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**COMMUNICATION ACCC/C/2014/124  
REACTION TO THE NETHERLANDS' STATEMENT  
BY LETTER OF 5 NOVEMBER 2019**

**Betreft: Greenpeace/GS (RWE Wob)**

The Netherlands have been arguing that with the Judgements of the Raad van State of 20 December 2017 (ECLI:NL:RVS:2017:1298) and of 24 October 2018 (ECLI:NL:RVS:2018:3459) the Netherlands put an end to the non-compliance with Article 4 put forward in Greenpeace Nederland's complaint to the ACCC.

Greenpeace Nederland contests this view. The non-compliance with Article 4(3) of the Aarhus Convention (Part I of Greenpeace's complaint) is ongoing, meanwhile the non-compliance with non-compliance with Articles 2(3) and 4 of the Aarhus Convention (Part II of Greenpeace's complaint) was not put to an end, not even in part.

**PART I of the Greenpeace Nederland's complaint: the non-compliance with Article 4(3) is ongoing**

The Judgements of the Raad van State the Netherlands relies on, would show that the Netherlands would no longer be in non-compliance with Article 4(3) of the Aarhus Convention where it concerns reliance on the grounds for refusal regarding 'internal communications'. Greenpeace Nederland wrote in its complaint with regard to the Netherlands non-compliance with Article 4(3) the following:

"Meanwhile, the exemption only applies to internal communications and thus does not apply to external communications.

An extension of the exemption of 'internal communications' to third parties with a direct commercial interest in communicating with a public authority constitutes in our view an even more serious non-compliance with the Aarhus Convention"

The Raad van State continues to consider that the 'internal communications' exemption applies to correspondence and communications between officials of a public body with third public and private parties. The new line in the Raad van State's case law regarding the 'internal communications' ground, only exempts communications with a third party, when that third party has an own interest in communicating with the administration. Only then the 'internal communications' exemption would not apply to communications with a third party. In other words, the Netherlands still consider communications with third parties, for example officials of other public bodies or with external experts hired by the public authorities, as falling under the ground for refusal of Article 4(3)(c) of the Aarhus Convention, the internal communications of public authorities exemption. This did not change with the Judgements of the Raad van State of 20 December 2017 and/or 24 October 2018, the 'new line' The Netherlands is relying on in its statement of 5 November 2019. The Raad van State indeed holds in these judgments clearly that communications with external third parties are considered to fall under the 'internal communications' exemption, whenever the third party concerned does not have an own (commercial) interest in the outcome of the internal consultation with the administration concerned. The Raad van State stated the following in its Judgement of 24 October 2018:

*"Documents from external third parties, as mentioned in the legislative history of Article 11 of the Public Access Act, which were drafted for the purpose of internal consultation, can only fall under internal deliberations in case that third party has no other interest than submitting to the administration its opinion with regard to a public matter, based on its own experience and expertise."* (Raad van State 24 October 2018, ECLI:NL:RVS:2018:3459, paragraph 2.4).<sup>1</sup>

But in Greenpeace's view, as expressed in its communication to the ACCC, 'internal communication of public authorities' do not and cannot in any case include correspondence and communications with external parties, whether it is a permit holder, an external advising bureau or officials of other public authorities. In its Judgment of 10 October 2018 (ECLI:NL:RVS:2018:3299) the Raad van State ruled, based on the same line of argumentation as in its Judgment of 24 October 2018 where The Netherlands relies on before the ACCC, that the minister of Economic Affairs was entitled to keep a draft strategic EIA, drafted by a private undertaking, Pondera Consult, confidential under the 'internal deliberations' exemption. It concerned a draft EIA commissioned by the ministry to Pondera Consult. With regard to the draft strategic EIA the Raad van State held as follows:

*3.5 (...) The minister explained at the hearing that he as well as the then competent minister of Infrastructure and Environment commissioned Pondera Consult to advise on the location of the wind farm. Pondera is an independent consultancy company and is to be considered as an external third party advising exclusively in the interest of the before mentioned administrations, and does not have another interest than to express its opinion based on its own experience and expertise. The draft strategic EIA is to be considered as a proposal as to what choice should be made in the involved officials' opinion regarding the location of the wind turbines. (...) The Raad van State agrees with the minister that in as far as the draft strategic EIA differs from the definitive EIA and thus is not yet disclosed, it is containing personal opinions on policy."*

