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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland
(By email only)

12 June 2017

Dear Ms Marshall

**Re: Communication to the Aarhus Convention Compliance Committee
concerning compliance by the United Kingdom in connection with public
participation regarding two nuclear reactors at Hinkley Point (ACCC/C/2013/91)**

1. Thank you for your letter of 10 May 2017 which forwarded the draft findings of the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom in connection with public participation regarding two nuclear reactors at Hinkley Point (ACCC/C/2013/91), and afforded the United Kingdom an opportunity to comment on the draft findings. The United Kingdom wishes to note that it is committed to allowing access by the public concerned to environmental decision-making, and shares the Committee's ambition in this regard.
2. This response outlines recent changes to the domestic law in the UK following amendments to EU law, and then proceeds to set out some significant concerns about the reasoning adopted by the Committee that led to the findings and recommendations set out in paragraphs 89-90 of the draft. Briefly, the United Kingdom submits that:
 - the interpretation of the Aarhus Convention proposed by the Committee does not reflect the intention of the Parties, since it fails to take into account fully the more specific obligations for transboundary consultation agreed in the Espoo Convention;
 - in our view, when considering the application of the Espoo Convention, the use of the term "likely" imports a requirement that there should be a "real risk" of a significant transboundary impact; and
 - the approach adopted for identifying the "public concerned" for the purposes of article 6 of the Aarhus Convention may not be capable of practical and objective application.
3. Further, the United Kingdom is concerned that the Committee has failed to take into account that the findings of the Espoo Convention Implementation Committee have

not been endorsed by a Meeting of the Parties to that Convention. The United Kingdom, therefore, considers it inappropriate to rely on unendorsed findings and recommendations of the Espoo Convention Implementation Committee.

4. The United Kingdom welcomes the Committee's commendation of the provisions of the Planning Act 2008 which allow for public participation in the examination of applications for development consent for major infrastructure projects.

Recent changes to UK and EU law

5. The Committee may be interested to note that since the original communication and the later discussion on Hinkley Point C, there have been changes to the relevant domestic legislative framework, consequent on amendments made to the EIA Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU).
6. As the Committee is aware, the EU is responsible for the implementation of the Aarhus Convention (as well as the Espoo Convention) in relation to matters within its competence.
7. In particular, and as the Committee notes at paragraph 15 of its draft findings, article 7 of the EIA Directive implements the Aarhus and Espoo obligations on the consideration of transboundary impacts. So far as the subject matter of this complaint is concerned, article 7 strongly echoes the language of the Espoo rather than Aarhus Convention. Article 7 only applies where "a project is likely to have significant effects on the environment in another Member State" (or where a Member State likely to be significantly affected requests) (paragraph (1); "likelihood" wording echoed in paragraph (3)(a)). And the obligation to provide information to the public concerned applies to the Member States "each insofar as it is concerned", within a process of consultations between the Member States and including that detailed arrangements are to be determined collaboratively by the Member States (paragraphs 3-5).
8. In seeking to provide for public participation, Directive 2014/52/EU (at article 1(6)(b)) inserted further provision into article 6 of Directive 2011/92/EU, such that "In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means".
9. In relation to Planning Act 2008 applications within the United Kingdom, such as that for Hinkley Point C, this obligation has been transposed as new regulation 9(2A) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as inserted by regulation 36(4)(b) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017)¹. Consequently, in the case of future EIA developments, notices concerning the proposed development must as a matter of law be made available on a website maintained by or on behalf of the Secretary of State. The United Kingdom considers that the current regime meets the requirements of article 6(2) of the Aarhus Convention and that there is consequently

¹ Available at: http://www.legislation.gov.uk/uksi/2017/572/pdfs/ukxi_20170572_en.pdf

no need for the recommendations at paragraph 90 of the draft findings and recommendations.

Provisions of the Aarhus Convention and relationship with Espoo Convention

10. The United Kingdom reiterates its concerns about the Committee's interpretation and application of the obligation under article 6(2) of the Aarhus Convention with respect to public participation in a transboundary EIA of the public in the territory of another Party in isolation from the specifically agreed obligation which governs precisely that issue under article 2(6) of UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 ('the Espoo Convention'). The United Kingdom considers that the approach adopted by the Committee would lead to the simultaneous and parallel application of two different obligations for transboundary consultation, each potentially of a different scope and capable of producing a different result, with respect to a single transboundary EIA. This cannot reasonably be taken to have been intended by the Parties.
11. In interpreting the obligation of public participation with respect to transboundary EIA under article 6(2) of the Aarhus Convention, pursuant to well-established rules of treaty interpretation in international law, the Committee must have regard to the context within which it is created (article 31(1) of the Vienna Convention on the Law of Treaties 1969). The Committee must also take into account of "any relevant rules of international law applicable in the relations between the parties".
12. The United Kingdom considers that when interpreting the scope of the obligation regarding public participation with respect to transboundary EIA under article 6(2) of the Aarhus Convention, the context and the "relevant rules of international law applicable in the relations between the parties" includes the provisions of the earlier Espoo Convention. The Parties' intention to this effect is specifically recorded in the preamble to the Aarhus Convention, which also provides evidence of the Convention's object and purpose, and states as follows: "Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991".
13. The Espoo Convention sets out a number of specific rules governing transboundary consultation on potential transboundary impacts and transboundary EIA, in particular at articles 2(6) and 3(8). The Aarhus Convention contains no express provisions displacing these specific provisions and there is no evidence that this was intended by the Parties. The United Kingdom considers, accordingly, that in relation to the obligation of transboundary public participation, the more detailed and specific rules set down in the Espoo Convention apply as the specific legal regime (*lex specialis*). In this context, the obligation to consult with the public concerned outside the United Kingdom extends only so far as compatible with the mechanism set out in the Espoo Convention.
14. Consequently, where a state considers that a proposed activity (as listed in appendix 1 to the Espoo Convention) within its jurisdiction is likely to cause a significant adverse transboundary impact in another state, and therefore potentially affects a possible public concerned, taking into account both the Espoo Convention specific rules on transboundary consultation and the more general rules under the Aarhus Convention, then the state of origin should notify the state within which there is a potential transboundary impact under article 3(1) of the Espoo Convention. As noted

