Nederlandse Vereniging van

Omwonenden Windturbines

"Netherlands Association of People Living in the Direct Vicinity of Wind farms"

COMMUNICATION TO THE COMPLIANCE COMMITEE OF THE AARHUS CONVENTION ON THE NON-COMPLIANCE OF THE NETHERLANDS WITH THE PROVISIONS OF THE CONVENTION ON: ACCESS OF THE PUBLIC TO ENVIRONMENTAL INFORMATION; ACCESS OF THE PUBLIC TO DECISION-MAKING ON ENVIRONMENTAL ISSUES; AND ACCESS OF THE PUBLIC TO JUSTICE IN CASE OF ENVRONMENTAL CONFLICTS

Submitted to the Aarhus Compliance Committee of the United Nations Economic Commission for Europe on 30 June, 2015.

COMMUNICATION

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I. THE COMMUNICANT SUBMITTING THE COMMUNICATION

1. The "Nederlandse Vereniging Omwonenden Windturbines"[*Netherlands Association of People Living in the Direct Vicinity of Wind Turbines*] (NLVOW) is an association with over 1,000 members. The association has been incorporated by a notarial deed and has legal personality under Netherlands law.

2. The association supports a shift towards sustainable energy. It strives to ensure that the choices to be made in that respect are based on a balanced assessment of all interests concerned with sufficient importance being given to people's right to live in an environment that is adequate to their health and well-being.

3. According to its by-laws, the association's objectives are: (1) supporting individuals and communities living in the direct vicinity of wind farm projects by promoting their interests in relation to such projects; (2) promoting actions and measures to safeguard the rights of said individuals and communities, including the initiation and conduct of legal proceeding; and (3) making expert contributions to the public debate on the advantages and disadvantages of wind power.

II. PARTY ADDRESSED BY THE COMMUNICATION

4. The Kingdom of the Netherlands

III. SOME PRELIMINARY OBSERVATIONS

1. Essence, structure and preparation

5. This communication concerns access to information on wind power and wind farms, decision-making on wind power en wind farms and access to justice against administrative decisions approving the construction of wind farms in the Netherlands.[1] In all three areas the Netherlands acts in violation of the rights of the public safeguarded by the "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters", concluded at Aarhus on 25 June 1998 (hereinafter: Aarhus Convention or Convention). The Netherlands ratified the Convention on 29 December 2004

6. The non-compliance of the Netherlands with the Convention concerns the availability of environmental information (article 5 and article 3 of the Convention), participation in decision-making (article 6 and article 7 of the Convention) and access to justice (article 9 of the Convention).

7. This document consists of two parts. The first part contains the actual communication. In the second part, the Annex to the communication, the arguments put forward are further elaborated and substantiated, also with examples from actual practice. This introductory section III of the communication contains some preliminary observations on the design of the

[1] The term "wind farm" also refers to a single solitary wind turbine.

communication, on the effects of wind farms on living conditions and on the applicability of the Convention to wind power and wind farms. It then discusses exhaustion of local remedies and availability of other international procedures. Thereafter, the communication moves on to the heart of the matter: the alleged non-compliance with the Convention by the Netherlands, as well as the grounds for this allegation. The communication ends with the requests of the communicant to the Committee. The Annex then follows with a further elaboration and substantiation of the alleged non-compliance.

8. This communication was drafted by Jan Veltman, attorney-at-law at Amersfoort, the Netherlands (info@veltmanadvocatenkantoor.nl) with input and support from Albert Koers, professor emeritus at the University of Utrecht, the Netherlands, and chairman of the NLVOW (a.w.koers@gmail.com). It was translated from Dutch to English by Roelien Lunenburg, certified translator English. Preparing this communication was a joint effort of many people, with some contributing valuable information and others providing financial support. Lindsay van den Bergh, Sander van de Laar and Jente Waal, students at the Erasmus School of Law at Rotterdam, helped with assembling and assessing all the information that was sent in. Ellen Hey, professor of international law at the Erasmus School of Law at Rotterdam, from time to time has advised the team. All the latter four acted in their personal capacity.

2. Wind farms and the environment

9. For a better understanding of this communication, it is important to point out that wind power and wind farms not only have positive consequences for the environment - they contribute to a reduction of the emission of greenhouse gases - but also have negative consequences for the environment - in the form of, predominantly, nuisance caused by noise or shadow flicker. For example, G.P. van den Berg, senior advisor on environment & health care to the Community Health Care Service Amsterdam [*Gemeentelijke Gezondheidsdienst Amsterdam*] writes the following about exposure to noise:

'Nuisance caused by the noise of wind turbines is, to date, the best studied effect. Three large studies carried out in the Netherlands and in Sweden show that the noise is annoying compared to other frequently occurring sources of noise. An important reason for this nuisance appears to be the regular variation in the sound of the rotor blades (swishing, whizzing or even thumping), which can be heard at great distances - especially in the evening or at night. Another contributory factor is the fact that the noise does not decrease at night but, on average, it even increases (a little) and becomes more prominent in the growing evening silence.'[2]

10. Also the National Institute for Public Health and the Environment [*Rijksinstituut voor Volksgezondheid en Milieu*] (RIVM) identifies exposure to noise as the most important source of nuisance caused by wind turbines and it has established that the noise of wind turbines can be heard 'up to several kilometres' depending on geographic and atmospheric factors.[3]

[2] G.P. van den Berg, 'Social and (non-)acoustic sides to wind power' ['*Sociale en (niet-)akoestische kanten van windenergie*'], in: Geluid, December 2011, page 9.
[3] 'Wind turbines: influence on the perception and health of those living in the vicinity' ['*Windturbines: invloed op de beleving en gezondheid van omwonenden*'], RIVM Report 200000001 / 2013, page 26.

11. In addition, shadow flicker is considered annoying as well. It refers to the moving, flickering shadow caused by a turbine's turning rotor blades on the ground or background and in homes and which result in a constantly changing pattern of shadow/no shadow.

12. The RIVM has established that:

'*(...) ongoing nuisance or the sense that wind turbines diminish the quality of life or the surroundings can have a negative impact on the health and sense of well-being of those living in the vicinity of wind turbines.*'[4]

13. Therefore, wind turbines can infringe on the right of a person to live in an environment adequate to his or her health and well-being as stipulated in article 1 of the Convention. For the purpose of safeguarding this right, the Convention requires State Parties to ensure access to information, participation in decision-making and access to justice. However, as mentioned above, in the Netherlands, the practice of access to information, participation in decision-making and access to justice is not in compliance with the Convention. The information supplied is one-sided, decision-making is not accessible to the public concerned and the courts do not offer adequate legal protection.

14. This results in decisions that do insufficient justice to the importance of living in an environment that is adequate to the health and well-being of people. Many wind farms are constructed at short distances of homes with all the associated negative consequences for the quality of the living environment. The observation by the RIVM cited above in paragraph 12 becomes reality for ever more people as the number of wind farms increases. This practice furthermore undermines the legitimacy of the government: a decision-making process that is experienced as unfair will result in decisions that are not supported by the people concerned. Studies have even shown that negative experiences with regard to decision-making subsequently result in an increased experience of intrusion and nuisance by the activity so authorized.[5]

3. The applicability of the Convention

15. As mentioned in paragraph 5, this communication concerns the construction of wind farms, which is an activity within the meaning of paragraph 20 of annex I to article 6, paragraph 1 sub a, of the Convention, namely an activity 'that is not (covered) by paragraphs 1 to 19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation'.

16. Wind farms are included in annex II of the EC Environmental Impact Assessment Directive.[6] Consequently, there is an obligation to assess whether it is necessary to draw up an environmental impact assessment (EIA). Under Netherlands law, this EIA duty applies at any rate to wind farms consisting of at least ten turbines or with a joint capacity of at least 15

[4] Ibidem., page 21.
[5] G.P. van den Berg, 'Social and (non-)acoustic sides to wind power' ['*Sociale en (niet-)akoestische kanten van windenergie*'], in: Geluid, December 2011, page 9 et seq.
[6] Part 3(i): 'installations for the harnessing of wind power for energy productions (wind farms).'

megawatt (MW).[7] The requirements for an EIA are set out in section 7.16 et seq. of the Environmental Management Act [*Wet milieubeheer*].

17. Wind farms of a smaller size are subject to a so-called 'duty to ascertain', which means that the competent authorities have to assess on the basis of the criteria set out in annex III to the EIA-Directive whether an EIA is, in fact, necessary.[8] Said assessment has no prescribed form, but it has to be expressly included and reviewed in the final decision to grant consent.

18. Plans for wind farms that exceed the aforementioned threshold - ten turbines or a joint capacity of 15 MW or more - are subject to the obligation to draw up an environmental impact assessment, with plans in this context specifically including spatial policy strategies [*ruimtelijke structuurvisies*], overall policy plans [*beleidsplannen*]) and zoning plans [*bestemmingsplannen*].[9] Such plans, together with the environmental impact assessment, are subject to public participation. The Spatial Planning Act [*Wet ruimtelijke ordening*], the Environmental Management Act [*Wet milieubeheer*] and the General Administrative Law Act [*Algemene wet bestuursrecht*] provide a framework for said public participation.

19. In view of the foregoing, this communication concerns an activity that falls within the scope of the Convention.[10]

IV. DOMESTIC REMEDIES AND OTHER INTERNATIONAL PROCEDURES

20. This paragraph sets out to what extent legal remedies have been sought to obtain judgment on the questions addressed in this communication. All available remedies have been used to the extent possible.

21. To the extent that this communication refers to the furnishing of biased information, it is not possible to submit such issues to administrative law courts as it concerns actual conduct. According to Netherlands procedural administrative law, it is not possible to challenge actual conduct in administrative law courts as only decisions, that is to say, acts governed by public law that are intended to have legal effect, can be challenged in administrative law courts.[11]

22. With regard to inadequate access to the decision-making on specific projects referred to by this communication: administrative law courts have ruled several times that the Dutch practice - which offers public participation in relation to a draft decision and/or in relation to a plan to prepare an environmental impact assessment for a proposed activity ('notification of intent' [*startnotitie*]) - is in compliance with the requirement of the Convention that public

[7] Category 22.2 of Annex D to the Environmental Impact Assessment Decree [*Besluit milieueffectrapportage*].
[8] Section 2, subsection 5, of the Environmental Impact Assessment Decree.
[9] Section 7.2, subsection 2, of the Environmental Management Act *[Wet Milieubeheer]* in conjunction with section 2, subsection 3 of the Environmental Impact Assessment Decree.
[10] Cf. Implementation Guide, 2013, page 254.
[11] Cf. section 8:1 in conjunction with section 1:3 of the General Administrative Law Act.

participation is made possible at a moment when all options are still open.[12] This aspect of the communication has therefore been submitted to administrative law courts in vain.

23. On a more general level, complaints concern in many cases the preparation of decisions. In view of section 6:3 of the General Administrative Law Act [*Algemene Wet Bestuursrecht*], such complaints - that, for example, no public participation was offered in good time (when all options are open) - are not independently appealable in administrative law courts, but have to be put forward as part of an appeal against the final decision. At that time, however, a court is authorised under section 6:22 of the General Administrative Law Act to disregard a defect, should it indeed establish such defect, if it is plausible that the interested parties have not been disadvantaged as a result of that defect. That criterion is only satisfied when a different decision could possibly have been taken without the defect. This is very difficult, if not impossible, to prove given the fact that the courts - as will be discussed in greater detail below in paragraphs 156 et seq. - review the merits of administrative decisions most restrictively and effectively refuse to engage in substantive review.

24. To the extent that a complaint concerns the failure to offer (adequate) public participation in plans and programmes (article 7 in conjunction with article 6, paragraph 4, of the Convention), such failures do not constitute legal acts under public law and are therefore not appealable in administrative law courts.[13]

25. In so far as the communication refers to the generic refusal of courts to submit decisions under article 6 to a review of their substantive legality - in accordance with article 9, paragraph 2, of the Convention - it is completely unrealistic to expect a court to make changes to its position solely at the instigation of a party to specific proceedings that are brought before that court.

26. As the norms for the two most important consequences of wind farms for people (noise and shadow flicker) have been standardized in statutory rules, these issues are excluded from the right of access to decision-making and justice, which is contrary to article 6 and 9, paragraph 2. To the extent that the complaint set out in this communication concerns these exclusions from access to decision-making and justice, such a complaint cannot be submitted to an administrative law court because generally binding regulations are excluded from appeal.[14]

27. Administrative law courts are only competent to rule on the decisions referred to in paragraph 21. Issues relating to generally binding regulations, programmes and plans within the meaning of article 7 of the Convention as well as the actual conduct by the government cannot be submitted to them. Disputes regarding the legality thereof can nonetheless be submitted to a civil court. However, this is a difficult road to take: not only because of the

[12] Administrative Law Division of the Council of State [*Afdeling Bestuursrechtspraak Raad van State*], 19 January 2001, ECLI:NL:RVS:2011:BP1342 (*Rondweg Zutphen-Eefde*) and 7 December 2011, ECLI:NL:RVS:2011:BU7002 (*Buitenring Parkstad Limburg*), 19 January 2011, ECLI:NL:RVS:2011:BP1342.

[13] Section 8:1 of the General Administrative Law Act only allows an appeal against legal acts under public law, that is to say, decisions that have legal effect. Appeal against so-called Spatial Structure Visions is expressly excluded under section 8:5 of the General Administrative Law Act.

[14] Section 8:3, subsection 1, sub a, of the General Administrative Law Act.

costs (that are substantially higher than in an administrative procedure), but also because a civil court (like an administrative law court) may only test against directly applicable convention provisions. It is likely that a substantial part of the Convention's provisions are not directly applicable, which largely reduces the chance of success of a civil action.

