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Content indication	Admissibility of the interest group; question whether the export license for military goods to Egypt granted by the State is unlawful; criteria to be applied in this regard; review of the EU Common Position.
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Pronunciation

COURT OF THE HAGUE

Department of Civil Law

Case number : 200.304.795/01

Court roll number: C/09/618625/KG ZA 21/923

judgment in summary proceedings of 17 May 2022

regarding

1 **PAX Peace Movement Foundation,**

located in Utrecht,

hereinafter referred to as: Pax,

2 **Campaign Against Arms Trade Foundation,**

Based in Amsterdam,

hereinafter referred to as: Stop Arms Trade,

3 the Dutch Lawyers Committee for Human Rights association,

based in Leiden,

hereinafter referred to as: NJCM,

appellants,

hereinafter jointly referred to as: Pax cs,

lawyer: mr. LM Ravestijn in Amsterdam,

against

the State of the Netherlands (Ministry of Foreign Affairs),

based in The Hague,

defendant,

hereinafter referred to as: the State,

lawyer: mr. WI Wisman in The Hague.

The lawsuit

By summons on appeal of 20 December 2021, Pax et al. lodged an appeal against the judgment of the preliminary relief judge in the District Court of The Hague of 23 November 2021, rendered in preliminary relief proceedings between the parties. In the summons on appeal, Pax et al. raised nine grounds of appeal against the contested judgment and submitted five exhibits (numbered 13 to 17 inclusive). In its response, the State contested the grounds of appeal and submitted one exhibit (Exhibit 10). On March 31, 2022, the parties argued the case before the Court of Appeal, Pax et al. by mr. R. Beets and mr. J.
Klaas, lawyers in Amsterdam, and the State through his lawyer as well as by mr. EV Koppe, lawyer in The Hague, in both cases on the basis of pleadings submitted to the Court of Appeal.
On that occasion, Pax et al. brought two more exhibits (exhibits 18 and 19) in dispute.
Finally, a judgment has been requested.

Assessment of the appeal

1. Short summary of this statement

1.1 Pax cs are interest groups that are committed to peace and agitate against the arms trade. Pax et al. believe that the State has wrongly granted a license for the export of certain military goods (radar and communication systems) to Egypt. Pax et al. are of the opinion that the State should not allow the export of these systems to Egypt because of the poor human rights situation in Egypt. They demand that the court order the State to stop these exports.

1.2 The court rejects the claims of Pax et al. According to the court, there is insufficient evidence that the systems that will be exported to Egypt will be used in the violation of human rights.

2. The facts and background of this case

2.1 In July 2020, the Minister of Foreign Affairs (hereinafter: the Minister) granted a license to a Dutch company for the export of radar and C3 systems, including software, tools, test and measurement equipment and associated services to the Egyptian navy for the purpose of value of over €114 million (hereinafter: the systems). This permit was extended on August 16, 2021. The systems to be implemented are intended to be installed in two Egyptian frigates. In the letter from the Minister of 11 October 2021, in which he informed the House of Representatives about this licence, he writes that these frigates have multiple applications and will be used, among other things, for patrols, search and rescue operations, submarine detection and humanitarian operations.

2.2 At the time of submission of the statement of defense (8 February 2022), a total of eleven current licenses for the export of military goods to Egypt had been granted, including the license referred to under 2.1.1

2.3 The systems (mentioned under 2.1) must be regarded as military goods. The export of military goods is subject to Art. 11 paragraph 1 of the Strategic Goods Decree (based on the General Customs Act)2 (the 'Decree') is prohibited, unless a permit has been granted for this. Art. 11 paragraph 3 of the Decree provides that a license will in any case not be granted insofar as this results from international obligations. An individual license such as the license for the export of the systems is valid for (more than) one year, but can be extended.

2.4 International obligations where art. 11 paragraph 3 Decree refers to, among other things, the EU Common Position3, in which the Member States have laid down agreements regarding the conditions under which military goods may be shipped to countries other than EU Member States, NATO Member States or Switzerland, Japan, Australia and New Zealand. are exported. The agreements laid down in the Common Position are binding on the State. The Common Position contains eight criteria against which the Member State must assess applications for export licenses for military goods on a case-by-case basis.4 The dispute concerns the following criteria5:

Criterion 2 6: respect for human rights in the country of final destination and compliance with international humanitarian law by that country.

