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Mr. Felix Zaharia
Chair Implementation Committee -
Convention on Environmental Impact Assessment
in a Transboundary Context
Ministry of Foreign Affairs
Directorate for International Law and Treaties
Alea Alexandru, 31-33, Sector 1
Bucharest, Romania

Your ref: EIA/IC/CI/5 – Hinkley Point C NPP
Our ref: 12.04.09.03/1C

21 November 2014

Dear Mr Zaharia

RE: HINKLEY POINT C NEW NUCLEAR POWER STATION

(A) Introduction

1. I refer to your letter dated 22 September 2014 concerning the Committee's consideration of the planned construction of Hinkley Point C new nuclear power station ("HPC").

2. By your letter you provided the United Kingdom with (a) correspondence from Ms Sylvia Kotting-Uhl dating back to March 2013, (b) correspondence from the Friends of the Irish Environment dated 27 March 2013, and (c) correspondence between the Committee and other state parties dating back to October 2013. You invited the United Kingdom to comment on this material. You also asked the United Kingdom to elaborate on what you referred to as "the transboundary procedures" relating to the adoption of the United Kingdom's nuclear National Policy Statement ("the nuclear NPS").

3. You also indicated that the Committee did not propose to discuss HPC with the United Kingdom at its thirty-second session on 9 to 11 December 2014. However, you requested that the United Kingdom indicate whether it would wish to avail itself of its

right to participate in a discussion with the Committee in relation to HPC and present information and opinions on the matter and, if so, what points the United Kingdom considers would have to be discussed with the Committee.

4. The United Kingdom welcomes the opportunity to comment on the material provided by the Committee and to provide further assistance to the Committee on the issue that arises for consideration.

5. Accordingly, this letter comprises:

(1) this introduction;
(2) a summary of relevant features of HPC (paragraphs 7 to 14 below);
(3) a summary of the United Kingdom's arguments on the proper interpretation of the Convention (paragraphs 15 to 27 below);
(4) the United Kingdom's comments on the material provided by the Committee (paragraphs 28 to 35 below);
(5) an explanation of the steps that were taken in relation to the nuclear NPS (paragraphs 36 to 37 below); and
(6) the United Kingdom's position in relation to participating in a discussion with the Committee (paragraphs 38 to 39 below).

6. In summary, the United Kingdom's position remains that it has complied with its obligations under the Convention. Prior to the decision to grant development consent for HPC, the United Kingdom undertook an environmental impact assessment in accordance with the standards set in EU law (including the requirements on public participation). Following that assessment the United Kingdom concluded that the project was not likely to cause a significant adverse transboundary impact. That decision took account of expert evaluation of the design of the reactors to be used and the detailed specification for the structures which will house the reactors. The evaluation considered what might happen in the event of accident, attack and extreme weather event. The United Kingdom's decision on transboundary impact has been scrutinised and upheld by judgments of the English High Court and Court of Appeal. The same point has been addressed by an Opinion issued by the European Commission under Article 37 of the Euratom Treaty, which concluded that if an accident occurred at HPC, the effect on the population in another member state would not be significant from the point of view of health.

(B) The HPC development

7. The United Kingdom set out the background to the grant of development consent for HPC in my letter to the Committee dated 25 November 2013, and this background was further expanded upon in the documents enclosed with that letter. The United Kingdom does not propose to repeat this information, upon which it continues to rely. However, it is important to stress a number of features in order to place the present matter in context.

8. HPC will comprise two new European Pressurised Reactors ("EPRs"). The consistent view of all experts who have assessed HPC is that, even if it suffered a serious accident, it is extremely unlikely that there would be an emission of radiological material that would affect the environment in another state.