28. There are no other international legal remedies available to the NLVOW in relation to the issues addressed in this communication. It is conceivable however to lodge a complaint against the Netherlands with the European Commission for breach of EC Directives 2003/4 and 2003/35. Subsequently, the Commission may start infraction proceedings and decide at any one time to submit the case to the EU Court of Justice.[15] The NLVOW has not (yet) decided to take that course. A first reason for not doing so (yet) is that the Directives mentioned have only implemented the first two pillars of the Convention and this communication also refers to the third pillar: access to justice. Another reason for not taking the EU route at the moment, is that the Commission is a political body that independently considers whether or not to start proceedings before the EU Court of Justice.

V. THE ALLEGED NON-COMPLIANCE WITH THE CONVENTION

1. Introduction

29. This communication concerns the practice of the Netherlands in relation to access to information, access to decision-making and access to justice. The NLVOW is of the opinion that this practice is not in compliance with the Convention on several important points. It should be stressed that this communication does not address isolated cases that were not handled in compliance with the Convention. On the contrary, it identifies several systemic phenomena that are most problematical in view of the Convention's requirements. This communication limits itself to the subject matter of wind power and wind farms although it is beyond doubt that the systemic problems identified by the NLVOW also occur in other areas of environmental policy-making and practice.

30. The systemic problems that are identified in this communication are set out in detail in the Annex to this communication and will be confirmed there by concrete examples. For reasons of readability, the number of examples is limited. If required, the NLVOW is in a position to supplement these examples with others.

31. Below an overview of these systemic issues:

(a) Information supplied on wind power and wind farms is one-sided and incomplete and this impedes effective public participation (article 5, paragraph 2 and paragraph 7; and article 3, paragraph 2);

(b) Decision-making on wind farms takes place without the involvement of the public in good time when all options are still open; only 'pro forma' participation exists (article 6, paragraph 4; and article 7);

[15] Article 258 et seq. of the Treaty on the Functioning of the European Union [*Verdrag betreffende de werking van de Europese Unie*].

(c) The restrictive review of decisions by the courts is not in compliance with the right to a review of the substantive legality of decisions (article 9, paragraph 2), nor with the fairness that article 9, paragraph 4, requires; and

(d) The two most important effects of wind farms (noise and shadow flicker) on people are regulated by generally binding regulations [*algemeen verbindende voorschriften*] with the result that the public has no right of access to decision-making and access to justice regarding these crucial issues (article 6; and article 9,paragraphs 2 and 3).

These statements will be elaborated below and further substantiated in the Annex.

2. Access to information[16]

32. Within the framework of national legislation, article 5, paragraph 2, of the Convention requires the safeguarding of transparency in the way public authorities make environmental information available to the public, as well as the effective accessibility of environmental information. Furthermore, article 5, paragraph 7, requires the publication of the facts and analyses of facts which the parties to the Convention consider relevant and important in framing major environmental policy proposals. Under article 3, paragraph 2, government agencies are obliged to assist and provide guidance to the public in seeking access to information and in facilitating public participation. The NLVOW understands these obligations to mean that the information that should be made available includes all relevant decision-making facts and analyses of facts and that this information should be objective in the sense that: (1) the information is correct and (2) its presentation is open-minded, meaning without prejudice.

33. However, in actual fact, the Netherlands gives too positive a picture of wind power and wind farms and does not disclose all information relevant to decision-making. This view will be substantiated below in the paragraphs 54 et seq. and 73 et seq. by describing some cases of the government's furnishing of incorrect information and then by looking at the introduction of new noise regulation standards and norms for wind turbines when the government furnished information that was inaccurate and misleading.

3. Access to decision-making[17]

34. Article 6, paragraph 4, stipulates that in decision-making regarding specific activities 'early public participation, when all options are open and effective public participation can take place' shall be provided. The outcome of such public participation shall be subsequently taken into due consideration (article 6, paragraph 8). Similar obligations apply under article 7, first and second sentence, when decisions are taken on plans and programmes.

35. In the Netherlands decision-making regarding plans for wind power and for administrative consent for wind farms does not satisfy these requirements, as set out hereinafter in more detail in the paragraphs 95 et seq. and 104 et seq. Public participation only takes place after administrative decision-making in a substantive sense has been completed and all relevant choices have been made. In general, such decision-making is

[16] Cf. paragraphs 41 et seq. of the Annex.
[17] Cf. paragraphs 76 et seq. of the Annex.

carried out in close consultation with the (private) developers of the project concerned or, when it concerns plans and programmes as defined in article 7, with for example the representatives of the commercial wind sector and other acknowledged supporters of wind power. In doing so, the public concerned is by-passed and is only informed and consulted afterwards about the choices made through a draft plan or draft decision. It has never happened, at least the NLVOW is not aware of any examples thereof, that various options were presented to the public concerned or that a draft plan or draft decision was amended to a significant degree, let alone revoked as a result of input received during public participation.

4. Access to justice[18]

36. Under article 9, paragraph 2, the State Parties to the Convention are required to offer access to a review procedure before a court of law to members of the public concerned who have a sufficient interest to challenge the procedural and substantive legality of decisions on specific activities. Such a procedure should furthermore be fair pursuant to article 9, paragraph 4.

37. Appeal against administrative consent for the construction and exploitation of wind farms must be lodged with an administrative law court. To this extent, the requirement of providing a judicial review procedure is met in a formal legal sense. However, as further substantiated hereinafter in the paragraphs 142 et seq. and 156 et seq., the practice of judicial protection is not in compliance with the right to a review of the substantive legality, while this practice is also not sufficiently fair. First, this is the result of the passiveness of administrative law courts in reviewing the facts of a case as they overwhelmingly hold the facts presented by public authorities to be correct. A second cause is the fact that administrative law courts review the exercise of a discretionary power by a public authority so restrictively that almost every outcome of the balancing of interests is able to stand the test of reasonableness regardless of how disproportionate that outcome may be for certain interests concerned.

5. General rules and access to decision-making and justice[19]

38. In the Netherlands, the two most important consequences of wind farms for those living in the vicinity, namely exposure to noise and shadow flicker, have been regulated through generally binding regulations. The developer of a wind farm has to demonstrate plausibly that the intended wind farm complies with these standards. If this is the case, there is no point in local residents contributing to the decision-making process by submitting the view that, in this particular case, the standards are inadequate to protect their living conditions, well-being and health. Nor is there any point, for this same reason, to submit the decision which grants consent for a wind farm to an administrative law court. Consequently, the two most important environmental effects of wind farms for local residents have been excluded from decision-making and judicial review. For these two issues, the public concerned is denied access to decision-making and justice, which is not in compliance with article 6 and with article 9, paragraph 2, of the Convention.

18 Cf. paragraphs 123 et seq. of the Annex
19 Cf. paragraphs 165 et seq. of the Annex

39. Furthermore, the noise regulation standards and norms have been drafted in such a way that it is impossible for local residents to establish whether these standard and norms are breached by a neighbouring wind farm. As a result, they are not in a position to enforce their right to compliance with these standards through the courts, as set out in article 9, paragraph 3, of the Convention.

6. Overall assessment

40. In summarising the preceding sections and paragraphs, the unavoidable conclusion is that in the Netherlands the public and, more precisely, that section of the public most affected by the construction of wind farms, is side-lined from the outset in the decision-making process and that it moreover has no serious chance of subsequently finding support for its views and concerns in a court of law.

41. This begins with the way in which the public is informed about wind power and (plans for) wind farms: one-sided, incomplete and sometimes misleading. This is also detrimental to the right to effective public participation.

42. The decision-making process, especially when fundamental choices are made, takes place in closed meetings. At such meetings, the public authorities concerned, together with businesses with vested interests in wind power and other supporters of wind power, such as environmental organisations and property developers, decide to what extent wind power is needed for the transition to sustainable energy and where the wind farms needed for that purpose should be located. These closed meetings result in administrative and other agreements, programmes and the like that set forth exact objectives and locations.

43. The public has no opportunity to participate until the consequences of the programmes and plans so established have been translated into policy strategies or spatial plans, that is, when real choices have already been made and set in binding agreements among the parties that participated in the closed door sessions. As a result, public participation and the comments it generates do not lead to changes of any significance. Subsequent decision-making on specific wind farms is also carried out with strict adherence to the aforementioned administrative and other agreements, programmes etc., implying that in this stage too public participation cannot have any real impact.

44. Anyone who then decides to challenge the outcomes of the above decision-making process in a court of law will soon discover that an administrative law court relies on the facts as presented and interpreted by public authorities, often based on what developers provide, and that it is most reluctant to review the substantive merits of a case. Only formal defects that might influence the outcome of decision-making have a chance of success. There simply is extremely little chance, if any, of an administrative law court deciding that certain interests of the public concerned have been prejudiced disproportionately and that, for this reason. the granting of a licence, permit or exemption for a wind farm is not justified.

45. In addition, opportunities for public participation and possibilities for judicial review cannot pertain to the two environmental effects of wind farms that are most important to

people living near a wind farm, i.e. exposure to noise and shadow flicker. As the standards and norms for these two issues have (almost) exclusively been laid down in statutory provisions, public participation must necessarily be limited to the scenic and economic effects of wind farms. But these are precisely the aspects where public authorities have a large measure of discretion.

46. Once a wind farm has been constructed and it then becomes apparent that there is a high level of exposure to noise, it proves impossible for local residents to verify whether noise standards and norms are being observed. As a consequence, they are barred from convincingly arguing that an infringement of the norms actually occurs. As the burden of proof of an infringement initially lies with local residents, this leads to a substantial impediment to the exercise of the right, as safeguarded in article 9, paragraph 3, of the Convention to also challenge the party responsible for an infringement or, alternatively, to request enforcement in administrative proceedings.

47. This practice of decision-making and judicial protection in relation to wind power and wind farms is not in compliance with a range of provisions of the Convention, including article 3, paragraph 2; article 5, paragraphs 2 and 7; article 6, paragraphs 2, 4 and 8; article 7, the first three sentences; and article 9, paragraphs 2 to 4. It therefore constitutes a substantial impediment for the citizens of the Netherlands to give effect to the fundamental right laid down in article 1 of the Convention - the right to live in an environment that is adequate to their health - by invoking the rights, safeguarded in the Convention, to participation in decision-making and access to justice.

48. Such a practice is also contrary to a fundamental assumption underlying the Convention, that is, citizens have the right to participate in the formulation of decisions that affect their living environment - a right that is fundamental if and when decisions relate to wind farms as these have major impacts on the living environment of all who (must) live in their vicinity.

49. As the public cannot, or only to a very limited extent, exercise the right it has under the Convention, the Netherlands also does not profit from the benefits to be derived from effective public participation and judicial protection as described in items 9 and 10 of the preamble to the Convention, being an enhanced quality of decision-making and implementation and more awareness of, and support for, decisions on the environment.

50. Perhaps even worse, the practice and procedure outlined in this communication have negative implications for the legitimacy of the government and public authorities. Legitimacy requires the furnishing of adequate and correct information; a decision-making process that is open, honest and transparent; and an effective judicial assessment of the outcome of such decision-making. For wind power and wind farms none of these conditions exist in the Netherlands.

7. Requests to the Committee

51. We submit the following requests to Your Committee:

A. To establish that the practice and procedures of the Netherlands as outlined above (and further substantiated in the Annex) in relation to access to information, participation in decision-making and access to justice with regard to wind power and wind farms are not in compliance with the Convention and, more particularly, are inconsistent with: article 3, paragraph 2; article 5, paragraphs 2 and 7; article 6, paragraphs 2, 4 and 8; article 7, the first three sentences; article 8; and article 9, paragraphs 2 to 4.

B. If and in so far as Your Committee grants this request, we hereby request to recommend to the Netherlands to take the following actions:

- To organise the furnishing of information on wind power and wind farms to the public in such a way that it does justice to both the advantages of, and objections against, wind power and wind farms by, for example, having information assessed by an independent and broadly constituted forum of neutral experts.

- To re-organize decision-making on wind power policies, in particular on the contribution of wind power to sustainability, and on the locations of the wind farms that are needed for this purpose, by ensuring:
  (a) that choices yet to be made in these areas are presented to the public without excluding any options in advance;
  (b) that subsequently due account is taken of the input of the public when re-considering the choices that were previously made; and
  (c) that, finally, the results of the above re-consideration are incorporated in all decisions that were previously taken.

- To change relevant legislation and administrative practice to the extent that is needed to ensure that public participation on wind power and wind farms no longer is a pro forma exercise that takes place when all decisions that matter have already been made and set in administrative agreements, but, rather, that it takes place at a time when all options are still open.

- To change administrative procedural law to the extent that, in compliance with the Convention and with due respect for constitutional relationships, administrative law courts are obliged to review the substantive legality of decisions on wind power and wind farms.

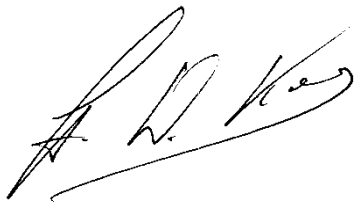
- To amend the rules and regulations applicable to wind turbines and wind farms so that in specific cases the norms for exposure to noise and shadow flicker may be tailored to local circumstances and conditions.

- To amend the noise standards and norms for wind turbines and wind farms so that local residents are able to determine themselves - if necessary, with the support of an expert - whether or not these standards and norms are complied with.

- To implement or propose every other measure that Your Committee considers fitting to ensure the Netherlands complies with the Convention.

