

Draft findings and recommendations with regard to communication ACCC/C/2014/104 concerning compliance by Netherlands

Adopted by the Compliance Committee on ...

I. Introduction

1. On 6 May 2014, Stichting Greenpeace Netherlands (the communicant) submitted a communication to the Committee alleging a failure by the Netherlands (the Party concerned) to comply with its obligations under article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in relation to the design lifetime extension of the Borssele Nuclear Power Plant (Borssele NPP).
2. More specifically, the communicant alleges that the Party concerned failed to provide for public participation to the extent required by article 6 prior to its decision to extend the period of operation of the Borssele NPP until 31 December 2033.
3. At its forty-fifth meeting (29 June—2 July 2014), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 3 September 2014. On the same day, the Committee sent questions to the communicant seeking further information.
5. On 19 September 2014, the communicant provided answers to the Committee's questions.
6. On 3 February 2015, the Party concerned provided its response to the communication.
7. On 17 March 2015, the communicant provided comments on the response of the Party concerned.
8. The Committee held a hearing to discuss the substance of the communication at its fiftieth meeting (Geneva, 6—9 October 2015), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to the Party concerned and invited it to respond in writing after the meeting.
9. On 8 October and 13 November 2015, the Party concerned provided additional information and its replies to the questions posed by the Committee during the hearing.
10. On 20 January 2016, the communicant provided comments on the further information provided by the Party concerned. On 19 February 2016 the Party concerned provided comments on the communicant's comments.
11. On 3 March 2017, the Committee sent further questions to the Party concerned. On 16 March 2017, the Party concerned provided its replies to the questions.
12. On 29 March 2017, the Committee sent a request to the Party concerned to clarify an aspect of its reply of 16 March 2017 and on 6 April 2017, the Party concerned provided its reply thereon.

13. On 11 April 2017, the communicant provided comments on the replies by the Party concerned to the Committee's questions.

14. The Committee completed its draft findings through its electronic decision-making procedure on 25 May 2018. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date for comments to the Party concerned and the communicant. Both were invited to provide comments by 4 July 2018.

15. *The Party concerned and the communicant provided comments on ... and ... respectively.*

16. *At its [...] meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its [...] meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.*

II. Summary of facts, evidence and issues¹

A. Legal framework

Public participation in the licensing of nuclear reactors

17. Section 17 of the Nuclear Energy Act of 21 February 1963 states that division 3.4 of the General Administrative Law Act of 4 June 1992² and division 13.2 of the Environmental Management Act of 13 June 1979 (*Wet milieubeheer*)³ apply to the preparation of a decision on a request for a nuclear licence.⁴ Division 3.4 of the General Administrative Law Act establishes the requirements to notify the public concerned on decision-making, the timeframes for the public participation procedure and the procedure for the consideration of the comments and views submitted.⁵

B. Facts

18. The Borssele NPP is operated by "N.V. Electriciteits Produktiemaatschappij Zuid-Nederland EPZ" (the NPP operator). The NPP is a two-loop Siemens/KWU pressurized water reactor that has been in commercial operation since 1973.⁶ The licence of 18 June 1973, reference No. 373/1132/EEK, was issued for an indefinite period under the Nuclear Energy Act.⁷ The Safety Report is part of the licence and was based on a design lifetime for the NPP of 40 years.⁸

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

² Appendix 4 to the Party's response to the communication.

³ Appendix 5 to the Party's response to the communication.

⁴ Party's response to the communication, para. 27.

⁵ Party's response to the communication, para. 29 and appendix 4.

⁶ Party's response to communication, para. 8.

⁷ Party's response to communication, paras. 8 and 10 and appendix 6, p. 3.

⁸ Party's response to communication, paras. 10 and 13.

The “2006 Covenant” and amendment of the Nuclear Energy Act

19. In 1994, the Minister of Economic Affairs of the Party concerned and the electricity producers' cooperative agreed to close the Borssele NPP in 2004.⁹

20. In 1997, the restriction to the operating time was entered into the operating licence but in 2000 quashed by the Council of State (the highest administrative court of the Party concerned) on formal grounds.¹⁰

21. In 2002, the NPP operator was asked to abide by the 1994 agreement to close the Borssele NPP but successfully brought a case alleging that it was not bound to cease operations by 2004 on the basis of that agreement. The Government did not appeal the judgment. In its 2002 coalition agreement, the Government announced that the NPP should close in 2013 instead.¹¹

22. In 2004, the NPP operator informed the Ministry of Environment that it would not voluntarily agree with the proposed closure in 2013 and stated that it considered that full compensation would be due in case of closure on that date.¹²

23. On 17 July 2006, the Government concluded the “Covenant Kerncentrale Borssele”,¹³ (the 2006 Covenant) an agreement between the Government and the NPP operator to continue the life span of the Borssele NPP up to and including 31 December 2033 at the maximum.¹⁴ In accordance with article 3.1 of the Covenant, the Government commits during the lifetime of the Covenant to “refrain from initiating international and national legislation and regulations that are intended to close the Borssele NPP before 31 December 2033”.¹⁵ Article 10.1 of the Covenant requires the Government to give reasonable compensation for the losses suffered and profits lost by the NPP operator in case of an attributable shortcoming in complying with article 3.1, including but not limited to the additional costs incurred relating to the premature closure of the NPP.¹⁶

