

# THE NEW ENVIRONMENT FOR CLIMATE CHANGE LITIGATION

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Legal Briefings - By **Jay Leary** and **Hannah Whitton**

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The Dutch Supreme Court (the **Court**) has recently affirmed a decision of the District Court to issue an order directing the State of the Netherlands to reduce its greenhouse gas emissions by the end of 2020 by at least 25% of the emissions as at 1990. The order issued by the District Court now stands as a final and binding order.

## EXECUTIVE SUMMARY

This litigation was brought by an environment focused not-for-profit foundation. Given its success, it is likely to inspire more environmental NGOs to commence similar legal action against corporations and governments.

The decision was based on a number of findings of fact, based on climate science evidence which was accepted by the Court and unchallenged by the parties, that established that there is 'a real threat of dangerous climate change'.

The Court adopted a broad interpretation of the principles under the European Convention on Human Rights (**ECHR**) and found that the protection of the right to life, home and private life extends to take measures to counter the genuine threat of dangerous climate change.

The Court recognised that there is an obligation on each State bound by the ECHR to 'do its part' to prevent dangerous climate change and that this obligation remains despite the Netherlands' small share in global greenhouse emissions and that the effect of reducing their own emissions makes little difference on an international scale.

The submission of the Netherlands that it is not the role of the Court to make political or policy decisions, such as those relating to the reduction of greenhouse gas emissions, was rejected. The Court held this to be permissible due to the exceptional grounds of the case, being the threat of dangerous climate change, the need to implement urgent measures and the State's obligations under the ECHR. In determining the appropriate specific measure to impose, the Court looked to internationally recognised scientific insights and standards.

## **KEY ISSUE**

Whether the Netherlands is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil, by at least 25% compared to 1990 emission levels, and whether the courts can order the State to do so.

## **SUMMARY OF PRIOR PROCEEDINGS**

The Urgenda Foundation, a not-for-profit made up of Dutch nationals, sought orders that the State limit the volume of greenhouse gas emissions in the Netherlands such that the volume would be reduced by between 40% and 25% at the end of 2020, as compared to the volume in 1990. The District Court and the Court of Appeal found in favour of Urgenda, granting the order that the State limit the volume by at least 25% by the end of 2020.

The District Court and Court of Appeal held that the State was failing to fulfil its duty of care pursuant to Articles 2 and 8 of the ECHR by not reducing the emissions by at least 25% by the end of 2020. Article 2 states that a State has a positive obligation to protect the lives of citizens within its jurisdiction and Article 8 obliges the State to protect citizens right to home and private life.

The Supreme Court affirmed these decisions and held, relying on evidence put before the Court, that there is a real threat of dangerous climate change and a serious risk that the current generation of Dutch inhabitants may lose their lives or have their family lives disrupted. The Court held that Articles 2 and 8 imply that the State has a duty to protect against this genuine threat.

## **SUPREME COURT DECISION**

### **ASSUMPTIONS REGARDING THE DANGER AND CONSEQUENCES OF CLIMATE CHANGE**

The Court noted the following as findings of fact regarding the danger and consequences of climate change:

- The emission of greenhouses gases, the partial result of the burning of fossil fuels, have led to increased concentration of the gases in the atmosphere which is warming the planet and resulting in extreme environmental conditions.

- Climate science has established that the safe warming of the planet must not exceed 1.5 degrees and concentration in atmosphere of 430ppm (formerly, the consensus was warming could not safely exceed 2 degrees and 450ppm).
- If the emission of greenhouses gases is not sufficiently reduced, the possibility that dangerous climate change will materialise in the foreseeable future cannot be excluded.
- The need to reduce greenhouse gas emissions is becoming more urgent.

## **INTERPRETATION OF ARTS 2 AND 8 OF THE ECHR**

### **INTERPRETATION**

The Court held that Articles 2 and 8 encompass long term environmental issues and that the protection does not only apply to specific persons, but applies to the population as a whole. The obligations to take appropriate steps under Articles 2 and 8 also encompass the duty to take preventative measures even where the materialisation of the risk is uncertain. The obligation to take appropriate steps may encompass mitigation and adaption measures.

The Court held that Articles 2 and 8 must be interpreted in light of Article 13, which provides that "if the rights and freedoms are violated, that there exists a right to an effective remedy before a national authority and the remedy given must provide effective legal protection from possible violation of the ECHR."

### **FINDINGS**

- The State is required under Articles 2 and 8 of the ECHR to 'take measures to counter the genuine threat of dangerous climate change as if this were merely a national problem'.
- Climate change constitutes a 'real and immediate risk' and risks that the lives and welfare of Dutch residents could be seriously jeopardised including because of the rise in sea level leading to some places becoming inhabitable.
- The protection and resulting obligation attaches and arises despite the fact that the risk will materialise in a few decades and that it will impact large parts of the population (as opposed to a specific person or group).

## **JOINT RESPONSIBILITY AND INDIVIDUAL RESPONSIBILITY OF STATES**

The Netherlands' defence that the reduction target of 25% was proposed for an overall target of group of wealthy countries and that the Netherlands cannot solve the global climate problem on its own was not accepted by the Court.

## **FINDINGS**

- The Netherlands is obliged to do its part in order to prevent dangerous climate change, even if it is a global problem. This is in part based on the approach of the United Nations Framework Convention on Climate Change (UNFCCC) and other annual global climate focused conferences, which are based on a global understanding that the all countries must work together to address the climate problem and the 'no harm principle' that exists at international law.
- The Court did not accept the defence that a State does not have to take responsibility because other countries do not comply with their partial responsibility or because the State's own share in global greenhouse emissions is very small, and that reducing emissions in its own territory makes little difference on a global scale. This was based on the view of the serious consequences of dangerous climate change and that in this context no reduction, no matter how small, can be said to be negligible.

## **SPECIFIC OBLIGATION OF THE STATE**

### **FINDINGS**

- What the obligation of the State means, in concrete terms, relies on national and international political agreement and that States must agree among themselves as to their respective individual share in reducing greenhouse gas emission and 'make the necessary choices and considerations'.
- That the Courts can assess whether the State complies with its duty under Articles 2 and 8 in relation to dangerous climate change, which may in certain circumstances, require an obligation on part of the State to take measures of a certain scope or quality.
- In determining the positive obligations imposed on the State, the Court looked to broadly supported scientific insights and internationally accepted standards.
- The Court rejected the Netherlands' defence that the order impermissibly involves creation of legislation and that it is not for the courts to make the political considerations necessary in relation to the level of reduction of greenhouse gas emissions.
- It was held that the case involves an exceptional situation being 'a threat of dangerous climate change and it is clear that measures are urgently needed' and that the State is required to do its part to protect the interests flowing from Articles 2 and 8 of the ECHR.

# WHAT ARE THE IMPLICATIONS OF THIS DECISION?

For the Netherlands government, it is left with the decision as to how best to implement the court's order. That is, how best to achieve a greater reduction in emission levels.

For the rest of the world, the decision will encourage climate change litigation from NGOs. Claims are initially more likely to be brought against states using binding conventions or state laws with broad principles.

However, in the not too distant future, those claims are likely to be brought against private entities (although the claims will be framed on a different basis). It is in the interests of the private sector to be heavily involved in the development of climate change policy. In this regard, being proactive rather than reactive is likely to be important. That is especially the case in jurisdictions such as Australia whose policy development is well behind.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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