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Mr. Felix Zaharia, Chair
Implementation Committee
Convention on Environmental Impact Assessment
in a Transboundary Context
Palais des Nations
CH-1211 Geneva 10
Switzerland

Your ref: EIA/IC/CI/5 – Hinkley Point NPP

11 March 2016

Dear Mr Zaharia

RE: Consideration by the Espoo Implementation Committee of the Planned Construction of a Nuclear Power Station at Hinkley Point C

1. I refer to your letter dated 13 January 2016 enclosing a copy of the Implementation Committee's draft findings and recommendations in relation to the planned construction by the United Kingdom of Great Britain and Northern Ireland of a new nuclear power station at Hinkley Point C. The United Kingdom is grateful for the opportunity to provide its comments and representations on the Committee's draft findings and recommendations.
2. These comments and representations address the following points:
 - (1) Three introductory points about the consultations that the United Kingdom carried out before granting development consent for Hinkley Point C.
 - (2) The United Kingdom's response to the Committee's reasoning. In summary, the United Kingdom maintains its position that "likely" in Articles 2(4) and 3(1) of the Convention refers to a "real risk", and that the Committee's approach involves the adoption of a "zero risk" approach which is inconsistent with the express wording of the Convention as agreed by the State Parties.

- (3) The United Kingdom's response to the Committee's recommendations. In summary, the United Kingdom has decided to adopt a practice of proactive engagement with other State Parties in cases involving the development of new nuclear power stations. This decision is without prejudice to the UK's position stated in paragraph 2(2) above.
3. The United Kingdom's suggestions as to how the Committee might clarify certain factual matters stated in its draft findings and recommendations are set out in the Annex to this letter.

(1) Introductory points about consultations in relation to Hinkley Point C

4. At the outset, the United Kingdom wishes to emphasise three introductory points.
5. *First*, the United Kingdom sought in good faith to comply with its obligations in relation to the environmental impact assessment of Hinkley Point C and believes that it did so. The responsible authorities carried out a full environmental impact assessment of Hinkley Point C in accordance with the law of England and Wales and EU law. As part of this assessment, the United Kingdom authorities expressly considered whether transboundary consultations were required by the law of England and Wales or by EU law. The United Kingdom authorities decided that no such consultations were required by either domestic or EU law, and this decision was upheld by the High Court and the Court of Appeal (and the Supreme Court refused permission to appeal against the Court of Appeal's decision). Further, the European Commission has decided that there are no grounds to open infringement action against the United Kingdom for a breach of EU law in this respect.
6. *Second*, the public in the United Kingdom and in other State Parties to the Convention had a full opportunity to participate in the process that resulted in the decision to grant development consent for Hinkley Point C. In particular:
 - (1) The United Kingdom provided the opportunity for early public participation in the decision-making. This included the opportunity to participate in consultation before the application for development consent was made. The opportunity for early public participation was open to the public in other States.

- (2) The United Kingdom gave the public access, free of charge, to all information relevant to the decision-making. The opportunity for access to information was open to the public in other States.
- (3) The United Kingdom allowed the public to submit in writing or at a hearing any comments, information, analyses or opinions that the public considered relevant. The opportunity to make submissions was open to the public in other States.
- (4) The United Kingdom Government took into account all comments, information, analyses or opinions, regardless of whether they came from inside or outside the United Kingdom. This included the information provided by the Government of Austria.

7. *Third*, the United Kingdom has previously acknowledged, and continues to acknowledge, that the development of new nuclear power stations presents special challenges and that particular sensitivities surround such development. However, the question of whether such development is likely to cause a significant adverse transboundary impact must be considered in the light of the particular features of the power stations in question and the regulatory regime that applies to them. The United Kingdom's regulatory regime is robust and internationally-respected. Prior to the grant of development consent for Hinkley Point C, its safety aspects were rigorously evaluated over a period of 5½ years, including an evaluation of what would happen if a serious accident were to occur. Further, the European Commission issued an Opinion under article 37 of the Euratom Treaty considering the general data relating to the plan for disposal of radioactive waste from Hinkley Point C (such general data covers both the planned discharges of radioactive waste as part of the day-to-day operation of the site and the mitigating measures to reduce the consequences of any unplanned release in the unlikely event of an accident), and concluded that it was not liable to result in a radioactive contamination of the water, soil or airspace of another Member State that would be significant from the point of view of health.¹

(2) The Committee's reasoning

8. The Committee's reasoning relates to the application of Articles 2(4) and 3(1) of the Convention. Article 2(4) requires a Party to notify an affected Party of a proposed activity listed in Appendix I that is "likely" to cause a significant adverse transboundary

¹ Commission Opinion of 3 February 2012 relating to the plan for the disposal of radioactive waste arising from the two EPR reactors on the Hinkley Point C nuclear power station, located in Somerset, United Kingdom (Notice 2012/C 33/01) OJ C 33, 7 February 2012, page 1.

impact. Similarly, Article 3(1) requires that, where a proposed activity listed in Appendix I is "likely" to cause a significant transboundary impact, a Party must notify any Party which it considers may be an affected Party. The key issue that arises for the Committee's consideration is the meaning and effect of the word "likely" in Articles 2(4) and 3(1).