9. Prior to the grant of development consent, the specialist regulatory authorities in the United Kingdom rigorously evaluated the safety aspects of HPC. This process of evaluation lasted 5½ years. The evaluation included the technical generic design assessment of the EPRs. The generic design assessment included a severe accident analysis, which assessed what would happen to the EPRs if a serious accident occurred. The evaluation also included an assessment of specific aspects of the site at Hinkley Point. The specialist regulatory authorities concluded that, in all circumstances, HPC could be constructed and operated in a way that is safe and secure.

10. The European Commission reached the same conclusion as the United Kingdom regulatory authorities. In 2012, the European Commission issued two opinions under article 37 of the Euratom Treaty. The European Commission concluded that if an accident occurred at HPC, the effect on the population in another member state would not be significant from the point of view of health.

11. Austria provided to the United Kingdom a technical report assessing the likelihood and effects of a serious accident at HPC. The report concluded that the calculated probability of an accident causing a relevant emission of radiological material was below 1e-7/a. This means that such an accident would not be expected to occur more frequently than once in every 10,000,000 years of reactor operation.

12. Throughout its lifetime HPC will be controlled by the rigorous and internationally-respected regulatory regime in the United Kingdom.

13. Three UK authorities considered whether HPC is likely to have significant effects on the environment in another EU member state: the Infrastructure Planning Commission, its successor the Planning Inspectorate, and the Secretary of State for Energy and Climate Change. In light of the evidence above, each concluded that HPC is not likely to cause a significant adverse transboundary impact. Each took into account the fact that it was extremely unlikely that there would be an accident at HPC that would cause a relevant emission of radiological material.

14. As the Committee is aware, An Taisce, the National Trust for Ireland, challenged the United Kingdom's decision not to conduct a transboundary consultation. It argued that the United Kingdom had failed to comply with article 7(4) of the EU Environmental Impact Assessment Directive (Parliament and Council Directive 2011/92/EU), which requires transboundary consultation where "a project is likely to have significant effects on the environment in another Member State". That challenge was dismissed by the High Court and An Taisce's appeal has now been dismissed by the Court of Appeal, which also refused permission to appeal to the Supreme Court. A copy of the Court of Appeal's judgment, to which I refer further below, was sent to the Committee on 20th August 2014. An Taisce has made an application to appeal further to the Supreme Court, which is now awaiting determination by the Supreme Court. The United Kingdom will update the Committee when the Supreme Court's decision is received.

(C) The proper interpretation of the Convention

15. As the United Kingdom understands the position of Ms Kotting-Uhl and the Friends of the Irish Environment, their main argument is that the United Kingdom was in breach of article 3(1) of the Convention because, when considering whether notification was required under that article, the United Kingdom wrongly treated impacts arising out of a catastrophic nuclear accident as not "likely" and therefore wrongly concluded that HPC was not likely to cause a significant adverse transboundary impact. The United Kingdom similarly understands that the Committee's concern, as articulated in its letter to the United Kingdom dated 14 March 2013, is that the United Kingdom wrongly applied the threshold test of "likely to cause a significant adverse transboundary impact" laid down by article 3(2). If the United Kingdom's understanding in this respect is incorrect, I would be grateful if you could inform me accordingly.

16. The United Kingdom understands that neither Ms Kotting-Uhl nor the Friends of the Irish Environment disputes the fact that HPC would only be likely to cause a significant

adverse transboundary impact if it experienced a catastrophic nuclear accident. The United Kingdom also understands that neither Ms Kotting-Uhl nor Friends of the Irish Environment seek to cast doubt on the technical evidence relied upon by the United Kingdom. Further, the Committee has not informed the United Kingdom that it disputes either the fact that HPC would only be likely to cause a significant adverse transboundary impact if it experienced a catastrophic nuclear accident or the technical evidence relied upon by the United Kingdom.

17. As the technical evidence is that a catastrophic nuclear accident is not expected to occur more frequently than once in every 10,000,000 years, the issue that arises for consideration by the Committee is whether the United Kingdom was entitled to conclude that HPC was not likely to cause a significant adverse transboundary impact in circumstances where such an impact would not be expected to occur more frequently than once in every 10,000,000 years.

