REACTION on the position of the Netherlands
ACCC/C/2021/187

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On the basis of the Observations of the Government of the Netherlands regarding Communication ACCC/C/2021/187 from Stichting Greenpeace Netherlands, LAKA and WISE to the Aarhus Convention Compliance Committee, we would like to make the following observations:

1. We welcome the fact that the Netherlands agree that the license changes for the Borssele nuclear power plant in 2016 and 2018 were subject to art. 6(10) of the Aarhus Convention and that the art.'s 6(2-9) need to be adhered to in case of extension or update of an activity.

2. Although we see steps into the right direction, we are not convinced that the Netherlands understand that in public participation procedures under art. 6 of the Convention, art. 6(6) defines which information minimally needs to be provided and art. 6(8) defines that all viewpoints need to be taken into due account.

3. The structural refusal by the Netherlands to submit operation of Borssele in the period between 2013 and 2033 to an environmental impact assessment (for which there exists a legal basis in the Netherlands) or another form of public participation on the environment (for which there does not exist an explicit legal basis), leads automatically to decisions being taken in non-compliance with the Convention. The only existing remedy that can deliver in short notice, is requiring an EIA before the next upcoming decision concerning extensions or upgrades of the activity, e.g. the upcoming periodic safety review in 2023 (10EVA23).

In the following we will react in detail on the response from the Netherlands.

Ad II. Request for deferment – paragraph 7 to 14 of the response from the Party concerned

4. The communication is not premature. This is already laid out in our communication itself.

5. The Party concerned finds the communication premature, because it is still in the process of implementing the findings in ACCC/C/2014/104. Does this mean, that the Netherlands would like to see continuation of non-compliance in new cases until it finally addressed the recommendations from an earlier non-compliance case? We would like to point out that according to the findings in ACCC/C/2014/104, there is non-compliance since the decision on the duration of operation of Borssele in 2006 – that is for a period of over 16 years already.

6. The Communicants have sought domestic remedy for the fact that the two decisions on license change of the Borssele nuclear power plant in 2016 and 2018 were taken in non-compliance with the Convention, without obtaining such remedy from the local appeal procedures. They kept the ACCC and the Party concerned updated of these procedures and communicated the two cases of non-compliant decisions to the ACCC as part of the review process of ACCC/C/2014/104 as soon as they exhausted domestic remedies for both cases.

7. The ACCC argued, however, during its compliance review process of ACCC/C/2014/104 in its July 2021 report to the MoP7 of the Convention, that these issues were separate cases from ACCC/C/2014/14 and that it was open to the Communicants to file a separate

communication if they alleged relevant and important cases of non-compliance. From this, it follows that the implementation of the findings of ACCC/C/2014/104 is a separate process from the consideration of ACCC/C/2021/187.

8. Furthermore, as we have argued in our communication before and will further clarify hereunder, the measures taken by the Netherlands in response to the procedure of, and to the findings and recommendations in ACCC/C/2014/104 are insufficient to lead to compliance with the Convention concerning our communication ACCC/C/2021/187.

9. The Communicants therefore argue that communication ACCC/C/2021/187 should be considered on its own merits, independent from the speed of implementation of measures in response to the findings and recommendations in ACCC/C/2014/104.

10. The ACCC concluded in its findings in ACCC/C/2014/104, paragraph 88 that *"by not having at any stage provided for public participation, meeting the requirements of article 6, where all options were open, in regard to setting the end date of 31 December 2033 for the operation of the Borssele NPP, the Party concerned failed to comply with article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention with respect to the licence amendment of 18 March 2013."*

11. The Communicants merely come to the conclusion that during the decisions concerning the license changes in 2016 and 2018, the Party concerned again failed to comply with art. 6(4) in conjunction with art. 6(10) and hence alleges that also these decisions were in non-compliance with the Convention.

12. When the Netherlands would have taken these two license decisions in full compliance with the Convention and with other international obligations, the Communicants argue that also some degree of remedy would have been made for the lack of compliance in ACCC/C/2014/104[1]; but with that, the direct relation between ACCC/C/2014/104 and ACCC/C/2021/187 ends.

