

Climate Change Litigation Heats Up in Europe

IN SHORT

The Ruling: On October 9, 2018, the Hague Court of Appeal upheld the Hague District Court's 2015 first-instance ruling that the Dutch State violated the European Convention on Human Rights ("ECHR") and failed to fulfil its duty of care by not pursuing a more ambitious reduction of greenhouse gas emissions in the Netherlands.

The Result: The Court of Appeal found that the current measures are too uncertain and insufficient to reach the 25 percent greenhouse gas emission reduction target necessary to prevent hazardous climate change by 2020, basing its ruling on Articles 2 (right to life) and 8 (the right to respect for private and family life) of the ECHR, which it held to have direct effect.

Looking Ahead: The Dutch government, charged by the Court of Appeal with devising and implementing a policy to reach this target, has stated that it is considering appealing the court's judgment but also expressed its commitment to its climate policy.

This judgment follows proceedings that the Urgenda Foundation brought in 2013 against the State, claiming that the State was not taking sufficient measures to protect its citizens from the adverse effects of climate change. Dutch law permits foundations or associations to bring actions of general interests of this type.

As part of its international commitments, the European Union has set a greenhouse gas emission reduction target of 20 percent by 2020 (40 percent by 2030) compared to 1990 levels. To achieve this target, the European Union adopted two specific instruments:

- The Emissions Trading System ("ETS")—the EU "cap-and-trade" system—covering greenhouse gas emissions from a wide range of large-scale industrial facilities and the aviation sector; and
- The Effort Sharing Decision, setting individual greenhouse gas emission reduction targets for Member States in non-ETS sectors (e.g., agriculture, waste) from 2013 to 2020.



The Court of Appeal found that there is a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life.



Although the Netherlands was on track to reduce its greenhouse gas emissions in accordance with the EU program, Urgenda introduced proceedings in 2013 to seek more ambitious targets. It requested that the District Court find that the State was acting unlawfully by not taking appropriate measures to reduce the level of greenhouse gas emissions in the Netherlands by 40 percent by 2020 or at least 25 percent compared to 1990 levels. It referred to the level deemed necessary by climate scientists for developed countries to prevent hazardous climate change.

Urgenda based its claims on the principle of proper social conduct under Dutch law as well as the duty of care enshrined in Articles 2 and 8 ECHR, which provide for the right to life and the right to respect for private and family life.

In an initial judgment of June 24, 2015, the District Court agreed with Urgenda that the State's conduct violated proper social conduct. With regard to Articles 2 and 8 ECHR, the District Court held that Urgenda itself could not be considered a direct or indirect victim of a violation of these provisions, within the meaning of Article 34 ECHR.

The State appealed the District Court's ruling, pursuant to which Urgenda filed a cross-appeal relating to the District Court's finding on Articles 2 and 8 ECHR.

The Court of Appeal upheld Urgenda's cross-appeal. It found that Article 2 ECHR imposes a

positive obligation on a state to protect the lives of its citizens and that Article 8 ECHR mandates the state to protect the right to a home and private life. When there is a real and imminent threat, it held, the state must take precautionary measures to protect these rights.

Applying these requirements, the Court of Appeal found that there is a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. Based on its review of the State's reduction plan, the Court of Appeal deemed the margin of uncertainty unacceptable.

In a letter of October 9, 2018, the Minister for Economic Affairs and the Climate informed the Dutch Parliament that the Dutch government was considering an appeal to the Dutch Supreme Court. The Minister referred to a question of principle of judicial interference in governmental policies. The Minister further indicated that according to the latest estimates, the 25 percent reduction target was within reach and that the Dutch government remained fully committed to the policy goals set out in the Energy Agreement for Sustainable Growth, a nonbinding document that aims at reducing energy consumption and increasing the share of sustainable energy in the Netherlands.

The *Urgenda* case may give rise to similar claims in other EU Member States or at the EU level; in fact, a case is already pending before the European General Court. Applicants representing 10 families from EU and non-EU Member States, as well as an association of young Sami people, have brought an action against the European Parliament and the Council before the EU General Court ("EGC") ([Case T-330/18](#)) to urge EU institutions to adopt more stringent greenhouse gas emission reduction targets.

The applicants filed an [application](#) to the EGC to seek the annulment of the emission targets set out in three legislative acts that are part of the [2030 climate and energy framework](#). In addition to annulment, the applicants seek injunctive relief from the EGC to require the EU institutions to enact a more ambitious greenhouse gas emission target of a reduction by 2030 of at least 50–60 percent from 1990 levels.

Follow the link to read an [English translation of the Court of Appeal's judgment](#). For further information on the EU-wide litigation, please see [The Climate Report, Summer 2018](#).

THREE KEY TAKEAWAYS

1. The Court of Appeal found that the Dutch State has a duty of care to protect its citizens from the adverse effects of climate change and, accordingly, ordered the State to ensure that, compared to 1990 levels, greenhouse gas emissions are reduced by at least 25 percent by the end of 2020, corresponding to the level deemed necessary in climate science for developed countries to prevent hazardous climate change.
2. Since the Court of Appeal relied on human rights set out in the ECHR to establish the State's duty of care, its ruling is possibly the first judicial decision linking climate change to human rights under the ECHR, thereby potentially setting the stage for climate change litigation in other jurisdictions party to the ECHR.
3. The *Urgenda* case may give rise to similar claims in other EU jurisdictions or at the EU level, as evidenced by the case *Carvalho and Others v Parliament and Council* pending before the EGC.



Françoise S. Labrousse
Paris



Yvan N. Desmedt
Amsterdam / Brussels



Coen E. Drion
Amsterdam

Pierre Chevillard of the Paris Office and *Kornel Olsthoorn* of the Amsterdam Office assisted in the preparation of this Commentary.

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