SURVEY OF RELEVANT EARLIER FINDINGS OF THE ACCC AND COMMENTS NLVOW
Based on ACCC Case Law, 3rd edition

I. ADMISSABILITY

On national remedies

1. ACCC/C/2005/12 (Albania), para 60 and ACCC/C/2013/93 (Norway), para 65

On exhaustion of national remedies: there is no strict requirement to exhaust domestic remedies.

Comment NLVOW

The NLVOW maintains its position that it has availed itself of all domestic remedies that offered any chance of success. This either by taken legal action itself or by supporting groups of people living in the vicinity of wind farm to take such legal action. See the earlier NLVOW submissions, in particular the Annex to the NLVOW Communication of November 2015.

II. ACCESS TO INFORMATION

On time frames

2. ACCC/2006/16 (Lithuania), para. 69.

The requirement to provide "reasonable time frames" implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.

Comment NLVOW

The documents of a draft decision on a wind farm project usually involve two to three thousand pages. The public - usually not experts - are given six week to get acquainted with these documents and to prepare comments. And this while even the most technical document may have significant impacts on the quality of their environment.

III. PUBLIC PARTICIPATION

On the process

3. ACCC/C/C/2010/50 (Czech Republic), para 70

Public participation cannot be limited to the EIA stage of decision-making, given that the EIA procedure is part of a broader permitting procedure.

4. ACCC/C/2006/16 (Lithuania), para 71; ACCC/C//2005/12 (Albania), para 28 and ACCC/C/2006/17 (European Community), para 51

Early participation is required in every phase of a tiered decision-making procedure and that lack of participation in an early phase of decision-making cannot be compensated for later in the decision-making procedure. The ACC made it clear that once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to
provide "early public participation when all options are open".

5. ACCC/C/2008/26 (Austria), para. 66

Importantly, participation is to include public debate and the opportunity for the public to participate in such debate 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.

6. ACCC/C/2009/37 (Belarus), para 79
Private actors can play a role in, for example, EIA procedures provided they are impartial and do not represent any interests related to the proposed activity being subject to the decision-making. This means that, while a consultancy firm might be contracted to conduct the EIA procedure, the procedure cannot be conducted by the developer seeking to realize an activity.

7. ACCC/C/2007/22 (France), para. 38
The decisive issue is whether "all options are open and effective participation can take place" at the stage of decision-making in question. This implies that when public participation is provided for, the permitting 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.

Comment NLVOW
This is precisely where practice in the Netherlands is not in conformity with the Convention. No public participation in policy development (which is acceptable under article 7, last sentence), no early, open and effective public participation in the drafting of plans and programmes (article 7), no early, open and effective public participation in the drafting of project decisions (article 6,4) and, finally at the end of a long chain of earlier decisions, an opportunity for the public to submit "views" on draft decisions often involving several thousand pages. And this without any substantive participation in the process that led to these draft decisions. Specifically on point 7: all too often public authorities have consulted and cooperated so closely with project initiators and their advisors to prepare the required draft decisions that in fact they have lost their independence and are no longer free to turn down the application. Maybe in theory, but not in reality.

On participants
8. ACCC/C/2012/70, (Czech Republic), para. 59
While the closer inclusion of the private stakeholders in the process may have been justified, there is still an obligation on the public authority to act in accordance with the objectives of the Convention and not to abuse this provision to effectively bar or significantly reduce the effective public participation of other members of the public.

9. Joint findings ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), para. 80-82.
If significant decision-making takes place during pre-planning procedures in which private parties, such as developers, take part, all-inclusive public participation is to take place during these early stages of planning, regardless of whether they are part of the formal planning process.

10. Joined findings ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), para 81
On identifying the public "which may participate": public participation needs to be all-inclusive, not limited to eg private sector actors.

11. ACCC/C/2010/45 1(United Kingdom, para 81
[If article 6 applies], the Party concerned would also be obliged to ensure all-inclusive public articipation, i.e., not limited to the involvement of private sector, in this early stage of planning.

12. ACCC/C/2009/37 (Belarus), para 79
Private actors can play a role in, for example, EIA procedures provided they are impartial and do not represent any interests related to the proposed activity being subject to the decision-making. This

means that, while a consultancy firm might be contracted to conduct the EIA procedure, the procedure cannot be conducted by the developer seeking to realize an activity.

Comment NLVOW
Which is precisely the practice in the Netherlands: preparing - without any substantive public participation - comprehensive draft <u>decisions on projects</u> in close and exclusive consultation and cooperation with private developers and their advisors. On point 12 specifically: it is quite usual that consultancy firms paid by the project initiator draft the text of decisions to be taken formally by the public authority "in charge". In fact, most documents of a draft decision open for public review originate from the desks of expert consultancy firms paid by project initiators.

13. ACCC/C/2009/44 (Belarus), para. 84
The Committee underlines that any discussions in closed groups (for example, within certain professional groups or employees of certain enterprises) or in closed advisory groups cannot be considered as public participation under the Convention and in particular cannot substitute for the procedure under article 6 of the Convention. In order to meet the requirements of article 6 such a procedure must be in principle open to all members of the public concerned, including NGOs, and subject only to technical restrictions based on objective criteria and not having any discriminatory nature.

