



Ms. Evgeniya Goriatcheva
Registrar
Permanent Court of Arbitration
Peace Palace
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2517 KJ Den Haag

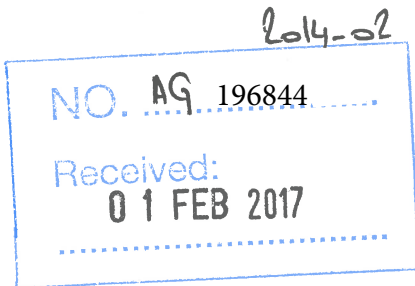
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Our reference

MinBuZa.2017.78242



Datum 31 January 2017

Betreft Arctic Sunrise Arbitration – Comments on expert report of Mr. Larsen

Dear Ms. Goriatcheva,

Further to the invitation in the Arbitral Tribunal's letter of 23 November 2016, the Kingdom of the Netherlands hereby provides its comments on the expert report (the Report) of Mr. Allan Larsen (the Expert). The Netherlands would like to avail itself of this opportunity to comment on the content of the Report and invite the Tribunal to consider whether the Report is acceptable as it is. In particular, the Netherlands would note that the Expert seems to have gone beyond the scope of his role. Furthermore, as will be explained in detail below, the Netherlands does not consider the Report to be helpful to the Tribunal for its assessment of the reasonableness of the claim with respect to the Rigid Hull Inflatable Boats (RHIBs).

The Netherlands would first make the general observation that the Report appears to include a review of the lawfulness of the events of 18 September 2013 (Report, p. 9). In the view of the Netherlands, such review falls outside the scope of the Expert's role as defined in the Expert Terms of Reference.

Furthermore, in the Report, the Expert appears to question the validity of the facts relating to the period of detention of the *Arctic Sunrise* and the Rigid Hull Inflatable Boats (RHIBs) in Murmansk (Report, pp. 10 and 94) and the preclusion of access to the ship and its RHIBs for Greenpeace International. In its Award on the Merits (paras. 116-137), the Tribunal established as fact that

- "the *Arctic Sunrise* was officially seized and transferred for safekeeping to the Murmansk branch of the Federal Unitary Enterprise 'Rosmorport' on 15 October 2013" (para. 120);
- "Stichting Phoenix's legal representatives in Russia unsuccessfully sought the release of and access to the *Arctic Sunrise*" (para. 135);

- "by a decision of 24 March 2014, the Primorsky District Court of St. Petersburg rejected a petition for the review of the Investigation Committee's decision not to allow representatives of Stichting Phoenix to inspect the *Arctic Sunrise* for the purpose of assessing and preventing damage" (para. 135);
- "on 6 June 2014, the Investigation Committee lifted the seizure of the *Arctic Sunrise* and handed the ship over to representatives of Stichting Phoenix" (para. 136); and
- "on 1 August 2014, having undergone a professional damage assessment and essential maintenance and received the port authorities' permission to leave Murmansk, the *Arctic Sunrise* set sail for Amsterdam, where it arrived on 9 August 2014" (para. 137).

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These facts should have formed the basis for the analysis of the Expert. Therefore, the Netherlands would request the Tribunal not to take account of the conclusions in the Report to the extent that they are affected by a dismissal of the facts as established by the Tribunal.

As to the five conclusions in Section 19 of the Report, the Netherlands wishes to make the following remarks:

- Conclusion Number One: "*The condition of the RHIBs on 17th September 2013 cannot be considered as "good" nor "fit for use in protest action" in all cases*".

The Netherlands considers that the criteria employed by the Expert for documentation relating to the condition and 'fitness for use' of such RHIBs are too stringent. It is the Netherlands' understanding that the employment of such stringent criteria in relation to the documentation of these RHIBs is not in line with marine surveying practice. Furthermore, assuming that the Netherlands provided insufficient documentation to support its claim that the RHIBs were 'fit for use in a protest action', the Report could have been limited to concluding so. However, the Report goes further and concludes on this basis that the RHIBs cannot be considered as 'fit for use in a protest action'. In the view of the Netherlands, such a conclusion is not justified. In addition, the video-footage and photographic materials that are available of the protest action on 18 September 2013 and have been provided to the Tribunal demonstrate that the RHIBs were fit for use.