24. On 1 July 2010, section 15 (a) of the Nuclear Energy Act was amended to read: “To the extent that it covers the release of nuclear energy, the licence granted pursuant to Section 15 (b) for the operation of the Borssele nuclear power plant that was commissioned in 1973 shall be revoked with effect from 31 December 2033.”¹⁷

Amendments to the operating licence and safety report of the Borssele NPP

25. Since 1973, the operating licence of the Borssele NPP has been amended several times. In 1994, the licence was revised to include all previous modifications and an environmental impact assessment procedure was carried out.¹⁸ In 1996, 2004 and 2013, changes to the licence concerning the fuel usage of the NPP were introduced (entitled POS 1996, POS2 2004 and MOX 2013), each time with an environmental impact assessment report and public participation.¹⁹ The NPP was also required to undergo mandatory 10-year periodic safety evaluations in 1993, 2003 and 2013. The 1993 and 2003 safety reviews

⁹ Annex to comments of the Party concerned on communicant's comments, 19 February 2016, p. 1.

¹⁰ Annex to comments of the Party concerned on communicant's comments, 19 February 2016, p. 1.

¹¹ Annex to comments of the Party concerned on communicant's comments, 19 February 2016, p. 2.

¹² Annex to comments of the Party concerned on communicant's comments, 19 February 2016, p. 2. Government Gazette, 17 July 2006, No. 136 / p. 29.

¹⁴ Annex 1 (a) to the communicant's reply to questions, 19 September 2014, article 2 (a) of the Covenant.

¹⁵ Annex 1 (a) to the communicant's reply to questions, 19 September 2014.

¹⁶ Annex 1 (a) to the communicant's reply to questions, 19 September 2014.

¹⁷ Party's response to communication, para. 11, and Annex 2.

¹⁸ Party's response to communication, paras. 12 and 14.

¹⁹ Party's response to communication, paras. 15 and 20.

resulted in further amendments to the licence with public participation. The 2013 procedure was ongoing at the time the communication was submitted.²⁰

Licence for the extension of the design lifetime of the Borssele NPP

26. On 25 July 2011, the NPP operator wrote to the Ministry for Economic Affairs, Agriculture and Innovation to request confirmation that the amendments to the Safety Report for Borssele NPP needed for an extension of the operating time of the NPP until 2033 did not require an environmental assessment. By letter of 13 September 2011, the Ministry confirmed that no environmental assessment would be needed as long as the application submitted in 2012 would not contain different elements than previously understood.²¹

27. On 19 September 2012, the NPP operator submitted a licence application requesting the extension of the design lifetime of the Borssele NPP in accordance with section 15 (b) of the Nuclear Energy Act.²²

28. On 24 October 2012, the Minister of Economic Affairs announced the preliminary decision to grant the licence in several newspapers and on the internet. The announcement stated that an advance assessment had determined that the intended activity should not be subject to a compulsory environmental impact assessment because it did not concern an extension to or modification of the design, but rather the formalisation of amendments to the Safety Report, which could not be expected to have any further environmental consequences. The announcement further stated that the relevant documents for the decision on the extension of the design lifetime were available for inspection on working days for a period of six weeks starting from 25 October 2012. It invited the submission of comments before 5 December 2012 (in writing, by email or orally), provided the website where the dossier for the procedure could be found and announced an information evening concerning the preliminary decision on Wednesday 7 November 2012 in Heinkenszand, a town in the vicinity of the Borssele NPP.²³

29. On 4 December 2012, the communicant wrote to the Minister of Economic Affairs challenging the intended design life time extension and the draft decision to grant the licence.²⁴

30. On 18 March 2013 the Ministry of Economic Affairs granted the licence for the extension of the design lifetime of the Borssele NPP.²⁵

31. On 20 March 2013, the Ministry of Economic Affairs issued a notification announcing the decision. The notification stated that the licence for the extension of the design life was available for public perusal from 21 March to 2 May 2013. It also stated that interested parties could lodge an appeal with the Administrative Law Division of the Council of State until 2 May 2013.²⁶

²⁰ Party's response to communication, paras. 25-26, and annex 3 to letter from the Party concerned, 13 November 2015, para. 1.6.

²¹ Annex 1 (g) to the communicant's reply to questions, 19 September 2014, and annex 1 to the additional information from the Party concerned, 8 October 2015.

²² Annex 1 (e) to the communicant's reply to questions, 19 September 2014, p. 1.

²³ Annex 1 (e) to the communicant's reply to questions, 19 September 2014.

²⁴ Annex 1 to the communication.

²⁵ Annex 1 (f) to the communicant's reply to questions, 19 September 2014.

²⁶ Annex 1 (f) to the communicant's reply to questions, 19 September 2014.

