QUESTION 5 ACC TO NLVOW

5. For each of the following judgments please provide:
   (a) The full text in Dutch;
   (b) An English translation of the parts of the judgment that you consider demonstrate that the court did not review the substantive or procedural legality of the decision as required by article 9(2) of the Convention:

   (i) *Windpark Duiven*;
   (ii) *Windpark Tolhuislanden;*
   (iii) *Windpark Noordoostpolder*;
   (iv) *Windpark Ecofactorij;*
   (v) *Windpark Neeltje Jans;*

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NLVOW REPLY TO QUESTION 5

I. Organization of reply

In trying to reply to the above question with the resources available to me (for example, I have no access to a professional translation department) and within the deadline set by the Committee, I have analyzed each of the above judgments with a view to identifying statements or (sub-)rulings that support the allegations of the NLVOW in its Communication of November 2015 to the Aarhus Compliance Committee. Whenever I found a relevant statement or ruling I inserted a comment consisting of two elements: (1) a translation of the relevant sentence or sentences in the judgment; and (2) an observation on the position or view of the NLVOW.

In the Table at the end of this note I will provide an overview of all such comments in each of the five judgments organized in six NLVOW allegations in relation to Dutch legal practices under article 9 (2) and (4) of the Convention and one allegation under a Resolution of the Parties adopted in 2005. Comments of particular relevance have been marked with (!).

For better readability I have added the Table as a separate Excel file.

II. Allegations NLVOW

Broadly speaking the NLVOW Communication submits two allegations in relation to access to justice:

- That Dutch legal practice is not in compliance with the right of the public concerned to a review of procedural and substantive legality; and
- That Dutch legal practice does not meet the requirement that administrative or judicial procedures must be fair and equitable.

The paragraphs that follow in the Communication elaborate these allegations by showing that:

- The Administrative Law Division of the Council of State (hereinafter: ALD) relies, often exclusively, on expert advice that is provided, directly, or indirectly, by commercial developers of wind farms;
- The Division does little, if anything, to ensure equality of arms, e.g. by commissioning independent experts to advise the Division even though the General Administrative Law Act makes this possible;

- The Division is most reluctant to infringe upon the discretionary powers of public authorities so that the Division questions a decision of a public authority only of it is in violation of the law or if the Division considers it "unreasonable" - which is hardly ever the case.
- For members of the public - faced with all the expert advice commissioned by commercial developers and used by public authorities in decision-making - it is most often a bridge too far to prove that a public authority cannot "reasonably" decide what it did decide.

Hence the allegations of the NLVOW that the Netherlands fails to meet the obligations of article 9 of the Convention. The NLVOW also alleges that the Netherlands fails to comply with a 2005 Resolution of the Parties on the protection of existing rights. I will return to this issue in paragraph IV as the European Court of Justice has recently ruled that on this issue the Netherlands did not act in compliance with the Aarhus Convention, which is most remarkable as the ALD accepted the practice in question for many years.

III. Overview of comments

An analysis of the approximately 130 substantive comments I have added to the five judgments in question shows that these comments fall into seven broad categories:

1. In not wishing to take the place of government, the ALD interprets its mandate most narrowly.
   Result: appeals are often declared inadmissible, e.g. on the ground that appellant did not submit an opinion on a draft decision or is considered to have no interest.
2. The reasonableness test is the dominant criterion to rule on procedural and substantive legality.
   Result: appellants are put in a position where they have to prove that a public authority acted unreasonably - all too often a mission impossible.
3. In deciding on substantive legality: one-sided reliance on information of experts of providers.
   Result: appellants without resources to hire experts of their own are most often dismissed with the dictum that the ALD "sees no ground" for their allegations.
4. Absence of interventions to ensure equality of arms for applicants without adequate resources.
   Result: the impacts of points 2 and 3 is not mitigated by interventions of the ALD to ensure a more level playing field even when such interventions are available to it.
5. Taking a position or drawing a conclusion without providing proper grounds or motivation.
   Result: most often the ALD just summarizes expert advice provided by a public authority and then states that it " sees no grounds" to accept an applicant's allegation.
6. Annulling a decision on formal grounds, but allowing correction or upholding status quo.
   Result: on the rare occasions the ALD finds fault with a decision of a public authority, it often leaves the status quo arising from that decision as it is.
7. Accepting a reduction of rights of the public contrary to a 2005 Resolution of the Parties.
   Result: when the government limited access to justice for projects deemed essential to combat the 2008 crisis the ALD did not intervene - unlike the European Court of Justice.

