

**Consideration by the Implementation Committee  
of the Convention on Environmental Impact Assessment  
in a Transboundary Context of the planned construction  
of a nuclear power plant at Hinkley Point C**

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**OPENING COMMENTS ON BEHALF OF THE UNITED KINGDOM**

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**Note**

These Opening Comments should be read together with the information contained in the United Kingdom's letters in response to questions raised by the Committee. See:

- (a) the letter dated 25 November 2013 (which responded to the questions in the Committee's letter dated 14 October 2013);
- (b) the letter dated 14 January 2014, in response to the Committee's letter dated 17 December 2013; and
- (c) the letter dated 21 November 2014, in response to the Committee's letter dated 22 September 2014.

## A. INTRODUCTION

1. On 19<sup>th</sup> March 2013, the United Kingdom Government granted development consent for a new nuclear power station at Hinkley Point in Somerset in the south west of England. The power station is to be known as Hinkley Point C.
2. Prior to the decision to grant development consent, the United Kingdom Government undertook an environmental impact assessment (“EIA”). This was undertaken in accordance with the standards set by EU law (including the requirements on public participation). As part of the EIA process, the United Kingdom Government specifically considered whether the project was likely to cause a significant adverse transboundary impact and, therefore, whether transboundary consultation was required<sup>1</sup>.
3. Based on the EIA process the United Kingdom Government concluded that Hinkley Point C is not likely to cause a significant adverse transboundary impact. That conclusion took account of expert evaluation of (a) the design of the reactors to be used, and (b) the detailed specification for the structures which will house the reactors. For example, the evaluation considered what could happen in the event of accident, attack, or extreme weather event.
4. The Government’s conclusion on trans-boundary impact has been scrutinised and upheld by judgments of the English High Court and Court of Appeal. Each court concluded that the United Kingdom Government has complied with its obligations under domestic and EU law (including the provisions of the Convention)<sup>2</sup>.

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<sup>1</sup> The obligation to consider whether a transboundary consultation is required is expressly imposed by domestic regulations that implement the EU Environmental Impact Assessment Directive and, in turn, the Convention.

<sup>2</sup> The United Kingdom Supreme Court rejected an application to appeal against the decision of the Court of Appeal.

5. An Opinion issued by the European Commission under Article 37 of the Euratom Treaty<sup>3</sup> has concluded that the disposal of radioactive waste arising from the operation of Hinkley Point C is not liable to result in radioactive contamination *“of the water, soil or airspace of another Member State”*.
6. The European Commission has also considered whether the United Kingdom was in breach of Article 7 of the EU Environmental Assessment Directive (“the EIA Directive”), which implements the Convention in EU law. The European Commission concluded that there were no grounds to open infringement action against the United Kingdom, as there was no information which questioned the validity of the decision that no transboundary consultation was required in the case of Hinkley Point C<sup>4</sup>.
7. The United Kingdom believes that it has followed and complied with its obligations under the Espoo Convention.
8. These opening comments seek to do the following.
  - (1) Summarise the domestic regulations that implement the relevant aspects of the EIA Directive and the Convention (see section B below).
  - (2) Provide a brief description of relevant characteristics of Hinkley Point C and explain how the United Kingdom Government considered the issue of whether Hinkley Point C is likely to have a significant adverse transboundary impact and, therefore, whether transboundary consultation was required (see section C below).
  - (3) Explain why the United Kingdom acted in accordance with its obligations under the Convention (see section D below).

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<sup>3</sup> Dated 3<sup>rd</sup> February 2012

<sup>4</sup> Letter dated 31<sup>st</sup> May 2013 from the European Commission, a copy of which is attached.

- (4) Explain why the correspondence that the Committee has received from other State Parties does not demonstrate any breach by the United Kingdom of its obligations under the Convention (see section E below)
- (5) Explain why the United Kingdom Government's communications with the Government of Austria do not demonstrate any breach by the United Kingdom of its obligations under the Convention (see section F below).

