Opening statement by

THE NETHERLANDS

62nd meeting of the Aarhus Convention Compliance Committee
Discussion of the Communication concerning compliance by the Netherlands with the access to information and public participation provisions of the Convention in connection with wind turbines
(ACCC/C/2015/133)

6 November 2018

INTRODUCTORY STATEMENT ON BEHALF OF THE NETHERLANDS
Head of delegation, the Netherlands – Marjolein Busstra

Introduction

Mr Chairman, distinguished members of the Committee, ladies and gentlemen,

My name is Marjolein Busstra, I am legal counsel at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

It is an honour for me to address your distinguished Committee on the occasion of the discussion of the Communication concerning compliance by the Netherlands with the access to information and public participation provisions of the Convention in connection with wind turbines.

My delegation is looking forward to a productive exchange of views.

Allow me to briefly introduce the other members of the delegation:

> For the Ministry of Economic Affairs: Mirjam Hoogendam, legal adviser; Kirsten van Leeuwen-Gerkema, legal adviser; Ben Schoon, policy adviser
>
> For the Ministry of Infrastructure and Water Management: Sjeanne Kamphorst, legal adviser

We are all at your disposal to answer any questions you may have on the implementation of the Convention, and will do so to the best of our ability.

The Communication

The communication by the Netherlands Association of People Living in the Direct Vicinity of Wind Turbines (Nederlandse Vereniging Omwonenden Windturbines; NLVOW) ('the communicant') is extremely broad and encompasses all three aspects of the Aarhus Convention (access to information, participation in decision-making and access to justice) in relation to wind farms. I will briefly discuss each of these aspects, as well as the admissibility of the communication. For the rest, I would refer the Committee to the Dutch Government's previous observations on this case, in which it discussed in detail the various assertions made by the communicant.

With regard to the admissibility of the communication:
Mr Chairman, the Committee has repeatedly stated that it 'should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.'

In this case, the communicant has not made any genuine effort to institute legal proceedings against the state. Notably, it has not legally challenged any decision by the Government on a

specific wind farm project or filed a tort claim with a civil court with regard to the government's implementation of its responsibilities under the Convention.

As the government has made clear in previous observations to the Committee, the Dutch legal system provides for numerous legal remedies against the decisions, acts, omissions and conduct of the government. Such remedies are employed by the communicant's fellow citizens, sometimes successfully and sometimes unsuccessfully. Only recently, The Hague Court of Appeal ruled in favour of an environmental NGO which challenged the government's implementation of its international obligations on carbon dioxide reduction, on the basis of the tort provision in the Dutch Civil Code.

The communicant, however, has not instituted any proceedings. Instead, it simply states that the available legal remedies look good on paper but do not suffice *in practice*. The government finds it strange that the communicant should make such a statement without having taken any action *in practice* itself.

The communicant argues that it would be pointless to challenge governmental decisions in the courts. However, the fact that the Council of State has not found in favour of the communicant's viewpoints does not constitute a breach of the Convention. Nor does it mean that the Council of State has not thoroughly reviewed the cases before it. Indeed, as I will explain later when talking about access to justice, the Government strongly objects to the communicant's inferring from a number of references to judgments by the administrative courts that the remedies offered by the Netherlands' legal system do not suffice and violate the requirements of the Convention.

As the Committee itself has stated, '[I]t is important that the Party's own administrative and judicial review procedures have the opportunity to rectify any defects in its domestic procedures before a case is brought before an international review mechanism such as the Committee.'

By not making use of any of the domestic legal remedies at its disposal, the communicant has deprived the Government of precisely that opportunity.

For this reason, Mr Chairman, the Government submits that the communication should be declared inadmissible.

<u>With regard to access to information:</u>

Mr Chairman, I can be quite brief on this point. Article 5 of the Convention requires environmental information to be effectively accessible. In earlier communications the

Government has provided the Committee with ample information on the manner in which the public is provided with environmental information.

Indeed, it is a legal requirement under Dutch administrative law for all public authorities to provide, of their own accord, information on their policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.

Moreover, as explained in more detail in previous correspondence, the Government has put in place mechanisms to ensure that members of the public can raise their concerns about information provided by the Government, whether related to its content or to its perceived incompleteness.

The Government would note that the communicant cites an example of a ruling of one of these mechanisms, the National Ombudsman, in order to substantiate its point that the provision of information was insufficient. The Government would submit, however, that if the case before the Ombudsman shows anything, it is that there are effective mechanisms in place to ensure adequate access to information. In this particular case, the Government amended the information provided on the website in question.

<u>With regard to participation in decision-making:</u>

Mr Chairman, decision-making by any Dutch authority with regard to any matters that have environmental relevance is subject to clear legislation concerning the participation of the public. Indeed, the Government extensively describes in its written observations the way in which the public is involved in the whole process, from policy plans and policy strategies to legally binding spatial plans and implementing decisions.

The Government submits that clear regard must be had for the specific requirements the Convention imposes for different documents.

Articles 6 and 7 of the Convention contain provisions on specific activities, plans, programmes or policies, in which at least the main contours of the envisaged policy are clear. As noted previously, the Government considers that initiatives such as the 2013 Energy Agreement, which outline a general political course of action such as an ambition for the percentage of wind energy in the national energy package, do not fall under these provisions. In so far as they fall under the provisions of the Convention at all, they should be considered to fall within ‘the preparation of policies relating to the environment’ under the last sentence of article 7 of the Convention. In its written statement, the Government explained to what extent and how the public was involved in each of these initiatives, in accordance with article 7. The Government would point out here that it endeavours to involve the public as much as possible

in initiatives that do not fall under articles 6 and 7. This is an ongoing process, in which procedures are constantly evaluated and improved.

