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CLIMATE POLICY INSTITUTE
APPLIED COMMUNICATIONS

GREENPEACE

24 March 2016

Ms. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations, Room 429-2
CH-1211 Geneva 10, Switzerland

Dear Ms. Marshall,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Hungary in connection with a plan to extend the Paks Nuclear Power Plant (ACCC/C/2014/105)

Please, find below our comments on the Hungarian Party's response. We reference here only those statements, indicated with the original numbering used by the Party, which we have commented on.

Yours sincerely,

Zsuzsanna Koritár

Energiaklub

András Perger

Greenpeace Hungary



30. It should be stated that the planned activity is not the extension but the replacement of the existing capacity of the Paks Nuclear Power Plant.

The related Parliament Resolutions talk about the establishment of new nuclear capacities or new nuclear units; the justification of the Parliament Resolution No. 25/2009 (IV. 2.) Ogy refers to the related Article 7 of the Atomic Law, which required the approval of the Parliament in case of the 'expansion of the existing nuclear power plant with new unit'.

In its communication, MVM Ltd., the company in charge for the establishment of the new unit project that time, used the word 'extension' or 'expansion' for describing the project.

<http://www.erbe.hu/en/activities/nuclearpowerprojects/extensionnpp/Lapok/default.aspx>

<http://www.mvm.hu/en/news/sitepages/newsdetails.aspx?newsid=173>

<http://www.mvm.hu/en/news/sitepages/newsdetails.aspx?newsid=216>

Taking into account that the already existing four and the planned two reactors will be operating together for 6-10 years, from 2025-26 (these are the starting dates of the two new blocks) to 2032-37 (during these five years the old blocks will be shut down one after another), this cannot be considered as a simple replacement.

34. When explaining the precise legal consequences of these Parliament Resolutions, it is also very important to highlight that according to the Fundamental Law of Hungary the Government – as it belongs to a different branch of power – is not subordinate to the Parliament. The Parliament therefore cannot instruct the Government – or the authorities not subordinate to the Parliament –, thus any “task” determined by a Parliament Resolution is not binding on the Government or on the authorities with responsibility in decision-making process in legal terms, as they are not subordinate to the Parliament.

Regarding the legal consequences of the Parliament Resolutions, it has to be mentioned that according to Article 15 of the Fundamental Law of Hungary, the Government is responsible to the Parliament. Although by law the Government cannot be instructed by the Parliament, it is not what happened in the cases of the Resolutions. The Parliament approved the actions (resolutions) proposed by the Government itself, and based on the Fundamental Law (which replaced the Hungarian Constitution in 2011) the Government has the responsibility to fulfil their own commitments.

We note that in connection with the Parliamentary decisions of 2008 and 2009 we should take into consideration the Act XI of 1987 on legislation that was in force until 30th of December, 2010, rather than the new acts on legislation. While the Parliamentary decisions were regulated quite similar in both, the former legislation was more accurate: *“The*



Parliament, the President (...) shall regulate the tasks of the bodies directed by them, their own operations and also the plans that belong to their tasks in decisions” (Art. 46(1)). The separate mentioning of the plans is missing from the new Act on legislation, although it shall be understood included, because the practice that the major national plans are accepted by the Parliament has continued after the new Act entered into force.

45. The Parliament resolutions that the question refers to are no plan, program or policy. Regarding their nature they do not have legislative nature but are statements by lawmakers of purely political nature with no legal consequences.

In our interpretation Article 6, 7 and 8 of the Convention constitute a closed system of state decisions relevant to the environment, ranging from the individual decisions through several kinds of planning decisions not having general normative effects and the preparation of legislation also of several kinds and levels. This interpretation is in harmony with the cases of ACCC and the available explanations and guides of the Aarhus Convention, while the interpretation of the Hungarian Party seem to contradict the system of the Convention and would lead to a treacherous legal path where certain state decisions could be taken out from the scope of the Convention quite arbitrarily. Needless to say in our opinion that apart from those under the SEA Directive or the Espoo Convention there are several other levels and kinds of strategic type State decisions either with the requirement of certain environmental impact assessment (such as high level state plans under Article 43-44 of the Environmental Code) or without such requirement.