- Conclusion Number Two: "*The actions of Stichting Greenpeace during the events of 18th September 2013 may have been in part, a causal factor in engine and RHIB damage*".

The Netherlands would observe the following regarding this conclusion. The conclusion that the damages sustained by the RHIBs during the protest action on 18 September 2013 can be attributed both to Greenpeace International and to the Russian Federation is without prejudice to the fact that, as a result of the unlawful detention of the RHIBs from 19 September 2013 up until 12 May 2015 (date of return), no inspection of the state of the RHIBs nor any repairs to the RHIBs could have been conducted. It would therefore have been appropriate to address, in the Report, the likelihood of possible aggravation of the

damage and deterioration of the condition of the RHIBs to occur as a result of the lack of maintenance during this period.

- Conclusion Number Three. *"The accounting value of each RHIB would not reflect the fair market or replacement value of each RHIB"*.

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The Netherlands would agree with this conclusion. However, it would have been helpful to the Tribunal had the Expert presented, *proprio motu*, an estimation of the fair market value of such RHIBs. It is the Netherlands' understanding that in regular marine surveying practice such an estimation could have been presented on the basis of a comparison of prices of equivalent RHIBs available on the second hand market.

- Conclusion Number Four. *"The evidence provided by the Kingdom of the Netherlands does not allow the exact condition of the RHIBs on 17th September 2013 to be ascertained. This in turn affects the Fair Market Value."*

With reference to the comment of the Netherlands to Conclusion Number One above, the Netherlands reiterates in this respect that the criteria employed by the Expert for documentation relating to the condition and 'fitness for use' of such RHIBs are too stringent. In the view of the Netherlands, it is not necessary to ascertain the 'exact condition of the RHIBs on 17th September 2013' in order to reasonably estimate their fair market value. It is understood that the approach used differs from what would be the regular practice in marine surveying.

- Conclusion Number Five. *"Any settlement for replacement RHIBs which the Tribunal deems appropriate should be based on a like for like basis of each RHIB. This relates to the age, specification and condition of each RHIB. This is to avoid any financial gain or any financial loss for [Stichting] Greenpeace."*

The Netherlands subscribes to the conclusion that replacement should be on a 'like for like' basis. In this respect, the Netherlands would however request the Tribunal to take into account that the RHIBs were confiscated by the Russian Federation from 19 September 2013 until 12 May 2015. During this period, Greenpeace International was required to replace the RHIBs in a timely manner in order to be able to continue its operations. In order to replace the required RHIBs, Greenpeace International was facing two options: hiring replacement RHIBs or buying replacement RHIBs. In order to limit the extra costs, Greenpeace International decided not to hire RHIBs, but, to the extent possible, acquire replacement RHIBs of similar quality on the second-hand market. Due to the unavailability of adequate replacements on the second-hand market, some RHIBs were replaced by new RHIBs. The Netherlands would reiterate in this respect that it would have been helpful if the Expert had presented an estimation of the fair market value of equivalent RHIBs to replace the RHIBs that were detained by the Russian Federation.

On the basis of Article 4.1 of the Expert Terms of Reference, the Expert

shall assist the Arbitral Tribunal in relation to its consideration of whether the amounts claimed by the Netherlands for damages to the Arctic Sunrise are well-founded. Specifically, the Expert shall report on whether the amount claimed by the Netherlands for the replacement value of the six rigid-hull inflatable boats (RHIBs) on board the Arctic Sunrise is reasonable.

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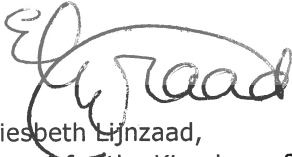
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In the view of the Netherlands, the Report does not sufficiently assist the Tribunal in its assessment of the reasonableness of the amount claimed for the replacement value of the RHIBs. The Report does not provide an opinion on what would have been a reasonable amount to claim for the replacement of the RHIBs. Thus, the Report only addresses, on the basis of too stringent criteria, the documentation in support of the claims, not their reasonableness.

For the above reasons, the Netherlands respectfully requests the Tribunal to award under this head of damage the amount as claimed.

Yours sincerely,



Liesbeth Lijnzaad,
Agent for the Kingdom of the Netherlands

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