



Aarhus Convention Compliance Committee
Attn. Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee

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Contact
Mr. R.J.M. Lefeber
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Date 03-07-2018
Re Ref. Communication ACCCC/2014/104

Our reference
MinBuZa.2018.756317

Dear Ms Marshall,

Further to your letter of 25 May 2018 concerning the draft findings and recommendations of the Aarhus Convention Compliance Committee with regard to the communication to the Committee concerning compliance by the Netherlands in connection with decision-making on plant life-time extension of the Borssele nuclear power plant (Communication ACCC/C/2014/104), I have the honour to hereby provide the Committee with the comments of the Netherlands pursuant to paragraph 34 of the annex to decision I/7.

Yours sincerely,

René Lefeber
Legal Adviser

Encl.: Comments of the Netherlands pursuant to paragraph 34 of the annex to decision I/7 with regard to the communication to the Committee concerning compliance by the Netherlands in connection with decision-making on plant life-time extension of the Borssele nuclear power plant (Communication ACCC/C/2014/104)

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Introduction

1. The Netherlands has received and reviewed the draft findings and recommendations of the Aarhus Convention Compliance Committee ('ACCC') in case ACCC/C/2014/14. The case concerns a communication submitted by Greenpeace alleging that the Netherlands, as the Party concerned, failed to provide for public participation as required by article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, hereinafter: 'the Convention') when granting the licence to extend the design lifetime ('LTO licence') of the Borssele Nuclear Power Plant ('Borssele NPP').
2. The Government of the Netherlands ('the Government') welcomes the ACCC's clarification of the interpretation of a number of provisions of the Convention. It will give serious consideration to the ACCC's findings once finalised and study how its recommendations can be complied with. However, the Government would like to make a number of comments regarding some of the ACCC's considerations, as explained in further detail below.

Internet consultation

3. In response to your draft recommendation contained in paragraph 86, the Government would advise the ACCC that the Dutch legislative process now includes an instrument known as 'internet consultation'.¹ This relatively new instrument was introduced in 2011 and did not therefore exist at the time of the relevant amendments to the Nuclear Energy Act in 2010. Internet consultation makes it possible for anybody to comment on planned legislation and policy memorandums prior to their adoption. This new instrument increases the scope for public participation, and in doing so satisfies the requirements of article 6 of the Convention.

Non-discretionary decision-making

4. The content of the draft findings came as somewhat of a surprise to the Netherlands, since the communication submitted to the ACCC concerned the LTO licence, whereas the draft findings ultimately focused on the 2006 Covenant on Borssele NPP (the 'Covenant') and the resulting legislative amendment of 2010, implying that the decision on the LTO licence followed from the Covenant. That is incorrect. The Covenant was only the precursor to the legislative amendment, not to the LTO licence.
5. One of the ACCC's main arguments for drawing this conclusion was the Covenant itself. In paragraphs 75 and 76 of the draft findings, the ACCC states that '*the 2006 Covenant created a new, enforceable obligation on the public authorities not to interfere with the NPP's operation until 2033*' and that therefore the LTO licence was part of or a phase of a non-discretionary decision-making process. That is, however, inaccurate. The power to grant the LTO licence is derived from section 15 of the Nuclear Energy Act. The Covenant also confirms that the aforementioned obligation arising from the Covenant does not detract from '*the powers and obligations of Central Government to implement national and/or international legislation in so far as that legislation concerns ensuring the normal operation of [Borssele NPP]*' and that '*Central Government is not obliged to provide any form of compensation if [Borssele NPP] no longer complies with the*

¹ <https://www.internetconsultatie.nl/>.

applicable safety requirements arising from the Nuclear Energy Act and the legislation based on it'.²

6. This means that safety plays a decisive role and that neither the 2006 Covenant nor the 2010 legislative amendment bound the competent authority to the end date in 2033 when granting the LTO licence. If the long-term safety analyses and evidence submitted in connection with the LTO licence had shown that the design lifetime could not possibly be extended or could only be extended for a period of less than 20 years, the competent authority would have had the power and the duty to deny the licence application or grant the licence for a shorter period than until 2033, on the basis of the interests cited in section 15b of the Nuclear Energy Act, including the protection of persons, animals, plants and goods.

Scope of article 6 of the Convention

7. In paragraph 79 of its draft findings, the ACCC is of the opinion that the legislative amendment of 2010 falls within the scope of article 6, paragraph 4 in conjunction with article 6, paragraph 10 of the Convention. The Government wonders how this draft finding can be reconciled with the final sentence of article 2, paragraph 2 of the Convention, which provides that the term 'public authority', for the purposes of the Convention, 'does not include bodies or institutions acting in a (...) legislative capacity'.
8. The legislative amendment of 2010 took the form of an Act of Parliament passed by a body acting in a legislative capacity which was therefore excluded from the scope of the term 'public authority' as defined in article 2, paragraph 2 of the Convention. The Netherlands would question why the ACCC is nevertheless of the opinion that the legislative amendment of 2010 falls within the scope of article 6 of the Convention. In this context the Netherlands wishes to stress once more that the Covenant was only the precursor to this legislative amendment.

Design lifetime vs. operational lifetime

9. It is the understanding of the Government that the ACCC regards the Covenant and the legislative amendment as a reconsideration or update of operating conditions within the meaning of article 6, paragraph 10 of the Convention. However, a decision on the design lifetime of a nuclear plant does not entail reconsidering or updating operating conditions.³ The decision in question involved an assessment by the regulatory body as to whether Borssele NPP's physical condition was sufficiently safe to allow a longer period of operation within the technical preconditions of the licence. It decided that this was the case, without the need for any change or extension to the plant, or any change to the operating time laid down in the licence, which had been granted in 1973 for an indefinite period and restricted to the end of 2033 by Act of Parliament. The subsequent change to the licence in connection with the extension of Borssele NPP's design lifetime related solely to the safety report associated with the licence. Its period of validity had to be extended by recording the results of the long-term safety analyses and evidence related to the design lifetime extension in the safety report.

Disclosure of environmental information

10. The Government endorses the ACCC's conclusion⁴ that in the context of decision-making on an extension to the operational and design lifetime, all relevant information must be made available to the public in accordance with article 6, paragraph 6 of the Convention.

² Articles 3.1 and 10.4 of the Covenant.

³ Paragraphs 63 and 64.

⁴ Paragraph 82.

11. It is correct that when the Covenant was being agreed, consideration was given to the environmental impacts of closure of Borssele NPP in 2033 as compared with the reference situation of closure in 2013, the planned year of closure under the second Balkenende coalition agreement of 2002. At that time, environmental impacts were one of the aspects that played a role in the negotiations on the closure date of Borssele NPP. The analysis drawn up by the Energy Research Centre of the Netherlands and the Nuclear Research & Consultancy Group (ECN-NRG) and containing environmental information, entitled 'Borssele Nuclear Power Plant after 2013: Consequences of closure or continued operation' was made available to the general public in accordance with article 6, paragraph 6 of the Convention, as an appendix to a letter to Parliament of 10 January 2006.
12. The ACCC appears to agree with the communicant's assumption that since no environmental information was disclosed in connection with the LTO licence, whereas such information had been disclosed in connection with the Covenant, that environmental information was in fact available to the competent authority but was deliberately not disclosed. Contrary to the ACCC's assumption, however, all information relating to the licence application, including environmental information, was in fact disclosed in connection with the LTO licence. In this respect, it is also relevant that the year 2013 was a reference date for the Covenant and a review date for the LTO license.