9. The United Kingdom's position is that the word "likely" imports a requirement that there should be a "real risk" of a significant transboundary impact. Such an interpretation of "likely" ensures that a proportionate and appropriately precautionary approach is adopted, but it does not deprive the wording agreed by the State Parties of any practical effect.
10. Insofar as the United Kingdom understands the Committee's reasoning, it is to the following effect:
 - (1) The Committee has previously found (in the *Bystroe Canal* case) that even a low likelihood of a significant adverse transboundary impact should trigger the obligations provided for by the Convention and that this means that notification under the Convention is necessary unless a significant adverse transboundary impact can be excluded. The Committee considers that these findings have been endorsed by the Meeting of the Parties (paragraph 57).
 - (2) There is a need to enhance international cooperation in assessing environmental impact and a need to prevent significant adverse environmental impact, and notification under the Convention would assist with this (paragraph 59).
 - (3) The view of the State Parties to the Convention is that there should be notification whenever there is a possibility of a significant impact, "no matter how uncertain", and this reflects the general spirit of the Convention (paragraph 59 and 60).
 - (4) In a case where the chances of a major accident are very low, but the likelihood of a significant adverse transboundary impact if such an accident occurs is very high, a State Party should be exceptionally prospective and inclusive in order to ensure that all Parties potentially affected by such an accident are notified (paragraph 62).

11. If the United Kingdom's understanding of the Committee's reasoning is correct, it is the United Kingdom's view that the Committee's approach is based entirely on a purportedly purposive approach to the Convention; that the Committee does not base its approach on the wording of the Convention, as agreed by the State Parties; and that it has not addressed the implications of its approach to that wording. On the contrary, the Committee's approach seeks to move away from the wording of the Convention as agreed by the State Parties.
12. The gist of the United Kingdom's argument is set out in paragraph 46 of the draft findings and recommendations, but the Committee's reasoning does not engage with this argument. In particular, the Committee's reasoning does not deal with the point that the effect of its approach is that the word "likely" in the Convention includes events that have a 0.00001% chance of occurring and that, in practical terms, this is equivalent to adopting a "zero risk" approach, which deprives the word "likely" of any practical effect. On the contrary, the Committee has not expressly acknowledged that this is the effect of its approach. Nor has the Committee expressly acknowledged that, because "likely" has to be given a uniform meaning throughout the Convention and across all activities to which it applies, a "zero risk" approach would have to be adopted for all projects (not just nuclear power stations), regardless of the type of activity under consideration and regardless of the rigour of the applicable regulatory regime.
13. The Committee has not explained how its approach can be reconciled with the express words of the Convention. It is not legitimate to depart from the express wording agreed by the State Parties to such an extent that it deprives the specific wording used in the Convention of effect and import a "zero risk" approach into the Convention.
14. Insofar as the Committee seeks to justify its approach on the basis of the reasoning in paragraph 62 of the draft findings and recommendations, that reasoning proceeds on the basis of a false dichotomy. The Committee appears to have considered that the likelihood of a major accident having a significant adverse transboundary impact is a separate issue from that of the likelihood of a major accident occurring. To justify its conclusion, the Committee relies upon the fact that the former likelihood is high, notwithstanding the fact that the latter likelihood is very low. However, the two issues cannot be treated separately in the manner in which the Committee has attempted to do. Insofar as is relevant, it has never been disputed that the only way in which Hinkley Point C could have a significant adverse transboundary impact is if a major accident occurs; similarly, it has never been disputed that if a major accident occurred, there would be a real risk of such an impact. Accordingly, the issue of whether Hinkley Point

C is likely to have a significant adverse transboundary impact resolves itself into the question of whether Hinkley Point C is likely to experience a major accident. As the Committee accepts, the likelihood of such an accident is very low, and the only way in which such an accident could be said to be "likely" is if "likely" is read as importing a "zero risk" approach. Accordingly, the reasoning set out in paragraph 62 of the Committee's draft findings and recommendations does not support the Committee's approach.