**B. THE ENGLISH LAW PROVISIONS THAT CONCERN TRANSBOUNDARY IMPACTS**

9. Decisions to develop nationally significant infrastructure project are governed by The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the 2009 Regulations"). Hinkley Point C is such a project. The 2009 Regulations implement the requirements of Article 7 of the EIA Directive and the requirements of the Convention.
10. Under regulation 24 of the 2009 Regulations, where an environmental impact assessment of a nationally significant infrastructure project is required, the United Kingdom Government is required to determine whether the project is likely to have significant effects on the environment in another EEA State. Where the United Kingdom Government concludes that the relevant project is likely to have significant effects on the environment in another EEA State, or where another EEA State likely to be significantly affected by the relevant project so requests, the United Kingdom Government must conduct a transboundary consultation with the relevant State.

**C. THE DECISION TO PERMIT THE HINKLEY POINT C DEVELOPMENT, INCLUDING PUBLIC INVOLVEMENT IN THAT DECISION**

11. There have been nuclear power stations at Hinkley Point since 1965<sup>5</sup>. The new development, known as Hinkley Point C, will comprise two European Pressurised Reactors (“EPRs”). Hinkley Point C will be controlled by the rigorous and internationally-respected regulatory regime in the United Kingdom.
12. The consistent view of all experts who have assessed Hinkley Point C is that even if a serious accident occurred, it is extremely unlikely that there would be an emission of radiological material that would affect the environment in another state.
13. Prior to the grant of development consent, the safety aspects of Hinkley Point C were rigorously evaluated by the United Kingdom specialist regulatory authorities. The evaluation took 5½ years to complete. 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, Hinkley Point C could be constructed and operated in a way that is safe and secure.
14. Austria sent a technical report to the United Kingdom<sup>6</sup>. The report assessed the likelihood and effects of a serious accident at Hinkley Point C. 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

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<sup>5</sup> Hinkley Point A operated from 1965 to 2000, and is currently being decommissioned. Hinkley Point B has operated since 1976 and is expected to continue in operation until 2023.

<sup>6</sup> Report titled “*Hinkley Point C. Expert Statement to the EIA*”, dated 2013.

accident would not be expected to occur more frequently than once in every 10,000,000 years of reactor operation.

15. Under the procedures required by law in the United Kingdom, the public in other State Parties had an opportunity to participate in the process that resulted in the decision to grant development consent for Hinkley Point C. That opportunity was equal to the opportunity afforded to the public in the United Kingdom. In particular, the Committee is asked to note the following matters.

(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 to 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.

16. Three UK authorities have expressly considered whether Hinkley Point C is likely to have significant effects on the environment in another EU member state: (a) the Infrastructure Planning Commission; (b) its successor the Planning Inspectorate; and (c) the Secretary of State for Energy and Climate Change.
17. In light of the evidence referred to above (for example, see paragraph 13 above) each concluded that Hinkley Point C is not likely to have significant effects on the environment in another EEA State. Each took into account the fact that it was extremely unlikely that there would be an accident at Hinkley Point C which would result in a relevant emission of radiological material.

**D. THE UNITED KINGDOM GOVERNMENT ACTED IN COMPLIANCE WITH ITS OBLIGATIONS UNDER THE CONVENTION**

(1) The issue for the Committee

18. The United Kingdom understands that the matters of concern to the Committee are as follows.
  - (1) Whether the United Kingdom complied with its obligation under Articles 2(4) and 3(1) of the Convention to notify Affected Parties of a proposed activity that is likely to cause a significant adverse trans-boundary impact.
  - (2) Whether the United Kingdom complied with its obligation under Article 2(6) of the Convention to provide to the public in areas likely to be affected in the territories of Affected Parties an opportunity to participate in relevant environmental impact assessment procedures.