18. The United Kingdom recognises that, perhaps more so than in relation to the other activities listed in Appendix 1 to the Convention, nuclear power is a subject in relation to which different state parties and different members of the public legitimately hold differing views. In particular, the United Kingdom recognises that different state parties and different members of the public legitimately hold different views as to whether the benefits of nuclear power outweigh its perceived disadvantages.

19. However, notwithstanding this legitimate divergence of views, the state parties to the Convention did not agree to treat new nuclear power stations any differently from the other activities covered by the Convention. Indeed, nuclear power stations are listed together with other types of power stations in paragraph 2 of Appendix 1, and there is nothing in the Convention that distinguishes between the relevant part of paragraph 2 and the other paragraphs in Appendix 1, much less the remainder of paragraph 2 itself. Accordingly, there is no basis in the Convention for treating new nuclear power stations as any different in principle from the other activities falling within the scope of the Convention. It follows that the same interpretation of "likely to cause a significant adverse transboundary impact" as is applied to other activities falling within the scope of article 3(1) must be applied to new nuclear power stations.

20. The United Kingdom accepts that, in the light of the fact that the word "likely" is open to a range of interpretations, and in light of the purposes of the Convention, it is not to be interpreted literally, as requiring the application of a balance of probabilities test. Accordingly, the United Kingdom accepts that "likely" does not require that a significant

adverse transboundary impact be more likely than not. In this context, the United Kingdom considers that the correct approach to "likely" is that identified by the Court of Appeal in An Taisce's challenge, where it said that "likely" entails a test of whether there is a "real risk" of a significant adverse transboundary impact (see paragraph 23). As the Court of Appeal held, such an interpretation of "likely" ensures that an appropriately precautionary approach will be adopted.

21. The United Kingdom notes the approach articulated by the Committee in its letter to the United Kingdom of 14 March 2014. In that letter, the Committee expressed the view that "even a low likelihood of such [a significant adverse transboundary impact] should trigger the obligation to notify affected Parties in accordance with article 3". In this respect, the Committee relied upon paragraph 28 of the *Guidance on the Practical Application of the Espoo Convention*, which gives practical guidance to the effect that "[i]t may be advisable to notify neighbouring Parties also of activities that appear to have a low likelihood of significant transboundary impacts". The United Kingdom observes that the references to a "low likelihood" of significant adverse transboundary impacts are not inconsistent with the "real risk" test set out above.

22. The United Kingdom also notes the Committee's reference to its decision set out in Annex I to Decision of the Parties IV/2, where in paragraph 54 it stated that "notification is necessary unless a significant adverse transboundary impact can be excluded". In this respect, the United Kingdom observes that the Committee has not elaborated on the approach to be adopted when deciding whether an impact "can be excluded". If the Committee intended to refer to impacts that can reasonably be excluded, then that approach would not necessarily be inconsistent with the "real risk" test set out above.

23. However, if the Committee intended to refer only to impacts that can be excluded in a literal sense (i.e. all impacts other than those that, no matter how unlikely, cannot be entirely ruled out), then it is respectfully suggested that this does not reflect the proper interpretation of article 3(1). In particular, it would involve giving the express wording agreed between the state parties ("likely") a meaning that would encompass even impacts that were fantastically unlikely. Such an approach to "likely" would entail the adoption of a "zero risk" approach. Such an approach cannot have been within the contemplation of the parties and, moreover, it is not necessary to give effect to the purpose of the Convention. In particular, such an approach would bring activities within the scope of the Convention that the state parties did not intend, and would not wish, to be subject to transboundary consultation.

24. In this respect, the United Kingdom draws particular attention to the judgment of the Court of Appeal in An Taisce's challenge that, even in the context of the EU Habitats Directive, which confers substantive protection on sites designated as of special European significance, "likely to have a significant effect" cannot be interpreted as encompassing all effects that, no matter how unlikely, cannot be entirely ruled out (see judgment at paragraphs 13 to 20).