13. The ACCC recommended in its findings in ACCC/C/2014/104, paragraph 89 that the Netherlands should take "*the necessary legislative, regulator and administrative measures to ensure, when a public authority reconsiders or updates the duration of any nuclear-related activity within the scope of article 6 of the Convention, the provisions of paragraph 2 to 9 of article 6 will be applied*."

14. As soon as the ACCC finalised its findings, the Netherlands have made clear in all its communications to the ACCC under the compliance mechanism – including the communication mentioned in paragraphs 12 and 13 of their response – that it interpreted the findings of the ACCC under ACCC/C/2014/104 and the obligation for the Netherlands to remedy the non-compliance as to be **related only to the update of the duration of operation** of nuclear installations.
    Although every license update of a (nuclear) installation also has consequences for the duration of the activity (as we have extensively argued before during the local legal remedy

1 This concerns, above all, the fact that in that case information would have been created in compliance with art. 6(6), that would under the obligations of art. 6 have been assessed by the public and would have been able to inform the decisions for the mentioned license changes. When implemented structurally and systematically, as we have argued, this would have been in our eyes a sufficient and for the public acceptable remedy for the non-compliance concluded in paragraph 88 of the findings in ACCC/C/2014/104.
The recommendations from paragraph 89 of the findings in ACCC/C/2014/104 give guidance how such processes should be implemented for the case of updates to the duration of operation of nuclear installations – however, not necessarily for other extensions and updates, *mutatis mutandis*, and where appropriate.

procedures as well as in our communication to the ACCC), the current communication ACCC/C/2021/187 goes beyond that limited scope and relates to the fact that art. 6(10) is related to more than only duration of operation – in these cases measures taken due to a Periodic Safety Review (10EVA13) and the EU post-Fukushima nuclear stress tests, and an upgrade of safety rules and guidelines respectively. The ACCC, during its review procedures of the implementation of the findings of ACCC/C/2014/104, concluded that that is for that reason a separate case and hence indicated that these allegations need a new communication. Deferment of consideration of this communication would be in contradiction with that conclusion.

15. We therefore ask the ACCC not to accept the request for deferment by the Party concerned.

16. Ad point 11 from the response of the Party concerned: Even though the Netherlands state that it also wants clarity around art. 6(10), it refused to go into dialogue with the Communicants on the issues raised in ACCC/C/2021/187, with the argumentation that they only want to discuss issues concerning ACCC/C/2014/104 and the non-compliance on that case, i.e. concerning duration of operation. It furthermore did not discuss this latter point with all Communicants (LAKA, WISE, Greenpeace), but only contacted and insisted on a video-meeting with Jan Haverkamp. Suggestions from his side for a wider participation were not acknowledged.[2]

17. Ad point 12 from the response of the Party concerned: Compliance with the Convention is not depending on the findings of the ACCC. The findings of the ACCC are guiding compliance. This means that fact that the cases mentioned here by the Netherlands postdated the license changes in 2016 and 2018, is not relevant. Already in 2016 and 2018, the Netherlands should have been in compliance with the Convention and we allege with arguments that the Netherlands were not. Point 12 is therefore irrelevant.

18. Ad point 14 from the response of the Party concerned: If the Netherlands were genuine in their request for deference, they would have taken up the suggestion of the ACCC to open a dialogue with the Communicants and discussed the issues brought forward in ACCC/C/2021/187 also in the framework of their attempts to implement the recommendations of the ACCC in ACCC/C/2014/104. This, however, did not happen. In contrary, the Ministry of Infrastructure and Water explicitly refused such a dialogue.

Concerning the obligation to public participation on environmental issues (paragraphs 15 to 20 of the response from the Party Concerned)

19. As we have argued before, the Aarhus Convention is not merely addressing “public participation”, but public participation concerning the environment. Central in this case are art. 6(6), which defines which information should be made available to the public during public participation procedures on environmental issues, and art. 6(8), which states that input of the public (also concerning the environment!) should be taken into due account. The Netherlands, in their description of the adaptations it is making in response to the recommendations in the findings in ACCC/C/2014/104 does not refer to this aspect explicitly. Indeed, public participation needs to take place under the GALA / UOV (the