(a) Member States deny an export license where there is a clear risk that military equipment or technology to be exported will be used for internal repression;

(c) Member States shall refuse an export license if there is a clear risk that the military equipment or technology to be exported will be used to commit serious violations of international humanitarian law.

Criterion 6 7: Behavior of the country purchasing military equipment or technology towards the international community, in particular that country's attitude towards terrorism, the nature of its alliances and respect for international law.

Member States shall take into account, inter alia, the extent to which the country purchasing military equipment or technology has historically:

b) its international commitments, in particular as regards the non-use of force

and has complied with international humanitarian law.

2.5 Pax cs are organizations that are committed, among other things, against arms exports to Egypt. In this case they bring claims against the State on the basis of art. 3:305a BW, in which they state that they act both from the general interest of compliance by the State with international law and from the combined interest of all who may become victims of arms trade in violation of the law. Pax et al take the position that the human rights situation in Egypt is very bad and that the application of criteria 2a and 2c should lead to the systems not being exported to Egypt. Moreover, Egypt has repeatedly violated international law, which, according to Pax et al. means that testing against criterion 6 must also lead to the result that the systems may not be exported to Egypt. On this basis, Pax et al., in summary, claim that the State be ordered to prevent already permitted exports of military goods to Egypt and, in addition, that the State be prohibited from allowing future exports of military goods to Egypt.

2.6 The preliminary relief judge rejected these claims in its contested judgment. In the first place, the preliminary relief judge considers that Pax's claims are inadmissible, because it appears from its articles of association that its sole purpose is to carry out programmes, projects and services for the benefit of the IKV and Pax Christi foundations and Pax the articles of association of did not challenge these organisations. According to the preliminary relief judge, Stop Wapenhandel and NJCM are admissible in view of their objectives. With regard to the claim for the prohibition of future export, the preliminary relief judge is of the opinion that each license application must be assessed on its own merits on the basis of all relevant and current circumstances of the case and that this assessment cannot be done in advance and in a general sense. take place. According to the preliminary relief judge, a case-by-case assessment can only be omitted if an arms embargo is in force for Egypt, but Pax et al do not aim for an arms embargo with the claims. With regard to the assessment against criteria 2a and 2c of the Common Position, the preliminary relief judge considers that *the position of the State that there is no clear risk that the military* goods to be exported will be used for internal repression or when committing serious violations of international humanitarian law, is not manifestly incorrect or incomprehensible. With regard to criterion 6 of the Common Position, the preliminary relief judge is of the opinion that it is not in dispute that testing against this criterion is negative, but that this does not automatically mean that the Member State is obliged to refuse the permit. The judge in preliminary relief proceedings considers the text of the Common Position to be decisive and not the User's Guide to the Common Position. According to the preliminary relief judge, the position of the State is that the military goods in the application are not related to the reasons why the test against criterion 6 is negative (in short: Egypt is not a party to the Biological Weapons Convention or the Chemical Weapons Convention). violates the arms embargo against Libya) is not manifestly incorrect or incomprehensible.

3. The grievances and their assessment

3.1 With ground for ground 1, Pax challenges the judgment of the preliminary relief judge that her claims are inadmissible. Pax argues that its articles of association refer directly to the articles of association of Vereniging Pax Christi Nederland (hereinafter: Pax Christi) and Stichting Interkerkelijk Vredesberaad (hereinafter: IKV). According to Pax, it appears from the statutes of Pax Christi and IKV (which she submitted on appeal) that their aim is to promote peace in the broadest sense of the word and to promote political solutions to crisis and war situations, respectively. This means that Pax meets the requirements of art. 3:305a BW, according to Pax.

3.2 Art. 3:305a paragraph 1 provides, in so far as relevant here, that a foundation may institute legal proceedings aimed at protecting similar interests insofar as it represents these interests pursuant to its articles of association. The articles of association of Pax contain in this regard (art. 2 paragraph 1):

'The aim of the foundation is to carry out programmes, projects and services for (…) IKV (…) and (…) Pax Christi (…), insofar as these programs, projects and services fit within the objectives of the IKV and Pax Christi.'