above, the United Kingdom's position is that the word "likely", in this context, imports a requirement that there should be a "real risk" of a significant transboundary impact. Such an interpretation of "likely", the United Kingdom considers, ensures an approach consistent with the principle of prevention and the wording agreed by the State Parties.

15. Where states have not been notified under article 3(1) of the Convention, but consider that there is a likely effect in their territory, article 3(7) of the Espoo Convention provides a mechanism for discussions with the state of origin on the applicability of the process set out in articles 4 to 6 of the Espoo Convention.
16. This, as noted above, is the mechanism adopted by the EU in the EIA Directive for the consideration of transboundary consultation, though with the addition of specific provisions on consultation including notices that are accessible widely (and as transposed by the United Kingdom).

Identifying the "public concerned"

17. Separately to the point made above, regarding the interpretation and application of the Aarhus Convention in a manner consistent with the specific rules on transboundary consultation set out in the Espoo Convention, as a general matter, the United Kingdom is significantly concerned about the implications of the reasoning in the draft decision for identifying the "public concerned" in the territory of other states. The reasoning of the Committee is set out in paragraphs 73-75.
18. The United Kingdom considers that the starting point for any limb of a test or requirement, such as identifying the "public concerned", should be that it is capable of objective assessment by the party responsible for meeting the requirement. "Public concerned" is defined in article 2(5) of the Aarhus Convention as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making".
19. As noted above, "likely", in the view of the United Kingdom, imports a requirement that there should be a "real risk" of an event or impact occurring. The United Kingdom consequently disagrees with the Committee's view that the "public concerned" should include all those who may be "potentially affected" (para. 69) "even if the risk is very small" (para. 75). The United Kingdom notes that, in the context of certain activities such as nuclear power plants, an obligation which covers all of the public who are "possibly" or "potentially" affected by environmental harm would be essentially unlimited. If that were the aim of the Convention, the Convention would have been drafted differently, imposing a universal obligation.
20. In relation to the identification of the public "having an interest", the United Kingdom considers that it is not possible for a state to objectively assess the perceptions and worries of persons located in another state (or, indeed, their own), and that to require this would be to remove any certainty from the process set out in article 6 of the Aarhus Convention. Effectively, it would mean that states are at risk of adverse Aarhus findings on the basis of an incorrect judgment of the level or nature of interest in another sovereign state. Again, absent express wording to the contrary, this cannot reasonably be taken to have been the intention of the Parties.

21. The United Kingdom considers, consequently, that there are significant questions as to the practical application of the test set out by the Committee, including the need to go beyond mere statistical analysis. Whilst wider environmental concerns are considered as part of the process, it is important that when applying a key legal test (such as identifying the public concerned) that this is on the basis of matters realistically capable of being assessed by the decision maker.

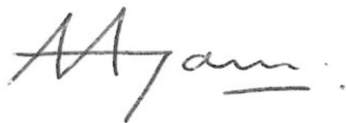
Conclusions

22. On this basis, the United Kingdom considers, first, that its current domestic law, as set out above and transposing the EU agreed approach, is sufficient to fulfil the obligations of article 6 of the Aarhus Convention. In reaching this conclusion, the United Kingdom considers that the specific rules on transboundary consultation set out in articles 2 and 3 of the Espoo Convention should be taken into account when interpreting and applying the Aarhus Convention. This would avoid the simultaneous application of two different regimes, potentially giving different answers on transboundary consultation, with respect to a single transboundary EIA. Consequently, it does not consider that the Committee's findings and recommendations, as set out in paragraphs 89 to 90, of the draft communicated to the United Kingdom are necessary.

23. Second, as a more general matter, the United Kingdom has considerable concerns on the specific wording and interpretation adopted by the Committee in relation to the identification of the "public concerned". In particular, the United Kingdom considers that the interpretation of "public concerned", in paragraphs 73-75 and recommendation 90(b), is not capable of practical and objective application.

24. The United Kingdom would, though, welcome the opportunity to discuss the matter further before any findings and recommendations are communicated to an appropriate Meeting of the Parties, as the United Kingdom shares the underlying ambition of the Committee to ensure access to decision-making in environmental matters.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Ahmed Azam', with a horizontal line underneath the name.

Ahmed Azam
United Kingdom National Focal Point to the UNECE Aarhus Convention