C. Domestic remedies and admissibility

32. The communicant appealed the 18 March 2013 decision of the Ministry of Economic Affairs to grant a licence to the Raad van State, the country's highest general administrative court. By decision of 19 February 2014, the court rejected the communicant's claims.²⁷ The communicant submits that the available legal procedures were thereby exhausted.²⁸

33. The Party concerned did not challenge the admissibility of the communication. It does, however, request a deferral.

34. The Party concerned states that on 19 September 2014, the Implementation Committee of the Espoo Convention requested it to provide clarification and information regarding the planned extension of the design lifetime of the Borssele NPP and that that Committee's investigation is ongoing. The Party concerned submits that the inquiry under the Espoo Convention aims to determine whether the extension of the design lifetime of the Borssele NPP constitutes an activity within the meaning of the Espoo Convention for which a transboundary environmental impact assessment should be carried out. The Party concerned submits that the process of establishing whether the extension of the design lifetime requires the conduct of a transboundary environmental impact assessment under the Espoo Convention is related to the process of establishing whether the extension of the design lifetime is subject to article 6, paragraph 2 (e), of the Aarhus Convention. It refers in that regard to the Committee's findings on submission ACCC/S/2004/01 and communication ACCC/C/2004/03 where the Committee took "into account the related process of establishing an inquiry commission under the Espoo Convention aimed at determining whether the activity was likely to have a significant transboundary environmental impact" and agreed to "consider the question of compliance with the part of article 6, paragraph 2 (e), relating to environmental impact assessment in a transboundary context in the light of the findings of the inquiry procedure being undertaken under the Espoo Convention".²⁹ The Party concerned accordingly requests the Committee to defer its consideration of the communication until such time as the Implementation Committee under the Espoo Convention has reviewed the issue.³⁰

35. The communicant argues that unlike the cases referred to by the Party concerned, the pending cases concerning the Borssele NPP before the Espoo Convention Implementation Committee and Aarhus Convention Compliance Committee are completely different in substance. The communicant submits that its communication before the Aarhus Convention Compliance Committee does not concern compliance with the Espoo Convention and the two Committees have been asked to investigate different things. The communicant accordingly requests the Committee to investigate the case on its merits without deferral.³¹

D. Substantive issues

Applicability of article 6

36. The communicant alleges that the March 2013 licence for the extension of the design lifetime of the Borssele NPP (see para. 30 above) constituted an extension of activities of the Borssele NPP which could have potentially severe effects on the environment.³² It submits

²⁷ Communication, p. 2 and annex 1 (i).

²⁸ Communication, p. 2.

²⁹ ECE/MP.PP/C.1/2005/2/Add.3, para. 8.

³⁰ Party's response to communication, paras. 4-7.

³¹ Communicant's comments on the Party's response to communication, 17 March 2015, p. 2.

³² Communication, p. 2.

that this extension therefore constitutes a new activity under paragraph 1 of annex I of the Convention, and thereby under article 6, paragraph 1 (a), of the Convention or, alternatively, an extension in accordance with paragraph 22 of Annex I of the Convention and thus subject to article 6, paragraph 1 (a) of the Convention or, at least, an update of operating conditions under article 6, paragraph 10, of the Convention.³³

37. The communicant states that, without the 2013 licence, the NPP would have had to cease operations and that therefore the licence falls under annex I of the Convention.³⁴ The communicant refers to the 1994 and 2002 agreements (see paras. 19 and 21 above), which established that the reactor would have to cease operation first by 2003 and then by 2013, to demonstrate that an extension occurred. It also refers to a statement made by the Government in the context of the elaboration of the 2006 Covenant in which it stated that the “initial intention, closure of the Borssele NPP, therefore constitutes the reference situation.”³⁵ The communicant also submits that the assumption of the Party concerned and the NPP operator that the Borssele NPP would have a design lifetime of 40 years, i.e. until 2014, had also been the assumption of the public and a longer operational lifetime is therefore seen by the public as an extension of the project.³⁶

38. The communicant contends that the Ministry of Economic Affairs justified the lack of an environmental impact assessment with the argument that no material changes took place in the NPP before the life-time extension was granted. The communicant submits that the Aarhus Convention makes clear that an extension of activities should be submitted to public participation concerning potential significant effects on the environment and a reference to material changes is in that framework irrelevant.³⁷

39. The communicant alleges that allowing a further 20 years of operation of the Borssele NPP after its design life-time of 40 years significantly increases the risk that possible incidents and accidents with severe environmental effects may occur, for example:

- An increasing risk of malfunction by ageing components and increased compatibility problems from the introduction of new replacement components, potentially escalating in a severe accident with emissions of radioactive substances into the environment;
- A 50% increase of the time of exposure to potential terrorist attack, sabotage or acts of war;
- A 50% increase of the time of exposure to extreme natural events that could alone or in combination with human failure or malevolent human acts lead to emissions of radioactive substances into the environment;
- An increase in risk of a nuclear accident because of the planned use of the more dangerous mixed oxide (MOX) fuel.
- An increased use of uranium and therefore increased environmental impacts from uranium mining, processing and fuel production;
- An increased production of radioactive waste;

³³ Communication, p. 2, and communicant's opening statement for hearing at the Committee's 50th meeting, 8 October 2015.

³⁴ Communicant's opening statement for hearing at the Committee's 50th meeting, 8 October 2015, and communicant's comments, 20 January 2016, para. 9.

³⁵ Communicant's comments, 20 January 2016, para. 1.

³⁶ Communicant's comments on Party's response to communication, 17 March 2015, pp. 3-4.

³⁷ Communication, p. 2.