3.3 The articles of association of the IKV include the following with regard to the description of the object (art. 2 paragraph 1):

'Building on the mission of the participating churches, the Foundation aims to promote political solutions to crisis and war situations.'

The articles of association of Pax Christi contain the following regarding the description of the object (art. 2 paragraph 1):

'The aim of the association is to promote peace in the broadest sense of the word.'

3.4 The articles of association of Pax therefore refer explicitly to the objectives of IKV and Pax Christi with regard to its objective (the execution of programmes, projects and services for IKV and Pax Christi), in the sense that programs, projects and services are carried out that fit within the objectives of IKV and Pax Christi. The Court of Appeal is of the opinion that it is thus sufficiently clear that Pax, pursuant to its articles of association, represents the interests that IKV and Pax Christi represent pursuant to their articles of association. There can also be no doubt that the initiation of the present collective action, which amounts to combating undesirable arms exports to Egypt, falls within the statutory objectives of IKV and Pax Christi.

The court will therefore declare Pax admissible. Ground 1 succeeds.

3.5 In ground 2, Pax et al argue that the preliminary relief judge has used an assessment framework that is too limited, because it considers that Pax et al's claims are closely related to questions of security and foreign policy, that for that reason the State has a large scope for policy and assessment. and that therefore the test to be made is whether the minister could reasonably have come to the decision to grant the contested export licenses.

According to Pax et al., the court should not exercise restraint in this case, but should examine whether, in the provisional opinion, the State should be prohibited from allowing arms exports, in anticipation of the determination in a case on the merits that there is illegality, i.e. acting contrary to the law. with the law, including the Common Position. In this regard, Pax et al also argue that issuing the present licenses is in conflict with the statutory obligations resting on the State, which not only originate from the Common Position, but can also be found in the Arms Trade Treaty8, the ECHR (in in particular Article 2 ECHR) and Art. 6 ICCPR. This requires a thorough assessment, according to Pax et al

3.6 The court rules as follows. In essence, this case concerns, and the parties have debated, whether the granting of the present export license violates criterion 2a, 2c or criterion 6 of the Common Position. It is not in dispute that the State is obliged to test against these criteria, but the parties differ on the question of what the outcome of that test should be. The Court of Appeal will therefore assess whether the permit has been granted in violation of (these criteria from) the Common Position.

3.7 In itself it is correct that the State has no 'policy room' when assessing whether these criteria have been met. The Common Position, with its precise and partly binding rules, leaves no room for policy freedom of individual Member States outside the provisions of the Common Position. To the extent that the Member States had policy freedom in the field of arms exports, they have renounced this with the Common Position. The fact that the State has drawn up additional policy under which a 'presumption of denial' applies (only) to certain countries other than Egypt, does not alter the fact that a license for the export of military goods to Egypt may not be issued insofar as which would be contrary to the terms of the Common Position.

3.8 The foregoing does not alter the fact that the State has a certain margin of appreciation when assessing against the criteria of the Common Position. This is because the minister has discretion when considering whether there is a 'clear risk' (criterion 2a and 2c) and to what extent he must take into account the behavior of the importing country in the past (criterion 6b). This assessment margin is smaller for criterion 2a and 2c than for criterion 6b. It is primarily up to the minister to weigh up the various facts and circumstances that must be taken into account when checking against the Common Position and to take a decision on the basis of this. It is not the task of the civil court to decide, instead of the minister, whether licenses for the export of military goods to Egypt can be granted. The court can only examine whether the minister could reasonably judge, in accordance with the Common Position, that the export licenses can be granted without violating international obligations. There is no reason to perform another test. The mere fact that Pax et al, without concrete explanation, rely on the Arms Trade Treaty, art. 2 ECHR and art. 6 ICCPR appeals does not change that.

3.9 The foregoing boils down to the fact that the Court of Appeal will examine whether the Minister could reasonably judge (i) that there is no clear risk that the systems to be implemented will be used for internal repression (criterion 2a) or (ii) when committing of serious violations of international humanitarian law (criterion 2c), or (iii) that even taking into account Egypt's past compliance with its international obligations (criterion 6b), this does not mean that the permit must be refused. Insofar as ground 2 is based on another criterion, this one fails.

