

THE RISING TIDE OF CLIMATE CHANGE LITIGATION

28 February 2020 | Tokyo
Legal Briefings - By **Caitlin Eaton**

The Urgenda Foundation, a not-for-profit organisation made up of Dutch nationals, sought orders that the State of the Netherlands 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. These targets reflect the recommendations of the Intergovernmental Panel on Climate Change (**IPCC**), the United Nations body for assessing the science related to climate change.

Urgenda argued that the State's failure to commit to greater emission reductions, and the resultant risk of climate change, violates the European Convention on Human Rights (**ECHR**). The relevant provisions are as follows:

Article 2 provides that a State has a positive obligation to protect the lives of citizens within its jurisdiction.

Article 8 obliges the State to protect citizens' right to home and private life.

Article 13 sets out the right to an effective remedy before a national authority in respect of possible violations of the ECHR.

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. The Supreme Court (**Court**) affirmed these decisions and held, relying on climate science 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.

- Findings of fact regarding the danger and consequences of climate change
- State responsibility
- International implications

Findings of fact regarding the danger and consequences of climate change

The Court made several findings of fact regarding the danger and consequences of climate change. The parties did not dispute these facts, and the Court therefore proceeded to base its judgment on these facts.

The Court noted that:

- The emission of greenhouse 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°C (formerly, the consensus was warming could not safely exceed 2°C).
- If the emission of greenhouse 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.

These findings of fact are significant, given the continuing lack of international consensus on climate change issues. The willingness of both the State and the Court to engage with these issues, and to accept certain matters as fact, may serve as a reference point for future climate change litigation.

STATE RESPONSIBILITY

The decision to order the State of the Netherlands to reduce its greenhouse gas emissions by a minimum of 25% on 1990 levels by 2020 is based on the recommendations of the IPCC. In its 2007 report, the IPCC concluded that in order for the world to limit global warming to below 2°C (above pre-industrial temperatures), the countries listed in Annex I to the United Nations Framework Convention on Climate Change (**UNFCC**) must reduce their emissions by 25-40% by 2020 compared with 1990. This finding has subsequently been endorsed in various resolutions and statements at the year Conference of Parties to the UNFCC.

The State of the Netherlands argued that the reduction target of 25% was proposed as an overall target for a group of wealthy countries, and that the Netherlands cannot solve the global climate problem on its own. The State rejected that the IPCC target should be considered a legally binding rule, and emphasised that the Netherlands is only a minor contributor to climate change.

The Court concluded that there is a “*high degree of consensus*” on the urgent need for the Annex I countries (which includes the Netherlands) to reduce greenhouse emissions by at least 25-40% by 2020 compared to 1990 levels. In addition, the Court concluded that this target applies both to the group of Annex I countries collectively and to each individual State. The Court noted:

- the fact that other States fail to meet their responsibility is no ground for the State not to perform its obligations;
- the fact that Dutch emissions are minor compared to the global whole similarly is no ground for non-performance; and
- no single reduction is negligible, since every reduction has a positive effect in diminishing dangerous climate change.

The Court held that there is a “*threat of dangerous climate change and it is clear that measures are urgently needed*”. As such, the Court concluded that the State is required to do its part to protect the interests flowing from Articles 2 and 8 of the ECHR, and is therefore obliged to reduce its emissions by at least 25% by 2020 compared to 1990 levels.

INTERNATIONAL IMPLICATIONS

Climate change litigation against private actors and governments is an emerging trend in a growing number of jurisdictions. In 2017, there were 884 such cases filed in 25 countries (of which 230 were outside the US). As at 30 July 2019, this figure was 1522 cases (of which 304 were outside the US). The *Urgenda* case may inspire like-minded NGOs to bring similar actions against States using binding conventions or State laws with broad principles, including on the basis of human rights.

While Japan is one of the top scorers in the UN Sustainability Development Goals Index, Japan has faced international criticism in relation to its climate change policies. Recently announced plans to build as many as 22 new coal plants at 17 different sites within the next five years have been particularly contentious.

Like the Netherlands, Japan is also listed in Annex I to the UNFCCC, and is also party to the Kyoto Protocol and Paris Agreement. In addition, Japan has committed to protect a range of human rights through its domestic law and international obligations. For example, Article 25 of the Constitution of Japan provides that *“In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health.”* Article 13 further provides that *“All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”* Japan is also party to several international human rights instruments, including the International Covenant on Civil and Political Rights, which protects *“the inherent right to life”* (Article 6), and the International Covenant on Economic, Social and Cultural Rights, which recognises the right to *“the highest attainable standard of physical and mental health”* (Article 12).

To date, there have only been three climate change-related litigation actions in Japan (two against the State and one against a corporation). However, against the backdrop of growing international concern, and with the benefit of previous cases such as Urgenda, it is possible that the Japanese State and Japanese corporates may see an increase in climate change-related litigation, not only domestically but also internationally.

Our recent publication, [Climate Change: Succeed in a Lower Carbon Future](#), gathers insights from our global experts, considers the political, regulatory and commercial pressures arising from climate change, looks at the steps for ensuring that risk management practices measure up to the climate change challenge, and examines the benefits for businesses in all sectors that lead the transformation and innovate toward a lower-carbon future.

If you would like more information on this topic, please consult our report, our Climate Change page [here](#) or contact your usual HSF contact and we would be more than happy to discuss.

KEY CONTACTS

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



DAVID GILMORE
 MANAGING PARTNER,
 JAPAN & SOUTH
 KOREA, TOKYO
 +81 3 5412 5415
 David.Gilmore@hsf.com



CRAIG SHEPHERD
 PARTNER, TOKYO
 +81 35412 5456
 Craig.Shepherd@hsf.com



YOSUKE HOMMA
 SENIOR ASSOCIATE
 (REGISTERED
 FOREIGN LAWYER –
 ENGLAND & WALES/□
 □□□□□□□□□□□□□□□□
 □□□□□□□□, TOKYO
 +81 3 5412 5479
 Yosuke.Homma@hsf.com



CAITLIN EATON
 ASSOCIATE, LONDON
 +44 20 7466 2662
 caitlin.eaton@hsf.com

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