- The production of more toxic and higher level radioactive waste from the planned use of MOX fuel.³⁸

40. The Party concerned refutes the communicant's allegations. It claims that there was neither a request to change or to extend the installation of the Borssele NPP nor a request to extend the operating time, because the initial 1973 licence was valid for an indefinite period. Rather, in order to make use of the licence after 2013, the operator had to demonstrate that the continuation of operation for a longer period was still possible within the applicable technical preconditions. It states that the operator provided this evidence in its licence application dated 12 September 2012 for the extension of the design lifetime and that as a result an amendment to the Safety Report (extending the original design lifetime from 40 years to 60 years) and a change to the licence was required. The Party concerned submits that accordingly the extension of the design lifetime of the Borssele NPP is not an activity listed in Annex I of the Convention and does not constitute a proposed activity within the meaning of article 6, paragraph 1 (a).³⁹

41. The Party concerned submits that the extension of the design lifetime of the Borssele NPP does not fall under article 6, paragraph 1 (b) of the Convention either. It contends that the extension does not concern whether the exploitation of the NPP can be extended but only the adaptation of the Safety Report.⁴⁰ It alleges that the amendments in the Safety Report do not concern any change to or extension of the operation of the Borssele NPP and, consequently, do not have more or less favourable environmental impacts than those considered in previous licences and accordingly, the extension of the design lifetime of the Borssele NPP is not a proposed activity within the meaning of article 6, paragraph 1 (b).⁴¹

42. The Party concerned further submits that the extension does not fall under article 6, paragraph 10, of the Convention because the extension of the design lifetime of the Borssele NPP neither involved any physical change to or extension, nor had any potential significant effect on the environment.⁴² The Party concerned submits that, in view of the Committee's findings on communication ACCC/C/2009/41 (Slovakia),⁴³ the adaptation of the Safety Report necessary for the extension of the design lifetime could be considered to involve a reconsideration and update of the operating conditions of the Borssele NPP.⁴⁴ It distinguishes the earlier case, however, on the basis that that case concerned the construction of two new units, which were, until that time, not in operation, and the related decisions entailed a number of new conditions for the operation of the NPP in that case. It submits that in contrast, the updating of the Safety Report for the Borssele NPP did not entail reconsideration or updating of the operating conditions as set out in article 6, paragraph 10, of the Convention, because the operating limits and conditions and the technical parameters of the Borssele NPP did not change.⁴⁵ The Party concerned suggests that the implementation of the Convention may benefit from further guidance by the Committee on the exact meaning of the term "operating conditions".⁴⁶

43. The Party concerned submits that, if the Committee should conclude that the term "operating conditions" includes the adaptation of the Safety Report for the Borssele NPP, it

³⁸ Communication, pp. 2-3, and communicant's comments, 20 January 2016, para. 3.

³⁹ Party's response to communication, paras. 41-42.

⁴⁰ Party's response to communication, para. 43.

⁴¹ Party's response to communication, para. 44.

⁴² Party's response to communication, para. 45.

⁴³ ECE/MP.PP/2011/11/Add.3.

⁴⁴ Party's response to communication, para. 45.

⁴⁵ Annex 3 to letter from the Party concerned, 13 November 2015, para. 4.2.

⁴⁶ Party's response to communication, para. 45.

applied the provisions of article 6, paragraphs 2 to 9, “mutatis mutandis, and where appropriate” and therefore complied with the Convention in any event.⁴⁷

Public participation under article 6 of the Convention

Public participation on the licence for the extension of the design lifetime of the Borssele NPP

44. The communicant submits that the Party concerned did provide for public consultation prior to the 18 March 2013 licence decision, but only on the limited issue of technical nuclear safety thereby excluding issues relating to the potential impact on the environment.⁴⁸

45. The communicant submits that, while there is no requirement under the Convention to carry out an environmental impact assessment procedure, there was no sufficient description of the significant effects of the proposed activity on the environment nor a description of the measures envisaged to prevent and/or reduce the effects, including emissions as required by article 6, paragraph 6, of the Convention.⁴⁹ The communicant submits that the information included in the Safety Report did not, for example, contain an outline of main alternatives studied by the applicant (as required by article 6, paragraph 6 (e)) or a description of the environmental impacts (as required by article 6, paragraph 6 (a) and (b)).⁵⁰ The communicant also submits that there was no description of the measures envisaged to prevent and/or reduce the effects, including emissions (as required by article 6, paragraph 6 (c)).⁵¹ It contends that in his letter of 10 January 2016 to Parliament, the State Secretary for Housing, Spatial Planning and the Environment claimed that he had assessed “impacts on the electricity supply, environmental impacts including radiation impacts and some additional effects like safety and risk, non-proliferation, spatial planning and employment”.⁵² The communicant submits that this demonstrates that the government was holding further information on the potential environmental impacts but that this information was not systematically shared with the public nor systematically included in the public participation.⁵³ The communicant claims that the public expressed viewpoints concerning the environment, but was not able to do this on the basis of an assessment of potential impacts on the environment.⁵⁴

46. The communicant further submits that the procedure was not open to include viewpoints on the environment because the Party concerned had already decided that the extension of the design lifetime would not have any environmental impacts. It states that no zero-options were analysed and there was no systematic assessment of potential environmental impacts.⁵⁵

47. Finally, the communicant submits that the Party concerned itself concedes (see para. 51 below) that the decision and the licence conditions were not adapted on the basis of any of the environmental concerns expressed by the public in the public participation procedure and that the Party concerned failed to take viewpoints concerning environmental matters into account in the final decision.⁵⁶

⁴⁷ Party's response to communication, para. 45.