Schettens, the Netherlands, 30 June 2015

On behalf of the NLVOW,



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ANNEX

SUBSTANTIATING THE COMMUNICATION

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I. ACCESS TO INFORMATION

1. Introduction

52. Article 5, paragraph 2, of the Convention contains the obligation of State Parties to ensure, within the framework of national legislation, that the way in which authorities furnish environmental information to the public is transparent and that such information is effectively accessible. The NLVOW understands this obligation to mean that the information to be made available must include all facts and analyses of facts relevant to the decision-making and that this information must be comprehensive and accurate. The Netherlands does not comply with this obligation by giving too positive a picture of wind power and by not disclosing all information that is relevant to decision-making.

53. As a result, the Dutch practice is also not in compliance with article 3, paragraph 2, of the Convention which provides that authorities assist and provide guidance to the public in seeking access to information and in facilitating public participation in decision-making. To substantiate these arguments, some concrete examples will be given below. If necessary, the NLVOW is able to provide more examples.

2. Incorrect presentation of information on wind power

54. The Internet is one of the ways in which the government provides information on wind power to the public. Until recently, such information was made available on the website www.windenergie.nl, a website of Agentschap NL that is part of the Ministry of Economic Affairs. This agency has now been renamed the Netherlands Agency for Entrepreneurship [*Rijksdienst voor Ondernemend Nederland*] and the information on wind power is currently found on the website of this government agency (www.rvo.nl)

55. This website included information on how to integrate wind power, which fluctuates by definition, into the electricity grid, and the need therefore to actually switch power stations on or off. In this context the implications for CO2-emissions were discussed. The website represented only one side of this discussion in that it only contained one link - to a study concluding that such integration could take place without too much difficulty. By not referring to the study reports of the Energy Council [*Energieraad*] and the Scientific Council for Government Policy [*Wetenschappelijke Raad voor het Regeringsbeleid*] - two independent advisory bodies to the government both of which actually foresaw problems with regards to this issue - the government gave incomplete and biased information to the public. Which was confirmed by the National Ombudsman who stated that the government had acted 'improperly'.[20]

[20] National Ombudsman, report dated 1 August 2011, AB 2011, 284 with commentary from P.J. Stolk.

56. Another example of providing biased information concerns the statutory possibility to deviate from statutory noise regulation standards and norms (which will be discussed in great detail in section 4 below) through the adoption of a so-called "customized regulation" [*maatwerkvoorschrift*] by municipalities. More specifically, section 3.14a of the Activities Decree [*Activiteitenbesluit*] (secondary legislation based on the Environmental Management Act) allows the setting of stricter noise regulation norms on the ground of 'special local circumstances'. The government website provides the following description.[21]

'Exceptional local circumstances. The third subsection of section 3.14a provides the opportunity to determine standards with a different value. Such special local circumstances are not defined, but it appears from the Explanatory Memorandum that the legislator means, for example, low-noise areas that have been designated as such by law. A rural, quiet environment is therefore not a condition that gives cause for drafting customized regulations for a varying norm at the location of a noise-sensitive object. The background to this is, as mentioned before, that the norms are based on a dose-effect relationship. As a result, they are unrelated to background noise levels. Only in exceptional circumstances is there still a reason to draft a customized regulation.'

57. In this passage, the government misrepresents the intention of the legislator. Note the word "exceptional" in the last sentence of the quote above, which is not the same as "special". Also, "low-noise areas that have been designated as such by law" are not the same as the "quiet areas" mentioned as an example in the Explanatory Memorandum [*Nota van toelichting*] for section 3.14a, third subsection of the Decree, which reads:

'The methodology of the Activities Decree implies that the competent authorities can provide further protection through customized regulations in special local circumstances, for example quiet areas.'[22]

Clearly, the intention of the legislator is being misrepresented on the website.

58. Contrary to what the government states on its website, the above passage does not at all exclude a rural low-noise environment to be considered a special local condition warranting stricter noise regulation norms. It is simply not true that local authorities may exercise the option of adopting stricter norms only for areas that have by law been designated as low-noise areas.

3. No analysis of the need, benefits and costs of wind power

59. On 11 September 2013, the NLVOW requested the minister of Economic Affairs - with reference to the Government Information (Public Access) Act [*Wet openbaarheid bestuur*] - to disclose the document or documents that jointly comprise an analysis of the advantages and disadvantages of wind power. Eventually, this resulted in the furnishing of a set of documents, predominantly consisting of notes taken during meetings and meeting reports, etc. However, none of these documents contains anything resembling an analysis of the advantages and disadvantages of wind power, even though the large-scale use of wind power ought to be considered, without any doubt, as an essential major environmental

[21] http://www.rvo.nl/onderwerpen/duurzaam-ondernemen/duurzame-energie-opwekken/windenergie-op-land/milieu-en-omgeving/geluid/bijzondere-omstandigheden.
[22] Bulletin of Acts and Decrees [*Staatsblad*] 2010, 749, page 8.

policy proposal as defined in article 5, paragraph 7 sub a, of the Convention. This paragraph demands that Parties to the Convention publish the facts and analyses of facts they consider relevant for the drafting of said proposals. This has not happened although many experts have requested for many years that such an analysis be made.

60. Consequently, the conclusion must be that such an analysis of the need, benefits and costs of wind power has not been made, which is not in compliance with article 5, paragraph 7 sub a, of the Convention. As detailed hereinafter in paragraph 95 et seq., this is even more serious as the government refuses to enter into discussions - as part of public participation - on why it considers wind power a matter of national importance.

4. Introduction of new noise regulation standards and norms[23]

4.1 Background information on noise regulation

61. The way new noise standards and norms were introduced in 2010/2011 demonstrates most clearly that the government not only provided incorrect information to the public, but on occasion also misled the public (and Parliament). As these are strong statements, a detailed analysis to substantiate them is required.

62. Until 1 January 2011, multi-purpose general noise standards and norms applied to single wind turbines and smaller wind farms, that is, farms with either fewer than ten turbines or with a joint capacity of less than 15 megawatt. These standards were detailed in the so-called Activities Decree. For wind turbines, the so-called wind norm curve allowed a maximum noise exposure on the outer wall of a home of in principle 40 dB(A), but that level could increase with wind speed. The rationale behind this was that as wind speed increases, background noise increases too, which in turn makes the noise produced by wind turbines less annoying. Competent authorities could opt for stricter or, conversely, more flexible norms through so-called customized regulations. In relatively quiet areas this could result in stricter noise norms.

63. Larger wind farms and wind turbines located close to homes - i.e. less than four times the height of the mast - required an environmental licence that included noise standards and norms tailored to the local circumstances. As a rule, the Guide to Industrial Noise and Licencing [*Handreiking Industrielawaai en Vergunningverlening*], a government publication, was applied in those cases. This Guide recommends for low-noise rural areas noise limits of 40, 35 and 30 dB(A) during, respectively, day, evening or night time and for rural areas with much agricultural activity slightly higher limits of 45, 40 and 35 dB(A) during those same periods of time.

64. Although the Guide, which still applies to industrial activities other than wind power, does not have the status of a generally binding regulation [*algemeen verbindend voorschrift*], it is usually applied when granting permits to businesses and activities that, due to their size or impact, do not fall within the scope of the Activities Decree. The reason is that the Guide is based on specific professional knowledge and, as a result, legal precedents have developed

[23] The term 'standard' refers to a unit that is used to measure noise. A norm is a unit with an actual value. For example, dB(A) or Lden are standards, while db(A) 40 or Lden 47 dB are norms.

through court decisions indicating that competent authorities wishing to deviate from the Guide may only do so on the basis of proper justification.

65. As from 1 January 2011, the Activities Decree was amended and this has led to a uniform noise standard and norm for wind turbines regardless of size or number. From that date, wind turbines are allowed to produce a maximum noise impact of 47 dB Lden and 41 dB Lnight on sensitive locations such as homes. The Lden standard refers to the average noise impact over a year, implying that periods in which the norm is exceeded may be cancelled by periods with little or no noise. The Lnight 41 dB norm is intended as an extra to the Lden 47 dB in view of the fact that noise during the evening and night is considered to be especially annoying. However, in practice the 41 dB Lnight norm does not have any independent significance separate from the 47 Lden norm.[24]

66. The drafting and adoption of these new noise standards and norms for wind turbines did not meet the requirement that information provided be objective and appropriate. Although the draft of the Order in Council [*algemene maatregel van bestuur*] had been subject to public participation, the public concerned was informed incorrectly and incompletely - as will be set out hereinafter in paragraph 73 et.seq. - and, as a result, was misled as to the purpose and background of the new rules. Secondary consequence is that effective public participation has not been possible.

4.2 No need for a new noise standard under the EC-Directive

67. A first aspect of the public being misled arises from the government's argument that the new rules constitute a response to the European Environmental Noise Directive. For example, the government states in the published draft of the new regulation:

'The 'Lden' is the noise indicator set out in the European Directive no. 2002/49/EC relating to the assessment and management of environmental noise. Scientific research has shown that this is the best indicator by which to predict annoyance and other effects on health.'[25]

68. Accordingly, it is suggested that the 'Lden' standard is prescribed by the above EC-Directive on the assessment and management of environmental noise. The aim of this Directive is the reduction of exposure to noise through a joint approach in order to achieve a high level of health and environmental protection (preamble, under 1). In order to collect information on exposure to noise in the Member States and to make it mutually comparable, Member States are required to draw up and provide to the Commission noise maps that include information on existing noise exposure. These maps subsequently serve as a basis for decision-making on measures to reduce noise exposure if necessary.

69. Needless to say, Member States should use a uniform noise indicator when drafting noise maps for the purpose of mutual comparability and Lden has become the noise indicator

[24] Cf. the 'Circular Noise Pollution Caused by Wind Turbines' ['*Circulaire geluidhinder veroorzaakt door wind-turbines*'] of 2 April 2010: 'Because of the unique conditions in the proximity of wind turbines, the 41 dB Lnight standard will rarely be exceeded compared with 47 dB Lden'. See also the Explanatory Memorandum to the Decree dated 14 October 2010 to amend the Activities Decree, Bulletin of Acts and Decrees 2010, 749, page 8.
[25] Government Gazette [*Staatscourant*] 31 August 2009, no 12902, page 9

chosen for that purpose. The Member States' application of this noise indicator enables the comparative assessment of existing noise exposure in Member States and the charting and comparison of developments thereof. According to article 1 of the Directive, this information may subsequently be used to develop a common approach to the harmful effects of exposure to environmental noise. In the EG-Directive Lden and Lnight are intended as common indicators for existing noise exposures and the trends therein.

70. Contrary to what the government implies in the aforementioned passage, the Directive does not oblige the Member States to apply Lden and Lnight in the setting of standards on exposure to noise. What is more, the Directive states that the Lden standard is not well suited as an indicator of noise exposure caused by wind turbines. The Directive allows the use of other indicators for noise exposure when drafting noise maps and action plans (see article 5, paragraph 2, in conjunction with annex I, under 3). According to the Directive, this may be 'beneficial" when the noise source operates only for a small proportion of the time, when it concerns low-noise areas in open country, when extra protection is needed during the evening period, or in the event the noise has a pulsating character or contains strong tonal components.

71. It is precisely these circumstances that apply in the case of wind turbines. Wind turbines are not, or only very limitedly, in operation in calm weather or with light winds. Furthermore, they are usually located in relatively quiet areas in open country. And wind turbines actually produce more noise in evening and night periods. In the evening or night there may be little wind at ground level - so that there is little background noise - while, at the same time, it may be quite windy at rotor level. This explains why the noise of wind turbines may be especially annoying at night.[26] Wind turbines also produce a sound that people living in the direct vicinity experience as substantially more annoying than the noise of other sources such as road and rail traffic or industrial noise.[27] The question as to whether this noise has a pulsating character or contains strong tonal components is being discussed, but it is an established fact that the noise of wind turbines, however exactly characterised, differs significantly - in a negative sense - from the noise of other sources.

72. The statement of the government presented above in paragraph 67 that the noise indicator Lden is the most appropriate standard for wind turbine noise is therefore incorrect and, in any case, its use cannot be justified by the EG-Directive. It should therefore be no surprise that the Netherlands is the only Western European country that applies the Lden standard to noise exposure from turbines.

4.3 Incorrect information on protection level

73. The government introduced the new noise standards and norms of Lden 47 dB and Lnight 41 dB as 'policy neutral': the new standard would offer the same protection level against exposure to noise from wind turbines as the previously applicable standards (as

[26] G.P. van den Berg 'The sound of high winds: the effect of atmospheric stability on wind turbine sound and microphonic noise', 2006 (doctoral thesis).

[27] RIVM, 'Evaluation of the new standards of wind turbine noise' [*'Evaluatie nieuwe normstelling wind-turbinegeluid'*], Report 680300007 / 2009, page 11; see also page 10, where the noise is characterized as 'swishing', 'rustling', 'with a low frequency' and/or 'low pitched'.

described above in paragraph 62). In the explanatory note to the draft decree the government states:

'The Activities Decree applies a standardization for noise of 50 dB(A) during day time, 45 dB(A) during the evening and 40 dB(A) during night time. It follows from using the new calculation method that these standards correspond to 47 dB Lden. For wind farms that are obliged to have a permit, it has been determined that permits granted in actual practice also correspond with a maximum level of 47 dB Lden. Therefore, a level of 47 dB Lden is in line with the current practical implementation of recent years.'

74. However, the position taken by the government that the new standards offer the same protection to people living in the vicinity of wind turbines as the previous standards is incorrect for various reasons.