19. These matters depend on whether the United Kingdom Government was permitted to conclude that Hinkley Point C is not likely to have a significant adverse trans-boundary impact.
20. The technical evidence available to the UK Government demonstrated that Hinkley Point C could only cause a significant adverse trans-boundary impact if a catastrophic nuclear accident occurred. The technical evidence shows that a catastrophic nuclear accident is not expected to occur more frequently than once in every 10,000,000 years. This evidence demonstrates that the chances of a catastrophic nuclear accident at Hinkley Point C are less than the chances of a meteorite over a kilometre wide hitting the earth. Insofar as the United Kingdom Government is aware, this technical evidence has not been disputed by the Committee, or by any other State Party, or by Ms Kotting-Uhl or Friends of the Irish Environment.
21. Accordingly, the issue for the Committee is whether the United Kingdom Government was entitled to conclude that a significant adverse transboundary impact that has a 0.00001% chance of occurring is "*likely*" within the meaning of the Convention.
22. The United Kingdom's position is that an interpretation of "*likely*" that includes events that have a 0.00001% chance of occurring, does not reflect the words of the Convention, and would not reflect the intention of the State Parties to the Convention.

(2) "*Likely*" must be given a uniform meaning

23. The United Kingdom recognises that different State Parties and different members of the public legitimately hold strong and differing views about nuclear power stations. Nevertheless the Convention embodies an agreement



to treat new nuclear power stations on the basis of the same rules as apply to all other activities covered by the Convention. The list of activities at Appendix 1 to the Convention draws no distinction between nuclear power stations and any other listed activity. The Convention contains no special rules applicable to nuclear power stations.

24. It follows: (a) that Article 3(1) is to be applied in the same manner to all Appendix 1 activities; and (b) that the phrase "*likely to cause a significant trans-boundary impact*" has the same meaning when applied to a nuclear power station as it has when applied to any other Appendix 1 activity.
25. Accordingly, if for the purposes of the decision on Hinkley Point C "*likely*" is interpreted as including events that have a 0.00001% chance of occurring, the same interpretation must be applied in all other cases. It follows that if a trans-boundary consultation was required for Hinkley Point C, a trans-boundary consultation will be required in all cases where there is a 0.00001% chance of a project having a significant adverse transboundary impact. In practical terms, this is equivalent to adopting a "zero risk" approach.

(3) *Meaning of "likely"*

26. The United Kingdom accepts that the word "*likely*" covers a range of meanings. The United Kingdom also accepts that in light of the purposes of the Convention, "*likely*" does not simply mean "*more likely than not*" - i.e. the approach required is not a simple balance of probabilities test.
27. The United Kingdom also recognises that the development of new nuclear power stations presents special challenges. The United Kingdom accepts that in a particular case, the nature of any potential significant adverse trans-boundary impact might affect the approach adopted to determining whether an impact is "*likely*".

28. 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 *“likely”* which treats an impact that has a 0.00001% chance of occurring 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. In substance, that interpretation would read *“likely”* as including events that are fantastically unlikely to occur, i.e. a *“zero risk”* approach.
29. The United Kingdom considers that the correct approach to *“likely”* is that stated by the Court of Appeal in its judgment on the challenge to the grant of development consent for Hinkley Point C. The Court of Appeal stated that *“likely”* means a test of whether there is a *“real risk”* of a significant adverse trans-boundary impact (see paragraph 23 of the Court of Appeal’s judgment).
30. The *“real risk”* test has been upheld by both the High Court and the Court of Appeal in the context of the EIA Directive. 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 the Convention. This interpretation of *“likely”* ensures that an appropriate precautionary approach will be adopted<sup>7</sup>. Applying the *“real risk”* test, an impact that has a 0.00001% chance of occurring is not an impact that is *“likely”* within the meaning of the Convention.

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<sup>7</sup> As noted above, the United Kingdom Supreme Court has dismissed an application for permission to appeal from the Court of Appeal’s judgment.