⁴⁸ Communication, p. 1, and communicant's comments, 20 January 2016, para. 6.

⁴⁹ Communicant's comments on the Party's response to communication, 17 March 2015, p. 4.

⁵⁰ Communicant's comments, 20 January 2016, para. 4.

⁵¹ Communicant's comments on the Party's response to communication, 17 March 2015, p. 4.

⁵² Annex 1 to letter from the Party concerned, 13 November 2015, p.3.

⁵³ Communicant's comments, 20 January 2016, para. 4.

⁵⁴ Communicant's comments, 20 January 2016, para. 4.

⁵⁵ Communicant's comments on the Party's response to communication, 17 March 2015, p. 4.

⁵⁶ Communicant's comments on the Party's response to communication, 17 March 2015, p. 4.

48. The Party concerned submits that the public participation requirements of article 6 of the Convention with respect to nuclear reactors are adequately implemented in Division 3.4 of the General Administrative Law Act in conjunction with Division 13.2 of the Environmental Management Act and Section 17 of the Nuclear Energy Act.⁵⁷

49. The Party concerned states that the public was notified of the draft licence through notices in several newspapers and the internet and that during a six-week period the public was allowed to provide comments and views.⁵⁸ It claims that the decision was made public in due time and that, in addition, individual letters were sent to notify those persons who had expressed their views earlier.⁵⁹ It submits that, in the light of the above, it complied with the article 6, paragraphs 2-5, 7 and 9, of the Convention.

50. With regard to the provision of information under article 6, paragraph 6 of the Convention, the Party concerned submits that, in accordance with section 3.11 of the General Administrative Law Act, the draft decision, the application and all other relevant documents were physically available for examination in the municipality of Borssele and the Ministry of Economic Affairs in the Hague and available for download on a government website.⁶⁰ Concerning the environmental effects of the licence decision, the Party concerned refers to the negative EIA screening decision and submits that this decision was also incorporated and extensively motivated in the licence (in para. 3.1 on p. 12 thereof) and mentioned in its replies to views expressed on the topic (para. 6.4.1, section a, on p. 32 of the licence).⁶¹ It further submits that because the initial licence was valid for an indefinite period and had not expired, no more or less favourable environmental impacts were to be expected of the decision to extend the design lifetime as already considered in previous licensing procedures.⁶²

51. While the Party concerned concedes that the decision itself and the licence conditions were not adapted as a result of the public's comments, it submits that the national competent authority took due account of the public's views in accordance with article 6, paragraph 8, of the Convention and that the reasoning of the licence was clarified on a number of points.⁶³

52. The Party concerned also argues that the public consultation was not limited to the issue of technical nuclear safety but also included issues relating to the potential impact on the environment. The Party concerned submits that in accordance with Divisions 3.4 of the General Administrative Law Act and 13.2 of the Environmental Management Act anyone could have submitted an opinion on the preliminary decision. It submits that in the preliminary decision and other relevant documents the proposed changes to the Safety Report were clearly set out. The Party concerned argues that models and calculations were used to explain the consequences of extending the design lifetime and to indicate that the extension of the design lifetime would not have any environmental impacts.⁶⁴ It also submits that the final decision addresses environmental effects and the views of the public expressed on that topic.⁶⁵

Earlier public participation procedures related to Borssele NPP

⁵⁷ Party's response to communication, paras. 38-39.

⁵⁸ Party's response to communication, paras. 47-48 and 51.

⁵⁹ Party's response to communication, para. 54.

⁶⁰ Party's response to communication, para. 49.

⁶¹ Annex 3 to additional information from the Party concerned, 13 November 2015, para. 2.2. See appendix 6 to the Party's response to communication for the decision on the licence.

⁶² Annex 3 to additional information from the Party concerned, 13 November 2015, para. 3.2, referring to para. 6.4 of the decision on the licence application (appendix 6 to the Party's response to communication).

⁶³ Party's response to communication, para. 53.

⁶⁴ Party's response to communication, para. 52.

⁶⁵ Annex 3 to letter from the Party concerned, 13 November 2015, para. 3.2.

53. The communicant submits that there were no previous public participation procedures that explicitly assessed environmental issues which considered the effects of the operation of the Borssele NPP beyond 2013.⁶⁶ Contrary to the submission of the Party concerned (see below), the communicant alleges that the impact of the utilisation of MOX fuel and a prolonged lifetime was not considered.⁶⁷

54. The communicant further submits that neither the 2006 Covenant nor the 2010 amendment of the Nuclear Energy Act were subject to public participation procedures. It submits that, on its own initiative, it submitted views on a 2005 study commissioned by the government in the preparation of the 2006 Covenant and that the Parliament invited specific stakeholders to give input, including the communicant, but that there were no opportunities for the public in general to participate.⁶⁸

55. The communicant alleges that the conclusion of the 2006 Covenant was a decision in a tiered decision-making process that led to a de facto lifetime extension of the Borssele NPP and thus should have been preceded by public participation.⁶⁹

