



Attn. Ms. Fiona Marshall

Secretary to the Aarhus Convention Compliance Committee

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**Our reference**

MinBuZa-2019.509614

Date 02-08-2019

Re Ref. Communication ACCC/C/2014/124

Dear Ms Marshall,

I am writing on behalf of the Netherlands to inform you about relevant amended case law of the Administrative Jurisdiction Division of the Council of State ('the Administrative Jurisdiction Division') in a case regarding the construction of two power plants (ACCC/C/2014/124).

This case concerned, inter alia, the question of law whether refusing access to information on the grounds of 'internal communication', whereby the documents requested contain communications between the responsible authority and third parties, is in compliance with the Aarhus Convention. Under Dutch law (section 11 of the Government Information (Public Access) Act), where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein. In cases – such as the present one – that involve environmental information, the administrative authority must weigh the interest of protecting personal opinions on policy against the interest of public disclosure. In certain circumstances consultations with third parties may be designated as internal consultation if they are conducted for the purpose of preparing a decision by the administrative authority. As the Dutch government has explained in previous documents, in the case that resulted in Greenpeace's communication the consultation between RWE and the Provincial Executive of Groningen at the time of the permit application was not designated as internal consultation, but the consultation on the application for judicial review of the decision to issue the permit was. The Provincial Executive of Groningen (partly) based its refusal to provide personal opinions on policy contained in the documents on the rule concerning internal consultation. On 16 July 2014 the



Administrative Jurisdiction Division dismissed Greenpeace's application for judicial review of this refusal (ECLI:NL:RVS:2014:2621). Further to this judgment Greenpeace submitted a communication against the Netherlands to the Aarhus Convention Compliance Committee (ACCC). On 16 August 2017 (one year after the ACCC hearing of 29 September 2016), the Administrative Jurisdiction Division declared the judgment of 16 July 2014 final and unappealable (ECLI:NL:RVS:2017:2211).

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However, the Administrative Jurisdiction Division has since departed from its case law where it concerns the interpretation of the term 'internal consultation'. In a judgment of 20 December 2017 it considered, for the first time, 'that – unlike in the past – it is of the opinion that a consultation loses its internal character if it involves an external third party that is promoting its own interest and, as such, plays a role in the consultation' (ECLI:NL:RVS:2017:3497). This new line has now further crystallised, and has been reaffirmed in judgments such as ECLI:NL:RVS:2018:3459 (24 October 2018). In this judgment the Administrative Jurisdiction Division took the line that documents of external parties could be deemed internal consultation only if the external third party had no interest in the matter other than giving the administrative authority its opinion on an administrative matter on the basis of its own experience and expertise.

The proceedings on Greenpeace's request for information continued after the Administrative Jurisdiction Division's judgment in 2014, because the Division ordered the Provincial Executive of Groningen to better explain its reasons for refusing the request. In this connection Greenpeace had also argued that, even if the documents did constitute internal consultation, the Provincial Executive of Groningen had failed to recognise that some documents contained information relating to environmental emissions. After the Administrative Jurisdiction Division held in its judgment of 16 August 2017 that some documents did indeed contain information relating to environmental emissions, the Provincial Executive of Groningen decided, after weighing the interests anew, to disclose the documents containing information on emissions, in so far as this had not yet been done. RWE lodged an application for judicial review of this decision. During appeal proceedings on 3 July 2019, the Administrative Jurisdiction Division held that it was permissible for the Provincial Executive of Groningen to decide that the importance of public disclosure of the emissions information outweighed the confidentiality arrangement it had with RWE, and upheld the public disclosure of the documents in so far as they concerned information related to emissions (ECLI:NL:RVS:2019:2209). Greenpeace raised the issue of the amended case law on internal consultation during the hearing of 23 November 2018 on RWE's application for judicial review of the public disclosure of the documents containing information relating to environmental emissions.



At the hearing the Administrative Jurisdiction Division took the position that, since its judgment of 16 July 2014 is final and unappealable, the considerations on internal consultation in these proceedings cannot be debated anew.

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The Dutch government wished to inform the Committee about these developments further to the new case law, which has since been reaffirmed, and the conclusion of the domestic legal proceedings concerning Greenpeace's request for information from the Provincial Executive of Groningen. In the light of these developments, it is the Dutch government's position that the consultation between the Provincial Executive of Groningen and RWE cannot, given the current thinking, be designated as internal consultation. This does not change the fact that Greenpeace's request for information has since resulted in a final and conclusive decision by the Provincial Executive of Groningen. For the parties concerned it is clear how future information requests involving third parties will be assessed. It is up to the parties concerned, in so far as they still have an interest in the matter, to determine whether they wish to take action in the light of this new case law.

Yours sincerely,

René Lefebber  
Legal Department  
Head of the International Law Division