ANNEX TO REVISED COMMUNICATION NLVOW OF 9 NOVEMBER 2012

1. INTRODUCTION

1. In support of paragraph 6 et seq. of the Communication this Annex provides additional information on the issue of exhaustion of domestic remedies. The administrative practices of the Netherlands government and other public authorities will be examined in relation to a set of specific cases of decision-making to determine: (a) what domestic remedies were available; (b) which of these remedies were used by the NLVOW and to what effect; (c) what domestic remedies – if any - are still are available to the NLVOW?

2. Three of the cases to be examined below relate to plans and programmes (article 7 of the Convention), while in view of their number, wind farm projects (article 6 of the Convention) will be reviewed more generally. For each case the information presented below will concern both access to justice and participation in decision-making. But first access to information

2. ACCESS TO INFORMATION

3. No specific examples of domestic remedies can be presented in relation to access to information and, more specifically, to support the submission in the Communication (paragraphs 12 et seq.) that the Netherlands government systematically provides biased or incorrect information on wind power and wind farms to the public. As mentioned in paragraph 6 of the Communication, Netherlands administrative law considers the practices of public authorities in relation to the quality of information as “actual conduct” which cannot be challenged in administrative law courts. In other word: there are no cases to present as there are no domestic remedies.

4. Under the Government Information (Public Access) Act [*Wet openbaarheid bestuur*] (which has been amended to implement the Convention insofar as relevant for the Act) the public has a right to request specific information from public authorities. This right has been exercised regularly by the public also in relation to wind power and wind farms and also by the NLVOW (see for example paragraph 13 of the Communication). However valuable this procedure may be to the public also in relation to wind power and wind farms, the right of the pubic to request information from public authorities is no substitute for, and legally quite unrelated to, a right of the public to challenge before a court of law the quality of information provided by public authorities. As was mentioned, in the Netherlands such a right does not exist.

5. The same holds true for the right of the public to file a complaint with the National Ombudsman. Although such a complaint may indeed address the quality of the information provided by public authorities, the National Ombudsman is not a court of law. Accordingly, decisions of the Ombudsman are not based on considerations of law, while these decisions are not legally binding. Even so, several complaints have been filed on the practice of the Netherlands government in relation to decision-making on wind power and wind farms. See paragraph 14 of the Communication for an example. The NLVOW has supported these initiatives by providing information. At present the NLVOW itself is preparing a complaint to the National Ombudsman in relation to information on the website of the Social-Economic Council [*Sociaal-Economische Raad*] (SER).

6. ***Conclusions:*** (a) in the Netherlands there are no legal remedies before a court of law in relation to the quality of information provided by the government and other public authorities; (b) the NLVOW has regularly used a mechanism that is available: requesting additional information under the Government Information (Public Access) Act; and (c) the NLVOW has supported complaints to the National Ombudsman and will shortly submit a complaint of its own. However, (b) and (c) are no alternative for (a).

3. PLANS AND PROGRAMMES

7. At the moment the three most important plans/programmes of the national government in respect of wind power and wind farms are: (a) the National Action Plan for Energy from Renewable Sources of 2010 [*Nationaal actieplan voor energie uit hernieuwbare bronnen*] (hereinafter: Action Plan); (b) the National Policy Strategy for Onshore Wind Power of 2013 [*Structuurvisie Windenergie op Land*] (hereinafter: SvWOL)*;* and (c) the National Energy Agreement of 2013 [*Energieakkoord*] (hereinafter: Energy Agreement).[1]

[1] The Action Plan of 2010 is the implementation by the Netherlands of the EU Directive of 2009 on targets for renewable energy (for the Netherlands 14 % to be reached in 2020); the SvWOL of 2013 identifies 11 areas that, according to the government, are

8. No legal remedies are available to the public once the above plans/programmes were adopted by the government. In the Netherlands the public has no right to challenge plans or programmes before an administrative court of law on the ground that such plans and programmes do not yet have a direct legal effect on the rights of citizens: that effect materializes later if and when a plan or programme is implemented in spatial zoning plans or other binding decisions.

9. In theory, it would be possible to challenge a plan or programme before a civil court of law. However, not only is such a procedure more expensive and is legal representation by a solicitor obligatory, but, more importantly, the chances of success are negligible, the reason being that in cases as discussed here civil law courts usually refer to administrative law courts and yield to administrative law decisions.[2] There is ample case law to prove the point. For this reason, this avenue to challenge the above plans/programmes is hypothetical and it has therefore not been tried by the NLVOW.