3.10 In ground 3, Pax et al. contest the judgment of the preliminary relief judge that the assessment against criterion 2a and 2c of the Common Position is concerned with whether there is a clear *risk that the military goods in question will be used for internal repression or* in the committing serious violations of international humanitarian law, and not whether they can be used for that purpose. Pax et al. are of the opinion that what matters is whether the systems to be implemented can be used for internal repression or when committing serious violations of international humanitarian law. Pax et al deduce this from the preamble of the original version (from 2008) of the Common Position, the explanation of criterion 2a in the User's Guide to the Common Position (hereinafter: the User's Guide) and the text of criterion 2a and 2c in the versions of the Common Position in a number of other languages.

3.11 The court rules as follows. In the preamble to the Common Position (which, incidentally, not changed by the 2019 amendment) (4) expresses the wish of the Member States to prevent the export of military equipment that 'could be used' for internal repression or international aggression. There is no reference to the 'clear risk' (which is used in criteria 2a and 2c). This does not alter the fact that the word 'can' in the preamble seems to be intended as an indication of 'risk'. The words “can” and “risk” imply that oppression or aggression need not always be actually present.

3.12 Concerning criteria 2a and 2c of the Common Position, the English ('might be used') and the Italian ('possono essere utilizzate') language versions use phrases which, literally translated into Dutch, mean 'can be used'. This is also the case in the versions in Spanish, Danish, Swedish and Portuguese mentioned by Pax et al. On the other hand, the word 'can' is missing in the Dutch ('to be used') and French ('servent à') versions. In the German version, in criterion 2a 'benutztwaren könnten' (ie with 'can') is used, but in criterion 2c 'verwendetwaren' (ie without 'can') is used. In the Dutch, German, French and English versions, after mentioning the criteria a and b in art. 2 paragraph 2 does use 'may', i.e. where it is clarified:

'Goods or technology which may be used for internal repression include, but are not limited to, goods or technology which have been proven to have used such or similar goods or technology for internal repression by the intended end-user, or which may be presumed to have another destination. than has been officially declared and will be used for internal repression (…..)'

Here the word 'may' is in the context of goods or technology that must be proven or assumed to be similar goods or technology 'have been used' or 'will be used' for the suppression.

3.13 The Dutch version of the User's Guide first quotes the text of criteria 2a and 2c9 in Dutch (i.e. without 'can'), then the above-cited description of 'goods or technology that can be used for internal repression' (with 'can') with an explanation of the method of assessment,10 and then says11:

'The fact that the text combines 'clear risk' with 'can be used' is telling. This is easier to prove than that there is a clear risk that the military technology or equipment will be used for internal repression.'

3.14 As can be seen from the foregoing, the various documents and language versions do not have a clear line. In one language version, the German, even uses both variants interchangeably. This indicates that, contrary to what the User's Guide apparently assumes, the importance of the distinction is not particularly great, but rather the different ways in which the individual language versions express the fact that a certain degree of uncertainty is inherent in estimating the (clear) risk of possible future use of the military goods to be exported. After all, the concept of 'risk' involves a certain degree of uncertainty.

The use of the word 'can' does not add anything essential to this.

3.15 In the passage challenged by the ground of appeal, the judge in preliminary relief proceedings only referred to: considered that the mere possibility that the systems could be used for internal repression or to commit serious violations of international humanitarian law is insufficient to deny an export license. Insofar as Pax et al. want to argue that this single possibility must lead to a refusal of the permit, that position is incorrect. After all, the issue is whether there is a (clear) risk that this possibility will also materialize in practice. In the view of Pax et al., the concept of 'clear risk' would have no meaning, while this is clearly a core concept of criterion 2a and 2c.

3.16 The conclusion is that ground 3 fails. The court will use the Dutch version of the Common Position, with the note that the assessment would not be different if (for example) the English text had been followed.