Furthermore, article 8 of the Convention contains a specific provision for public participation in the development of generally applicable legally binding instruments. One example of such an instrument is the Environmental Management (General Rules for Establishments) Decree [incorrect reference: reference should have been made to the Activities Decree], which contains standards for shadow flicker and noise from wind turbines, and is singled out by the communicant in its communication. The Government will not reiterate all its arguments concerning the communicant's claims with regard to this Decree. It suffices here to emphasise that the public has been adequately involved in the decision-making process with regard to this instrument, in accordance with the requirements of article 8. Over 80 extensive comments by members of the public were received and were duly taken into account when the standards were adopted. The Government's response to each comment was published online. One concrete effect of this public participation, in combination with concerns raised in parliament, was the inclusion of the 41dB Lnight standard in addition to the 47dB Lden standard in the final text of the Decree.

Mr Chairman, the communicant claims that public participation arranged by the government with regard to decision-making on wind energy has no effect. It supports this claim with the argument that it sees no substantive changes in the particular documents or policies after public consultation. The previous example alone shows that this is not true.

More generally, the mere fact that the government does not accept and implement a comment made in a public consultation does not mean that the comment was not given due consideration. As the Committee has stated numerous times, public participation does not amount to a right of the public to veto a decision. Nor does it require that the final say about the fate or design of the project rest with the local community in the vicinity of the project, or that their approval – although preferable – is always needed. It means that public authorities must have taken due account of the outcome of the public participation process, which the government has done in the past and continues to do with regard to decision-making on wind energy.

Specifically with regard to wind turbine projects, stakeholder consultations and participation procedures take place at an early stage in the decision-making process. Public authorities are obliged under Dutch law to take due account of the outcome of these procedures and they take this obligation seriously. Public participation always leads to adjustments of the (draft) decision, some minor and some more substantive, as shown by those made to various decisions involving wind farms. More substantive adjustments include for instance the relocation of wind turbine positions in the final decision on Windpark Blauw and the cancellation of two and five wind turbine positions respectively in the final decisions on

Windplan Zeewolde and Windpark de Drentse Monden (furthermore, at an earlier stage this project was reduced from 420-600 MW to 135 MW).

Mr Chairman, a final word with regard to the role of the initiators of wind turbine projects. These parties are, understandably, closely involved in the development of specific projects. The possible effects of wind turbines on various environmental factors are researched thoroughly, which results in discussions and the exchange of documents between the competent authority and the project initiator before formal public participation is organised. This does not mean that stakeholders and the public at large are not included in the process, or that their interests, views and concerns are not taken into account. It simply means that the public can only be informed in an adequate, timely and effective manner if public authorities have something meaningful to present.

<u>With regard to access to justice:</u>

Mr Chairman, as I said earlier, the Government considers that the current communication should be declared inadmissible, as the communicant has made no effort to avail itself of any domestic remedy to present its grievances. The choice not to make use of a domestic legal remedy is one thing, but the choice to dismiss all available domestic remedies as useless and to describe the attitude of courts as passive is another.

It is simply not true that Dutch courts do not actively investigate the cases before them.
Where an authority is granted discretionary powers, Dutch constitutional and administrative law does indeed require that an administrative court review only whether or not the authority could reasonably have arrived at its decision and whether or not the boundaries of its competences were crossed. However, this concerns only the procedural aspects of the decision taken. With regard to the substantive aspects of decision-making, full judicial review takes place, including on provisions relating to noise, shadow flicker and other environmental effects. This is in accordance with the aim of the Aarhus Convention, namely that access to information, participation in decision-making and access to justice ensures that the public is able to express environmental concerns and that due account is taken of those concerns when decisions are made.

The fact that the Council of State has so far followed the same line of reasoning in wind turbine cases (which the applicant disagrees with) simply means that in each particular case the Council concluded that the challenged decision had been taken in accordance with the law and that the appellant's arguments in the particular case did not convince it otherwise. In this respect the government would note that, in numerous cases involving wind farms, the appellant underpinned their arguments solely with a general reference to the NLVOW's ongoing communication before the Committee, without elaborating further. As noted, the communicant has not itself instituted any proceedings against any of these various wind farms, and has presented no argumentation of any substance to the court.

Conclusion

Mr Chairman, in this statement, as in the Government's previous observations to this Committee, it is impossible to address every point made by the applicant. And in the Government's view, that is exactly where the problem of this case lies: the communication boldly states that the Government's implementation of its obligations under the Convention with regard to wind turbines is wrong in every respect. In order to substantiate this overly broad complaint, it presents a number of examples of perceived incorrect implementation, which it extrapolates into general conclusions. Moreover, it suggests that whenever the Government or a judicial body takes a view that does not concur with the view of the communicant there is a violation of the Convention.

As a matter of principle, Mr Chairman, the Government does not consider this to be the way to proceed when it comes to discussing the implementation of the Convention. Not in the domestic arena, in the dialogue between a country's government and its citizens, nor in the international arena, whether before this Committee or among states. Dialogue is a two-way street. It would have been helpful if the NLVOW had first engaged in such a dialogue at national level before addressing the Committee with its concerns.

Mr Chairman, distinguished members of the Committee, thank you for your attention. We are open to your remarks and questions. Let me end by saying that we are looking forward to a constructive dialogue with your Committee.