75. First, the previous norms were simplified to one universally used norm, that is: as if the 50 dB(A) (day time), 45 dB(A) (evening periods) and 40 dB(A) (night time) norms applied universally to all wind farms. These norms, set out in section 2.17 of the Activities Decree, are general norms that apply to the vast majority of all industrial activities. However, wind turbines were subject to their own regime which provided case-by-case noise standards and norms for larger wind farms and for wind turbines located at close proximity to homes and other noise-sensitive locations. Above in paragraph 63, it has already been mentioned that, in principle, these local norms were derived from the Guide mentioned there. Consequently, they varied, in open country, between 40 to 45 dB(A) during day time, 35 to 40 dB(A) in the evening and 30 to 35 dB(A) at night depending inter alia on the level of background noise. Sometimes they were even more strict. Viewed in this light, the 47 Lden norm is a very substantial relaxation compared to the norms set forth in the Guide. This contradicts the information provided by the government.

76. Although it is possible to impose customized regulations pursuant to section 3.14a, subsection 3 of the Activities Decree, the government has insisted with municipalities on the exercise of restraint.[28] For example, the government website rvo.nl - which has been described before in paragraph 56 - states that customized regulations are only allowed in special circumstances and, furthermore, states that the presence of quiet open country as such is no reason for imposing stricter noise norms by means of customized regulations. A refusal by competent authorities to impose stricter noise norms through customized regulations is invariably endorsed by the highest administrative law court, the Administrative Law Division of the Council of State.[29] In view of this administrative practice and the case law on this practice, section 3.14a, third subsection of the Activities Decree is in practice of no consequence. This is an important issue because, as mentioned before, wind turbines are often located in relatively quiet, open country, while for local residents noise is the most important environmental effect of wind farms.

77. There also appears to be a relaxation in the applicable noise norm in comparison to the wind norm curve that applies to smaller wind farms and solitary wind turbines. The curve is based on a norm of 40 dB(A), but Lden 47 dB corresponds to a constant noise exposure of

[28] Circular 2 April 2010, section 2.4
[29] For example, see Administrative Law Division, 19 February 2014, 201303440/1/A4.

41dB during a 24-hour period. As a consequence, there is an increase of 1 dB. As dB is a logarithmic value, every rise of 3dB results in a doubling of noise exposure. According to the RIVM, an increased noise exposure of 2 dB already results in a doubling of the amount of people (seriously) affected by the noise.[30] An increase of 1 dB can therefore not be regarded as marginal.

78. The new Lden 47 dB norm refers to a year-average noise level. Exceeding the norm at any given time is therefore allowed as long as this is sufficiently compensated by periods when noise exposure remains below the norm. This is a crucially important point as wind turbines are not, or only very limitedly, in operation in calm weather or with light winds. As a result, wind turbines are now allowed to produce (much) higher noise levels for much longer periods than would be allowed under the previous norms, which were in the nature of limits that were not to be breached at any time.

79. Actual practice has also shown that the new standards and norms result in a relaxation compared to the previously applicable standards and norms. For example, the environmental impact assessment drafted for the government-imposed zoning plan [*rijksinpassingsplan*] for a wind farm in the Noordoostpolder shows that this farm could be realised when the new standards and norms are applied whereas it would not have been possible had the old standards and norms been applied.

80. The introduction of the new Lden and Lnight norms was preceded by an assessment by the RIVM.[31] This shows that it was initially the government's intention to prescribe a target value [streefwaarde] and maximum limit value [grenswaarde] in dB Lden, just as has been done for road and rail traffic noise. Target values and maximum limit values are also applied to the regulation of industrial noise although these are expressed in dB(A) and not in Lden or Lnight. The researchers write the following in their report:

'Under the target value, there are no impediments to construct new wind turbines; in excess of the maximum limit value the competent authorities may not grant a permit. Between those values, the interests must be balanced in a public participation procedure.'[32]

81. However, the new regulation does not provide for such a methodology as a maximum limit value of 47 Lden is the sole norm, which negates the balancing of interests through public participation as envisaged by the RIVM. According to the RIVM, the Lden 47 dB maximum limit value is not consistent with the choices the legislator has made earlier in regard to the standardization of road and traffic noise:

'(...) that a target value of approximately 40 dB (lower limit) is consistent with the normative guidelines for other sources of environmental noise. This results in an annoyance protection that is similar to the one that applies to road and rail traffic noise. (...). From the point of view of nuisance and health problems, a value over 45 dB is unfavourable when setting a maximum noise limit.'[33]

[30] See footnote 3, page 18.
[31] See footnote 3.
[32] Idem, page 3.
[33] Idem, page 9.

82. Notwithstanding the above opinion of the RIVM, the government has maintained and defended the position that the 47 dB Lden standard provides a comparable level of protection to people living in the vicinity of wind turbines as provided to those living near roads and railways.

83. The above can lead only to one conclusion: the considerations that were given by the government in support of the introduction of new noise standards and norms have been misleading. The government made it appear as if the new standard and norms were the most appropriate way to limit exposure to noise from wind turbines because the Lden standard 'would be the best indicator to predict annoyance and other health effects', but the real purpose of introducing the new Lden standard and norm was to increase the number of possible locations for wind turbines. As a result of the new norm, people living in the vicinity of wind turbines are faced with a significantly increased noise exposure than was acceptable under the old standards. The government's claim that the new standards and norms would ensure a similar level of protection as the previously applicable standards and norms is simply untrue.

84. The Netherlands has not acted in compliance with article 5, paragraph 2 and paragraph 7, of the Convention, nor with article 3, paragraph 2, of the Convention: it did not put all its cards on the table, but instead it provided incorrect and incomplete information to the public. This while the Convention actually demands that authorities assist the public in obtaining information, also with a view to supporting its participation in decision-making

5. Conclusions

85. The examples provided above show that the information supplied by the government to the public on varying issues regarding wind farms has been one-sided and sometimes misleading. This is not in compliance with article 5, paragraph 2 and paragraph 7, nor with article 3, paragraph 2, of the Convention.

86. It should be noted here, in anticipation of the following part of this communication on access to decision-making, that all this is also not in compliance with article 6, paragraph 6, of the Convention which demands that all information relevant to decision-making shall be made available to the public After all, the information concerned is most relevant to the decision-making regarding specific projects. For people living in the vicinity of a planned wind farm, i.e. the public concerned, it is imperative in assessing the impact of a wind farm that they have a correct understanding of, for example, the lesser protection level of the new standards and norms and of the possibility to prescribe stricter norms through customized regulations.

II. ACCESS TO DECISION-MAKING

1. Introduction

87. In relation to decision-making, articles 6 and 7 of the Convention oblige State Parties to inform the public concerned about specific intended activities, plans or programmes in an adequate, timely and effective manner as well, as about the decision-making procedure and

the opportunities for the public to participate. Such public participation must take place at an early stage 'when all options are open and effective public participation can take place' to quote article 6, paragraph 4, of the Convention, which - according to article 7, second sentence - also applies to plans and programmes. The outcome of such public participation must subsequently be taken into due consideration.

88. This part sets out why the decision-making practice in the Netherland regarding wind farms is not in compliance with the requirement for early and effective public participation when all options are still open, as stipulated in article 6, paragraph 4, of the Convention. The focus is on decision-making at the level of the national government, which takes place by adopting plans and programmes that are, to a large extent, binding on subsequent decision-making about specific projects. The problem in this context is that the public concerned is side-lined. Substantial decision-making takes place prior to formal public participation in cooperation with, or based on the input from, supporters of wind power, that is, commercial interests and nature and environmental organisations. As a result, there exists only pro forma participation by the public concerned.

89. Below, a short description is provided first of the way in which decision-making about wind power and wind farms is generally organised in the Netherlands. Then the following issues are addressed: (1) decision-making by the national government on plans and projects in view of the question as to whether such decision-making is in compliance with article 7, second sentence, in conjunction with article 6, paragraph 4, of the Convention; and (2) decision-making on specific projects governed by article 6, paragraph 4, of the Convention.

2. The organisation of decision-making on wind power

90. Wind farms can be located both on land and at sea. This communication concerns only wind farms located on the Dutch mainland including inland waters such as the IJsselmeer and the delta in Zeeland. In the Netherlands decision-making on wind power and wind farms on the mainland takes place at three levels: (1) nationally: by the national government in The Hague; (2) provincially: by the 12 provincial administrations; and (3) locally: by the local authorities of approximately 400 municipalities.

91. The national government decides on the main policy elements such as: the extent to which wind power is needed with a view to making energy supply more sustainable and in which areas major wind farms will be located. The national government also decides on the applicable standards and norms regarding exposure to noise and shadow flicker, as has been discussed above. Insofar as is required, provinces and local authorities will further elaborate, as set out below in paragraph 95 et seq., the policies developed by central government.

92. Where decision-making procedures concern specific wind farms, it should be noted that the authority to license or regulate varies depending on the size of the wind farm in question. For wind farms with a capacity of 100 MW or more, the (national) minister of Economic Affairs and the minister of Infrastructure and the Environment are authorised to establish a so-called government-imposed zoning plan, which in terms of legal consequences is identical to a zoning plan adopted by a municipality. Like a municipal zoning plan a government-imposed zoning plan makes a (big) wind farm possible in spatial terms. These

two ministers also direct the further decision-making by local authorities about required licences, permits or exemptions for such a wind farm - like an integrated environmental permit normally issued by municipalities that deals both with the construction and the environment. This procedure means in practice that decision-making on a government-imposed zoning plan and the required licences, permits and exemptions takes place simultaneously. Should a local authority refuse to grant a certain licence, permit or exemption, the ministers concerned may override the reluctant authority and grant the requested permits themselves.[34]

93. Provincial authorities are competent for wind farms with a capacity between 5 and 100 MW. They are authorised to determine a provincial-imposed zoning plan [*provinciaal inpassingsplan*] and they direct - along the same lines as set out in the previous paragraph - the granting of further required licences, permits and exemptions.

94. The authority to grant permits for single wind turbines and wind farms with a capacity of less than 5 MW remains with municipalities.

3. Decision-making regarding plans and programmes (article 7, first and second sentence, in conjunction with article 6, paragraph 4, of the Convention)

3.1 No participation in policy development

95. Decision-making on wind power projects was in the hands of local and provincial authorities until, approximately, the turn of the century. This changed in 2001 when the national government and the provinces entered into an agreement - the Administrative Agreement on the National Development of Wind Energy [*Bestuursovereenkomst Landelijke Ontwikkeling Windenergie*] - with the aim to install at least 1,500 MW of wind power on the mainland by 2010. The provinces were made responsible for the choice of locations. Each province was directed, under the agreement, to realise a certain amount of MWs which together would constitute the intended 1,500 MW.

96. Since then, the target of MWs to be installed has been repeatedly raised. In September 2007, the national government decided to adopt the 'Work Programme Clean and Efficient' ['*Werkprogramma Schoon en Zuinig*'], which aimed at installing 2,000 MW of additional wind power on the mainland by 2011 and at offering a perspective for substantial growth in the years thereafter.

97. Then, in the autumn of 2007, two round-table conferences and several additional meetings took place.[35] Participants in these meetings were the ministries concerned (Economic Affairs and Infrastructure and the Environment), provincial and local authorities, nature and environmental organisations and the Netherlands Wind Energy Association [*Nederlandse Wind Energie Associatie*] (NWEA), which is an umbrella-organisation of for-profit businesses in the field of wind power in the Netherlands. These conferences and meetings led to the 'National Plan of Approach Wind Power' [*Plan van aanpak Windenergie*], dated 30 January 2008. This plan expressed, for the first time, the intention to install yet another 2,000

[34] Section 3.36 of the Spatial Planning Act *[Wet ruimtelijke ordening*].
[35] National Plan of Approach Wind power, 30 January 2008, page 3.

MW of wind power on the mainland between 2012 and 2020, which is in line with the previous decision to substantially increase the amount of wind power by 2020. Eventually, the final target was set at 6,000 MW to be realised by 2020 at the latest.[36]

98. In 2007 and 2009 respectively, the national government entered into further agreements with the provinces and municipalities.[37] The provinces and local authorities committed themselves to the national government's policy objectives regarding wind power and agreed to a best efforts pledge to achieve the target at the time of 4,000 MW by 2011 (which has meanwhile been changed in 6000 MW by 2020). Each province was allocated its own share in MWs. To reach that target, provinces would make use of their power to designate locations, while they would also assist potential investors by granting permits swiftly and by removing bottlenecks and impediments. After additional studies, further agreements would be concluded regarding the additional target of having an installed total of 6,000 MW in 2020.

99. In accordance with its obligations under Directive 2009/28/EC, the Netherlands incorporated all of the above plans on the future of wind power into a 'National Action Plan for Energy from Renewable Sources' ['*Nationaal actieplan voor energie uit hernieuwbare bronnen*'] (hereinafter: National Action Plan) in 2010. This plan was then submitted to the European Commission. It describes the way in which the Netherlands will meet the target of 14 percent renewable energy by 2020 as set out in the Directive.

100. In view of earlier decisions of Your Committee, the National Action Plan should be considered a plan or programme in the sense of article 7 of the Convention.[38] Consequently, the Netherlands should have offered public participation in this plan in accordance with the requirements set out in article 6, paragraphs 3, 4 and 8, respectively: early public participation when all options are open and effective public participation can take place; and taking due account of the outcome of the public participation. However, this has not been done and, as a result, the National Action Plan has been adopted in a manner that is not in compliance with the Convention.

101. Should it be of importance[39], it should also be noted that in all the decision-making that preceded the National Plan, such as the Work Programme Clean and Efficient and the National Plan of Approach Wind power - both of which have been described above in the paragraphs 96 en 97 - no public participation was provided for. Both documents should be considered as plans or programmes in the sense of article 7. Therefore, they too have been adopted in non-compliance with the Convention.