3.17 With grounds 4 to 7, Pax et al. appeal against the judgment of the preliminary relief judge that the Minister could reasonably decide to allow the export of the systems. The Court of Appeal understands that with grounds 4 and 5 Pax et al raise criterion 2a, with ground 6 criterion 2c and with ground 7 criterion 6b and that they argue that assessment against each of these criteria separately led to refusal of the export license. have to lead.

3.18 The State has argued that the contested license was granted on the basis of facts and circumstances known to it at the time the license was granted, and that subsequently changed facts and circumstances cannot lead to the conclusion that the granted license is unlawful. This is in principle correct. The question of whether the State has acted unlawfully by granting the permit must, like any unlawful act, be assessed in the light of the circumstances and applicable regulations at the time of the relevant

act or neglect. This is also in accordance with the assessment carried out by the administrative court in appeals against decisions (on objection). After all, as a rule, this is also an assessment ex tunc. In so far as Pax et al. in these proceedings base their claim with regard to the license already granted, the Court of Appeal must therefore disregard these. This does not mean, however, that Pax et al. should not submit new evidence of facts and circumstances that already existed at the time of the attacked permit granting. In so far as Pax et al. therefore do not invoke changed facts and circumstances after that permit was granted, but only submit new evidence of facts and circumstances that, according to them, already existed at that time, the Court of Appeal may take cognizance of those evidence.

3.19 Pax et al. have brought two exhibits in dispute during pleadings:

- a piece entitled 'Risk of Egyptian Navy involvement in human rights violations in North Sinai', by Nouska du Saar, Open Source Intelligence researcher (exhibit 18);

-ÿeenÿAmicusÿCuriaeÿstukÿgetiteldÿ‘Egyptianÿnavalÿforces’sÿseriousÿviolationsÿofÿinternational humanitarianÿlawÿandÿhumanÿrightsÿlawÿinÿtheÿGazaÿstrip’ÿvanÿdeÿNewÿYorkÿUniversityÿSchoolÿof Law’sÿEuropeanÿUnionÿPublicÿInterestÿLawÿClinicÿ(productieÿ19).

The State has argued that bringing these exhibits in dispute, partly in view of their size and the time of consultation, is contrary to due process. The State has nevertheless provided a general response to these productions.

3.20 Exhibit 18 does not contain any new propositions as such, but is apparently intended to substantiate the propositions already put forward by Pax et al. The Court therefore sees no reason to disregard this production. This does not alter the fact that, in view of the size of this production and the time at which it was brought into question, there could be grounds for giving the State the opportunity to respond further to certain parts thereof. As will become apparent below, there is no reason to do so.

3.21 Exhibit 19, according to Pax et al.'s own contention, contains new facts that are relevant to the assessment of criterion 2c of the Common Position, namely that Egypt arbitrarily and routinely detained, tortured and killed Palestinians during the implementation of the blockade of the Gaza Strip. . As considered above, the Court of Appeal must disregard such new facts. In addition, Pax et al. have not previously put forward Egypt's actions in and around the Gaza Strip in these proceedings and therefore also not in the statement of appeal. It is too late for that on appeal. It is true that the State has addressed this production in pleadings, but since it has assumed that introducing this production is contrary to due process, it can only discuss it in outline and needs more time for a detailed response, it cannot be said that the State has accepted the legal battle on the basis of these new propositions.

criterion 2a (grievances 4 and 5)

3.22 The Court of Appeal will deal with grounds 4 and 5 jointly. In summary, the argument of Pax et al mean that the Egyptian government is oppressing its own citizens and violating their human rights in Sinai, that the Egyptian navy is involved in this action by landing special forces ('Navy Seals') from sea, also with the help of frigates, which support or carry out internal repression in the Sinai and that their operations are (or can be) conducted with the exported radar and C3 equipment that will be built into the frigates. In support of these grievances, Pax et al. specifically refer to:

- a report from Human Rights Watch;12

- an article by the medium Al-Monitor;13

- an Egyptian army propaganda video;14

- the aforementioned Open Source Intelligence report;15

- an October 31, 2021 article on Al-Ahram Weekly;16

- a video about Egyptian Navy Seals in training and actions.17

In the first instance, Pax cs also invoked the following productions:

