Closing 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

Chairperson, thank you once more for the opportunity to provide you with background information and additional explanation on this communication. As Party concerned, we wish to highlight several elements which were discussed today either in detail, or more generally. In order to provide the Committee the full picture, we like to highlight a number of points.

First, even though the Government is aware of the admissibility of the case, and fully respects the Committees decision in that respect, as a State Party to the Convention which also pertains to access to justice, the Government still wishes to note the following to provide the full picture on access to justice.

- On the administrative level, the applicants could have requested the court to decide whether the decision was wrongly based on the underlying plans, such as the Regional Plan for Utrecht 2005-2015 and the Provincial Spatial Policy Strategy 2013-2028 (spatial policy rules), because of an alleged breach of a higher rule of law or a general principle of law. This is a so-called incidental review (in Dutch: *exceptieve toetsing*).
- In case the court would find a breach of law in such an underlying plan, which forms the basis for the subsequent concrete decision, the plan could be declared void. This would lead to the subsequent decision also being void due to either lack of legal basis of lack of adequate reasoning.
- This was for example done in a court case concerning a permit for a solar park in which was contested that the underlying Regional Plan was not published in accordance with the rule of law. The court subsequently subjected the publication of the Regional plan to incidental review (and ruled that the Regional Plan was published in accordance with the rule of law)(ECLI:NL:RVS:2020:2378).
- Incidental review was also done in a court case concerning a permit for a windfarm in which was contested that the general rules on the exploitation of wind turbines in the Activities Decree (*Activiteitenbesluit milieubeheer*) were not established in accordance with EU-directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment *(SMB-richtlijn)* and the case-law Nevele (ECLI:EU:C:2020:503) (ECLI:NL:RVS:2021:1395). In this case the court ruled that under these general rules an environmental impact assessment as defined in article 3, subsection two, under a, of Directive 2001/42/ should have been carried out. The Court ordered that the permit was not established in accordance with the rules laid down in the General Administrative Law Act and that thus the permit could not have been granted on the basis of these rules.

- These examples show that administrative courts meet the standards of the Convention, as an administrative judge assesses the cases that lie before it in substance.
- The Government is able to provide the Committee with several cases in which the implementation and compliance with the Aarhus Convention is taken into account by administrative courts. The outcome of one of these cases has been that two legal provisions have been set aside in the so called "varkens in nood" judgement (pigs in distress) (C-826/18 en ECLI:NL:RVS:2021:786, ECLI:NL:RVS:2021:953).The Government is willing to provide the Committee examples of such cases in writing. These cases show that the Aarhus Convention is an integral part of our domestic legal order.
- Furthermore, the Government wishes to emphasize that civil proceedings are possible. There are cases exist brought before the civil courts in environmental matters (in the past). One very famous case is, which I think everybody is aware of, the Urgenda case.
- Nevertheless, we hear what the communicants state on civil proceedings and costs. Despite this was not a matter of discussion during these hearings, we wish to note that the issue at hand is more nuanced. Amongst others, (the Duch legal system provides for) (there are) possibilities to obtain legal aid. Should the Committee be interested in receiving more information on this issue, the Government is able to provide additional information in writing.

Secondly, Chairperson, one of the most prominent points in this communication at hand is the adjustment from 50 MW to 65,5 MW. In this respect, the Government wishes to make the following points.

- As my colleagues explained, these adjustments were embedded in plans, draft plans, draft revisions, and revisions themselves. The Government will provide the Committee with a timeline in which the sequence of events will be clarified and visualised.
- As outlined before in our opening statement, even if such a target is embedded in a plan, revision or partial revision, this does not mean the target is set in stone.
- In fact, more and larger indicative areas have been designated than necessary to achieve this objective. Therefore, there was a genuine possibility of deciding not to install wind turbines in a particular indicative area. Moreover, municipalities had a say in this. Municipalities attached great value to gaining acceptance (*draagvlak)* amongst their residents. Furthermore, the possibility of deciding not to build wind turbines is evident from the fact that the target set in 2013 to achieve 65 MW of wind turbine capacity by 2020 was not met.