102. It should be noted that the involvement of nature and environmental organisations and the NWEA on behalf of commercial parties cannot be regarded as public participation in the sense of article 7, third sentence, of the Convention. This sentence stipulates that relevant

[36] Ibid, page 8.
[37] Climate-Energy Agreement between the National Government and Provinces, 14 January 2009; Climate Agreement Municipalities and National Government 2007-2011, 12 November 2007.
[38] ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12, 2 October 2012; ACCC/C/2012/68.
[39] It appears from the second decision mentioned in the previous footnote that public participation in the National Plan should have been arranged even in the event that the measures included therein have been subject to a previous public participation in a different context.

"public authorities" must identify the public that may participate 'taking into account the objectives of this Convention'. It goes without saying that to involve in public participation only the known supporters of, and the vested corporate interests in, wind power - a most selective selection from the public - is not in line with the objectives of the Convention.

103. Nor has public participation taken place in relation to the aforementioned administrative agreements between the national government, the provinces and municipalities. These agreements involve best efforts pledges aimed at the realisation of specific targets - i.e. specified quantities of MWs wind power to be installed - with the help of concrete measures. They too should be considered as plans and programmes in the sense of article 7, first sentence, of the Convention.

3.2. Participation in decision-making has no effect

104. Public participation was offered for the first time in 2011 as part of the National Policy Strategy for Infrastructure and Spatial Planning [*Structuurvisie Infrastructuur en Ruimte*], a plan in which the government sets out its spatial policy on wind power for the entirety of the Netherlands. Wind power is just one of the many subjects that is addressed - and even then rather briefly - in this document. A draft of the National Policy Strategy was made available for public scrutiny during six weeks commencing on 3 August 2011. In this draft the government set out once again its target of 6,000 MW installed wind power on the mainland and it designated selected areas as 'promising for wind power', mostly in certain parts of the coastal provinces. The areas concerned had already been earmarked earlier for wind power by the provinces in accordance with the aforementioned prior agreements between them and the national government.

105. Although many of the comments received from the public spoke out against the target of 6,000 MW of wind power, against the earmarking of areas for wind farms and/or proposed other methods to promote sustainable energy, the government did nothing with any of these comments and adopted the plan without any changes on 13 March 2012. This is not surprising as this National Policy Strategy was mostly a re-statement of the earlier plans and programmes discussed above in the paragraphs 95 et seq. The conclusion should be that public participation was finally offered at a stage when the decision-making in a substantive sense had already taken place. Consequently, public participation has not been in compliance with the requirements set out in the Convention, that is, offering public participation at a time when all options are open and effective public participation can take place and taking due account of the outcome of the public participation (article 7 in conjunction with article 6, paragraph 4 and 8).

106. The National Policy Strategy for Infrastructure and Spatial Planning has since been followed by a new plan specifically on wind power alone: the National Policy Strategy for Onshore Wind Power [*Structuurvisie Windenergie op Land*] (SvWOL). More specific and detailed than the National Policy Strategy the national government designates specific areas for large-scale wind farms in this document. The government's introductory note to Parliament contains the following passage:

'The most important reason for the development of the SvWOL (National Policy Strategy for Onshore Wind power, NLVOW) is the government's wish to concentrate large-scale wind power capacity in the most appropriate areas. In doing so, fragmentation of the landscape and its disruption may be limited. Furthermore, the earmarking of areas for large-scale wind power in a National Policy Strategy will speed up the procedures for the realisation of large wind power projects. The SvWOL is important for the realisation of the 14 percent target for renewable energy in 2020. This is, primarily, connected with the earmarking of areas for large-scale wind power projects. In 2013, the government entered additionally into performance agreements with the provinces, represented by the IPO[40], on the location of larger and smaller projects to install at least 6,000 MW from wind power by 2020. On 27 January 2014, these agreements were reconfirmed and thereupon included as part of the SvWOL. Both the government and the twelve provincial governments made a commitment to strive for the full implementation of these agreements. This is to be achieved through exercising the powers vested in each of the parties and through mutual consultation. A core team has been established to monitor progress consisting of representatives of the national government, IPO, the commercial parties involved (NWEA), nature and environmental organisations and grid managers.'

107. This (somewhat lengthy) quote illustrates the typical way in which decision-making on wind power and wind farms takes place in the Netherlands. This happens through meetings between the various authorities concerned, occasionally supplemented with selected parties from the private sector (as was mentioned before in paragraph 97 in relation to the round-table conferences in the autumn of 2007). It should be noted once again that the one-sided selection of the parties participating in these meetings (all proponents of wind power) derogates from the stipulation set out in article 7, third sentence, of the Convention as it is not in compliance with the objectives of the Convention to exclude systematically the public from a role in decision-making. At no point in time is the public given the opportunity to participate, while discussions take place at meetings involving a small group of organisations with vested interests. The result of these meetings are subsequently incorporated in official decisions such as the aforementioned policy strategies. Consequently, public participation - which under Netherlands law should take place in relation to draft decisions - takes place, in actual fact, at a time when decision-making in a substantive sense has already taken place. This was also the conclusion drawn at the end of paragraph 95 et seq.

108. The above is confirmed by the actual procedure with regard to public participation in the above National Policy Strategy for Onshore Wind power. The public participation took place in two parts. The first part (in the fall of 2012) concerned the intention to draft a national policy strategy as well as, in preparation thereof, to carry out an environmental impact assessment. The second part (in the spring of 2013) pertained to the draft of the National Policy Strategy itself. In neither of these two parts have the comments that came as a result of public participation led to any substantive changes, not in relation to the plans for a National Policy Strategy (fall 2012) and not in relation to that Policy as such (fall 2013).

109. In the Memorandum of Reply [*Nota van antwoord*] - a document through which the government responds to the comments submitted as a result of public participation - the government stated that part of these comments, especially those concerning the possible

[40] The abbreviation IPO stands for Association of Provincial Authorities [*Interprovinciaal Overleg (IPO)*]. IPO is the umbrella-association of the 12 provinces of the Netherlands.

negative consequences of wind farms, made clear 'what concerns and opinions are on citizens' minds'. However, the government held that these comments should make no difference to the National Policy Strategy because, in the view of the government, they should be considered in further decision-making on individual wind farms.

110. The government then continues by identifying a number of subjects that were put forward in the comments from participation, but that 'fall outside the scope of the National Policy Strategy and the related EIA' - such as: the benefits of, and need for, wind power, comparisons with other methods to generate sustainable energy and the standardization and enforcement of statutory rules on exposure to wind turbine noise.

111. The government states the following regarding the first two subjects:

'The following is relevant regarding the issue of alternative sources of sustainable energy. On the basis of, inter alia, studies by the ECN (Energy Research Centre of the Netherlands [Energieonderzoek Centrum Nederland]), the conclusion was reached in the Energy Report [Energierapport] (2011, Ministry of Economic Affairs) that essentially all sources of sustainable energy are needed in order to achieve the sustainable energy target (a 14 percent proportion) by 2020. For this, a joint capacity of 6000 MW of onshore wind power is considered realistic. In the existing situation, onshore wind power cannot be traded in for other sources. The discussion on the benefits and need of 6000 MW of onshore wind power has therefore been officially concluded with the issue of the Energy Report. In the years previously (from 2008), a broad public discussion has been held on this in connection with the Work Programme Clean and Efficient.'

112. The Work Programme Clean and Efficient (2007) has already been discussed above in paragraph 96 and, contrary to what is being suggested in the quote above from the Memorandum of Reply, it was not subject to public participation. The same is true for the Energy Report, also mentioned in the quote, outlining the energy policies of the new government that came into office in October 2010. There simply was never a real opportunity for public participation on any of these policy plans/programmes.

113. The government did not take into consideration comments arising from public participation concerning yet another relevant issue, i.e. the standards and norms for noise exposure, because those have been laid down by statutory law, as has been discussed in paragraph 61 et seq.

114. The government did not even consider comments that argued for a change in the choice of locations:

'Opinions that requested not to include a certain area or to actually include an additional area in the National Policy Strategy have not been honoured. The government has agreed with the provinces that the provincial designations of areas are the starting principle of the EIA Plan and the National Policy Strategy. Furthermore, performance agreements have been made with the provinces on the implementation of the government's objective for onshore wind power at the request of Parliament.'

115. The fact that the government did not, under any circumstances, want to make any changes to the agreements with the provinces on the selection of locations for wind farms, is

also evidenced by the government disregarding a most critical opinion on this issue from the Commission for Environmental Impact Assessment (Commission EIA). This Commission is an advisory body established by law for the purpose of reviewing the contents and quality of environmental impact assessments. With regard to the choice of locations for wind farms under the National Policy Strategy, the Commission's observations include the following statement:

'Because administrative agreements serve as a starting point, the Commission is of the opinion that opportunities for large-scale wind power projects remain unused without sufficient substantiation of the environmental effects of this approach and/or without it becoming clear what potential capacity is at stake. An analysis of all SvIR-areas would have resulted in a more coherent, broader and more effective composition of the alternatives with a bigger chance of achieving the goals set.'[41]

In response, the government announced its intention to adhere to the agreements with the provinces as agreed.

116. In summary of the above, the conclusion is that public participation made possible in the National Policy Strategy for Onshore Wind Power could not relate to: (1) the benefits of and need for wind power; (2) sources of energy that would be an alternative to wind power; (3) standards and norms on noise exposure from wind turbines; and (4) the selection of locations. Accordingly, all fundamental choices put forward in the National Policy Strategy were kept outside the scope of public participation. It should not come as a surprise that the comments submitted as a result of public participation did not even result in one single amendment to the National Policy Strategy. At most, they resulted in (slightly) more thorough explanations or in the addition in a few cases.

117. A likely result thereof is that suboptimal choices have been made, as the above-cited opinion of the Commission EIA also suggests. Consequently, the Dutch practice of decision-making as outlined above is also detrimental to the Convention's aim to improve the quality of decision-making and to strengthen public support for decisions on the environment through, for example, public participation.[42]

118. Summarizing this section: administrative agreements between the national government, provinces and municipalities, as well as agreements between public authorities and specific private parties (such as the umbrella-organisation of the commercial sector and nature and environmental organisations), are in fact decisive for the content of government plans and programmes on wind power. Therefore, they are decisive for the content of actual decisions about wind farms as well. This has also been the case in relation to the National Policy Strategy for Onshore Wind Power as has been shown above. Needless to say, such agreements make it virtually impossible for the government to assess the comments arising

[41] Memorandum of Reply, page 94. The quote stems from a summary of the opinion of the Commission EIA in the Memorandum of opinions, a document in which the government discusses comments and recommendations from public participation. The abbreviation 'SvIR' refers to the National Policy Strategy for Infrastructure and Spatial Planning that earmarks potential areas for wind power and which has already been discussed earlier in this section.

[42] Preamble to the Convention, sub 9 and 10.

from public participation with an open-mind: its hands are tied. Or, rather, it has tied its own hands.

3.3 Case: the National Energy Agreement of 2013

119. Finally, it is relevant to also discuss the so-called National Energy Agreement [*Energieakkoord*] as this document reflects the most recent developments in policies on sustainable energy. This agreement was concluded between the government and several organisations on 6 September 2013, and it qualifies as a plan or programme in the sense of article 7, first sentence.

120. The agreement comprises a large number of measures to ensure that the target of 14 percent sustainable energy is met in 2020. However, the scope of this agreement is more ambitious: 16 percent sustainable energy by 2023 and a fully sustainable energy supply by 2050. The parties have committed themselves again to the well-known target of 6,000 MW installed wind power by 2020, but they have also committed themselves to a further increase in wind power after 2020.

121. In addition to the national government, provinces and municipalities, various private parties have signed the agreement: employers' organisations, trade unions, the commercial wind sector, nature and environmental organisations and investors. However, organisations that are critical of wind power, such as the National Critical Platform on Wind Power [*Nationaal Kritisch Platform Windenergie*] (NKPW) and the NLVOW, were not invited to take part in the discussions and negotiations of the agreement, even though the NLVOW had explicitly requested a seat at the table. The parties to the negotiations even refused to receive a contribution to the discussion by the NKPW on behalf of 88 groups of local residents.

122. The Financieele Dagblad, a daily newspaper, published an article by Pieter Lukkes with the headline 'Public should judge the agreement on energy' on the occasion of the signing of the National Energy Agreement. In this article, Lukkes argued, once again, for making an analysis of the benefits of, and need for, all measures set forth in the Agreement, and for making - finally - an analysis of the social costs and benefits of wind power. The author proposed that both analyses should be presented to the public, which should thereupon make the final decisions.

123. This publication resulted in a request for a response to these proposals from a member of Parliament to the minister of Economic Affairs. His reaction was as follows:

'The Netherlands is a representative democracy. Your House has broadly agreed to the National Energy Agreement on 2 October of this year. In addition, I am of the opinion that the agreement has broad public support as it has been signed by 40 parties.'

124. The response of the minister shows once again that the Netherlands government has no awareness of the obligations resulting from the Convention to provide for early public participation in plans and programmes such as the National Energy Agreement at a time when all options are still open and effective public participation can take place. In the government's view, it suffices to submit such major plans and programmes to the Parliament

once they have been adopted by a small, carefully selected group of like-minded organisations, that is, without any form of public participation. In doing so, the government fails to appreciate that the Convention's obligations actually apply in addition to, and rank above, the usual political decision-making mechanisms and that they are intended to increase public involvement and to improve the quality of decision-making.

125. Lastly, it goes without saying that the contents of the National Energy Agreement are coloured to a large extent (as was the case with previous agreements) by the backgrounds of the participating parties. Once again, in derogation from article 7, third sentence, the authorities concerned have been most selective in their choice of which parties to invite. It is plainly incorrect to speak of broad public support as the minister did in the quote above.