56. The Party concerned concedes that the extension of the design lifetime of the Borssele NPP was not considered in the environmental impact assessments carried out in 1996, 2004 and 2011 in the context of the 1996, 2004 and 2013 changes to the licence. The Party concerned claims, however, that the 2011 EIA report on MOX fuel took into account the fact that that fuel will be used until the end of 2033.⁷⁰

57. With regard to the 2006 Covenant, the Party concerned submits that this agreement in fact led to a restriction of the operating time of the Borssele NPP because the licence had been issued for an indefinite period and the Covenant stipulates closure of the plant by 2033.⁷¹ The Party concerned further submits that prior to the conclusion of the 2006 Covenant there was no lawful justification to withdraw the licence of the NPP operator and, in accordance with article 1 of Protocol No. 1 to the European Convention of Human Rights, the NPP operator would have had a right to receive compensation if the NPP operating licence had been terminated.⁷²

58. The Party concerned also submits that at the time that the communication was submitted it was in the process of evaluating the 2013 10-year safety review (10EVA13). It submits that a conceptual improvement plan had to be prepared by the operator for this purpose. On the basis of this plan, the competent authority would decide which measures had to be implemented by the NPP operator. If those measures included measures for which an amendment of the licence would be needed, a procedure according to Division 3.4 of the General Administrative Law Act, including public participation and possibly an environmental impact assessment, would follow.⁷³

⁶⁶ Communicant's comments, 20 January 2016, paras. 5 and 9.

⁶⁷ Communicant's comments, 20 January 2016, para. 5.

⁶⁸ Communicant's comments, 20 January 2016, para. 10.

⁶⁹ Communicant's comments on reply to questions from the Party concerned, 11 April 2017.

⁷⁰ Party's response to communication, paras. 15 and 20.

⁷¹ Party's response to communication, para. 11; Party's opening statement for hearing at the Committee's 50th meeting, 8 October 2015, p. 3; and reply to questions from the Party concerned, 16 March 2017.

⁷² Party's reply to clarification request, 6 April 2017, p. 1.

⁷³ Party's response to communication, para. 26.

III. Consideration and evaluation by the Committee

59. The Netherlands ratified the Convention on 29 December 2004. The Convention entered into force for the Netherlands on 29 March 2005, being ninety days after the deposit of its instrument of ratification.

Admissibility and request for deferral

60. The Committee notes that the communicant unsuccessfully sought to challenge the 18 March 2013 decision before the Council of State (see para. 32 above). The Committee also notes the communicant's submission that no further domestic remedies were available and that the Party concerned has not challenged the admissibility of the communication on this ground. The Committee therefore finds the communication to be admissible.

61. With respect to the request by the Party concerned for a deferral of the Committee's consideration of the communication in the light of the ongoing parallel investigation before the Espoo Convention Implementation Committee (see para. 34 above), the present case concerns claims under the Aarhus Convention which are independent of whether a duty to conduct a transboundary environmental impact assessment was required under the Espoo Convention. The Committee therefore considers that there is no need to defer consideration of this communication.

Article 6, paragraph 10, of the Convention

Reconsideration or update of operating conditions

62. The Committee notes that neither the communicant nor the Party concerned exclude the possibility that article 6, paragraph 10, of the Convention could potentially apply to the licence to extend the design lifetime of the Borssele NPP, though the Party concerned submits that there was no update in the operating conditions in the present case because the initial licence of 1973 was valid for an indefinite period⁷⁴ and the operating limits and conditions and the technical parameters of the Borssele NPP did not change.⁷⁵

63. The Committee cannot agree with the position of the Party concerned that the fact that 1973 licence was for an "indefinite" period means that the decision to extend the design lifetime until 2033 was not a change in the NPP's operating conditions. Indeed, the Party concerned itself states: "At the time of the original design and construction of the Borssele NPP, it was assumed that it would have a design lifetime of 40 years, i.e. until 2014."⁷⁶ It is also clear from the licence documentation that, without the 18 March 2013 licence, the NPP was not permitted to operate beyond 2014.⁷⁷ The Committee considers that the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions. It follows

⁷⁴ See para. 40 above.

⁷⁵ See para. 42 above.

⁷⁶ Party's response to communication, para. 41.

⁷⁷ See, for example, the notification of the licence decision of 18 March 2013 (appendix 8 to the Party's response to the communication), p. 1: "In order to make use of the licence under the Nuclear Energy Act after 2013, NV EPZ must demonstrate that the continuation of operations until 2034 is possible within the relevant technical parameters. [...] As a result of this justification for extending the provisional period of operation to 2034, an amendment to the safety report and a change to the licence under the Nuclear Energy Act are required."

that any decision permitting the NPP to operate beyond 2014 amounted to an update of the operating conditions.

64. Based on the above, the Committee considers that the 18 March 2013 licence granting a lifetime extension until 31 December 2033 updated the operating conditions of the NPP. Accordingly, under article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, “*mutatis mutandis*, and where appropriate to that decision.

65. In the light of the above, it is not necessary in the present case to consider whether article 6, paragraph 1 (a) would also apply, either in conjunction with paragraph 1 or paragraph 20 of Annex I of the Convention, to the 2013 lifetime extension.

“Mutatis mutandis” and “where appropriate”

66. Having found that the decision to extend its design lifetime constituted an update of the operating conditions for the Borssele NPP under article 6, paragraph 10 of the Convention, the Committee examines whether the requirements of article 6, paragraph 10, were in fact met by the Party concerned in this case.