-ÿExpertÿStatementÿvanÿAndrewÿFeinsteinÿ18

- Egyptian Commandos – Al Quwaat Al-Khaasat published on GlobalSecurity.org;19

-ÿEgypt'sÿnavyÿmodernization,ÿTheÿgrowthÿofÿnewÿpowerÿinÿtheÿMiddleÿEast,ÿeenÿpublicatieÿvan NavalPost.20

3.23 The State acknowledges that the human rights situation in Egypt is worrying and that it is aware of the security situation in North Sinai and the repression there by the Egyptian armed forces against IS-affiliated terrorist groups. The State argues, however, that it cannot be said that there is a clear risk that the systems to be supplied will be used for this internal repression. Although the C3 system is intended for a frigate *that can provide support to special forces units, among other things, this system is by* its nature intended for maritime operations and not suitable for directing military operations on land. The C3 system is not suitable for this, as the State explained in more detail in its plea, now that the system is intended to communicate with other 'platforms' (aircraft and other ships), not with individuals. Moreover, the State also explained in more detail in the pleadings, the use of a frigate for the actions targeted by Pax et al. would be disproportionate; it is more obvious to use smaller and more manoeuvrable ships for this purpose.

3.24 The Court of Appeal states first and foremost that when deciding whether or not to grant a license for the export of military goods, the Minister must assess all the relevant circumstances of the specific case. This means that it will have to be examined on a case-by-case basis whether there is a 'clear risk' that the military goods to be exported will be used for internal repression or when serious violations of international humanitarian law are committed. It therefore always concerns (the clear risk of) the concrete use that will be made of the military goods. This means, for example, that the fact that certain parts of the Egyptian army are involved in human rights violations does not automatically mean that the supply of military goods to other army parts that are not involved in human rights violations is inadmissible. It will have to be assessed whether, in view of the nature of the military goods to be exported, the army unit for which they are intended and the operations in which that army unit is deployed, there is a clear risk that the military goods to be exported will be used for internal repression or that they be used in serious violations of international humanitarian law.

3.25 In the assessment to be made, it is also important that the risk of the use of the exported goods for oppression or human rights violations must be 'clear' (in other language versions: *'çlear risk', 'risque manifeste' and 'wenn Eindutig das Risiko besteht'). This not* only means that there must be more than the mere (theoretical) possibility, but also that there is no reasonable doubt that that risk actually occurs. Moreover, as has been considered above, this case concerns the question of whether the Minister was reasonably able to reach his decision to grant a permit. This does not only mean that it is primarily up to the minister to weigh the facts and circumstances of the specific case, such as the

conditions in the country of destination (Egypt). It is also up to the minister to assess whether there is a risk of misuse of the goods to be supplied and whether that risk is sufficiently 'clear'. The civil court can only assess whether the minister has reasonably been able to reach his opinion on this. The scope for the civil court to review the minister's decision is therefore limited. This scope is further limited because this is an interim injunction and the injunction does not lend itself to further investigation into the facts.

3.26 Against this background, the Court of Appeal will now assess whether grounds 4 and 5 have been correctly submitted. As stated, this concerns the statement by Pax et al. that the Egyptian government oppresses its own citizens in the Sinai and violates their human rights, that the Egyptian navy is involved in that action because it deploys special forces from sea, also with the help of frigates ('Navy Seals') that support or carry out internal repression in the Sinai and that their operations are (can) be led with the exportable C3 equipment that will be built into the frigates.

3.27 The Court of Appeal is of the opinion that Pax et al. have not succeeded in making it plausible that the Minister has not reasonably been able to conclude that there is no clear risk of such occurrence. The decisive factor here is that, even if it is assumed that the Egyptian navy is involved in military operations in the Sinai because special forces units are landed from naval ships with boats that will participate in oppression or human rights violations there, from the productions submitted by Pax et al. it does not appear that the frigates in which the present systems will be installed will be used for this purpose. According to the State, this is not obvious due to the size of the frigates and Pax et al. have not been able to demonstrate sufficiently convincingly in these proceedings that this is obvious. Pax et al's statement that the frigates to be delivered are in principle suitable for such operations does not mean that there is a clear risk that they will be used for this purpose.