10. ***Conclusions:*** (a) once adopted, no legal remedies are available to challenge the above plans/programmes before a court of law; and (b) for this reason, the discussion below will refer only to the drafting of the above three plans/programmes.

3.1. Action Plan 2010

11. The Action Plan did not appear out of thin air, but was based on earlier plans/programmes. See paragraphs 30 and 31 of the Communication. Even so, the Plan also contained significant new elements, for example, the decision that about 40 % of the 14 % EU target should be realized in the sector "electricity production". The decision to focus on electricity production was, and continues to be, a most important cornerstone of wind power and wind farm policies in the Netherlands. There are other examples where the Action Plan not only re-stated earlier decisions, but also introduced new decisions.

12. As with all precursor plans/programmes the government provided no opportunity - none - for public participation in the drafting of the Action Plan. The minister of Economic Affairs convened a number of advisory groups specifically set up for this purpose. Participation in these advisory groups was by invitation only, often at a personal level for specific areas of expertise, sometimes for an organisation with a particular perspective or interest. Accordingly, special interest groups such as the electricity industry, the commercial wind sector and nature and environmental organisations had every opportunity to provide input in the drafting of the action plan - the public at large had none. The minister created a coalition of the willing.

13. During the drafting process there also were no other forms of outreach to the public, nor were there any special mechanisms to seek input from the public. At some point meetings were organized to inform other public authorities, selected NGO's and commercial parties, but there never were meetings directed at the public. The fact that there were no (formal) opportunities for the public to participate also means that the public had no right of access to a review procedure before a court of law, neither in relation to (draft) decisions, nor in relation to the procedure used for drafting the Action Plan. Also, as stated in paragraph 8, there is no access to a review procedure once the Action Plan was adopted by the government.

14. The EU Directive on renewable energy requires Member States to submit periodic progress reports to the European Commission. The Netherlands government has regularly implemented this requirement, but has never submitted any of these reports to public scrutiny before sending them to Brussels. In contrast, in 2013 for the Aarhus Convention the government invited the public to submit comments on a draft progress to the meeting of the Parties to that Convention.

15. At the time of the drafting of the Action Plan the NLVOW did not yet exist. It follows from the above that if it had existed, it would not have had access to any domestic remedies, neither in relation to participation in decision-making, nor in relation to access to justice.

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suitable for large scale wind farm projects (that is: projects with more than 100 MW installed capacity); and the Energy Agreement provides an overall framework for the transition to sustainable energy.

[2] Which have ruled that the Netherlands practice is in accordance with the Convention. See paragraph 42.

16. ***Conclusions***: (a) as was mentioned above (paragraph 8), there are no domestic remedies once the Action Plan was adopted by the government; (b) during the drafting of the Action Plan there was no opportunity for the public to participate; and (c) during the drafting of the Action Plan there were no domestic remedies to challenge (draft) decisions or the procedure before a court of law.

3.2. SvWOL 2013

17. The SvWOL also did not appear from thin air. It too re-stated existing policies and decisions, but it also incorporated new choices and new decisions. Unlike its precursor the SvWOL deals only with wind power and wind farms, identifying 11 specific areas as suitable for large wind farms (more than 100 MW installed capacity). The SvWOL therefore incorporates new decisions.

18. In the drafting of the SvWOL there were two opportunities for public participation: (a) first in relation to a draft document outlining the scope and depth of the Environmental Impact Assessment (EIA) to be carried out; and (b) second, in relation to the draft of the SvWOL itself.[3] Although a large number of comments were received from the public, especially on the draft of the SvWOL (also from the NLVOW), none of these comments led to any substantive changes. At most, there was an attempt to clarify the text or to provide some extra explanation or examples. The comments from the NLVOW were also brushed aside.

19. Paragraph 41 of the Communication outlines the various grounds that were used to dismiss all comments from the public. These grounds came in two main varieties: (a) comments addressed issues that had already been decided earlier (without any form of public participation); or (b) comments addressed issues that fell beyond the scope of the SvWOL or that were regulated by law.

20. The SvWOL was one of the first major plan/programme on wind power and wind farms in which the public was given an opportunity to participate in decision-making. This opportunity was seized by many individuals and organisations, which indicates that there was much interest among the public to participate in decision-making.