One glance at the Table in the Annex to this note should suffice to conclude that each of these categories is repeatedly represented in each of the five judgments. Accordingly, they are not anomalies that occur once in a while, but they are systemic, part of a pattern that is consistently present through all these judgments. And that is still to be found in many other ALD judgments up to the present. I am sure that in each and every judgment of the ALD on wind farm disputes I can add the same comments as I made in these five judgments. This including judgments as recent as 2019 and 2020.

The NLVOW submits that in these five judgments all comments in the above categories 1, 2, 3, 4, 5 and 6 support the allegations in the NLVOW Communication that Dutch legal practice does not comply with the provisions of the Convention on access to justice. The fact that the ALD relies almost

exclusively on the reasonableness test to decide on legitimacy puts an applicant in the position that she, he or it must prove that a public authority - minister, provincial government and/or municipality - acted unreasonably. This in itself is already an almost insurmountable obstacle for members of the public (often with limited resources), but that obstacle becomes even more insurmountable as public authorities - with the blessing of the ALD - may freely use elaborate expert reports commissioned by commercial parties to prove how reasonably they act.

And to make matters even worse from the perspective of an appellant with limited resources: the ALD hardly ever intervenes to ensure equality of arms by using its authority to seek independent expert advice or testimony. On the contrary: see comment [ak59] in the Noordoostpolder judgment in which the ALD explicitly states that there are no reasons to question the independence or impartiality of expert reports provided by commercial parties. Or see [ak69) in the same judgment: the ALD "sees no ground" to accept an allegation of an applicant as that appellant had failed to submit an expert report.

The NLVOW also notes that in an earlier decision the Aarhus Compliance Committee was critical in relation to the reasonableness test. See paragraph 64 of the NLVOW Communication and comment [ak18] in the Noordoostpolder judgment.

The impact of all this can be seen in the Neeltje Jans case. Here - exceptionally - the applicant had the resources to also seek expert advice. As expected, that advice often contradicted the advice provided by the defendant, that is provided "in name" as in reality the advice used by the municipality came from experts commissioned and paid by commercial developers. As a result the Neeltje Jans judgment shows that in this case the ALD really had to evaluate and weigh conflicting opinions and positions. See the comments in the attached Table marked with a #. In this case the ALD could not rely on its standard phrase that "there are no grounds" to rule against a public authority.

Which phrase actually is a self-fulfilling prophecy if appellants do not have the resources to present their own "grounds", as the ALD seems perfectly satisfied with the grounds submitted by public authorities/commercial parties and as the ALD sees no reason to find out for itself whether or not there may be other or conflicting grounds.

To sum up: in the Netherlands access to justice is all too often a impressive façade: looks good from the outside, but on closer inspection - see my 130 comments - turns out to be an empty shell.

IV. Ruling European Court of Justice

In the Noordoostpolder judgment there are statements that seem to indicate that the ALD is not always aware of the Aarhus Convention and/or EU law.

- On the Aarhus Convention: see comment [ak16] on a ruling of the ALD to the effect that under the Spatial Planning Act non-compliance with an obligation to organize public participation has no consequences for the legitimacy of the planning procedure and the Land-use plan. No reference is made to the obligations of the Netherlands under the Aarhus Convention and to the question whether or not the Spatial Planning Act complies with the obligations of the Netherlands under that Convention.
- On EU law: see the comments [ak20] and [ak24] where the ALD takes the view that an EU Directive "may be relevant" for the interpretation of national provisions designed to implement that Directive. That view is legally incorrect as the European Court of Justice makes clear in paragraph 75 of its decision ECLI:EU:2020:503: the interpretation of a concept of EU law is not up to national courts, but is a matter for the ECJ itself.

However, that the ALD on occasion mis-interprets EU law by its strict focus on national law has recently become clear in a case that has direct implications for the issues under review here: access to justice and reduction of rights. In a case of a local NGO on the treatment of pigs in livestock farming a local judge - not the ALD - decided to request a preliminary ruling of the European Court of Justice on a number of questions. These questions dealt with the interpretation of article 9 (2) of the Aarhus Convention. By way of background:

- The "Stichting Varkens in Nood" ("Foundation Pigs in Distress") had failed to submit an opinion on a draft decision of the municipality of Echt-Susteren to allow the construction of a pig farm building.
- In the case before the local administrative law court the municipality argued on the basis of the Crisis and Recovery Act that the Stichting was not admissible as it had failed to submit an opinion.
- In reply the Stichting argued that being declared inadmissible on these grounds would be in violation of article 9 (2) of the Aarhus Convention. Whereupon the local judge decided to request a preliminary ruling from the European Court of Justice.

