National Planning Agency issued an opinion on Arctic Sea Farm hf. and Fjarðalax ehf. report on alternatives (addition to the original Environmental Impact Statement from 2016) See: http://www.skipulag.is/umhverfismat-framkvaemda/gagnagrunnur-umhverfismats/alit-skipulagsstofnunar/nr/1024#alit.
MAST issued new licences in accordance to the capacity of the impact assessment on the 27 of August and UST on the 28 of August 2019 and at the same time the temporary exemptions and operation licenses ceased to be in force.

(iii) Alleged Breach of Article 6 and 8

Alleged breach of Article 6

The Communicant alleged that Article 21(2)c violates Article 6 of the Aarhus Convention since the licensing procedure does not provide for a public participation before the licencing.

Article 21(2)c allows the licensing of a temporary operation license to be based on all the data and documentation gathered in the licencing procedure leading up to the annulled license.

The only purpose of Article 21(2)c is to provide for an interim measure under the circumstances where an operating license for a fish farm operation has been annulled due to an error in the licencing procedure.

An annulled operation license is a prerequisite for a licensing under Article 21(2)c. Therefore, only operations that have been granted operation licenses in accordance with Article 10 of Act No 71/2008, on Fish Farming (the normal procedure) are applicable for temporary operation license *c.f.* Article 21(2)c. If an environmental impact assessment (EIA) is required for the fish farm operation in question a public participation is secured in that process by Act No 106/2000, on Environmental Impact Assessment. A license granted under Article 21(2)c is based on the data and documentation gathered under the previously conducted license procedures in which a public participation was granted. The public therefore has had the opportunity to participate in decision making of the annulled licenses on various stages in the licensing procedure under Article 10 of the Fish Farming Act. Applications for temporary operation licenses are assessed on a case to case basis. In the explanatory note to the legislative bill it is stated that an assessment needs to be made on how significant the procedural flaw is and whether it is legitimate to base a temporary operation licence on the available documentation and the previous licencing procedure. Where the EIA is flawed, an assessment must be made whether the flawed EIA covers the proposed activity in a sufficient way, so the environmental impact of the proposed operation is known and has been described. Such assessment would also include assessment on public participation if a lack of such participation led to the annulment of the license.

In this regard the Government points out that the procedure leading up to issuance of a licences under Article 10 of the Fish farming Act is a lengthy procedure in which massive data gathering and documentation is conducted. Licence under Article 21(2)c does not have such procedure but allows the licensing to be based on the previously conducted data and documentation, *i.a*. the EIA. Article 21(2)c does also stipulate a very short time limit for the procedure. Therefore, the procedure under Article 21(2)c does not provide the same opportunity to allow for public participation on various stages. In addition to this it is also stressed that it is clear from the explanatory notes accompanying the legislative bill that the application of the Article is very narrow and is only applicable in exceptional cases.

In this context the Government also points out that the purpose of the temporary operation license is *i.a.* to give the operator opportunity to rectify the procedural flaws. Therefore, under that procedure (new license procedure) the procedural error is rectified and that procedure is in accordance with Article 10 of the Fish Farming Act. Under that procedure a public participation is provided for on various stages.

Alleged breach of Article 8

The Communicant alleges that the legislative procedure of Act No 108/2018 amending Act No 71/2008, on Fish Farming did not fulfil the requirements of Article 8 of the Aarhus Convention of public participation.

The Government would firstly like to draw attention to that fact that a Parliamentary legislative procedure does not fall under Article 8 of the Aarhus Convention. The Article however requires a public participation in the legislative process, up until the time the draft bill prepared by the executive branch is passed to the legislature. Before a Government Bill can be introduced in Parliament a regulated process/system is carried out within the Government. There are however exemptions in that process.

The regulated process is based on a Government Handbook from 2007 issued by the Prime Minister´s Office and the Ministry of Justice and the Parliament. The process is also based on Rules on the Functions of Cabinet No 791/2018 and a Cabinet Resolution on the Preparation of Government Bills from 10 March 2017.

Each Ministry is responsible for carrying out impact assessment with a review from the Department for Legislative Affairs in the Prime Minister´s Office. The requirements for a regulatory impact assessment are laid out in the 2007 handbook and supplemented by the other guidance material mentioned and a standard form for impact assessments that has to be completed and was designed jointly by the Ministry of Finance and the Prime Minister´s Office. It is still to some extent a ticking box exercise where all thinkable impacts are listed and Ministries must answer whether such impacts are foreseen. According to the Cabinet Resolution on the preparation of Government bills, the first step when an idea for a new regulation is born is a preliminary analysis. If the relevant Ministry is convinced that a legislative solution is called for, a document called legislative intent must be drafted with an attached preliminary impact assessment. Both documents are circulated internally between line Ministries for 2 weeks. Only then can the legislative intent and the preliminary impact assessment be published for external consultation. In the Cabinet Resolution a link is established between this process and the annual legislative programme of the Government. Thus, it is stipulated that a planned Bill can in principle only fit in the legislative programme if a legislative intent document has previously been presented for internal and external consultation (public participation). The purpose of this is to make the legislative programme more realistic and improve the legislative planning.

Another development was the opening of the Government consultation portal, see: www.samradsgatt.island.is, in 2018. The majority of draft Government bills are issued there for public consultation, as well as other policy documents. It has proven to be very successful in generating active contribution from stakeholders and quite often Government draft bills are amended following consultation, or even abandoned. Every Government Bill has a chapter in the explanatory notes devoted to impact assessment where the main findings of the impact assessment contained in the standard form is summarised. The abovementioned handbook´s check list covers possible impacts on the environment.