2 It has to be noted that the mandate on nuclear policy issues, including those relating to the Aarhus Convention, was in the mean time removed from the nuclear regulatory agency ANVS to the Ministry of Infrastructure and Water (Ministry of IenW). The ANVS did start a dialogue with – the same – one representative of the Communicants on the preparation of public participation for the upcoming periodic safety review in 2023 (10EVA23). The Ministry of IenW, however, conducted only one rather formal video-call with mr. Haverkamp on 4 April 2022 on the plan of action following the recommendations of ACCC/C/2014/104, explicitly excluding issues around ACCC/C/2021/187 or more general conclusions.

uniform public participatory procedure), but this does not explicitly oblige the inclusion of environmental aspects – this happens only in the Environmental Management Act (*wet milieubeheer – wbm*) for activities that are submitted to an EIA[3]. In the preparation of the license changes in 2016 and 2018, the environmental information as defined in art. 6(6) of the Convention was not delivered for consideration at any point in time. With that, it is clear that the public participation as meant under the Convention did not take place.

20. Ad point 19 from the response of the Party concerned: From this description it becomes crystal clear that the GALA does not mention the information required under art. 6(6) of the Convention.

21. Ad point 20 from the response of the Party concerned: The Netherlands refer to its update from 27 May 2021, which is only giving a limited overview of the discussions taking place. This paper indeed proposes to provide the information under Aarhus art. 6(6), but then continues to only refer to an obligation for an UOV under the GALA, which does not know such an obligation. This fails to make clear whether or not that means that an obligation to provide this environmental information, and take views concerning the environment actually into account, indeed will exist.

22. It is furthermore unclear from the description whether cases like the license changes made in 2016 and 2018 indeed would fall under an obligation to provide this information, or whether it is assumed that such changes may not have significant consequences for the environment, and hence an obligation for provision of environmental information would fall away.
    Apart from a potential interesting development that this might point to, and apart from the lack of discussion about these issues with the Communicants, this does not address the lack of compliance with the Convention during the decisions on the actual (concrete) license changes of 2016 and 2018.
    We have to point out once more in this respect, that, as the Party concerned also indicated, there already existed an obligation for an UOV under the GALA for these license changes, but the by art. 6(6) Aarhus prescribed environmental information does not need to be delivered under the UOV in the GALA, was not delivered and environmental viewpoints from the public were not recognisably taken into account.

23. We furthermore notice that the proposed changes are explicitly made within the nuclear legislation, and not in the more general GALA or Environmental Management Law (*wmb*). Even if further amendments would in the end provide compliance in case of nuclear installations, this could still lead to similar situation not being solved for other activities under Annex I of the Convention. How, for instance, are obligations interpreted for thermal power plants, large intensive cattle farms, airports or steel factories?

24. We conclude that the proposed changes are not sufficient and in the wrong legislation.

3 Hence our suggestion for remedy to make an EIA obligatory for extensions and updates under art. 6(10) as well as for changes under art. 6(1) in conjunction with Annex I (1) and (22) of the Convention, by explicitly moving extensions and updates as defined under art. 6(10) and changes as defined under art. 6(1) in conjunction with Annex I (1) and (22) of the Convention in the categorisation of the activity of nuclear installations from category D to category C of the Dutch EIA Regulation (*besluit mer – bmer*). This would also bring that in line with the obligations under the EU EIA Directive and the Espoo Convention.

Implementation of articles 6(2) to 6(9) – points 21 to 27 of the response of the Party concerned

25. **Application of art. 6(10) is appropriate**
We welcome the implicit conclusion from the Netherlands in point 22 that article 6(10) of the Aarhus Convention is valid for the two concerned license changes, and that articles 6(2) to 6(9) had to be applied, *mutatis mutandis*, to these license changes. With this, the Netherlands concedes, (different than the *Raad van State*, which limited application of art. 6(10) to issues concerning duration of operation) that application of the obligation to apply articles 6(2) to 6(9) on the basis of article 6(10) is indeed appropriate.

26. In paragraph 23, the Party concerned confirms that the same form of public participation was executed as before the LTO license of 2013. As concluded in the findings of the ACCC in ACCC/C/2014/104, this form of public participation does not fully comply with the obligations under art. 6(2) to 6(9).

27. Important in this case are especially art. 6(4) (early public participation when all options are open), art. 6(6) (information to be provided) and art. 6(8) (taking into due account) of the Convention.