15. Further, insofar as the Committee has concluded that its approach reflects the intention of the State Parties (even though it does not honour the wording agreed by the State Parties), the facts and matters relied upon by the Committee in this respect do not sustain its conclusion. In particular:

- (1) The Committee's previous statement in the *Bystroe Canal* case cannot be taken to be an authoritative statement of the meaning of the Convention, and it cannot be taken to have been adopted by the Meeting of the Parties in Decision IV/2. In particular, in the *Bystroe Canal* case, the Committee was not required to interpret Article 3(1) of the Convention or to decide upon the meaning of "likely" in that Article: the fact that the Bystroe Canal was likely to have a significant adverse transboundary impact had already been determined by an Inquiry Commission established pursuant to Article 3(7) of the Convention. Accordingly, the Committee's statement was not a necessary part of either the Committee's findings or the Meeting of the Parties' decision. Further, the Committee's statement was based on the *Guidance on the Practical Application of the Espoo Convention*, which is not, and does not purport to be, authoritative guidance on the interpretation of the Convention: paragraphs 2, 3 and 18 of the *Guidance* make clear that it is simply providing advice as to good practice.
- (2) The recitals to the Convention cannot support an interpretation of the Convention which does not reflect the wording agreed by the State Parties.
- (3) Document CEP/WG.3/R.6, *Specific Methodologies and Criteria to Determine the Significance of an Adverse Transboundary Impact* (20 January 1995), does not support the Committee's conclusion that the State Parties to the Convention consider that there should be notification whenever there is a possibility of a significant impact, "no matter how uncertain". Paragraph 7 of the document, upon which the Committee relies, refers to a "consultation". However, as the footnote on the first page of the document makes clear, the relevant

consultation was not with State Parties, but was with technical experts designated by only five State Parties. Accordingly, the views referred to in paragraph 7 cannot be taken to reflect the views of the State Parties to the Convention.

16. Accordingly, the United Kingdom respectfully invites the Committee to reconsider its reasoning and to conclude that the United Kingdom did not act in breach of the Convention.

(3) The Committee's recommendations

17. The United Kingdom's comments and representations on the Committee's recommendations are without prejudice to its primary contention that it did not act in breach of the Convention.
18. The United Kingdom understands that the purpose of the Committee's recommendations (b) and (c) is to facilitate the United Kingdom's consideration of its approach to recommendation (d). For the avoidance of doubt, the United Kingdom does not understand recommendations (b) and (c) as purporting to impose any requirement to revisit the decision-making in relation to Hinkley Point C. This is particularly the case in light of the fact that the development consent order for Hinkley Point C has already been commenced and considerable resources have been expended in reliance on it; the fact that neither the Committee nor the Meeting of the Parties usually purports to impose requirements on State Parties, particularly those that require retrospective action; and the fact that the Committee itself has determined that notification was required under the Convention, therefore the exercise of entering into discussions with other State Parties to determine whether notification was required would appear to be otiose.
19. In accordance with this understanding of recommendations (b) and (c), the United Kingdom recognises that there would be benefits to entering into discussions with other State Parties with a view to considering what approach it should adopt to engaging with them in relation to new nuclear power stations. However, the United Kingdom respectfully invites the Committee to re-phrase its recommendations (b) and (c) in accordance with the Committee's normal practice, so that they are put in terms of invitations to the United Kingdom in relation to new nuclear power stations, rather than recommendations about Hinkley Point C.

20. In relation to recommendation (d), in light of the facts that the development of new nuclear power stations presents special challenges and particular sensitivities surround such development (but without prejudice to its contention that the Convention does not necessarily apply in such cases), the United Kingdom has decided to adopt a practice of proactive engagement with other State Parties in cases involving the development of new nuclear power stations.
21. Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) transposes Article 3(1) and (2) of the Convention, and article 7(1) of the EIA Directive (Directive 2011/92/EU) into the law of England and Wales. In respect of its application, the United Kingdom has already made certain changes to its procedures to reflect ongoing learning, and to clarify that States concerned can participate in the decision making for a new nuclear power station at an early stage.
22. In December 2015, the Planning Inspectorate issued Advice Note 12 on Transboundary Impacts,² setting out the following policy for new nuclear power stations as follows:
- "5.2.4.1 In relation to NSIPs which are proposed nuclear power stations (under section 15 of the PA 2008 and Schedule 1 of the EIA Regulations), the Planning Inspectorate will screen the proposed NSIP and determine whether the proposed development is, or is not, likely to have significant effects on the environment in another EEA State(s). In either circumstance, all EEA States will be informed that the Planning Inspectorate has screened the proposed nuclear NSIP for significant transboundary effects.
- 5.2.4.2 The Planning Inspectorate will also inform Switzerland and the Crown Dependencies (the Isle of Man and the Bailiwicks of Jersey and Guernsey) that the Planning Inspectorate has screened the proposed nuclear NSIP for significant transboundary effects.
- 5.2.4.3 In circumstances where the Planning Inspectorate is of the view that a proposed nuclear NSIP is likely to have a significant effect on the environment in another EEA State(s), the Planning Inspectorate will notify that EEA State(s) in accordance with Regulation 24.
23. Accordingly, the United Kingdom will notify all EEA states and certain others of the results of the screening opinion as to whether a new nuclear power station is, or is not, likely to have significant transboundary effects. All those notified will have the opportunity to dispute the screening opinion as to whether there is likely to be significant adverse effects in their territory and, therefore, they can engage the provisions of Article 3(7) of the Convention if they wish to do so. Further, they can participate in the relevant decision-making process as an interested party under the Planning Act 2008.