(4) Guidance on the Practical Application of the Espoo Convention

31. The Committee's letter to the United Kingdom dated 14<sup>th</sup> March 2014 referred to paragraph 28 of the *Guidance on the Practical Application of the Espoo Convention* ("the Guidance") in support of the suggestion that a significant adverse trans-boundary impact is "*likely*" if it "cannot be excluded".
32. The United Kingdom's position is that the Guidance does not support the conclusion that "*likely*" means "cannot be excluded".
33. *First*, it is important to recognise that the Guidance is not, and does not purport to be, authoritative guidance as to the interpretation of the Convention. The Guidance states as follows.

"2. ... This guidance document has been written for competent authorities in the Parties to the Convention. It provides *hints and suggestions* that can improve the practical application of the Convention.

3. ... The Guide goes through each of the steps in the application of the Convention and identified *good practices* based on accumulated experiences from the different Parties to the Convention."

(emphasis added)

34. *Secondly*, and in any event, paragraph 28 of the Guidance does not state either expressly or by implication that a significant adverse trans-boundary impact is "*likely*" where there is a "low likelihood" of that impact occurring. Paragraph 28 states only as follows.

"It *may be advisable* to notify neighbouring Parties also of activities that *appear* to have a low likelihood of significant transboundary impacts. It is better to inform potentially affected Parties and let them decide on their participation instead of taking the risk of ending up in an embarrassing situation in which other Parties demand information on activities that have already progressed past the EIA phase...."

(emphasis added)

35. Thus, the following points may be made.

- (1) Paragraph 28 of the Guidance does no more than advise State Parties that even where it appears that a particular project has a low likelihood of significant adverse trans-boundary effects, it may nevertheless be prudent to inform potentially Affected Parties so as to avoid any difficulties later in the decision-making process. It is no more than a “hint and suggestion” as to “good practice”.
- (2) The fact that paragraph 28 of the Guidance refers to notification as “advisable”, makes it clear that the Guidance is *not* stating that a trans-boundary consultation is *required* where a project has a “low likelihood” of causing a significant adverse trans-boundary effect.
- (3) Paragraph 28 does not state that significant adverse trans-boundary impacts that have a “low likelihood” of occurring include impacts that cannot be excluded. The application of the “real risk” test set out above is entirely consistent with the application of a “low likelihood” test.

36. *Accordingly*, the Guidance does not support the suggestion that a significant adverse trans-boundary impact is “*likely*” if it “cannot be excluded”. In fact, the Guidance points against such a conclusion.

(5) *The Committee’s findings and recommendations in the Bystroe Canal case*

37. In its letter to the United Kingdom dated 14<sup>th</sup> March 2014, the Committee also refers to paragraph 54 of its findings and recommendations in the Bystroe Canal case, as set out in Annex I to Decision of the Parties IV/2 (“Decision IV/2”). At paragraph 54 of the Committee’s findings and recommendations it

is stated that “notification is necessary unless a significant adverse transboundary impact can be excluded”.

38. The United Kingdom’s position is that this conclusion should not be taken to represent an authoritative interpretation of Article 3(1). This is because neither the interpretation of Article 3(1), nor the meaning of “likely” in that context, were issues that the Committee was required to determine.
39. The Committee’s findings and recommendations in Decision IV/2 concerned a dispute between Romania and Ukraine as to whether Ukraine should have undertaken trans-boundary consultation in relation to the Bystroe Canal (i.e. the Danube-Black Sea Deep Water Navigation Canal). Pursuant to Article 3(7) of the Convention, an Inquiry Commission had been established to advise on whether the Bystroe Canal was likely to have a significant adverse trans-boundary impact. The Inquiry Commission’s unanimous opinion was that the canal project was likely to have a significant adverse trans-boundary impact (see paragraphs 4 and 42 of the Committee’s findings and recommendations). In light of this, the question that arose for consideration by the Committee was whether that opinion had a retrospective or prospective effect (see paragraphs 50 to 53 of the Committee’s findings and recommendations).
40. Given these matters, the statement at paragraph 54 of Decision IV/2 as to the meaning of Article 3(1) was not necessary for the purposes of the Committee’s decision. The Committee did not have to reach any conclusion as to whether the Bystroe Canal was likely to have a significant adverse trans-boundary impact, much less consider what was meant by “likely”; and it is not clear whether the Committee had the assistance of the parties on that issue, or on the issue as to the proper meaning and effect of the Guidance.
41. In any event, in the Bystroe Canal case the Committee did not elaborate on the approach to be adopted when deciding whether an impact “cannot be