21. ***Conclusions***: (a) as was mentioned above (paragraph 8), there are no domestic remedies once the SvWOL was adopted by the government; (b) during the drafting of the SvWOL there were two opportunities for the public to participate; (b) the NLVOW used the second opportunity to submit comments (it did not yet exist when the first opportunity arose); and (c) the comments made by the NLVOW did not produce any result (as was the case with all other comments), essentially because all basic decisions had already been made earlier.

3.3. Energy Agreement 2013

22. The 2013 Energy Agreement is an attempt to bring more consistency in Dutch sustainable energy policies by mobilizing all sectors of society behind an agreed set of targets, principles and actions. It was negotiated within the framework of the Social-Economic Council [*Sociaal-Economische Raad*] (SER), which is an independent advisory body consisting of representatives of employer organisations and labour unions, complemented with independent members appointed by the government.

23. After an extended and sometimes difficult negotiating process, the Energy Agreement was signed in September 2013 by the government and approximately 40 organisations. These organisations include not only employer organisations and labour unions, but also (umbrella) organisations like the “VNG” (all municipalities) and the “IPO” (all provinces), environmental and nature organisations (like Greenpeace) and organisations representing particular commercial interests, including organisations representing the commercial wind sector.

24. Although the purpose was to mobilize all sectors of society, there was no opportunity - none - for the public to participate, nor was there any attempt to reach out to the public or seek input from the public. Accordingly, the Energy Agreement was drafted behind closed door - even in secrecy - by a carefully selected group of organisations, each representing a particular perspective or interest. Other organisations were not welcome and

[3] Unlike the Action Plan of paragraph 11 et seq. the SvWOL was developed by the minister of Infrastructure and Environment (I&E). Plans/programmes developed by I&E are regularly made available for public scrutiny and participation, while this is not the case for plans/programmes developed by the minister of Economic Affairs (EA). See also paragraph 14: the EU progress report (no public scrutiny and participation) falls under EA, while the Aarhus progress report (public scrutiny and participation) is the responsibility I&E. The Energy Agreement (22 et seq.) is also an EA responsibility (and, as will be shown below, for the Agreement there was no public scrutiny and participation).

they were even excluded from providing input into the negotiations. A formal NLVOW request to the SER to allow the NLVOW to participate in the negotiations and discussions on wind power and wind farms was denied as "inappropriate". When the the National Critical Platform on Wind Power [*Nationaal Kritisch Platform Windenergie*] (NKPW) sent a letter on its views with regard to wind power and wind farms, the SER refused to pass that letter on to the negotiators.

25. When at a later stage the NLVOW submitted in writing proposals to the minister of Economic Affairs on the further implementation of the Agreement in relation to wind power and wind farms, the minister did not even confirm having received these proposals. So far the minister has also refused the NLVOW participation in the working party that coordinates the implementation of the Energy Agreement even though environmental and nature organisations and the commercial wind sector are permanent members. The practice of decision-making behind closed doors continues until the present time. There are no legal remedies to challenge this practice before a court of law.

26. There is well-researched study on how the negotiations on the Energy Agreement took place and this study supports the above observations: that the Energy Agreement was drafted in secrecy by a closed group of invited organisations without any public participation and without seeking any input from the public.[4] It is most "remarkable" that the Agreement repeatedly stresses the importance of strengthening support for wind power and wind farms in society and among local residents..

27. ***Conclusions***: (a) as was mentioned above (paragraph 8), there are no domestic remedies once the Energy Agreement was adopted by the government; (b) during the drafting of the Energy Agreement there was no opportunity for the public to participate; (c) a non-legal intervention by the NLVOW to gain access to the negotiations was rejected; and (d) during the drafting of the Agreement there were no domestic remedies to challenge (draft) decisions or the procedure before a court of law.

4. SPECIFIC ACTIVITIES

28. In the Netherlands there are two significant legal differences between decision-making on plans and programmes and decision-making on specific wind farms: (a) in the latter case draft decisions must be submitted to public scrutiny; and (b) the public has the right to challenge final decisions before an administrative law court.

29. To simplify the discussion the following will only relate to wind farm projects with a capacity of 100 MW and more; the national government is in charge of decision-making for such projects. Accordingly, reference will be to general practices and procedures that apply to all wind farm projects, but four specific wind farm projects were used as input: (a) the Windpark [*Wind farm*] Noordoostpolder (under construction); (b) the Windpark Wieringermeer (being planned); (c) the Windpark Drentse Monden/Oostermoer (being planned); and (d) the Windpark Fryslân (being planned).