28. Ad point 24 of the response from the Party concerned: Given the fact that the mentioned license changes were not informed by (sufficient and relevant) environmental information and related public participation for the operational period between 2013 and 2033, Greenpeace argued that such information should have been provided before a decision on license change was taken and asked the *Raad van State* for injunctive relief until a decision based on such information could be taken. It argued that by not having provided this information and allowing for public participation before the 2013 decision, this information and important conclusions could well have influenced the content of the changes in license. Given the necessity of 11 technical adaptations and possibly more on the basis of full environmental information, operation of the activity on the basis of its valid license obviously would be an unacceptable risk. Greenpeace used hereby its rights under article 9(2) of the Convention and requested a form of remedy that is specifically mentioned under art. 9(4) of the Convention. By withholding injunctive relief, the decision on license change was not taken “when all options are open”, and the obligation under art. 6(4) of the Convention was hence not met.

29. Ad point 25 of the response from the Party concerned: There were several viewpoints concerning the environment submitted by the Communicants in the two procedures that were not taken into account. One is the fact that there was insufficient environmental information available (because of a lacking EIA for the operation time from 2013 to 2033) to judge whether the license changes proposed would not have environmental impacts. This included further for the 2016 license change potential impacts of the long term use of MOX (after 2013), the use of higher burn-up, changes in the set-up for emergency power provision, the role of off-site fire brigades in case of emergency, and issues of radioactive waste and security. For the 2018 license change, the request for a comparison of environmental impacts before and after validity of the license was not responded to, nor to the viewpoint that consequences of the license change for the nuclear regulatory regime should be laid out. Also the consequences from changes in the environment (e.g. increase of important nature areas) were not taken into account.

30. Ad point 26 of the response from the Party concerned – relevance of art. 6(6) of the Convention: The Party concerned claims that environmental information was made available and subject to public inspection. First of all, there was no environmental impact assessment

available for the operation time between 2013 and 2033, as concluded in ACCC/C/2014/104. For the 2016 license change, the only provided environmental information concerned the EIA notification from EPZ (*Aanmeldingsnotitie milieueffectrapportage kerncentrale Borssele*), which without too much detail only describes in one or a few short paragraphs the potential direct environmental impacts of each of the proposed 11 technical changes in isolation, coming to the conclusion that there would be no environmental impact from the changed license. It did, for instance, not provide the environmental information on which the choice of the 11 technical measures (and the exclusion of others) was based – this would logically need to include a description of the impacts on the environment for the operation of Borssele until 2033, compared to a zero-alternative in which the power plant would have been closed in 2013 or on the date of adoption of the license change, and conclusions on that basis for needed technical measures. This does not comply with art. 6(6) Aarhus, because the license change was foreseen for "the activity", which is the operation of a nuclear power station, not only the implementation of 11 separate measures. This is a fundamental difference of view between the Convention and the Dutch legal position, in which only the individual actual measures in isolation are concerned. Hence, the descriptions required under art. 6(6a-c) were insufficient, there was no non-technical summary, no outline of main alternatives studied by the applicant, nor an overview of other main reports and advice at the time the public was informed.
The 2018 license change did not contain any environmental information.

31. It has to be concluded that none of the two license changes was submitted to a public participation procedure as prescribed in articles 6(2) to 6(9) of the Convention.

Ad the issue of rectification – points 28 to 33 of the response from the Party concerned

32. We continue to argue that in principle all decisions concerning activities in Annex I of the Convention should be based on by public participation validated environmental information concerning the period of operation of the activity in order to increase the quality of the decision. In case of minor changes to an activity, when appropriate, a full round of public participation may not be necessary, because of the small impact of these minor changes. This, however, can only be concluded, when in general by public participation validated environmental information for the concerned period of operation of the activity is actually already available – for instance in the form of earlier EIAs or other public participation procedures.

33. In the case of the Borssele nuclear power plant, there was no such information available – not to the authorities that had to take the decision on license change in 2016 and 2018, nor to the public that wanted to participate in the decision procedures. This information was not available because it had not been produced for the life time extension of the Borssele NPP for the period from 2013 to 2033.

