Opening statement of

THE NETHERLANDS

79th meeting of the Aarhus Convention Compliance Committee

Discussion of the Communication concerning compliance by the Netherlands in connection with public participation provisions of the Convention in connection with wind turbines

(ACCC/C/2020/181)

14 June 2023

INTRODUCTORY STATEMENT OM BEHALF OF THE NETHERLANDS

Head of delegation The Netherlands – Jeroen Gutter (Legal Counsel International law division to the Dutch MFA)

Introduction

We would like to thank the Aarhus Convention Compliance Committee for giving us the opportunity to provide the Committee background information and additional explanations on the communication at hand.

The communication at hand relates to wind farms in the Province of Utrecht. Although this communication is focused on wind farms within the Province, the Government notes the similarities between this communication and the communication of the Netherlands Association of People Living in the Direct Vicinity of Wind farms (NLVOW) which deals with wind farms on a national level.

Nevertheless, this communication deals with participation in decision-making under articles 6 and 7 of the Convention. In this opening statement, I will briefly highlight the aspects of this communication, including, but not exclusively, on the admissibility of this communication. For more information, I hereby refer to the observations of the Government provided to the Committee earlier in which the Government set out the arguments in more detail.

Before turning to communication-specific aspects, I would like to introduce the Dutch Delegation.

- *Marieke van der Haar: Senior Legal Advisor to the Province of Utrecht*
- *Sara Spano: Legal Advisor to the Province of Utrecht*
- *Michelle Duin: Legal Officer, International law division to the Dutch MFA*
- *Jeroen Gutter: Legal Counsel, International law division to the Dutch MFA*

Unfortunately, several of our colleagues from the Ministry of Economic Affairs and Climate Policy, as well as the Ministry of the Interior and Kingdom Relations were not able to join us in person today. They will instead participate online. We are aware of paragraph 36 of the Guide to the Compliance Committee, in which it is stated that only representatives of the Party concerned, and communicants and observers that are present in person at the hearing will be able to speak during the hearing. Our colleagues who are joining us online today will nevertheless facilitate the Dutch Delegation, and thereby also the Committee, in answering any questions the Committee may pose, which I will, as the Head of Delegation, convey here in person. We hope that the experiences learned during the COVID-19 period will be helpful, but we kindly request your patience with this set up.

I will now start with admissibility, after which I will delve more into the merits part of this communication.

I. Scope

Chairperson, on the scope of the issue at hand, the Government wishes to note the following. The Government is convinced that it is within the competence of the Committee to determine the scope of its assessment and to determine what it wishes to focus on in a specific case. However, the Government wishes to note that the Aarhus Convention was ratified by the Netherlands on 29 November 2004 and only entered into force on 29 March 2005.

The documents in this case, such as the BLOW, the Wind Energy Action Plan 2002-2010 and the Utrecht Wind Plan 2002 predate the Convention's entry into force with respect to the Netherlands, as these documents date from 2001, 2002 and 2002 respectively. In the view of the Government, these do therefore not fall within the Convention's scope and obligations, including the assessment of the 50 MW at hand.

Secondly, Chairperson, the Government wishes to note that the present communication reflects a similar communication submitted by NLVOW (case 133) on 9 November 2015, to which the Government responded on 11 August 2016 . A hearing took place in Geneva on 6 November 2018. The case is still pending before the Committee.

- The issue before the Committee in communication no. 133 is whether the Convention has been complied with at the national level in connection with access to information on, public participation in decision-making, and access to justice in matters concerning wind turbines in the Netherlands.
- The outcome of the Committee's findings on communication no. 133 would have been beneficial to the Government in how to deal with the communication at hand.

II. With regard to Admissibility:

Chairperson, the Committee has repeatedly stated that it "should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress".

In this case, the application has not shown that the communicants have exhausted all legal remedies. Notably, communicants did not submit a request to the court for a ruling on the legality of the higher-level decisions through incidental review. Also, the communicants have not made use of the opportunity to initiate a civil law case for tort.

As the Committee itself has stated, "[I]t is important that the Party's own administrative and judicial review procedures have the opportunity to rectify any defects in its domestic procedures before a case is brought before an international review mechanism such as the Committee." By not making full use of the domestic legal remedies at its disposal, the communicant deprived the Government and the Committee of exactly that opportunity.

Furthermore, The fact that administrative law courts often have held that the decision-making process for decision-making on actual wind farms is in line with the Aarhus Convention, does not mean that administrative courts, including the Council of State, do not thoroughly review the cases before it. Indeed, the Government strongly emphasizes that a number of references to judgments of administrative courts clearly demonstrate that the legal remedies offered by the Netherlands' legal system are sufficient. For such a far-reaching conclusion, one would need to take into account all the facts of the case and the particular context. It is in this light even more important to exhaust the remedies available so as to offer the relevant authorities, such as administrative courts, the opportunity to review a specific case. For the law to develop, whether be it in favour of the communicants or not, the Government argues it is beneficial or helpful for citizens to make use of the remedies available.

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

III. <u>With regard to Participation in decision making:</u>

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

The Government submits that clear regard must be had for the specific requirements the Convention imposes for each phase in this trajectory. In the view of the Government, articles 7 and 6 of the Convention contain provisions for (proposed) policy of which at least the main contours of the envisaged policy are clear, draft plans, draft programmes and proposed specific projects, like the activities listed in annex I of the Convention.