The Raad van State thus ruled that the draft strategic EIA written by a third party qualifies as 'internal deliberations'. The conclusion is that the case law of the Raad van State regarding the 'internal

<sup>1</sup> Original citation in Dutch: "Documenten van externe derden, zoals bedoeld in de geschiedenis van de totstandkoming van artikel 11 van de Wob, die zijn opgesteld met het oog op intern beraad, kunnen slechts onder intern beraad vallen in het geval dat de externe derde geen ander belang heeft dan het bestuursorgaan vanuit de eigen ervaring en deskundigheid een opvatting te geven over een bestuurlijke aangelegenheid."

communications of public authorities' clause is still not in line with Article 4(3) of the Aarhus Convention. This means that submitting a new access to documents request to the province relying on the case law since the Raad van State's Judgment of 20 December 2017 will not lead to the disclosure of all the documents coming from or exchanged with third parties that Greenpeace requested to disclose regarding the power plants for which the province granted environmental permits and that have incorrectly and in breach with Article 4(3)(c) of the Aarhus Convention been withheld. Only the correspondence and communications between RWE, NUON and the province would fall under the scope of the new case law of the Raad van State. There were many communications between the province and officials of other administrations and between the province and external experts that have been qualified by the province as 'internal deliberations', whereas it is clear that it concerns communications with external third parties. Greenpeace specifically mentioned in its communication to the ACCC that the exemption of Article 4(3) of the Aarhus Convention does not apply to external communications and that the province thus has been acting in non-compliance with Article 4(3) of the Aarhus Convention. Furthermore Greenpeace specifically pointed in its communications at communications with third parties with a direct commercial interest in the communication, such as RWE and NUON, the permit holders. But it is clear that external consultancy bureaus also have an own commercial interest in advising public authorities, as they are paid for their advise, as was the case for Arcadis, the ecological consultant regarding the effects of the power plants and Groningen Seaports. Furthermore, Greenpeace Nederland has listed as an example under point 5 of its Response of 20 January 2016 to the ACCC's questions, the exchange of e-mails and documents between the province and the ministry of Agriculture and Nature, including external advise on the ecological effects and noise of the power plants. As the Raad van State continues to qualify communications with external third parties (private persons, companies and officials from other public authorities) as falling within the grounds for refusal regarding 'internal deliberations', is it continuing to act in non-compliance with Article 4(3) (c) of the Aarhus Convention, even taking into consideration that since the Judgment of 20 December 2017 the Raad van State does not consider communications with permit holders any longer as falling under the exemption of 'internal deliberations'.

The conclusion is that the non-compliance with Article 4(3) of the Aarhus Convention is ongoing, so that the non-compliance described in PART I of Greenpeace Nederland's communication remains unresolved.

## **PART II of the Greenpeace Nederland's complaint: non-compliance with the Articles 2(3) and 4 of the Aarhus Convention**

Documents relating to the 'absence of alternative solutions' and 'imperative reasons of overriding public interest'-test under the Habitats Directive have still not been qualified as environmental information under Article 2(3) of the Aarhus Convention by the Dutch authorities. It is clear and without doubt that it concerns information that is required before a nature permit can be and was granted for the construction of the power plant of RWE in the province of Groningen, qualifies as environmental information. As it concerns reports, studies, correspondence and documents exchanged between a private consultancy, ECN, and the province and between the province and the ministry of Agriculture and Nature it is crucial to be aware that the new case-law of the Raad van State continues to qualify such information as 'internal deliberations' that may be kept confidential as 'internal communications of public authorities' in the sense of Article 4(3)(c) of the Aarhus Convention, also under the new line exempting communications with commercially interested permit holders such as RWE and NUON.

From the above cited Judgments of the Raad van State of 10 and 24 October 2018 it is beyond doubt that documents exchanged with officials of other public bodies and with external third party experts, such as Arcadis and ECN, for example regarding advise commissioned by the administration concerning the assessment of environmental impact of the involved power plants, are still qualified by the Raad van State as 'internal deliberations' that can be kept confidential. It thus is clear that The Netherlands' non-compliance with the Articles 2(3) and 4(3)(c) is ongoing, where it concerns PART II of Greenpeace Nederland's communication.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'BKloostra', is positioned above the typed name.

For Stichting Greenpeace Nederland  
Bondine Kloostra