² Available at <http://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2013/04/Advice-note-12v2.pdf>.

Consequently, for projects in England and Wales,³ the processes will mean that, whether or not it is concluded that a particular project may have significant adverse transboundary effects, other states will have the opportunity to comment on proposals for new nuclear power stations before a decision is taken on whether or not to grant development consent.

Conclusion

24. For the reasons set out above, the United Kingdom respectfully invites the Committee to reconsider its reasoning and to conclude that the United Kingdom did not act in breach of the Convention. The United Kingdom also respectfully invites the Committee to re-phrase its recommendations (b) and (c) as suggested in paragraph 19 above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Giles Scott', written in a cursive style.

Giles Scott

Head, National Infrastructure Consents and Coal Liabilities

³ Sites proposed for new nuclear are only in England and Wales: see National Policy Statement EN-6, available at: <https://www.gov.uk/government/publications/national-policy-statements-for-energy-infrastructure>.

ANNEX: CLARIFICATION OF FACTUAL MATTERS

1. Paragraph 19 of the Committee's draft findings and recommendations records that there was consultation on a draft energy infrastructure National Policy Statement. However, there were in fact six such Statements. Accordingly, the United Kingdom suggests that paragraph 19 be re-worded as follows:

"On 9 November 2009, the United Kingdom published a public consultation on six draft energy infrastructure National Policy Statements (NPSs), including one on nuclear energy (the nuclear NPS), as well as draft appraisals of sustainability incorporating strategic environmental assessments. The nuclear NPS provided a list of potential sites for new NPPs, including HPC. On 13 November 2009, copies of the energy NPSs were sent to the European Union (EU) and European Economic Area (EEA) Member States for consultation on possible adverse transboundary effects."

2. Similarly, paragraph 22 should refer to draft energy NPSs in the plural.
3. Paragraph 21 records the position of the United Kingdom as relayed to Ireland on 27 July 2010. However, this paragraph does not fully reflect the United Kingdom's position. Accordingly, the United Kingdom suggests that paragraph 21 be re-worded as follows:

"On 22 February 2010, Ireland notified that it reserved its position on transboundary effects. On 27 July 2010, the United Kingdom Minister wrote to the Irish Minister saying that having reviewed all the data and advice from the regulators, the UK believed that the construction of new nuclear power stations was not likely to have any significant effects on the environment of the Republic of Ireland, and that transboundary effects could be caused only by an unintended release of radiation from an accident, for example, but the probability of such transboundary effects was very low owing to the United Kingdom's robust regulatory system."

4. Paragraph 21 explains that the Planning Inspectorate is "the agency responsible for operating the planning processes". However, the United Kingdom suggests that the role of the Planning Inspectorate would be more accurately summarised as "the agency responsible for examining development consent order applications for nationally significant infrastructure projects and making recommendations to the relevant Secretary of State to inform his or her decision".
5. Paragraph 31 refers to the challenges brought in the domestic courts, however the second sentence of paragraph 31 is potentially unclear. The United Kingdom therefore suggests that it be replaced with the following: "Greenpeace withdrew its challenge".
6. In relation to paragraph 32, the United Kingdom considers it important to note that the challenge brought by An Taisce was considered by both the High Court and the Court

of Appeal at substantive oral hearings. Accordingly, the United Kingdom suggests that paragraph 32 be amended as follows:

"Following a hearing which took place on 5 and 6 December 2013, on 20 December 2013, the High Court of Justice in England and Wales dismissed the application for review of the development consent order by the Secretary of State. On 24 December 2013, An Taisce filed notice of their appeal. Following a hearing which took place on 15 and 16 July 2014, on 1 August 2014, the Court of Appeal dismissed the application for appeal. On 11 December 2014, the Supreme Court refused permission to appeal the Court of Appeal's order of 1 August 2014."

7. The United Kingdom notes that, in paragraph 52, the Committee has referred to its previous view that the United Kingdom had provided to Austria an opportunity under the Convention to participate in the decision-making process in relation to Hinkley Point C. As the Committee records in paragraph 47, however, the United Kingdom's position is that the information exchange with Austria did not constitute any form of concession by the United Kingdom that Hinkley Point C was likely to have a significant adverse transboundary impact. In the light of this, the United Kingdom understands that the Committee does not maintain the previous view recorded in paragraph 52, and it might therefore be beneficial for the Committee to state this expressly.