excluded". If the Committee intended to refer to impacts that cannot *reasonably* be excluded, then that approach may be consistent with the "real risk" test set out above.

42. If, however, the points made at paragraphs 38 - 41 above are rejected, the United Kingdom's position is that the conclusion on Article 3(1) which the Committee stated at paragraph 54 of Decision IV/2, is incorrect.

(1) It is a conclusion on the meaning of the word "*likely*" that does not reflect the proper interpretation of the Convention.

(2) It requires that the phrase agreed by the State Parties - "*likely to cause a significant adverse transboundary impact*" - be interpreted to extend to impacts that were fantastically unlikely. That is, for all practical purposes a "zero risk" approach. A zero risk approach is inconsistent with the terms of the Convention, as agreed by the State Parties.

(3) Such an approach to the meaning of the Convention would be inconsistent with the usual approach to the construction of the meaning of treaties. See for example, the "*general rule of interpretation*" at article 31 of the *Vienna Convention on the Law of Treaties*.

43. The United Kingdom draws particular attention to the judgment of the Court of Appeal of England and Wales that, even in the context of the EU Habitats Directive, which confers significant 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 paragraphs 13 to 20 of the Court of Appeal's judgment).

**E. CORRESPONDENCE WITH OTHER STATE PARTIES DOES NOT DEMONSTRATE A BREACH OF THE CONVENTION**

44. In its letter to the United Kingdom dated 24<sup>th</sup> December 2014, the Committee relies on correspondence received by it from the Netherlands and Norway to support the suggestion that Hinkley Point C is likely to cause a significant adverse trans-boundary impact.
45. The United Kingdom's position is that this correspondence provides no support for that suggestion.
46. *First*, the letter from the Government of the Netherlands dated 23<sup>rd</sup> January 2014 states no more than that the United Kingdom government had not provided information about Hinkley Point C. For this reason the government of the Netherlands declined to state any opinion on whether or not Hinkley Point C would or would not be likely to cause any significant adverse trans-boundary impact. It follows that the Government of the Netherlands' statement does not provide any support for a conclusion that the United Kingdom breached its obligations under the Convention.
47. *Secondly*, the letter from the Government of Norway dated 5<sup>th</sup> February 2014 only addresses the risk of significant adverse trans-boundary impact "*in the case of a major accident or incident*". The Government of Norway does not express any view on the likelihood of such a major accident or incident occurring. Yet, as stated above, the primary question in the present case concerns the likelihood that a major accident or incident could occur. Therefore, the Government of Norway did not state that Hinkley Point C is likely to cause a significant adverse trans-boundary impact.
48. *Thirdly*, the United Kingdom notes that in correspondence with the Committee, the governments of Belgium, France, Germany, Ireland and Spain

have accepted the United Kingdom's view that Hinkley Point C is not likely to cause a significant adverse trans-boundary impact in their territories.