126. The National Energy Agreement has been discussed here as it demonstrates that non-participation by the public is not an incident, but a structural phenomenon of how the national government and other public authorities develop policies and take decisions on wind power. Non-participation by the public - or, rather, systematic exclusion - began with the first important administrative agreement between the national government and the provinces (see above paragraph 95) in 2001 and it continues uninterrupted to this day with the National Energy Agreement of 2013 as a good example. Decision-making on the implementation of the Agreement is also carried out behind closed doors in meetings between representatives of ministries, other public authorities, nature and environmental organisations, the NWEA (representing commercial interests) and a few other organisations with specific interests invited to that end. That is, it still takes place without any involvement by, or input from, the public.

4. Decision-making regarding specific wind farms (article 6 of the Convention)

127. It has already been noted above in paragraph 92 that the national government is authorised to decide on wind farms with a rated capacity of 100 MW or more and that the ministers of Economic Affairs and Infrastructure and the Environment may adopt a government-imposed zoning plan,[43] which grants spatial planning permission for such a farm. All other decisions are made by provincial and local authorities under the direction of the two ministers of the national government, who - should local authorities refuse to cooperate - may take the necessary decisions themselves.

128. The procedural sequence is that public participation is provided for, first, in respect of a draft notification on the scope and details of the environmental impact assessment [*Notitie reikwijdte en detailniveau*] and, second, in respect of the draft government-imposed zoning plan and the draft licenses, permits and exemptions as needed. At the time of filing this communication, two wind farms have been constructed (or are being constructed) on the

[43] A government-imposed zoning plan is a zoning plan that is adopted at the level of the national government. It grants spatial planning permission for a wind farm and is similar to a provincially-imposed zoning plan or a local zoning plan. Additional licenses, permits or exemptions may be required for the construction itself and for operating the wind farm. It is customary that planning permission is granted by local authorities in the form of a local zoning plan. However, if national or provincial interests are at stake, the national government or the provincial administration may 'impose' its own spatial zoning plan on the municipal zoning plan. Hence the term 'government-imposed zoning plan' or 'provincially-imposed zoning plan'.

basis of this proedure, namely the *Windpark Zuidlob* (Zeewolde) and the *Windpark Noordoostpolder* (in the municipality with the same name). The comments submitted as a result of public participation did not lead to any significant changes in any of the above draft documents. This is not surprising in view of the observations made in paragraph 104 et seq.

129. At present, preparations are being made to construct more large wind farms as part of the National Policy Strategy for Onshore Wind.[44] Public participation will undoubtedly be in vain again, that is to say, if the public concerned would at all wish to make use of any opportunities for public participation. The interest to do so will no doubt decrease as and when it becomes clear that public participation is only taking place for formal reasons.

130. The situation is not different for wind farms smaller than 100 MW for which provinces and local authorities are the competent authorities. They are obliged to implement the national government's policies (established, as mentioned in paragraph 95 at seq., without public participation) by providing spatial and environmental planning support in the form of provincial or local policy strategies, zoning plans, licences, permits and exemptions. Provincial and local authorities are bound by the policies formulated by the national government for two reasons. The first is that, in view of consistent court decisions, they must take into account the spatial and zoning policies of the national government, while any deviation from these policies requires proper justification.[45] And, secondly, as was mentioned above in the paragraphs 95 et seq., because provinces and municipalities have committed themselves to a range of administrative agreements with the national government.

131. After having studied the files of many tens of (initiatives for) wind farms, the NLVOW has not managed to find one single example of a case in which a province or municipality relinquished its intention to support the building of a wind farm as a result of comments arising from public participation. Nor has the NLVOW found any cases where plans were substantially changed as a result of public participation. For decision-making on specific wind farms the situation is identical to the situation of decision-making in regard of plans and programmes as summarized above in paragraph 126.

5. Conclusions

132. In view of the foregoing, the conclusion must be that plans and programmes regarding wind power and wind farms are concluded without any significant involvement by the public. Decision-making takes place in private meetings between public authorities and organisations with vested interests in promoting wind power. Formal decision-making follows after the crucial choices have been made in this way, initially on plans and programmes and later on actual wind farms.

[44] It concerns, at any rate, the *Windpark N33* near Veendam, *Windpark Drentse Monden and Oostermoer* (south of Stadskanaal), the *Windpark Wieringermeer* (west of the Afsluitdijk), the *Windpark Fryslân* (in the IJsselmeer, west of Makkum) and the *Windpark Krammer* (south of Goeree-Overflakkee).

[45] P.J.J van Buuren, et al, 'Main features of spatial administrative law' ['*Hoofdlijnen ruimtelijk bestuursrecht*'], 2010, page 348; Administrative Law Division 24 May 1997, *Milieu & Recht* 1998

133. Although opportunities for public participation are provided, this is only pro forma as there is no question of any participation in decision-making by the public when all options are open. Comments and contributions from the public are routinely dismissed without any satisfactory explanation. Consequently, the Netherlands does not act in compliance with the obligation to provide early public participation when all options are open and effective public participation can take place (article 6, paragraph 1 and 4, and article 7, second sentence), nor does it comply with the obligation to ensure that due account is taken of the outcome of public participation (article 6, paragraph 8). This applies both to public participation concerning plans and programmes and to public participation concerning specific projects. [46]

III ACCESS TO JUSTICE

1. Introduction

134. Article 9, second paragraph, of the Convention ensures that the public concerned, to the extent it has sufficient interest, has the opportunity to submit an - in short - environmental decision to a court of law to have its procedural and substantive legality reviewed. Such a procedure should furthermore be fair pursuant to article 9, paragraph 4.

135. With the help of examples taken from judicial decisions on wind farms, the NLVOW maintains that Dutch legal practice is not in compliance with the right of the public concerned to a review of the substantive legality, nor does that practice meets the requirement of fairness.

136. This is first of all the result of a high degree of judicial passiveness by the courts with respect to the facts of a case. Courts generally accept the facts as established and assessed by the public authority concerned. It is very difficult, if not impossible, to bring up for discussion the accuracy of the facts that support a decision and the assessment of those facts by a public authority in a court of law. This, together with the courts' most profound respect for the way in which authorities exercise discretionary powers, explains why there is no real chance of success when lodging an appeal against a decision permitting the construction of a wind farm.

137. It is beyond the scope of this communication to discuss in any detail the reasons for this judicial reluctance. However, the following passage by E.M.H. Hirsch Ballin, former minister of Justice and former member and head of the Administrative Law Division of the Council of State, provides much clarification:

'One of the changes that legislation has accomplished is the introduction of independent administrative law courts, which has been a strikingly difficult process in the Netherlands and one which has lasted for almost all of the 20th century. The fear that irresponsible courts of law would

[46] ACCC/C/2008/24, Spain.

want to know better than public authorities has slowed down both the formation and the performance of judicial functions in administrative law.'[47]

138. The absence of adequate review of substantive legality is confirmed by research into judicial decisions on wind farms carried out by Marjolein Geling.[48] She analysed 67 judicial decisions on wind farms issued in connection with appeals from opponents and they show that ultimately just fifteen decisions upheld the appeal.

139. However, the court allowed the legal consequences of the disputed administrative decision to stand in six of those fifteen cases on the ground that the established violations of procedural requirements would not have resulted in a different substantive decision in view of the position taken by the public authority in question. By allowing the legal consequences of the annulled decision to stand, these decisions could nevertheless be implemented.

140. In the remaining nine cases, the administrative decision was invariably annulled on the ground of a procedural defect, such as the absence of an environmental impact assessment. Once that defect had been remedied, the development in dispute could in principle move forward again. In none of the cases was the annulment of an administrative decision the result of the violation of a substantive criterion such as, for example, the prohibition of arbitrariness or the requirement that a zoning plan must be in accordance with 'proper spatial planning'.

141. The following paragraphs are based on Marjolein Geling's analysis and on our own research into judicial decisions on wind farms.

2. Judicial assessment of the facts

142. Specialist knowledge is crucial in any discussions and proceedings concerning wind power and wind farms. Expert knowledge and expertise is, for example, required for calculations of noise exposure and shadow flicker to determine whether turbines meet statutory standards and norms; for preparing visualisations and assessments of external appearances to establish whether legal requirements are met; and for assessing the importance of ecological, historical, architectural or landscape values as constraints on the building of wind farms.

143. Initially, it is the developer of a wind farm project who collects such knowledge, and expertise, adding it to his or her application to the public authorities to support his or her initiative. Mostly, such knowledge and expertise is collected and integrated into an environmental impact assessment drafted by a specialist consultancy firm. Subsequently, the competent public authority - be it a municipality, a province or the national government - assesses the application and its accompanying information and takes a decision. Local residents may present contrary evidence provided by their own experts.

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[47] 'Legal development by administrative law courts' ['*Rechtsontwikkeling door de bestuursrechter*'], *VAR*-series 154, 2015, page 9.

[48] 'Fighting against a wind farm: a losing battle' ['*Vechten tegen een windmolenpark. Een kansloze strijd?*'], August 2013 (final thesis University of Groningen [*Rijksuniversiteit Groningen].*

144. Ultimately, it is for a court of law to assess whether there is a proper factual basis for the decision of the public authority concerned. If a court of law acts in this respect with judicial passiveness and allows itself to be predominantly guided by the facts as presented and interpreted by the public authority, it will be most difficult for local residents to find recognition for their interpretation of the facts. Effective legal protection may then easily become an illusion. In view of the importance of facts for disputes on wind farms, the question as to how a court of law assesses the facts presented by a public authority is therefore of crucial importance to the outcome of legal proceedings on wind farms.

145. Broadly speaking, in legal procedures the principle applies that a public authority may rely on an expert report in taking a decision, even if it has been commissioned by the applicant of a permit. Anyone who wishes to challenge in appeal the findings of an expert is therefore advised to provide contrary evidence by an expert. However, even then it is neither easy nor straightforward to challenge the facts as accepted and interpreted by a public authority.

146. The decision with regard to *Windpark Duiven* proves the point.[49] In this case, the appellants argued that the noise of wind turbines is of a tonal and pulsating character, which makes it even more annoying than other sources of noise. They were of the opinion that for this reason stricter norms were called for (this case fell under the old noise regime when it was still possible to impose stricter norms for noise with a pulsating character; see above paragraph 62). To substantiate their point of view, the appellants referred to a study by the University of Groningen and the University of Gothenborg entitled 'Wind farm perception; visual and acoustic impact of wind farms on residents'. In response, the Municipality submitted to the court a study by the Ministry of Transport, Public Works and Water Management which supposedly concluded that the noise of wind turbines 'normally' does not have a tonal or pulsating character.

147. The Administrative Law Division then held that the appellants 'had failed to sufficiently demonstrate that the Municipality had wrongly adopted this position' (that stricter norms were not needed). Without further explanation, the Division accepted the Municipality's interpretation of the facts even though this dispute over the facts might have been decided by appointing an expert or by issuing an order to furnish proof. There was all the more reason to do so as the study cited by the Municipality showed that, in some cases, wind turbines actually do generate noise with a tonal or pulsating character.

148. The decision on the *Windpark Tolhuislanden* contains a similar discussion with a similar outcome.[50] Again, the Administrative Law Division opted for the authority's interpretation of the facts although the obvious step to resolve the matter in dispute would have been to order one or both parties to submit additional evidence or, alternatively, to appoint an expert.

149. An order to submit evidence or to appoint an expert would also have been appropriate with regard to another factual question that arose in the case of *Windpark Duiven* and which has also arisen in other cases. This question concerns the technical specifications and capacities of wind turbines. For example, in the case of *Windpark Duiven*, the Municipality

[49] ECLI:NL:RVS:2011:BT2817.
[50] ECLI:NL:RVS:2012:BV0563.

and the developer of the wind farm project argued that noise standards and norms could be satisfied by 'reducing' the output of the turbines where necessary. The Administrative Law Division considers the following:

'In view of this, and as Nuon and the Municipality undisputedly stated at the hearing that the rotational velocity of the turbines to be build is adjustable - so that, when necessary, an impending violation of the norms may be pre-empted - there is no reason to conclude that there is no ground for the view that there is serious doubt whether the noise standards and norms set out in the Activities Decree can be satisfied.'

150. It is therefore most difficult for local residents to dispute arguments from public authorities or developers of projects, seeing that this requires expert knowledge of wind turbines, something they will not normally possess. An additional concern is that such knowledge is mostly in the hands of commercial parties, which often makes it difficult, if not impossible, to find an independent expert. In other words, residents-appellants have an evidentiary problem. The Administrative Law Division could extend a helping hand by ordering a public authority to submit evidence or by appointing itself an independent expert, if one is to be found. There is every reason to do so as the issue of utmost concern to local residents is the specific question whether their exposure to noise may be limited efficiently and verifiably through the adoption of special measures. If a court takes no action, it tells local residents in effect that they simply have to trust that the public authority in charge, as well as the commercial parties involved, are doing the right thing to ensure that standards and norms are respected.

151. The judicial decisions outlined above are typical of the passive attitude of the courts. They allow themselves to be guided (sometimes blindly) by the facts as presented and interpreted by public authorities which in turn rely (sometimes blindly) on experts contracted by the developers of wind farm projects as these in actual fact write the environmental impact assessment. Objections - even when based on contrary evidence - are brushed aside, often with no more than the observation that the appellant has failed to sufficiently demonstrate that his or her view of the facts is correct. A court of law that takes its dispute-settling responsibility seriously, should carry out - directly or indirectly - its own inquiry into the facts of a case if these facts are in dispute. In practice, however, if an appellant questions an authority's presentation and interpretation of the facts, Netherlands administrative law courts most rarely challenge the view of the public authority concerned.