Chairperson, the communicant furthermore claims that public participation organized by the Government with regard to decision-making on wind energy has no real effect. It supports this claim

with the argument that it sees no substantive changes in the particular documents or policies after public participation.

The mere fact that the Government or competent public authority does not accept and implement a comment made in a public participation procedure does not mean that the comment was not taken seriously. As your Committee has stated numerous times, “the Committee confirms that the requirements of [article 6, paragraph 8, of] the Convention that public authorities take due account of the outcome of public participation does not amount to a right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always required”. It means that public authorities must have taken due account of the outcome, which the Government has done in the past and still does with regard to decision making in wind energy.

Specifically with regard to concrete wind turbine projects, stakeholder consultations and participation procedures take place at an early stage in the decision-making process with regard to draft documents, as well as final documents. Public authorities are obliged under Dutch law to take due account of the outcome of these procedures and they take this obligation very seriously. Public participation practically always leads to adjustments of the (draft) decision – some minor, some more substantive, as appears from several adjustments in decisions for wind turbine projects. For instance, following the public participation for the Utrecht Regional Plan 2005-2015, the intention to definitively appoint specific locations for wind turbines was changed to the designation of indicative areas where further decision-making was required. Also, several locations draft plans were removed due to lack of public support.

Chairperson, a final word with regard to the role of initiators of wind turbine projects. The public has been engaged at various stages throughout the procedures. They have had opportunities to express their views during the formulation of the Structural Vision for Wind on Land, the Utrecht Provincial Regional Plan and the Provincial Spatial Structural Vision / Policy Strategy Utrecht, and other decisions that gradually developed plans for the installation of wind turbines in the province of Utrecht. The initiators became involved at the final stage of this process, when the exact location for the wind turbines had to be decided. Cooperation with the initiators was necessary to ensure the exact location was indeed suitable for the activity. This cooperation is part of the preparation for the decision. For the decision itself the regular procedure is followed and the final decision was made after taking into account views of the public.

IV. Environment and Planning Act

Chairperson, the Government affirms that the Dutch legal system at hand complies with the Aarhus Convention, and the decisions mentioned by the communicants adhere to Articles 6 and 7 of the convention. Nevertheless, Dutch law is not static.

Namely, on the first of January 2024 a new act on environment and spatial planning will enter into force after twelve years of preparation. Thirty (30) acts and even more orders in council, regulations and decisions on environment and spatial planning are combined in one coherent framework. The act also incorporates or re-implements relevant existing international conventions to which the Netherlands is party, like the Aarhus Convention and European legislation in a renewed system of environmental decision-making. The act provides for a coherent framework of participation in a so-called layered system, starting with participation in general policy-making in accordance with article 7 of the Aarhus Convention, and ending with public participation in specific decisions to permit specific projects in accordance with article 6 of the Aarhus Convention. This is for a great part a codification of the existing system.

Chairperson, I will give a very brief summary of the new system.

- The national env*ironmental strategy* is the starting point. This strategy contains the main points of the comprehensive policy for the physical environment on a national level.
- Programmes include an elaboration of the policy to be pursued for the development, use, management, protection or preservation of the physical environment and measures to achieve objectives for the physical environment.
- Environmental strategies and programmes shall be considered on all decentralized levels - province, county, and water authority.
- For permission in a legal sense, a decision is necessary. This often concerns a so called project decision. This is a permit to execute, operate, or maintain a project.

Environmental strategies, programmes relating to the environment, as well as project decisions will be prepared in accordance with the uniform public preparatory procedure which is set out in part 3.4 of the General Administrative Law Act. Anyone can present its views. As in the current legislation, this procedure provides for the public participation referred to in the articles 6 and 7 of the Convention.

In the new legislation, prior to the application of the uniform public preparatory procedure, a participation process is provided. This process provides for involvement of administrative bodies, citizens, companies and organisations in an early stage of the decision-making process.

Thus, this new framework provides appropriate involvement and participation of the public. This framework has been designed over the past 10-15 years. The Government highly values the involvement of the public in decision-making in relation to the living environment.

All governing bodies, the national government as well as decentralized governments, have to take into account the competences of other governing bodies in the execution of their own competences. This means, for example, that with the determination of a programme, a province has to take into account its own spatial strategies, as well as the national environmental strategy and possible national programmes and municipal regulations – as this is what good governance requires.

Such an approach makes it possible to ensure a funnelled decision-making process.

Chairperson, as I mentioned earlier, the current legislation meets the criteria of the Convention and in the near future the new framework of the Environment and Planning Act consolidates opportunities for participation of the public.

V. Conclusion

Chairperson, in this statement, as in the previous communications with your Committee, it has been impossible to address each and every point made by the applicant.

As a matter of principle, chairperson, and while the Government very much supports and encourages the correct implementation of the Convention and, as a State Party, wants to facilitate the Committee as much as possible in fulfilling its tasks, the Government would like to emphasize that it would appreciate it, should the Committee decide to first deal with a particular/prior communication on this topic, before handling a similar/later communication on the same topic.

Moreover, the Government is of the opinion that the current legislation is compliant with the Convention, but also wishes to note the forward-looking character of the compliance with the Convention. In this sense, it draws the attention of the Committee to the new Environment and Planning act that will enter into force as of 1 January 2024, re-implementing, among others, our international undertakings.

Thank you.