Nevertheless, there are exemptions to this process, if the relevant Ministry considers an expedient process to be necessary, based on valued reasons. As described under point (ii) the ÚUA annulled the operating licences, which were granted in 2017, for both Fjarðalax ehf. and Artic Sea farm hf. and both operators were already operating fish farms in accordance with their licences. Thus, two fish farm operations were operating without a licence and the Minister of Agriculture and Fisheries had no legal measures to facilitate a down-scaled operations similar to that of the Minister for the Environment and Natural Resources. The Minister of Agriculture and Fisheries and the Parliament recognised the urgency of the matter which led to the speedy procedure, both at administrative level and in the Parliament.

(iv) Alleged Breach of Article 9

The Communicant alleged that Article 21(2)c violates Article 9 of the Convention for operation licenses granted under that article cannot be brought before a review procedure.

The Government holds the view that a decision to grant a temporary operation license under Article 21(2)c cannot be equalised to a decision to grant an operating licence under Article 10 of the Act on Fish Farming. The purpose of licenses issued under Article 21(2)c is to prevent unnecessary loss of value.

In this context the Government refers to the Committees findings in Communication ACCC/C/2005/11 concerning Belgium (ECE/MP.PP/C.1/2006/4/Add.2), para. 29.) where the Committee held that when determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a license to *actually* carry out the activity.

The Government draws attention to that fact that a temporary operation license granted under Article 21(2)c is only valid for a limited period of time. A temporary operation license is an interim measure, with limited durability, strict conditions to either rectify the procedural error or bring the matter before a domestic court and scaled down operation. As stated in the explanatory notes of the bill, an operation license granted under Article 21(2)c should be limited to what is necessary in order to prevent irrecoverable damage. Its purpose is to prevent the loss of irrecoverable value, give leeway to rectify procedural flaws or the opportunity to bring the findings of the ÚUA before domestic courts. Its purpose is first and foremost to keep the fish alive for a period of time to rectify procedural flaws.

To this date only two temporary operation licenses have been issued under Article 21(2)c. Before the issuance of the licenses the Complainants who brought the initial operating licenses before the ÚUA were invited to submit their opinion on the draft of the temporary operation licenses. This entails that, although the standing before Icelandic Domestic Courts is stricter than before the ÚUA, the complainants from the annulment case would be considered parties to the administrative licensing procedures, given they submit opinions on the proposed licence, and therefore are eligible for bringing the matter to court, *c.f* cases in Reykjavik District Court No E-252/2019 and E-253/2019. It should also be noted that an operation, which is subject to a temporary operation license, has undergone the thorough process required under Article 10 and the public has had the opportunity to bring the matter under a review procedure. It should also be noted that an operation holding a temporary operating license is subject to either a new license or a court review. Furthermore, a new license issued under Article 10 of the Fish Farming Act will be subject to review procedure before the ÚUA. In this context the Government would also like to refer to a practical approach. A temporary license can only be issued for 10 months with the possibility to renew the license once. A review procedure before the ÚUA can take months, in these cases it took approximately 10 months. In this context the Government points out that a new licence succeeding the temporary licence is subject to a review procedure before the ÚUA.

(v) EFTA Surveillance Authority review of licences

The EFTA Surveillance Authority (the Authority) has issued a preliminary view in which the Authority considers Article 21(2)c to be in breach of the requirements in Directive 2011/92/EU on the assessment of the effects of certain public or private projects on the environment (the Directive). In its letter the Authority informed the Government that it considers the Article as it currently stands leaves room to circumvent EU rules. The Government understands the Authority's concerns but stresses that the purpose of the Article is not to circumvent Iceland´s international obligations in environmental matters whether those obligation stem from EU rules or the Aarhus Convention. In its letter the Authority accepts the necessity for such preliminary measures to exist but points out that such measures need to be in conformity with EU law and should not leave room to circumvent EU rules. It points out furthermore that it must only be in exceptional circumstances and when an environmental impact assessment has been conducted or rectified after the issuing of a licence the impact assessment must account for impacts from the beginning of operation.

The Authority has brought to the Government´s attention, that such requirements need to be implemented by legislation. The Government is therefore looking into the matter in cooperation with the Authority.

(vi) Conclusion

In these observations the Government has described the circumstances that led to the drafting of the aforementioned Government bill and the process until it was passed by Parliament (Alþingi), jfr. Act No 108/2018, amending Act No 71/2008 on Fish Farming. Furthermore, the time factors and imminent loss of value have been outlined. The exceptional circumstances and measures needed to prevent unnecessary waste of resources have been explained. The Government follows an extensive process when preparing legally binding rules as a general rule, but there are exemptions when Ministries consider it to be necessary for an expedient process for valued reasons. As stated in the explanatory notes with the aforementioned bill the Minister of Fishery and Agriculture believed that the bill was not in breach of the Aarhus Convention or other international obligations.

As for the substance of Act No 108/2018 the Government has described how the interim measures are considered a part of a government process from the issuing of a licence that was annulled to the issuing of a licence after rectifications. The process therefore entails public participation on various stages and a right for a review process.

The Government emphasizes that the circumstances that led to the changes in the aforementioned legislation were unusual and called for measures to prevent waste of living resources. The government is fully committed to meeting the obligations under the Aarhus Convention and welcomes the review and findings of the Aarhus Convention Compliance Committee in this matter and is ready to consider proposing adjustments in the legislation if needed. The Government emphasizes that the Convention is an active instrument on access to information, public participation and access to justice in environmental matters. Parties to the Convention should continuously strive to review their legislation and practises in line with Convention obligations and norms and react to findings. The Government awaits the findings of the Compliance Committee in this matter.

The Government is ready to provide further information in the matter if needed.