152. It should be pointed out that opinions in Dutch legal literature vary on the attitude an administrative law court should adopt with regard to the facts of a case. Some writers take the view that public authorities have primacy in establishing the facts and that a court of law should limit itself to the question whether the facts have been set out in a careful and legally appropriate manner.[51] Others argue in favour of an administrative law court that - within limits - does its best to 'find out what the actual situation is'.[52] The legislator of the General Administrative Law Act took the view that an active administrative law court would strive to establish the substantive truth. [53] This principle of an active court of law is based on

[51] For example, M Schreuder-Vlasblom, 'Judicial protection and administrative preparatory proceedings' ['*Rechtsbescherming en bestuurlijke voorprocedure*'], 5th edition, 2013, page 650.
[52] For example, N. Verheij in his review of Administrative Law Division, 20 February 2001, AB 2002, 29.
[53] Parliamentary Papers II [*Kamerstukken II*], 1991/92, 22 495, no 3, page 32 and page 36 et seq.

'compensation for inequality', which traditionally is seen as an important feature of administrative procedural law in the Netherlands. The term 'compensation of inequality' refers to the responsibility a court of law has to assist citizens, for example by supplementing facts where necessary. Section 8:69 General Administrative Law Act explicitly provides the courts with the power to do so.

153. Compensation for inequality should be regarded as one of the ways to give meaning and substance to the requirement set out in article 9, paragraph 4, of the Convention: that judicial review must be 'fair'.

154. As shown above (in paragraph 142 et seq.), administrative law courts in practice adopt a passive attitude. This has also been confirmed by empirical research in which the Administrative Law Division of the Council of State was characterized as an entity that reviews marginally with an 'easy-does-it' attitude[54] and that does not make any serious attempt to find the truth as to how matters really are. This characterization was based on several studies, one of which was designed to evaluate administrative procedural law and, more specifically, the way in which administrative law courts decide on the facts. The researchers write the following:

'Empirical studies have primarily shown that there exists disagreement between parties on the facts in approximately 90% of the proceedings that are brought before an administrative law court at first instance. It appears that the courts adopt a reluctant attitude in this discussion, contrary to what might be expected of them in view of the basic principles underlying the procedural law aspects of the General Administrative Law Act. Courts only make very limited use of the possibilities they have to inquire about the relevant facts of a case. (...). The result is that administrative law courts often take decisions on the question whether a public authority's decision reflects a correct interpretation of the facts solely on the basis of the arguments presented by the parties and not on an investigation of their own into these facts. In a large majority of cases a court decision on the facts turns out in favour of the public authorities. What also stands out is that administrative law courts often carefully select their words and that they often do not even give a reason for their decision if they consider that a citizen/appellant has failed to substantiate his or her arguments.''[55]

155. The examples of the case law of administrative law courts given earlier are in line with the picture outlined in this quote. This judicial approach is not in compliance with the right of the public concerned to a review of the substantive legality of environmental decisions under article 9, paragraph 2, of the Convention. Such a review should also comprise a review of the accuracy of facts[56], which implies that a court of law has to develop an opinion of its own and may not rely solely on the facts as presented and interpreted by public authorities. In essence, this is also the opinion of the European Court of Human Rights as is demonstrated by its case law on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - a provision that is comparable to article 9,

[54] This characterization comes from L.J. Damen, as cited by R.J.N Schlössels in: 'Administrative Law of Evidence: Legislator or Court of Law' ['*Bestuursrechtelijk bewijsrecht: wetgever of rechter*'], VAR-series 142, 2009, pages 37, where one can also find records of this empirical research in the footnotes.
[55] T. Barkhuysen, L.J.A Damen et al, 'Finding of Fact in Appeal Cases' ['*Feitenvaststelling in beroep*'], Den Haag 2007, xviii et seq.
[56] Cf. Communication ACCC/C//2008/33, 125.

paragraph 2, of the Convention.[57] The case law on wind farms referred to above proves that the approach of the Netherlands administrative law courts deviates fundamentally from that advocated by the European Court. As a result, there is no, or very little, point for the public concerned to submit a dispute about facts to an administrative law court.

3. Judicial assessment of the merits of a decision: prohibition of arbitrariness

156. Respect for the discretionary powers of public authorities, exercised by them on the basis of political considerations, is a basic assumption of Netherlands administrative procedural law as interpreted and applied by administrative law courts. Administrative law courts should not determine what should be the best outcome of seeking a balance, on political grounds, between different interests. They may only intervene if public authorities either exceed the boundaries of their discretionary powers or act contrary to the law.

157. For a better understanding of this fundamental principle, it should be noted that administrative law courts not only consider discretionary powers to be present in so-called 'may-clauses' ['*kan-bepalingen*']: a provision that, for example, allows an authority the discretionary power to either grant or deny a permit. Courts also assume discretionary powers when a public authority implements open-ended statutory standards, such as 'in the best interest of protecting the environment' or 'in view of proper spatial planning'.

158. Usually, a zoning plan has to be changed in order to realise a wind farm. Court decisions on zoning plans invariably start with the following consideration:

'In determining a zoning plan the [town or city] council has discretionary powers to designate such uses and provide such regulations as the council deems necessary from the point of view of proper spatial planning. The Administrative Law Division reviews such decisions restrictively, which means that, on the basis of the grounds of appeal, the Division assesses whether there has been reason for the view that the council could not have reasonably taken the position that the plan is designed for the purpose of proper spatial planning. The Division furthermore assesses on the basis of the grounds of appeal whether the disputed decision has been prepared or taken in violation of the law.'

This restrictive review also applies to other planning decisions that permit wind farms, such as an integrated construction and environmental permit [*omgevingsvergunning*] in deviation from a zoning plan.

159. Case law is consistent: an administrative law court only intervenes when a public authority could not have reasonably taken the decision in dispute.[58] The terms 'manifest unreasonableness' or 'arbitrariness' are also used. This implies a most restrictive approach to judicial review - an approach based on a particular interpretation of section 3:4, subsection 2 of the General Administrative Law Act. This subsection states that 'the adverse consequences of an order for one or more interested parties may not be disproportionate in relation to the purposes served by the order'.

[57] ECHR 17 December 1996, (*Terra woningen*). no 20641/92.
[58] Administrative Law Division 9 May 1996, AB 1997, 93, ABKlassiek, Deventer 2009, page 417.

160. An illustration of this approach is the decision by the highest administrative law court, the Administrative Law Division of the Council of State, in the case of *Windpark Noordoostpolder*.[59] The appellants, inhabitants of the polder, argued in appeal that the project's benefits and need were questionable. After a survey of the objectives pursued by the government (as specified in the Work Programme 'Clean and Efficient' and the National Spatial Strategy [*Nota Ruimte*] and outlined in the environmental impact assessment) and after referring to the European obligations of the Netherlands (14 percent sustainable energy by 2020),[60] the Division considered that the arguments put forward by the appellants 'do not give ground for the opinion that the ministers should not have referred to the aforementioned basic premises when adopting the government-imposed zoning plan'.

161. The Division also dismissed the appellants' criticism that the wind farm's contribution to the energy supply of the country would be minimal:

'To the extent that Gaasterlân has argued that the wind turbines will only contribute minimally to the annual Dutch energy demand, the Division considers that, be that as it may, the ministers in this case could reasonably consider important the factor that the wind farm would make a considerable contribution to achieving the objectives of sustainable energy.'

162. The Division then concludes its consideration of this aspect of the appeal with the following statement:

'In view of the foregoing, the ministers could reasonably assume the benefits and need of the plan.'

163. The respect for the discretionary powers of public authorities has also led administrative law courts to reject other grounds of appeal that refer to the balancing of interests, such as: the visual deterioration of the Wouda pumping-station;[61] the infringement of historical or architectural values of interest to Urk; the adverse effects of wind farms on the landscape; and the acceptability of exposure to noise and shadow flicker.

164. Yet another example concerns the decision on *Windpark Ecofactorij* in Apeldoorn.[62] In this case the appellants argued that the distance between the turbines and their homes was too small and that this did not comply with the 'Businesses and Environmental Zoning Brochure' ['*Brochure Bedrijven en Milieuzonering*'].[63] The Administrative Law Division dismissed the argument on the ground that the distances in the Brochure were 'guidelines'. According to the Division, not meeting such a guideline should not be an impediment to the granting of a permit. Additionally, the Division pointed out that the Brochure only provides guidelines for wind turbines with a rotor diameter of 50 metres, in which case a distance of 300 metres should be observed. According to the Division, the fact that the case involved

[59] ECLI:NL:RVS:2012:BV3215.

[60] These plans and programmes are described in paragraph 95 et seq. and it has been explained there that these were not established in compliance with the Convention.

[61] The Wouda pumping-station is the largest steam-powered pumping-station in the world and it still fulfils a significant role in the water-regime of the northern Netherlands. The pumping-station has been added to the World Heritage List of UNESCO in 1998.

[62] ECLI:NL:RVS:2011:BU7930.

[63] A brochure of the Association of Netherlands Municipalities [*Vereniging van Nederlandse Gemeenten*] (VNG) that provides guidelines based on expert research and opinions on the distances to be observed between activities and environmentally sensitive objects. Although without statutory status, these guidelines are usually applied.

wind turbines with a rotor diameter of 90 metres is no reason to conclude 'that a distance of 320 metres between said wind turbines and the nearest residential buildings is unacceptable'.

165. This decision shows to what extent administrative law courts give room to public authorities to make their own choices and how reluctant they are to critically review such choices. After all, it is very plausible that a wind turbine with a 90-metre rotor diameter causes more exposure to noise and shadow flicker over a far larger distance than a wind turbine with a diameter of almost half the size. The guidelines of the Zoning Brochure are actually intended to give substance to the norm of 'proper spatial planning'. Accordingly, the preface to the Brochure starts with the statement that 'proper spatial planning also implies avoiding foreseeable nuisance caused by environmentally harmful activities'. All of no consequence!

166. A decision that clearly shows that the basic premise of compensation for inequality - one of the manifestations of the 'fairness' required by article 9, paragraph 4, of the Convention (see above paragraph 153) - has been abandoned by the Netherlands administrative law courts is the case of the zoning plan '*Windpark Neeltje Jans*' on an island near the Oosterscheldekering.[64] A theme park on the Deltawerken is located on this island. One of the arguments the operator of this theme park, Delta Park, put forward in appeal was that the wind turbines would cause annoying shadow flicker on the land occupied by the theme park. Therefore, Delta Park argued that the theme park be classified as a 'sensitive object' within the meaning of the statutory provisions concerned. The consequence of this would be that a strict norm for the maximum duration of shadow flicker would apply and that, as appropriate, a stand-still rule could be imposed. In this way the employees of Delta Park, who sometimes work 40 hours a week in the park, would be protected from excessive shadow flicker.

167. The Administrative Law Division dismissed this argument because the theme park did not fall under the statutory definition of a sensitive object. In itself, this view is correct, but from Delta Park's grounds of appeal the Division should have considered that the Delta Park argument implied that the zoning plan is disproportionately detrimental to the work environment of its staff on the site and that, for this reason, it is inconsistent with 'proper spatial planning'. Section 8:69 of the General Administrative Law Act obliges an administrative law court to supplement grounds of appeal and also gives courts the authority to supplement the facts in dispute. A more active attitude required by the fairness principle of the Convention is therefore very well possible under Netherlands administrative procedural law. Instead, the Division opted for a passive approach.

168. The way Netherlands administrative law courts deal with manifest unreasonableness (the prohibition of arbitrariness) is quite similar to the so-called Wednesbury test, a test applied by courts of law in England and Wales that results in the annulment of an administrative decision if it is so unfair that no reasonably acting public authority could have taken the decision. In earlier decisions Your Committee has taken the view that this criterion may not be in compliance with the requirements of the Convention regarding the review of substantive legality.[65] Your Committee also stated that a proportionality test (review of

[64] 21 November 2012, ECLI:NL:RVS:2012:BY3735.
[65] ACCC/C/2008/33, 125 (for a further description of the Wednesbury test, see considerations 86 to 91).

proportionality) could well be more adequate under the Convention.[66] Considering its wording, the above-cited section 3:4 subsection 2 (paragraph 153) does not preclude such a review of proportionality by Netherlands administrative law courts. However, in practice, Netherlands administrative law courts act in accordance with the Wednesbury test.

169. Very recently, the aforementioned E.M.H Hirsch Ballin argued extensively in a report to the Administrative Law Association [*Vereniging voor Bestuursrecht*] (VAR) in favour of 'a judicial mandate that includes a review of the principle of proportionality'.[67] In this context, he speaks of the need to 'free the hands of the judge' by:

'(...) the replacement of the doctrinal reluctance of administrative law courts by an attitude that resembles more closely the common judicial function of assessing facts and requiring reasonableness and balance.'[68]

170. Administrative law courts therefore only assess whether or not a decision is manifestly unreasonable. In practice, this stricter standard has led to the creation of a legal vacuum in which administrative law courts approve the choice or decision of public authorities regardless of how disproportionate it may turn out for certain interests concerned.

171. Case law shows that administrative law courts invariably review the outcome of the balancing of interests by public authorities so marginally that these administrations have in fact a free rein - 'anything goes'. In effect, the courts refuse to carry out a review of the substantive consideration on which an authority bases its decision. As a result, it is pointless to put forward any grounds of appeal to the effect that the interests of local residents were ignored by the public authority, that a wind farm conflicts with 'proper spatial planning' or, for example, leads to an environment that is not adequate to health and well-being as stipulated in article 1 of the Convention. For this reason, the practice of judicial review by Netherlands courts is inconsistent with the Convention, in particular its requirement that a court reviews the substantive legality of environmental decisions (article 9, paragraph 1).