25. The United Kingdom recognises that the development of new nuclear power stations presents special challenges and it accepts that the nature of any potential significant adverse transboundary impact might affect the approach adopted to determining whether an impact is "likely" in a particular case. However, whatever approach to "likely" is adopted, it is not legitimate to depart from the express wording agreed by the state parties to such an extent that that it deprives that wording of any effect. On any view, an interpretation of art 3(1) which treats an impact that is not expected to occur more frequently than once in every 10,000,000 years as "likely" is one that departs so far from the express wording agreed by the state parties that it deprives that wording of any effect. Applying the "real risk" test referred to above, an impact that is not expected to occur more frequently than once in every 10,000,000 years is not an impact that is "likely" within the meaning of article 3(1).

26. The United Kingdom's approach has been upheld by both the High Court and the Court of Appeal in the context of the EU Environmental Assessment Directive, and the United Kingdom relies in particular on the reasoning set out in paragraphs 10 to 45 of the Court of Appeal's judgment, much of which is equally applicable to article 3(1) of the Convention.

27. For the avoidance of doubt, insofar as Ms Kotting-Uhl argues in her letter of 10 July 2013 that a new nuclear power station is, of itself, likely to cause a significant adverse transboundary impact, this is incorrect. It would have been open to the state parties to agree a provision in the Convention requiring transboundary consultation in relation to all new nuclear power stations, or deeming new nuclear power stations to cause significant transboundary impacts, but they did not do so. As explained above, in fact the state parties did not differentiate new nuclear power stations from other activities covered by the Convention.

(D) Comments on the material provided

28. The United Kingdom is grateful for the opportunity to comment on the material that was provided with your letter. In addition to the points made above in relation to the interpretation of the Convention, the United Kingdom has the following comments on that material.

(i) The information provided by Ms Kotting-Uhl

29. The United Kingdom notes that, in the information form dated 22 March 2013, Ms Kotting-Uhl alleges breaches of articles 3, 4, 5 and 6 of the Convention. However, as explained above, the United Kingdom understands that the only issue that is being considered by the Committee is whether the United Kingdom was in breach of article 3(1) of the Convention. Accordingly, the United Kingdom does not propose to address any alleged breaches of articles 4, 5 or 6. Nevertheless if, contrary to the United Kingdom's understanding, the Committee proposes to consider other breaches of the Convention, it would be grateful if the Committee would inform it accordingly so that it can make representations.

30. Insofar as Ms Kotting-Uhl states that the United Kingdom notified Austria pursuant to the Convention, and that the United Kingdom thereby confirmed the applicability of the Convention, this is incorrect. Austria requested that the United Kingdom afford it and its citizens an opportunity to make representations on the application for a development consent order to HPC. The opportunities for making representations on the application for development consent were open to the public regardless of citizenship, nationality or domicile. The public and NGOs in, and the governments of, other states were all entitled to participate in each of the consultation exercises that were carried out. Accordingly, there was no reason for the United Kingdom to refuse Austria's request; Austria's request was not granted pursuant to the provisions of the Convention.

31. Insofar as Ms Kotting-Uhl suggests that her letter to the Secretary of State dated 13 March 2013 was not taken into account when the decision to grant development consent for HPC was taken, as paragraph 44 of my letter to the Committee dated 25 November 2013 makes clear, this suggestion is incorrect. As my letter to Ms Kotting-Uhl dated 15 March 2013 made clear, her letter was to be taken into account. The fact that there is no express reference to Ms Kotting-Uhl's letter in the formal decision letter of 19 March 2013 cannot be taken to indicate that her letter was not taken into account: in a project of this nature and complexity, it is plainly impossible for the formal decision letter

to refer to every matter that has been taken into account. In any event, paragraph 6.6.3(i) of the formal decision letter expressly records the fact that representations had been made directly to the Secretary of State after the close of the examination period.