51. The proposal was discussed by the Environmental Committee as well as the Committee of Economy and IT and – from its submission on – it was also published on the Parliament’s website.

The two referred Committees are the bodies of the Hungarian Parliament, consisting of the members of the Parliament; the Committees are not public bodies, their meetings are publicly open only since 2012.

However, Energiaklub and Greenpeace were allowed to participate at one of these Committee meetings, during which the proposal was discussed, and could express their views on it. Nevertheless, it cannot be considered as any kind of public participation process: the presence of the organisations was realised only for their special request.

Furthermore, the published proposal contained only a one and a half page long so-called justification, background studies were missing. Should we talk about a due public



participation process, the published documents would not have been enough to implement a reasonable process.

57. In this context it should be mentioned that on May 22, 2015 the Government of Hungary has submitted its official “no State Aid” notification to the European Commission on the Paks II. Project. After several months of detailed assessment without finding any evidence on the existence of State Aid, the Commission decided on initiating a formal in-depth investigation on the Paks II. Project. In this instance, the measure may not be implemented until the investigation is concluded therefore the Paks II Project is now pending in the context of EU laws and waiting for the Commission’s positive reply.

Regarding the European Commission procedures, there are currently two ongoing investigations. One is about the state aid of Paks II, the other is about the lack of tender.

(1) State aid: the financing scheme of Paks II (the construction is paid from Russian loan, which will be paid back from the Hungarian national budget, thus state money is spent on the investment) might be considered state aid pursuant to EU laws. State aid is normally prohibited under EU regulations, however, there might be circumstances, under which it could be allowed by the European Commission. DG Competition of the EC is currently investigating whether state aid is involved in the Paks II investment, and if so, whether it could be illegal. If illegal state aid is found, the project could not be financed from the national budget, which would mean the end of the whole investment. In November 2015 the EC issued its preliminary decision, in which it announces the start of an in-depth investigation, because it was not convinced by the “no State Aid” notification of the Hungarian Government. In its conclusion the Commission expresses its doubts: *“The Commission has come to the preliminary conclusion that there are doubts that the development of the two new nuclear reactors in Hungary that are fully financed by the Hungarian State during construction for the benefit of the entity Paks II, that will own and operate them, does not entail State aid within the meaning of Art 107(1) TFEU. [...] The Commission has therefore, at this stage, doubts as to the compatibility with the internal market.”* Based on this decision, the outcome of the in-depth investigation might as well be negative, meaning the prohibition of the financing scheme.

(2) Lack of tender: Another issue is investigated by the European Commission under competition rules. Hungary concluded the agreement with Russia to build the new nuclear power plant without announcing a tendering procedure, which could also be the violation of EU laws. An infringement procedure was started by the EC also in November 2015, to which Hungary has submitted its response. We are now waiting for the Commission’s decision. If the Commission concludes the non-compliance, the project might start from the beginning:



the contract with Russia has to be annulled, and a tender procedure will have to be announced.

80. Secondly, in his opinion the Commissioner examined two Parliament Resolutions. However, according to art. 29 para. 2 point a) of act 1993:LIX (on the legal status of the Parliament Commissioner for Future Generations) the Parliament is exempted from the scope of the investigation of the Commissioner.

In the statement of the FGO it was stressed that not the decisions of the Parliament themselves were the subject of the examination of the parliamentary ombudsman office, but rather the procedure of their preparation performed by the Government that is not exempted from the scope of the investigation by the FGO. This approach was similar to that of Article 8 of the Convention.

82. Opposed to the statements of the Commissioner:

- **This Parliament Resolution does not fall under the scope of strategic environmental assessment.**

Please find here the translation of the relevant paragraphs from the Ombudsman's statement:

40. Energy policy - also in its relation with climate policy - is a crucial and fundamental field for sustainable development, the life opportunities for future generations and for the evolution of the quality of life. In particular, the use of nuclear energy represents a special set of tasks and concerns that call for attention, heightened care from an environmental point of view, precaution and responsibility. This is also highlighted by the legislator's intent manifest in paragraph 7 (2) of the Fundamental Law of Hungary. The approval in principle granted by the Parliament (National Assembly) is supposed to express the priority of the particular issue. The fact that establishing new nuclear power plants requires approval from the supreme sovereign representative body of the state carries extraordinary significance. The responsibility resulting from this significance weighs on the government when it requests approval from the National Assembly.