172. Support for this conclusion may also be drawn from a ruling by the European Court of Human Rights, dated 2 November 2006, on article 8 of the ECHR. This article embodies to a degree the fundamental right to live in a healthy environment, which makes this article similar to article 1 of the Aarhus Convention. In its ruling, the Court's considers:

'(…) the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.'[69]

4. Conclusions

173. For decisions on wind power or wind farms, going to court is futile from the very start because of the administrative law courts' strong inclination to follow a public authority's

[66] Ibidem, consideration 126
[67] 'Legal Development by Administrative law courts' ['*Rechtsontwikkeling door de bestuursrechter*'], VAR Series 154, 2015, in particular page 51 et seq.
[68] Ibidem., pages 15 and 56.
[69] Giacomelli vs Italy, 59909/00.

presentation and interpretation of facts, while at the same time refusing to substantively review the way in which the authority considered and weighed the interests involved and in which it interpreted and applied vague and open-ended statutory standards and norms. Going to court remains worthwhile only if a decision suffers from an obvious formal defect such as the absence of an inquiry that is explicitly required by law. Going to court on substantive aspects and issues is pointless as the decisions referred to above illustrate.

174. Administrative law courts adopt a passive approach although section 8:69 of the General Administrative Law Act offers them sufficient room for a more active approach. They do not apply a proportionality test - as advocated by Your Committee[70] - but focus exclusively on the prohibition of arbitrariness (manifest unreasonableness), although section 3:4, subsection 2 of the General Administrative Law Act does allow the courts to apply a proportionality test. The NLVOW is not aware of any examples where going to court resulted in a wind farm not being allowed to be constructed or in any real changes to plans for such a farm.

175. The Netherlands judicial practice on environmental issues, including those in relation to wind farms, is inconsistent with article 9, paragraph 2, of the Convention and its requirement of a review of substantive legality. As a result, also, the requirement of 'fairness' contained in article 9, paragraph 4, remains unfulfilled.

IV. GENERAL RULES AND ACCESS TO DECISION-MAKING AND JUSTICE

1. Introduction

176. The most important environmental effects of wind turbines, that is, noise and shadow flicker, are subject to maximum limits set forth in statutory provisions. Wind turbines are only allowed if the noise exposure of surrounding homes does not exceed 47 Lden and Lnight 41 dB. These are year-average norms, implying that, within the same year, periods with a high level of noise may be cancelled by periods with no or little noise. As to shadow flicker, wind turbines may cause shadow flicker on a home for a limited number of hours in the course of a full year. Where necessary, an automatic stand-still mechanism should be installed to prevent exceeding this norm.

177. The developer of a wind farm has to provide plausible proof that the farm will comply with these standards. If he or she succeeds, there is no impediment to constructing the wind farm from the point of view of noise exposure or exposure to shadow flicker. Should it appear in retrospect that the norms have not been met after all, the competent authorities may take enforcement action, either on their own initiative or at the request of people living in the direct vicinity.

178. The two most important environmental effects for people living in the vicinity of a (planned) wind farm are therefore regulated by generally binding statutory provisions, implying that public participation or judicial review is not possible in respect of these two specific issues. This is not in compliance with the Convention's requirement that decisions

[70] ACCC/C/2008/33, consideration 126.

with a substantial impact on the environment must involve effective public participation (article 6, paragraph 4) and subsequently be subject to judicial review (article 9, paragraph 2).

2. Substitution of case-by-case assessment by general rules

179. As stated, there is no point in bringing up for discussion the issue of the environmental impact of wind turbines in terms of exposure to noise and shadow flicker in public participation in decision-making on wind farms as these two issues are regulated in statutory provisions. The question whether those regulations are actually adequate to sufficiently protect local residents in a particular situation has become moot in the context of public participation.

180. One could argue that this problem has been mitigated by the obligation provided for in the Convention to offer public participation in the preparation of, in brief, executive regulations on environmental standards and norms, including those for exposure to noise and shadow flicker of wind farms. Article 8 of the Convention stipulates that for these topics the parties to the Convention must provide their best efforts to 'promote effective public participation at an appropriate stage, and while options are still open'. In the Netherlands, this provision has been implemented in section 21.6, subsection 4 of the Environmental Management Act that stipulates that drafts of an Order in Council must be open for public review for at least four weeks. During this period, anyone has the opportunity to comment in writing on the draft for consideration by the government and/or Parliament. This form of public participation has also been arranged for the noise and shadow flicker regulations.

181. However, for public participation to be effective, it is essential that - in compliance with article 5, paragraph 2, of the Convention - all relevant facts and data for the assessment of the intended decision are made available to the public in a transparent and accessible way. It has already been explained above in paragraph 67 et seq. that this requirement has not been satisfied as far as noise standards and norms are concerned. On the contrary, the government misled the public about the reasons for, and level of protection of, these standards and norms. This in itself is reason to conclude that the public participation provided when introducing the new noise standards and norms in an Order in Council can not eliminate the obstacle identified above in paragraph 179.

182. Moreover, article 6 of the Convention, unlike article 8, sets forth mandatory and detailed rules for public participation, both in relation to the information to be supplied about an intended activity and in relation to the organisation of the public participation as such. By contrast, article 8 has been very cautiously drafted and does not offer safeguards regarding public participation similar to those offered by article 6. For this reason, public participation provided for in article 8 cannot be regarded as an adequate alternative to public participation under article 6.

183. By regulating exposure to noise and shadow flicker in statutory law, the Netherlands gives the public concerned very little opportunity, if any, for public participation. As a result, only those environmental effects of wind farms that have not been regulated by law (in fact just the effects of a wind farm on the landscape and nature) may still be addressed in a public participation procedure. It is true that the public concerned may ask a public

authority to adopt customized regulations that are more strict than the statutory standards and norms, but in actual fact this option has no practical value as will be discussed below in paragraph 185 et seq.

184. Considering the Convention's objective to provide citizens with an opportunity to participate in decision-making, it is inconsistent with the Convention to withdraw the two issues most crucial to people living near wind farms (exposure to noise and shadow flicker) from decision-making and the balancing of interest by local authorities and, as a result, from public participation at local level. After all, the Convention is intended to offer the public an opportunity to participate in decision-making on specific activities so that a person may exercise his or her right 'to live in an environment adequate to his or her health and well-being' (see article 1 of the Convention). Precisely on the two issues that for wind farms are most crucial to people, the public cannot defend this right as a result of the fact that these two issues have been regulated in statutory law since 2011). This is contrary to the requirement of effective public participation. As a result, it is no longer possible to adopt norms that are tailor-made for specific situations as is an underlying purpose of article 6.

3. Impact of general rules on access to justice

185. The right of access to justice is impeded in that no appeal is possible against generally binding regulations, at least not with an administrative law court. As standards and norms for exposure to noise and shadow flicker caused by wind turbines are laid down in statutory provisions, there is, in principle, no point in disputing in appeal that these standards offer inadequate protection in a specific situation. Regarding exposure to noise and shadow flicker decision-making on a wind farm is simple: it involves no more than answering the question whether a wind farm can meet the statutory standards and norms. The same applies to judicial review. An administrative law court may therefore not test whether in a particular case the applicable standards and norms are appropriate considering all relevant interests and facts.

186. Furthermore, the option of replacing the statutory norm for noise exposure with a local customized regulation is largely hypothetical as it is available only in special circumstances. In fact, and without exaggeration, the option is a dead letter since the Administrative Law Division grants local authorities in this respect too extreme discretion to refrain from exercising the option, which is precisely what the national government suggests they do (see above paragraph 76). This implies that there is no effective way to argue against the general standards and norms in the context of granting a particular permit for a wind farm. This is unique: for other industrial installations with a high noise profile, the public has the right to participate in decision-making on noise exposure and to submit their case to a court of law.

187. The option to submit the statutory noise and shadow flicker standards and norms to a court within the scope of an 'exceptive review' is not a realistic alternative. Under an exceptive review a court addresses the question whether a generally binding rule should not be applied in a specific situation (such as the particular wind farm in dispute) as in this particular situation the rule is unlawful. According to established case law, administrative law courts are most reluctant to carry out such a review. Accordingly, exceptive review is

not an alternative to the option of challenging in court specific aspects of licences, permits and exemptions for wind farms.

188. The above is confirmed by practice. Exceptive review has been tried twice in connection with appeals against *Windpark Noordoostpolder* by arguing before the Administrative Law Division of the Council of State that the new noise standards and norms should not be applied on the grounds of their being unlawful. The Division did not honour this argument on the ground that it must take a most restrictive attitude on exceptive review.[71] The decisions by the Division on the applicability of the (new) noise exposure standards and norms of the Activities Decree of 2011 provide, for that matter, a good illustration of the way in which the Division resolves disputes on wind farms: minimal attention for the arguments of appellants is combined with maximum room for public authorities to persist in their views.

4. Enforcement of compliance with standards

189. Whether or not there exists an infringement of the statutory noise standards and norms can now only be decided by a public authority. In the past (before 2011) when the previous noise standards and norms applied, a local resident could ascertain for him- or herself whether non-compliance with the norms existed by carrying out an immission measurement on the outer wall of his or her home. On that basis he or she could subsequently request competent authorities to take enforcement measures against the operator of the wind turbines concerned. He or she could also opt to bring an action against the operator of the wind turbines before a civil court on the ground that the operator had acted illegally or unlawfully. Such an approach, enabling an interested party to establish for him- or herself whether a norm is being violated, complies with article 9, paragraph 3, of the Convention which requires a State Party to ensure that members of the public with sufficient interest have access to a judicial procedure 'to challenge acts and omissions by private persons and public authorities which contravene the provisions of its national law relating to the environment'.

190. The possibility of an individual to ascertain for him- or herself whether a noise norm for a wind farm is being violated no longer exists:

'Enforcement by means of direct immission measurements is virtually excluded because only the Lden-norm is used. (...). Emission characteristics provided by the manufacturer of a wind turbine serve as the starting point for an acoustic investigation. On the basis of the annual average acoustic capacity, the immission level [on the exterior wall of a home. NLVOW] is determined by calculations and then tested against the norms.'[72]

191. In theory this does not limit the possibility for local residents to lodge a complaint about their exposure to noise. Since 2011, however, they can no longer substantiate such a compliant with data that prove plausibly that an infringement occurs in their case as they no longer can carry out immission measurements. This implies that local residents are completely dependent on the willingness of public authorities to conduct an inquiry into the

[71] 8 February 2012, ECLI:NL:RVS:2012:BV3215 and 21 November 2012, ECLI:NL:RVS:2012:BY3691.
[72] Bulletin of Acts and Decrees 2010, 749, page 11.

question whether noise standards and norms are being observed. Moreover, even if the authority concerned carries out an inquiry, that inquiry is based on data provided by the manufacturer on the power output and noise emission levels of the turbine(s), as well as on data recorded by the operator on the turbine's output. On this basis, calculations are performed using general assumptions and models and without taking into account any specific local conditions that may increase noise exposure. As a result, there is a real risk that the calculated noise exposure is lower than the actual noise exposure.

192. If compliance to noise standards and norms is checked, it is in principle carried out only once a year.[73] Local residents are dependent on the willingness of authorities to act on any violations that are found and on the accuracy of data provided by the manufacturer and/or operator. Furthermore, they can only hope that there are no local conditions that increase the actual noise exposure beyond the level that emerges from the calculations.

193. Citizens who are faced with a public authority that refuses to enforce noise standards and norms also have the option of bringing an action directly against the offender on the ground of his or her acting illegally or unlawfully. They may request the court to order the operator to shut down the turbine(s) so that the applicable noise standards and norms are no longer being violated or face a non-compliance penalty. As from 2011, however, this option has also been eliminated as a result of the fact that the noise norm is now in the form of Lden and the impossibility for private persons to prove, in practice, that this norm is being violated (see above paragraph 191).

194. The conclusion must be that local residents living near a wind farm are totally side-lined with respect to the question whether noise standards and norms are being observed and whether enforcement by local authorities - by whatever means - is appropriate. As mentioned before, article 9, paragraph 3, of the Convention requires that members of the public have the possibility to challenge, in administrative or judicial procedures, acts by private persons that contravene provisions of national law relating to the environment This requirement implies that environmental standards and norms should be drafted in such a way that members of the public - if necessary with the help of experts - are able to establish for themselves whether there exists an infringement of a particular standard or norm. The noise standards and norms that apply to wind turbines in the Netherlands do not satisfy this requirement.

V. REDUCTION OF EXISTING RIGHTS

195. Finally, compared to the state of affairs at the time of the ratification and implementation of the Convention by the Netherlands there actually has occurred a reduction of the opportunities for public participation and of the possibilities of judicial review. In the past exposure to noise and shadow flicker was regulated in a local administrative decision, which allowed considerable room for the weighing and balancing of interests in each individual case. This room no longer exists nowadays due to the applicability of generally binding regulations. This is where a conflict occurs with article 3,

[73] Cf the letter by the Regional Implementing Agency Northern Noord-Holland [*Regionale Uitvoeringsdienst Noord-Holland Noord*] dated 30 April 2014.

paragraphs 5 and 6, of the Convention which state that in all three areas - access to information, to decision-making and justice - the States Parties are free to do better than what the Convention requires. The Netherlands has ignored the spirit of this provision by doing the opposite: as far as wind power and wind farms are concerned, it has substantially reduced the existing rights of its citizens.

196. This course of events is also inconsistent with a recommendation of 2005 of the Parties to the Convention to offer better public participation and judicial protection than is minimally required by the Convention and to refrain from any measures that restrict existing rights pertaining to public participation and judicial protection.[74]

[74] Report of the second meeting of the parties, 20 June 2005, ECE/MP.PP/2005/2/Add. 1, sub I, 5. Cf. also communication ACCC/C/2004/4 (Hungary).