32. I note that the information form completed by Ms Kotting-Uhl on 22 March 2013 refers to a letter sent on 12 March 2012. Although I assume that the 2012 date is incorrect, and that the letter referred to was in fact sent on 12 March 2013, the United Kingdom has not been provided with a copy of a letter with either date. Accordingly, the United Kingdom is not in a position to comment on that letter.

(ii) The information provided by Friends of the Irish Environment

33. I note that, in the information form dated 27 March 2013, the Friends of the Irish Environment allege breaches of articles 2, 3, 5 and 6 of the Convention, and in its letter of the same date it alleges breaches of arts 3 and 5. In this respect, I repeat the point made in paragraph 29 above.

(iii) Correspondence between the Committee and other state parties

34. The United Kingdom notes that the Committee has sought the views of various other state parties on the question of whether those state parties consider that HPC is likely to cause a significant transboundary impact within the territories of those states. However, those views are of limited assistance in the present context because the state parties do not always identify what evidence (if any) they rely upon to support their views, and they do not explain what approach they have adopted to the issue of whether an impact is "likely". However, what the relevant correspondence does clearly reveal is that all state parties do not agree that a new nuclear power station must necessarily be treated as likely to cause a significant adverse transboundary impact, thereby revealing that all state parties do not agree that art 3(1) encompasses all effects that literally cannot be ruled out.

35. In this respect, the United Kingdom also relies on the documents referred to in paragraphs 7 to 8 of my letter to the Committee dated 19 June 2014 (erroneously dated 2104) and upon paragraphs 6 and 8 of Annex II to the Report of the Third Meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment (Co-Chairs' summary of the workshop on nuclear energy-related activities). These documents reveal a difference of approach to low probability catastrophic nuclear accidents as between the state parties and again indicate that the state parties

do not agree that art 3(1) encompasses all impacts that, no matter how unlikely, cannot be entirely ruled out.

(E) The nuclear National Policy Statement (NPS)

36. As explained in my letter to the Committee dated 25 November 2013, on 13 November 2009, the United Kingdom provided other EU and EEA Member States with copies of the consultation documents on the proposed new NPS documents, including the nuclear NPS. On 28 October 2010, the United Kingdom similarly provided other EU and EEA Member States with copies of the consultation documents on the revised proposed new NPS documents. Some Member States, including Austria and the Republic of Ireland, made representations in response. Further detail on this process is provided in paragraphs 10 to 23 and 97 to 100 of the witness statement that I made in response to the challenge brought by An Taisce, which was sent to the Committee as enclosure 1 to my letter dated 25 November 2013.

37. The consultation with other EU and EEA Member States on the NPSs was conducted voluntarily by the United Kingdom Government. There was no obligation under the Convention to conduct a transboundary consultation, and nothing in the communications with those other Member States indicates that the consultation was being carried out pursuant to the Convention. This is because it was not considered that the NPS documents, and in particular the nuclear NPS, were likely to give rise to significant adverse transboundary impacts.

(F) Discussion with the Committee

38. The United Kingdom does wish to avail itself of its right to participate in its discussion with the Committee and present information and opinions in relation to HPC.

39. You have asked the United Kingdom to specify the points that will have to be discussed with the Committee. However, apart from the brief statement in the Committee's letter of 14 March 2014, the Committee has not provided to the United Kingdom any explanation of its reasons for considering that the United Kingdom might be in breach of the Convention. Accordingly, the United Kingdom is not at this stage in a position to specify the points that might have to be discussed with the Committee. If the Committee is able to provide the United Kingdom with an explanation of its reasons, the United Kingdom would of course be happy to specify the points that require discussion in the light of that reasoning.

Yours sincerely,

Giles Scott
Head, National Infrastructure Consents

enc. *R (An Taisce) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111