In the report of the 'Open Source Intelligence researcher'21 on page 28 ff ('3.1.b. Involvement of navy vessels at Northern Sinai') are also only called 'amphibious assault Mistral class ships' and 'patrol vessels', not frigates.

3.28 It further does not follow from Pax et al's productions that there is a clear risk that the radar and C3 systems to be supplied will be used in such operations. Pax et al have contradicted the State's defense that these systems are unsuitable for this purpose, with insufficient reasons. Pax et al's statement that C3 systems are 'indispensable' for such operations is insufficiently substantiated in the light of the dispute by the State. The fact that radar and C3 systems are indispensable for the operation of a frigate as such does not mean that these, even if it is assumed that the Navy Seals will sail to land from a frigate, also for the specific, by Pax et al. mentioned, Navy Seals operations can be deployed. It is not unreasonable or incomprehensible that the minister did not see a clear risk in this. Pax et al.22's statement that the ministry itself (in exhibit 9 in the statement of reply) establishes that the Navy Seals operation can be conducted with C3 systems is incorrect, it cannot be read in it. The statement that the Dutch company that according to Pax et al. will supply the systems itself indicates that hidden targets can be detected on land with them also does not hold. That too cannot be read in the passage23 quoted by Pax et al., in particular it is not clear (and *contested by the State) that the 'small surface targets' referred to therein refer to targets on land.*

3.29 Grounds 4 and 5 fail.

3.30 Grounds 6 relates to criterion 2c. Pax et al argue that the Egyptian navy – in any case case at any time – participated in the maritime blockade of Yemen, leading to starvation of the civilian population. Pax et al argue that this participation by Egypt in the maritime blockade of Yemen should lead to a refusal to export arms to the Egyptian navy. The State merely states that it is 'probable' that the Egyptian navy will no longer participate in the blockade of Yemen, but that is insufficient to negate the clear risk of such participation, according to Pax et al., who point out that the Egyptian

navy patrols far beyond its own coast in the Bab el Mandeb, the strait off Yemen.

3.31 This ground of appeal fails. Contrary to the opinion of Pax et al., it is not up to the State to clear risk of the Egyptian navy's participation in the blockade of Yemen. The fact that the Egyptian navy participates in the blockade or that there is a clear risk that the frigates to be delivered will participate in it has proved insufficient. The minister could therefore reasonably conclude that there is no such clear risk.

3.32 In ground 7, Pax et al argue that the preliminary relief judge erroneously ruled that the the State is free under criterion 6b of the Common Position to allow the export of arms to Egypt. Pax et al argue that, as the State also acknowledges, testing against criterion 6b is always negative for Egypt because Egypt has not ratified the Biological Weapons Convention, is not a party to the Chemical Weapons Convention and, despite the arms embargo on Libya, supply weapons to General Haftar. According to Pax et al. it appears from the User's Guide that no license may be issued if testing against criterion 6 is negative. The User Guide always means:24

'Member States will not grant authorization if the assessment of the track record of the purchasing country against criterion 6 does not yield a positive result.'

Pax et al also argue that in the assessment against criterion 6 the State wrongly attached importance to the deployment of the systems by Egypt and the role of the Egyptian navy in relation to the aspects referred to in criterion 6 and to the arms supplies to Haftar. The use of the goods to be exported by the end user and the precise role of the Egyptian navy are irrelevant in the context of criterion 6, according to Pax et al.

3.33 It is not in dispute between the parties that testing against criterion 6 is negative. What is in dispute is what consequences that should have. The Court of Appeal does not endorse Pax et al's statement that if the test against criterion 6 is negative, this must always lead to the refusal of the export license.
It is clear that in the event of a negative outcome of some criteria, the Common Position mandatorily prescribes that the license must be refused ('refusing an export licence', see for example criteria 2, 3 and 4) and that in the event of a negative outcome of other criteria it only prescribes that the Member States 'take into account, among other things' this outcome (as with criteria 5 and 6). In its judgment, the Court of Appeal takes into account this undeniable distinction that the Common Position, it must be assumed, deliberately makes. The quoted passage from the User's Guide, which completely ignores this difference in system without further explanation, cannot therefore be assigned any decisive significance, at least not in the present situation, in which the negative judgment is not related to the nature of the concrete export goods.