14. ACCC/C/2010/54 (European Union), para 83
A targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.

Comment NLVOW
Which is precisely the practice in the Netherlands: preparing - without public participation - <u>plans and programmes</u> in close and exclusive consultation and cooperation with selected NGOs and private sector actors. At present a National Climate Plan is being negotiated between government representatives and representatives from the private sector and selected NGOs. Behind closed doors en in secret and with a minimum of public participation.

On due account
15. ACCC/C/2008/24 (Spain), para 100 and ACCC/C/2008/29 (Poland), para 29
On the articles 6, 8 and 6,9: these provisions entail the public not having a veto and that a decision on an activity should set out how public participation was taken into account. There is no obligation to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, but the relevant authority must seriously consider all the comments received.

Comment NLVOW
As shown on the NLVOW Communication the response of public authorities to the "views" submitted by the public on draft project decisions is usually very brief, often dismissive and not to the point.

On article 7 versus article 6
16. ACCC/C/2004/8 (Armenia), para 28 and (ACCC/C/2011/61 (United Kingdom), para 53 and 60–61
Whether an act constitutes an activity under Article 6 or a plan or programme under Article 7 depends on the context and legal effects of the act in question, not how national legislation denotes the act. Similarly, when projects, often large infrastructural works, are approved by way of legislation these have been considered to be activities, with Article 6 applying to the permitting process

Comment NLVOW

The Netherlands considers all decisions at an early stage to be "policies" in the sense of the last sentence of article 7 without any reference to the context and legal effects of such decisions. In a tiered system of decision-making this may make public participation at a later stage futile

On non-compliance

17. ACCC/C/2012/68 (European Union and United Kingdom), para. 101

Because the United Kingdom's NREAP was not subjected to public participation, the Party concerned (United Kingdom) failed to comply with article 7 of the Convention, in this regard.

Comment NLVOW

The UK NREAP is a document that is in all but name legally identical to the Netherlands' "Nationaal Actieplan voor duurzame energie uit hernieuwbare bronnen" from 2010. This plan too was adopted without public participation (as the Netherlands confirms in its response to question from the ACCC). Therefore, the Netherlands too failed to comply with article 7. In contrast, the Netherlands Council of State has ruled consistently that the Netherlands complied with the Convention when adopting plans and programmes such as the plan from 2010

IV. ACCESS TO JUSTICE

On misuse

18. ACCC/C/2012/76 (Bulgaria), para 68.

On the one hand, participation in a permitting procedure, based on Article 6, is not a precondition for challenging a permitting decision under Article 9. On the other hand, if NGOs were to develop a practice to deliberately opt not to participate during public participation procedures, though having the opportunity to do so, but instead to limit themselves to using administrative or judicial review procedures to challenge the decision once taken, that could undermine the objectives of the Convention.

Comment NLVOW

The NLVOW availed itself of each and every opportunity to participate in decision-making

On indirect review

19. ACCC/C/2011/58 (Bulgaria), para 77

In relation to permitting processes based on tiered decision making: it may not be necessary to allow members of the public concerned to challenge each such decision separately in an independent court procedure. Instead, decisions of a preliminary character may be integrated into a subsequent decision, provided that the 'previous decision is subject to judicial review upon appeal of the final decision'

Comment NLVOW

Prima facie this seems to allow the Netherlands practice of indirect review: a follow-up decision can be challenged on the ground that the decision on which it is based is illegal. Which - indirectly - also challenges the higher-level-decision. However, in indirect review only the follow-up decision may be annulled, which implies that the illegal decision on which it was based remains in fact unchallenged.

On review

20. ACCC/C/2008/33 (United Kingdom), para 123

The review envisaged by Article 9 (2) encompasses both substantive and procedural legality.

21. ACCC/C/2008/31 (Germany), para. 78
However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision.

22. ACCC/C/2008/33 (United Kingdom), para. 125)
The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords,100 and the European Court of Wednesbury test

Comment NLVOW
On point 21: this is precisely what the Netherlands did in the "Crisis en Herstelwet" of 2010 by stipulating that in an appeal to the Council of State the applicant may not use arguments that are not already part of the applicant's earlier comments on the draft decision. And on point 22: as stated in the NLVOW Communication of November 2015 the test applied by the Netherlands Council of State in the review of decisions by public authorities - could the decision reasonably be take? - very similar to the Wednesbury test.

On theory versus practice
23. ACCC/C/2008/24 (Spain), para 105).
What matters is whether the conditions set by Art 9(4) are met in practice, not if they are available in theory

24. ACCC/C/2008/31 (Germany), para. 83
It would not be compatible with the Convention to allow members of the public to challenge the procedural legality of the decisions subject to article 6 of the Convention in theory, while such actions were systematically refused by the courts in practice, as either not admissible or not well founded, on the grounds that the alleged procedural errors were not of importance for the decisions (i.e., that the decision would not have been different, if the procedural error had not taken place).

Comment NLVOW
From the perspective of the NLVOW two most crucial findings, not just in relation to article 9, but also for the Convention system as a whole. In essence, the NLVOW Communication raises the question whether compliance with the Aarhus Convention is a matter of having the right laws and regulations in place or a matter of how these laws and regulations are applied in practice? Is compliance a matter of paper or of practice? The NLVOW submits that it is both: paper and practice. And that the Netherlands failed and continues to fail in relation to practice.