4.1. Preparation

30. When (for a 100 MW and more wind farm project) the developer is ready to engage the government, he requests the minister of Economic Affairs to apply the National Coordination Regulation [*Rijkscoördinatieregeling*] to his initiative. If the minister agrees (he is not obliged), the result is that the government is in charge of decision-making, implying that the government will develop the spatial zoning plan and that the government will coordinate the issuing of all licences, permits and exemptions.

31. Clearly, the decision to apply the National Coordination Regulation is a most important one, but there is no opportunity for public participation, nor may the public challenge the decision before a court of law. Not even provinces or municipalities have access to the courts to challenge the decision. Accordingly, there are no domestic remedies in relation to a most fundamental decision - fundamental for the public as it has to deal with the government in The Hague and not with its "own" province and/or municipality and fundamental for provinces and municipalities as essentially they are reduced to implementation arms of the government.

[4] See https://www.groene.nl/artikel/de-herontdekking-van-de-polder (in Dutch).

32. Once the National Coordination Regulation applies, it is customary to set up a working party consisting of representatives from the minister, from the province and the municipality where the planned wind farm is to be located and from the developer of the wind farm project. These working parties coordinate the preparation of all draft decisions.

33. When the NLVOW requested the minister of Economic Affairs to include representatives from the NLVOW or from people living in the vicinity of these (planned) wind farm projects, the minister denied the request on the ground that such representation was unnecessary in view of the presence of municipal and provincial representatives in the Working Parties concerned. Although working parties may decide on issues that have a direct impact on local residents, the public has no opportunity to participate.

34. Often, developers organize informational meetings for people living in the direct vicinity of wind farms. It happens only rarely that such meetings are organized by the government itself. The reason for such absence is that the government considers that it is up to a developer to ensure support for his plan among local residents.

35. As to access to justice, as is mentioned in paragraph 7 of the Communication, there is no independent right of the public to engage a court of law with a complaint on inadequate public participation in the preparatory stages of decision-making. Such a complaint may be included in a complaint against the final decision, but at that stage there is little chance of success.

36. ***Conclusions:*** (a) there are no domestic legal remedies in relation to a most fundamental decision: to apply the National Coordination Regulation to a specific wind farm project; (b) there is no public participation in the preparation of draft decisions on that project; (c) a non legal intervention by the NLVOW to gain access to working parties was rejected; and (d) during the preparation of draft decisions there are no domestic remedies to challenge (draft) decisions or the procedure before a court of law.

4.2. Draft decision

37. The step just outlined results in a draft decision or set of draft decisions. Under a uniform procedure laid down in the General Administrative Law Act [*Algemene Wet Bestuursrecht*] a draft decision (or set of draft decisions) on a wind farm project must be made available for public scrutiny for a period of six weeks and during that period any person or organisation may submit an “opinion” [*zienswijze*] on any part or aspect of the draft decision(s).

38. The NLVOW itself has not submitted opinions on specific wind farm projects as it considers that such opinions had better come from local residents or organisations and not from a national organisation. However, on many occasions the NLVOW has actively and extensively supported local residents and organisations with information and hands-on experience in preparing an opinion.

39. The NLVOW has analysed the effects of opinions filed by local residents and organisations. The conclusion is that for wind farm projects opinions from the public never result in substantive changes to the draft decisions, the reason being that major elements of the draft decision(s) were already fixed in earlier decisions and/or in agreements with the developer. Draft decisions on plans for wind farms are systematically made available for public scrutiny when all substantial decisions have already been made. See also paragraph 36 et seq. of the Communication.

40. The effectiveness of public participation in relation to draft decisions on a planned wind farm is even further reduced by two other developments. The first one is practical and a consequence of the National Coordination Regulation. When this Regulation applies, all elements of the draft decision(s) - spatial zoning plan, building and environmental permits and nature and water licenses and exemptions - are made available to the public in one single package. This package may easily run into several hundred pages, often very complicated and technical in nature. It is not easy and often impossible for an individual to absorb all this information and to develop a well-founded opinion in the six weeks that are available. Hence, the NLVOW supporting local residents in understanding all the information and in developing an appropriate response to the draft decision(s).