3.34 Contrary to what Pax et al. adduce, it does not appear from the Common Position that the Minister is limited in the circumstances that he may take into account when asking what consequences should be attached to the negative outcome of the assessment against criterion 6.
On the contrary, criterion 6 states that Member States 'among others' take criterion 6 into account.
The fact that the Minister has ruled that the supply of the present systems is not related to the Biological Weapons Convention, the Chemical Weapons Convention or the arms supplies to Haftar is therefore not unlawful and this judgment is also not unreasonable or incomprehensible. Ground 7 fails.

3.35 In ground 8, Pax et al argue that the preliminary relief judge wrongly attached value to the question whether other Member States refrain from arms supplies to Egypt. Pax et al have no interest in this ground of appeal because that question does not play a role in the judgment of the Court of Appeal. Even if the actions of other Member States are not taken into account, Pax et al's claims cannot be awarded.

3.36 With ground 9, Pax et al. contest the judgment of the preliminary relief judge that the claimed ban on future exports should be rejected. This ground of appeal is already grounded on the fact that, as has been considered in the foregoing, it cannot be assumed that the State acted unlawfully by granting the export license specifically discussed in these proceedings. In that case, it cannot be seen that there would be any reason to ban any future arms supplies, about which nothing is known and which the Court of Appeal cannot therefore rule on.

4. Conclusion

4.1 The conclusion is that only ground 1 is successful. The Court of Appeal will quash the judgment of the preliminary relief judge insofar as Pax has been declared inadmissible therein and Pax's claims will still be declared admissible. The judgment will otherwise be affirmed.

4.2 The Court of Appeal will order Pax et al, as the party that has been largely unsuccessful, to pay the costs of the appeal proceedings.

Decision

The court:

- annuls the judgment of the preliminary relief judge of 23 November 2021, but only in so far as Pax has been declared inadmissible in its claims,

- and in so far as once again in law: declares Pax still admissible in its claims;

- affirms that judgment for the rest;

- orders Pax et al. to pay the costs of the appeal proceedings, estimated to date at €772 in court fees and €3,342 in salary of the lawyer, and determines that these amounts must be paid within 14 days of the date of the judgment must be paid, failing which these amounts will be increased by the statutory interest as referred to in Article 6:119 of the Dutch Civil Code from the end of the said term of 14 days until the date of payment;

- declares this judgment provisionally enforceable with regard to the reimbursement of costs of the proceedings.

This judgment was given by mrs. SA Boele, G. Dulek-Schermers and A. Dupain, and pronounced in open court on 17 May 2022, in the presence of the Registrar.

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[1] Memorandum of Reply 2.1; the State has confirmed on appeal that, insofar as known to him, the license referred to under 2.1 had not yet been (fully) used at that time.

[2] stb. 2008, 252 (subsequently amended).

[3] Council Common Position 2008/944/CFSP of 8 December 2008, OJ 2008 L 335/99, as amended by Council Decision (CFSP) of 16 September 2019, OJ 2019 L 239/16.

[4] Art. 1 paragraph 1 Common Position.

[5] The following quote is taken from the Dutch language version of the Common Position.

[6] Art. 2 paragraph 2 Common position.

[7] Art. 2 paragraph 6 Common Position.

[8] Trb. 2013, 143, Trb. 2014, 45 and (entry into force:) Trb. 2015, 1.

[9] Pg. 43.

[10] Pag. 44 this

[11] Pg. 47.

[12] The report “Egypt, massive Sinai demolitions likely war crimes” of 17 March 2021 (located in footnote 34 of the preliminary summons).

[13] Reference to the location on the internet is included in footnote 36 of the introductory paragraph summons and in footnote 22 of the appeal summons.

[14] Production 13 (on USB stick).

[15] Production 18.

[16] Production 16.

[17] Production 17 (on USB stick).

[18] Production 6.

[19] Production 10.

[20] Production 11.

[21] Production 18.

[22] Subpoena No. 69.

[23] Subpoena No. 70 Footnote 36.

[24] Pg. 115.