67. Pursuant to article 6, paragraph 10, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied “*mutatis mutandis*” and “where appropriate” to the 2013 permission.

Mutatis mutandis

68. The reference in paragraph 10 to “*mutatis mutandis*” simply means “with the necessary changes”,⁷⁸ i.e. when applying the provisions of paragraphs 2 to 9 of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority applies those paragraphs with the necessary changes.⁷⁹

Where appropriate

69. With respect to “where appropriate”, the Committee recalls that, in its findings on communication ACCC/C/2009/41 (Slovakia), it held that although each Party is given some discretion under article 6, paragraph 10, this does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.⁸⁰ In its findings on communication ACCC/C/2013/99 (Spain), the Committee stated that the discretion as to the “appropriateness” of the application of the provisions of paragraphs 2 to 9 of article 6 of the Convention “must be considered to be even more limited if the update in the operating conditions may itself have a significant effect on the environment.”⁸¹ The Committee considers that, except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment it is “appropriate” for extensions of duration to be subject to the provisions of article 6. In this regard, the Committee considers it inconceivable that the operation of a nuclear power plant could be extended from 40 years to 60 years without the potential for significant environmental effects. The Committee accordingly concludes that it was “appropriate”, and thus required, to apply the provisions of article 6, paragraphs 2-9, to the decision to grant the lifetime extension of the Borssele NPP until 2033.

⁷⁸ Bryan A. Garner ed., *Black’s Law Dictionary*, 10th edition, (St Paul, Minnesota, West Thomson Reuters, 2014).

⁷⁹ See also *The Aarhus Convention: An Implementation Guide*, second edition, p. 159.

⁸⁰ ECE/MP.PP/2011/11/Add.3, para. 55.

⁸¹ ECE/MP.PP/C.1/2017/17, para. 85.

Compliance with the requirements of article 6

70. Having found that the Party concerned was obliged pursuant to article 6, paragraph 10 of the Convention to carry out public participation meeting the requirements of article 6, paragraphs 2 to 9 to the decision to extend the lifetime of Borssele NPP until 2033, the Committee examines the extent to which the Party concerned met those requirements below.

71. The Committee notes that it is common ground between the parties that the Government conducted a public participation procedure prior to issuing the licence to extend the design lifetime of the Borssele NPP. The communicant submits, however, that this public participation procedure was only on the safety aspects of the lifetime extension and did not fulfil the requirements of article 6 of the Convention in several respects. In particular, while not linking its allegations to specific paragraphs of article 6, the communicant alleges that the Party did not provide the public the chance to participate in a way that took into account environmental matters, that it did not provide the public with the information prescribed in article 6 concerning the environment, that public participation was not provided at an early stage when all options were open and that the public's viewpoints concerning environmental matters were not taken into account in the final decision. The Committee examines the Party's compliance with the provisions of article 6 below.

Article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention

72. The communicant submits that, by virtue of the 2006 Covenant, the Party concerned was bound to extend the lifetime of the Borssele NPP until 2033, or else to potentially pay significant compensation to the operator. It claims that during the licensing decision the zero option (i.e. to not extend the lifetime of the NPP beyond 2013) was therefore not considered. It submits that the 2006 Covenant was part of a tiered decision-making procedure and should have been preceded by public participation.

73. With respect to the 2006 Covenant, the Party concerned submits that, rather than forming part of a decision on extension, the Covenant in fact was an agreement between the Party concerned and the operator to limit the duration of its operating time, as the previous licence had been issued for an indefinite period.

74. In order to meet the requirements of article 6, paragraph 4, public participation must take place "at an early stage of the decision-making process, when all options are open and when due account can be taken of the outcome of the public participation" (findings on communication ACCC/C/2008/26 (Austria)).⁸² As the Committee held in its findings on communication ACCC/C/2007/22 (France), "this implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making."⁸³

75. The Committee notes that the 2006 Covenant stipulates that the Government shall refrain from any steps that prevent the operation of Borssele NPP until 2033 and establishes that the Government is required to compensate the operator if it fails to do so (see para. 23 above). The Party concerned submits that it was already potentially liable under the European Convention on Human Rights to pay compensation should it have terminated the licence and the 2006 Covenant accordingly did not alter its position. The Committee considers that whether or not a claim by the NPP operator for compensation could have succeeded prior to

⁸² ECE/MP.PP/C.1/2009/6/Add.1, para. 66.

⁸³ ECE/MP.PP/2009/4/Add.1, para. 38.

concluding the agreement,⁸⁴ the 2006 Covenant created a new, enforceable obligation on the public authorities not to interfere with the NPP's operation until 2033. The Committee further considers that even if, as the Party asserts, the 2006 Covenant formally limited the duration of the licence from an indefinite period to 2033, it accordingly set the date on when the plant was to cease operation, which was an important aspect of the decision-making procedure concerning the NPP.

76. The Party concerned does not dispute that the amendment to the Nuclear Energy Act dated 1 July 2010 resulted from the 2006 Covenant.⁸⁵ The July 2010 amendment to the Nuclear Energy Act specifically formalized the lifetime duration of the NPP Borssele and established the parameters for the licence application to amend the Safety Report to adjust the design lifetime to 2033 as well. The Committee considers that this in turn culminated in the 18 March 2013 licensing decision through which the Ministry of Economic Affairs granted the licence for the extension of the design lifetime of the Borssele NPP.