In a rather densely written judgment (ECLI:EU:C:2021:7) the European Court of Justice ruled *inter alia* as follows:

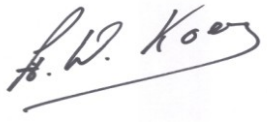
> Article 9(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters …. must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the 'public concerned' referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure.

To summarize the essence of the decision: access to justice under article 9 (2) of the Aarhus Convention may not be made conditional upon the party involved having participated in the earlier phase of political decision-making. In other words: article 9 (2) requires that a member of the interested public must have access to a court of law regardless of whether or not that party submitted an opinion when the draft decision was made available for public scrutiny.

More can be said about this ruling, but the point to be made here is that for many years and in many judgments the ALD declared certain appellants inadmissible on the ground that they had not submitted an opinion in relation to the draft decision in dispute. Of course, this occurred not only in the Noordoostpolder judgment - see comments [ak8] and [ak9] - but also in many other case since then. Faced with the ruling of the European Court of Justice the ALD has recently stated that is up to the government and parliament to change the law and that meanwhile it will not "hold it against" a defendant if she, he or it has not submitted an opinion on the draft decision.

All in all not just a victory for the continued relevance of the Aarhus Convention, but also confirmation of the NLVOW's allegation that the ALD does little to promote and guarantee access to justice as set forth in that Convention. On the contrary - alas.

On behalf of the NLVOW,



Prof.em. dr. Albert W. Koers

ANNEX

COMPARATIVE TABLE OF COMMENTS NLVOW IN RELATION TO FIVE DECISIONS OF THE ADMINISTRATIVE LAW DIVISION (ALD) OF THE COUNCIL OF STATE ON WIND FARMS

Allegations NLVOW on ALD not complying with article 9 (2) and 9 (4) of the Convention	Relevant para's Communication NLVOW	Comments NLVOW in margin margin ALD decision Noordoostpolder [ak..]	Comments NLVOW in margin ALD decision Neeltje Jans [ak..]	Comments NLVOW in margin ALD decision Tolhuislanden [ak..]	Comments NLVOW in margin ALD decision Duiven [ak..]	Comments NLVOW in margin ALD decision Ecofactorij [ak..]
In not wishing to take the place of government, the ALD interprets its mandate most narrowly	60, 61, 62, 63, 65, 66	7, 8 (!), 9 (!), 11,12, 13, 14 (!), 16 (!), 20 (!) 21, 24 (!), 45, 63 (!), 64, 24, 45, 63 (!), 64	20	6, 7,	6	
Reasonableness test is the dominant criterion to rule on procedural and substantive legality	61, 62, 64, 65.	18, 19, 22, 23, 24, 27, 28, 29, 30, 31, 33, 39, 40, 44, 48, 50, 51, 54, 55, 58, 65, 67, 68, 70, 72	8	8, 12, 13, 14, 16	7, 12	
In deciding on substantive legality: one-sided reliance on information of experts of providers	53, 54, 57, 58, 59, 62, 65	15, 18, 25, 26, 27, 30, 32, 33, 35, 36, 37, 38, 39, 41, 42, 43, 51, 53, 56, 59 (!), 60, 61, 62, 67	6, 8, 9, #10, #11, #12, #18, #19, 20, 21	8, 10, 11, 12, 13, 14	8	#6, 10, 11, 12, 13, 14
Absence of interventions to ensure eguality of arms for applicants without own resources	55, 56, 57, 58, 59, 62, 63, 65.	14, 15, 25, 26, 32, 33, 35, 36, 37,38, 42, 43, 51, 53, 36, 37, 38, 42, 43, 51, 53, 57, 59 (!), 69 (!)	6, 9, 10, 11, 12, 15, 17, #18, #19, 20, 21	9, 10, 11, 12, 13, 14	8	7, 8, 9, 12, 14, 19
Taking a position or drawing a conclusion without providing proper grounds or motivation		15, 26, 57	#7, #11, #12, 13, 14, 16	7, 17	7, 9, 10, 11	7, 8, 9, 10, 15, 16, 17, 18
Annulling a decison on formal grounds, but allowing correction or upholding status quo		73 (!), 78	24			
Allegations NLVOW on ALD not complying with 2005 Resolution on reduction of rights						
Accepting a reduction of rights of the public contrary to a 2005 Resolution of the Parties	67, 68, 73, 74, 75	46, 47, 49, 52				
The # sign indicates that in this instance there is an exception: here the ALD acted correctly, that is: contrary to the allegation in question						