41. The second development with a negative impact on public participation is legal and even more important as it amounts to a reduction of existing rights. Nowadays, the two issues that are most essential for local residents are excluded from public participation (totally) and access to justice (largely). Since 2011 rules to limit exposure to

noise and shadow flicker are set in statutory law, implying that they now are no longer determined on a case-by-case basis for individual wind farms. This eliminates all opportunities for public participation, as well as for challenging decisions before a court of law (except perhaps in relation to certain highly technical aspects). The result is that since 2011 the public no longer has a voice and has no rights in relation to the two most important impacts of wind farms on people: noise and shadow flicker. See also paragraphs 67 et seq. of the Communication.

42. Notwithstanding the above observations, the Administrative Law Division of the Council of State has ruled that the procedure op public participation in relation to a draft decision is in accordance with the Convention.[5]

43. ***Conclusions:*** (a) for draft decisions on wind farm projects there is a right of public participation in the form of submitting an opinion on these decisions; (b) the NLVOW has used this right by supporting local residents with the preparation of opinions; (c) the NLVOW has monitored the results of submitting opinions and concludes that these results are negligible; (d) in recent years opportunities for effective public participation in decision making on wind farm projects have been significantly reduced; and (e) the Administrative Law Division of the Council of State holds that in this domain Netherlands practice is in accordance with the Convention

4.3 Final decision

44. When the final decision has been taken by the government on the spatial zoning plan and all licenses, permits and exemptions, the uniform procedure of the General Administrative Law Act provides for the right of the public to challenge this final decision before an administrative law court. For decisions on wind farms that fall under the National Coordination Regulation some special rules apply.

- First, only individuals and organisation that have submitted an opinion on the draft decision have the right to go to court in relation to the final decision.
- Second, in the complaint to the court no issues may be raised that are substantially new, that is: issues that have not been raised in the opinion on the draft decision.
- Third, exceptionally, there is not access to a lower court with appeal to a higher court, but rather just a single court: the Administrative Law Division of the Council of State delivers a first and final verdict.

45. The NLVOW itself has not yet challenged any final decisions on wind farm projects before a court of law as it considers that such actions had better come from local residents or organisations and not from a national organisation. However, on many occasions the NLVOW has actively and extensively supported local residents and organisations with information and hands-on experience in the preparation of documents to be submitted to a court of law.

46. Notwithstanding these limitations on the right of access to justice specifically for wind farms (and selected other projects),[6] the Communication submits that the Administrative Law Division interprets its mandate so restrictively that for cases relating to decisions on wind farms the public has virtually no chance of success. See paragraphs 51 et seq. of the Communication.

47. ***Conclusions:*** (a) for final decisions on wind farm projects the public has the right to challenge those decisions before a court of law; (b) the NLVOW has used this right by supporting local residents with the preparation of documents to be submitted to a court of law; (c) the NLVOW has monitored the results of challenging final decisions before a court of law and concludes that these results are negligible; (d) since 2010 the right of access to justice for wind farm projects has been significantly reduced by limiting the group that can exercise this right, by restricting the arguments to be used and by prescribing a single-court procedure.

5. CONCLUSIONS

48. The overall conclusion is that in the Netherlands: (a) the public has few opportunities to participate in decision-making on wind power and wind farms (both for plans/programmes and for projects); (b) that the opportunities that exist were used by the public, but that this did not result in any substantive changes; (c) that the public's right to challenge decisions on wind power and wind farms before a court of law is equally restricted and is equally

[5] ECLI:NL:RVS:2011:BP1342; and ECLI:NL:RVS:2011:BU7002.
[6] That is: projects falling under the Crisis and Reparation Law [*Crisis- en Herstelwet*] of 2010. This law is designed to speed up decision-making on large scale infrastructural projects with a view to combating the economic and financial crisis of that time.

ineffective; and (c) that in recent years for wind power and wind farms existing rights of the public to participate in decision-making and to challenge decisions before a court of law has been significantly reduced.

49. The NLVOW has used all domestic remedies available to it - few as they are - to the extent possible, while the interventions of the NLVOW met the same fate as virtually all interventions from the public: no result.

50.The Communication requests the Committee to establish that for wind power and wind farms the Netherlands has acted contrary to the requirements of the Convention. As this Annex demonstrates, this non-compliance relates in particular to decision-making on the National Action Plan of 2011, the SvWOL of 2013 and the Energy Agreement of 2013. It also relates, more generally, to decision-making and access to justice in relation to specific wind farm projects and, more particularly, to the post 2010 reduction of existing rights of the public in relation to public participation and access to justice. The Communication emphasizes that non-compliance is systematic, but these cases stand out as examples of practices and procedures that the NLVOW considers in violation of the Convention.