77. The communicant submits in that regard that prior to the conclusion of the 2006 Covenant and the 2010 amendment of the Nuclear Energy Act, only selected stakeholders were invited by Parliament to comment and this has not been disputed by the Party concerned.⁸⁶ As the Committee held in its findings on communication ACCC/C/2010/51 (Romania), engagement of stakeholders selected on a discretionary basis cannot be considered to meet the requirements for public participation under the Convention.⁸⁷

78. With respect to the possibility for the public to submit comments on the duration of the licence during the 2012 public participation procedure, in his response in the licence decision to the comments received from the public on various topics, the Minister repeatedly reiterates: "NV EPZ has a licence for the KCB for an indefinite period, limited by Section 15a (1) of the Nuclear Energy Act to the end of 2033." In the Committee's view, the Minister's repeated statements on this point clearly demonstrate that the duration of the NPP until 2033 was already set prior to the 2012 public participation procedure.

79. Based on the above, the Committee considers that by deciding to set 2033 as the end date for the operation of the Borssele NPP through the 2006 Covenant and the associated 2010 amendment of the Nuclear Energy Act without providing for public participation meeting the requirements of article 6 on that decision-making, the Party concerned failed to comply with article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention.

Other provisions of article 6

80. In the light of its finding in paragraph 79 above, the Committee considers it unnecessary to proceed to examine the compliance of the 2012 public participation procedure with the other provisions of article 6. This is due to the fact that, since the Party concerned did not provide for public participation meeting the requirements of article 6 prior to already setting the end date of the licence in the 2006 Covenant and 2010 amendment to the Nuclear Energy Act, it was not possible for the Party concerned to rectify that non-compliance through a public procedure on the licence application carried out in 2012.

81. While the Committee will accordingly not further examine the compliance of the 2012 public participation procedure with the requirements of article 6, it considers it useful to make

⁸⁴ Annex to letter from the Party concerned, 19 February 2016, pp. 2-3.

⁸⁵ Annex 3 to letter from the Party concerned, 13 November 2015, paras. 5.1-5.2.

⁸⁶ Communicant's comments, 20 January 2016, para. 10.

⁸⁷ ECE/MP.PP/C.1/2014/12, para. 109.

observations on certain aspects of the case that are relevant for the correct implementation of article 6, paragraphs 6 and 8.

Article 6, paragraph 6 of the Convention

82. While, as acknowledged by the communicant, article 6, paragraph 6, of the Convention does not require an environmental impact assessment to be carried out, the competent public authorities must as a minimum provide the public concerned with access to the information listed in subparagraphs (a)-(f) of that provision. The Committee points out that, in the context of decision-making on the extension of the design lifetime of a NPP, subparagraph (b) of article 6, paragraph 6, requires that information on the environmental effects of such a longer operation should be made available to the public concerned. The Committee notes in that regard the communicant's submission that in the present case the public authorities in fact held relevant information on this point but did not make it available to the public concerned in a systematic manner (see para. 45 above). Indeed, the Party concerned itself has referred to an analysis commissioned to inform the parliamentary debate on the 2006 Covenant on "the consequences of ending or continuing the operation of the Borssele NPP after 2013."⁸⁸ This analysis is mentioned in the letter of the Minister of State Secretary for Housing, Spatial Planning and the Environment to Parliament of 10 January 2006, which stated that "the purpose of this analysis is to examine the consequences of KCB's closure in 2033 as compared with its closure at the end of 2013 pursuant to the political [Balkenende II] Coalition Agreement."⁸⁹ The Committee underlines that, in the context of decision-making to permit a lifetime extension of a nuclear plant, all relevant information should be made available to the public in accordance with article 6, paragraph 6 of the Convention.

Article 6, paragraph 8

83. Since as noted in paragraph 80 above, a public participation procedure carried out after the end date of the nuclear power plant had already been set cannot make up for a failure to provide for public participation fulfilling the requirements of article 6 before the duration was decided, it would serve no purpose for the Committee to examine the compliance with article 6, paragraph 8, of the 2012 public participation procedure. However, notwithstanding that the 2012 public participation procedure was held too late to meet the requirements of article 6 of the Convention with respect to the decision to extend the NPP's lifetime until 2033, the Committee considers that the format used in the licence decision to summarize, group and respond to the comments received from the public may serve as a useful example on how to deal with comments received from the public in the text of a decision subject to article 6 in a well-structured, clear and sufficiently detailed way.

IV. Conclusions and recommendations

84. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs:

A. Main findings with regard to non-compliance

85. The Committee finds that, by deciding to set 31 December 2033 as the end date for the operation of the Borssele NPP through the 2006 Covenant and the associated 2010 amendment of the Nuclear Energy Act without providing for public participation meeting the

⁸⁸ Annex 3 to additional information from the Party concerned, 13 November 2015, para. 5.2.

⁸⁹ Annex 1 to additional information from the Party concerned, 13 November 2015, p. 3.

requirements of article 6 on that decision-making, the Party concerned failed to comply with article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention.

B. Recommendations

86. The Committee pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, [and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 37 (b) of the annex to decision I/7,] recommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that, 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.