Only 34 MW has been realized thus far. Many reasons may exist for the realisation of only 34 MW, such as objections from municipalities or from the public itself.

- The current situation reflects the preference of the province of Utrecht to determine the locations for wind energy only with the support of the municipalities and the public concerned. Several municipalities have chosen not to initiate or to discontinue the necessary procedures, in part because of views expressed during public participation and other forms of public opposition.
- Furthermore, the competent authority has the discretionary power to *not* adopt a (local) zoning scheme or grant a permit if the competent authority is of the opinion that the draft (local) zoning scheme or requested permit is not in accordance with the applicable laws (article 3.1 of the Spatial planning act (*Wro*).

Thirdly, the communicant referred to Autena situation/case and the lack of public participation.

- Autena concerns only three wind turbines which means that it falls under the national obligation to assess whether an environmental impact assessment is necessary. In this assessment, it was determined that this particular windfarm did not have any significant environmental effects and is thus not subject to an environmental impact assessment. This in turn means that public participation in the sense of article 6 of the Convention is not applicable as point 20 of Annex I is not applicable. The Government wishes to point out to the Committee the findings in communications no. 2010/45 and 2011/60 (UK) and 2010/50 (Czechia). Nonetheless, public participation in accordance with article 6 of the Convention was also provided for in this particular (Autena) case, as is mentioned before.

Fourthly, Chairperson, the communicant noted that absolutely no public participation was possible and that this was evident from the (anterior) agreements between initiators and municipalities. On this, the Government wishes to note as follows.

- The conclusion of such agreements are standard practice and necessary so as to ensure that, when all plans are finalised – for which the public had been involved through public participation - the plan can indeed be executed and that the initiator is responsible for covering the costs of, among other things, the preparation of the draft plan and the necessary environmental studies. However, the fact that such an agreement is reached or concluded, does not mean that this agreement is unconditional, as the communicants put forward by pointing at article 4 of the agreement between initiators and the municipality of Vianen. With reference to this article 4, the Government wishes to point out that in its paragraph 2 it is stated that parties to the agreement have the possibility of “opting out”.

- I hereby quote the paragraph: “if public-law obstacles arise which do not allow for the unaltered implementation of the Construction Plan and/or the implementation of the associated public utility facilities, or do not allow for them in a timely manner, the Parties will immediately consult with each other regarding the measures to be taken at that time”.
- Thus, this is conditional to the outcome of formal decision making procedures, including public participation and the outcome of administrative procedures.
- The foregoing shows that this agreement is solely an obligation of conduct, rather than of result.

Furthermore, the communicant the Government disagrees with the interpretation by the communicant of the ruling of the Council of State about the zoning scheme for windpark Autena. The ruling simply states that 3 locations were researched, of which Vianen was the most suitable. Applicant had not contested that. Additionally, the location of Vianen was designated in the Provincial spatial policy plan. The Council of State took all that in consideration and concluded that the location of Vianen could have reasonably been chosen the location of Vianen. This therefore does not mean, as communicant states, that the location of Vianen was ‘fixed’ or could not be challenged in participation or in Court (which was done).

Finally, Chairperson, I would like to address a question put forward by the Curator. Regarding his question on the ‘agreement’ on wind power made in 2001 between the central government and the organization of provinces (IPO), I would like to remark that this arrangement was made in a preliminary stage and thus does not contain [clear] contours of the envisaged policy. These contours were only to be found in the draft plans, draft programmes etc. that were subsequently made and on which the public was consulted in accordance with the requirements on public participation of the Aarhus Convention.

Chairperson, we want to thank the Committee, especially the Curator, the Secretariat and the communicants for posing the questions on this communication. We would like to make use of the opportunity to share a timeline with the Committee and the Secretariat in order to clarify the complex timeline of this communication.