34. This had been alleged already during the local appeal procedures after the 2013 LTO license change at the *Raad van State*, which denied the problems, but then further put for the ACCC in 2014 in the form of the initial communication in ACCC/C/2014/104. That means that the Netherlands were aware of potential problems in this respect during the preparation of the 2016 license change in 2015, as well as the license change in 2018. During the appeal procedure of the latter, the ACCC had already published its findings, confirming in paragraph 88 that public participation had not taken place before the 2013 LTO license change, confirming that this information was not available. In our view, the Netherlands should have analysed that information in order to prevent it potentially making another

decision that was not in compliance with the Convention. Compliance with the Convention is pro-active, not re-active.

35. We would like to notice that the Netherlands structurally avoids addressing the conclusion in paragraph 88 from the findings of the ACCC in ACCC/C/2014/104, that it was found in non-compliance with the Convention. The Netherlands have not taken any step to remedy that situation, creating a now already almost decade-long period for which there exists no by public participation validated environmental information to support decision making for the operation of the Borssele nuclear power plant.
    The provided, very limited, information in the EIA notification from EPZ for the 2015 license change did not fill that gap.

36. We recognise that the recommendations of the ACCC are forward looking and have strived to play a constructive role to come to implementation of those recommendations. However, repeated offers for cooperative dialogue have not yielded any other result than one rather formal video call with only one of the people involved from the side of the Communicants.

37. We also acknowledge that any deficiencies in domestic regulations and implementation must be corrected for the purpose of future implementation and decision making. This should have alerted the Netherlands on the issue of necessity of attention to the implementation of Aarhus from the moment that the allegation of non-compliance of the 2013 LTO decision was on the table – and make it consider the argumentation that followed from that procedure, even if that procedure was not ended yet in 2015. The procedure was finalised, however, in 2018, because the Netherlands had conceded to follow the findings of the ACCC. And we argue that within the existing legislation, there was nothing to withhold the Netherlands from implementing its obligations.

38. The conclusion "*it was not necessary to draft an environmental impact statement in relation to the Borssele licence in 2013, as the Council of State of the Netherlands has concluded with regard to the 2016 and 2018 decisions*", as made by the Netherlands in paragraph 30 is therefore also completely incomprehensible. Yes, purely formally speaking they are right – the Aarhus Convention does not oblige to an EIA for the extended lifetime of a nuclear power station (though the Espoo Convention and EU EIA Directive do). Even where the *Raad van State* concluded at the time the contrary, the case ACCC/C/2014/104 showed that the Netherlands did have the obligation in 2013 (even in 2006!) to organise public participation concerning environmental matters preceding its LTO decision. It was necessary. It did not do that.

39. That the Netherlands would only be obliged to produce nothing more than the limited environmental information it did during the 2016 and 2018 procedures is is not a foregone conclusion. We have argued that the amount of information delivered does not fulfil the obligations under art. 6(6), but even beyond that, we argue that decisions, even minor ones, cannot be taken only on the basis of compartimentalised or salami-slicing bite-bits of information. They should be taken with the whole picture in view. And under normal circumstances, such information is available. In this case, that information should have been available minimally from an EIA before the decision of lifetime extension in 2013. But that information did not exist.

40. When the Netherlands argue in point 32 that both license changes were taken in line with the requirements, they miss the point. The point is that in these cases of extensions and updates of the activity (art. 6(10) Aarhus), public participation concerning the environment should have taken place. Indeed on the basis of all relevant environmental information and we have

argued *in extenso* that not all relevant information was available.
Different than the Netherlands claim here, the insights from the ACCC were not “new”. They were simply a reflection of law. Very clearly written law. The Netherlands did not want to know this – they were told, by among others the Communicants during three legal appeal procedures and during the communication procedure under the Aarhus Convention. They did not want to take this into account. And the impression the Communicants have that where some authorities (e.g. the nuclear regulatory office ANVS, who, however, no longer has policy mandate in these matters) understand the situation and have started an open dialogue with the Communicants on this issue, the Netherlands in its response still does not genuinely seem open to the fact that it was wrong. When the Netherlands states in point 33 that it is fully and genuinely committed to complying with its obligations under the Convention, we do not understand its defensive position in this response, nor that it has not been willing and able to sit together with the Communicants to discuss the way how.