41. While on the one hand, nuclear power is considered as clean energy from the point of view of climate policy, the appearance of new security risks, the problem of the final disposal of radioactive waste (partially still unsolved) raises a number of social and environmental questions for the preparation of the relevant decisions that cannot be ignored. With regard to the foregoing, public access to information and public participation should be strictly



ensured at all stages of the process. For only this can guarantee that the major social risks are explored and discussed from all aspects by civil society organizations, expert bodies and individuals who are not themselves professionally or economically committed to the expansion of the nuclear power plant.

42. Approval by the National Assembly, as called for by Article 7 (2) of the Fundamental law, cannot be considered as only formal when it concerns expanding the existing nuclear power plant by a unit incorporating new nuclear reactors, or establishing a new nuclear facility. Furthermore, it may not be assessed independently from the consequences in terms of the changes it will bring about in the country's energy mix. Whenever the decision under preparation - such as in the case examined here - results in increasing the share of the nuclear energy, one should, in the course of preparing the decision and drawing up a proposal for resolution, examine the extent of the expansion, along with the changes it will bring about with regard to the country's power structure, as well as how the resulting change of given dimensions will appear in the general plans for the country's energy structure. Of course, it needs accordingly to be explored and justified why the new facility is needed, whether it is necessary at all, what other substitutes are available in parallel with reducing energy needs at the same time. Furthermore, the public must be informed of all these aspects. The consent in principle is in fact a decision in principle on nuclear energy; the National Assembly declares its opinion on whether it supports further use of nuclear power in the country through the realization of a particular facility.

43. Based on the principle of integration, a country's energy policy in the sense of defining the energy structure of a given member state is an issue highlighted from an environmental point of view, and thus it is mandatory to have a strategic environmental assessment (SEA) for the country's energy policy¹. One of the fundamental questions of energy policy planning at the national level is the weight and energy market share of a particular sector enjoys in the general plans for the national power structure, given that different energy markets characterised by different structural compositions have different environmental, economic and social impacts and implications.

46. When drafting decisions bound to modify the plan for the country's energy structure, it is necessary to conduct a strategic environmental assessment in terms of their energy policy content in the course of preparing the decision in order to provide the proper environmental foundation. Only in that way can an informed decision be made. For exploring and analysing the environmental, economic and social impacts of the decision is unavoidable, including e.g.

¹ See (4)-(5) of Article 43 of the Act on Environmental Protection, and the (2) ba) of Article 1 of 2/2005. (I. 11.) Government Decree on the environmental assessment of particular plans and programs. In his remark the state secretary on climate and energy matters to the statement of the Commissioner of Future Generations also emphasized the existence of the obligation concerning the SEA.



the examination of how opting for nuclear energy will influence fossil energy use, the prospects of renewable energy in the future, and even our country's international commitments in this regard. In order to be able to decide whether a new nuclear plant is required, it is necessary to know and analyse the energy sector in its entirety, along with its development in line with environmental and economic changes.

87. As it is a very important guarantee, the environmental impact assessment procedure has to be carried out before development consent is given to any public and private projects, which may have impacts on the environment. Development consent can only be granted only after a comprehensive environmental assessment procedure with regard to the impacts of the planned activity on the environment is completed.

88. In this procedure, early and effective opportunities of participation are given to the public concerned, and through this the public is entitled to express their comments and opinions before the decision on the request for a development consent is taken, which means at a time when all options are still open to the competent authorities.

These last two points of the Hungarian Party, as we read, underlines the paramount importance of Article 7 of the Aarhus Convention. By the time the procedure of realisation of the Parliamentary plans subject to the present communication reaches the level of individual permitting (that will fall under Article 6 of the Convention) the Hungarian State will have spent millions of Euros of public money on the preparation of the plan. If the public is confronted with the facts of the decision only at that late stage and the State decision-maker is informed about the counter arguments and the possible wide spread objection from the general public and will be obliged to change or eliminate the plans of the investment, this said great sums were spent in vain. One of the biggest advantage of closely following the rules of Article 7 is ensuring timely public participation and feed-back at the earliest possible stage of the long tiered decision-making procedure, where the options are still really open.