49. Accordingly, the evidence before the Committee is that, of the eight State Parties contacted by the Committee, only Austria has expressed the opinion that Hinkley Point C is likely to cause a significant adverse trans-boundary impact. However, that view rested on a conclusion that there was a 0.00001% chance that an event that would give rise to a trans-boundary impact might. This reflects only Austria's legitimate and publicly-stated position that it opposes the use of nuclear power and the construction of any new nuclear power stations. It is not a statement that supports the conclusion that the United Kingdom has acted in breach of Article 3(1) of the Convention.
50. The fact that a State Party might disagree with a Party of Origin's conclusion that a project is not likely to cause a significant adverse trans-boundary impact does not mean that the relevant project is to be treated as being likely to cause a significant adverse transboundary impact. Article 3(7) of the Convention expressly provides that, in such a case, the dispute is to be resolved by an Inquiry Commission under Appendix IV to the Commission (or such other means of dispute-resolution as the parties may agree upon). Accordingly, the Convention itself is clear that a mere difference of views as to whether a project is likely to cause a significant adverse trans-boundary impact does not imply that the project in question is likely to cause a significant adverse transboundary impact.

**F. COMMUNICATIONS WITH AUSTRIA DO NOT DEMONSTRATE A BREACH OF THE CONVENTION**

51. In its letter to the United Kingdom dated 24<sup>th</sup> December 2014, the Committee expressed its view that the fact that the United Kingdom Government



provided to Austria an opportunity to “*participate under the Espoo Convention*” demonstrated an acceptance by the United Kingdom that Hinkley Point C was likely to have a significant adverse trans-boundary impact.

52. However, the Committee’s assumption that the United Kingdom Government provided Austria with an opportunity to participate “*under the Convention*” is incorrect.
53. The Government of Austria first sought information in relation to Hinkley Point C, pursuant to Article 3 of the Convention, by a letter dated 18<sup>th</sup> September 2012. The Planning Inspectorate responded by a letter dated 8<sup>th</sup> October 2012, explaining that it had concluded that Hinkley Point C was not likely to cause significant adverse trans-boundary effects, but informing the Government of Austria that it might nonetheless have the opportunity to participate in the decision-making procedure and that it should contact the Secretary of State.
54. The Government of Austria wrote to the Secretary of State on 19<sup>th</sup> October 2012, requesting that the United Kingdom Government confirm that Austria would have the opportunity to participate in accordance with the Convention. In particular, pursuant to Article 3(7) of the Convention, the Government of Austria requested information to enable it to evaluate the possible significant adverse transboundary effects of Hinkley Point C. The requested information was sent to the Government of Austria by a letter dated 16<sup>th</sup> November 2012.
55. By a letter dated 11<sup>th</sup> January 2013, the Government of Austria stated that it intended to participate in the decision-making procedures. The United Kingdom Government responded by a letter dated 17<sup>th</sup> January 2013. This letter made it clear that the United Kingdom Government did not consider that Hinkley Point C was likely to have a significant adverse trans-boundary impact but that it would nonetheless afford Austria the opportunity to

participate in the decision-making procedures. The letter of 17<sup>th</sup> January 2013 included the following passage.

“Although the United Kingdom has seen no evidence to suggest that there would be any significant transboundary effects which might affect Austria as a result of this development, even if it were the case that such effects were likely, consideration of the responses to your consultation by the Secretary of State, along with other material that will be before him at the time he takes his decision, would discharge any applicable obligations of the UK under Article 7 of the EIA Directive.”

56. Accordingly, it is clear that the United Kingdom: (a) did not accept that Hinkley Point C was likely to cause a significant adverse trans-boundary impact; (b) did not accept that there was any obligation under the Convention to notify Austria about Hinkley Point C; and (c) did not accept that it was necessary “*under the Convention*” to allow Austria to participate in the decision-making procedures. Rather, the United Kingdom took a pragmatic decision to consider any information that Austria wished to submit. This was entirely in accordance with the general approach adopted by the United Kingdom Government which was, as explained above, to afford the public in other State Parties the same opportunity to participate in the decision-making procedure as it afforded to the public in the United Kingdom.

## G. CONCLUSION

57. For the reasons set out above, the Committee is respectfully invited to conclude that the United Kingdom did not act in breach of the Convention.

16<sup>th</sup> March 2015.