Yearbook of International Environmental Law

COUNTRY/REGION REPORTS

The Netherlands

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(1) Introduction

This country report deals with issues of Climate Change policy in the Netherlands and with developments of environmental law in the Netherlands in general as far as it is relevant for implementing international environmental law.

(2) Climate Change: goals and difficulties

In the fall of 2012 the political parties in the Netherlands negotiated for a new government and on 29 October 2012 a new coalition agreement was published (see <http://www.government.nl/government/coalition-agreement>). In 2010 Peeters reported in the Yearbook on the Dutch policy goals of the last government with respect to climate change. In that period the political parties didn't agree even on *the existence* of the human-induced global warming threat: the right wing Party for the Freedom (*Partij Voor de Vrijheid*, PVV) was supporting the minority government and contested the need to take climate protection actions. The new coalition-agreement of October 2012 (called 'Building bridges') states that government has an ambitious climate change policy. Perhaps most striking is the target of 16% renewable energy in 2020 instead of the 14% that is required by the European Union Directive on renewable energy (Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC). Furthermore it states that the Netherlands wishes to contribute to an international effort to allow for a sustainable energy supply in 2050.

Whether the Netherlands will meet the renewable energy target for 2020 is somewhat uncertain. According to the EU the EU target is likely to be met when the Netherlands follows its national renewable energy action plan. Still, it has been said that current efforts will allow for just 10,8% renewable energy in 2020 and that it is crucial that the Netherlands exploits the extra potential that is to be found in wind energy and biomass. One of the problems is that wind energy projects at sea – because of procedures and construction – take a long time before they're able to produce energy. Therefore arrangements to tap into that potential should be made in the near future. Another problem is the growing discomfort amongst citizens with large wind turbines on shore. In that respect the national government is negotiating with decentralised governments (provinces) to try and come to binding agreements for the allocation of sufficient space on shore for new wind turbine farms. Finding suitable space in a densely populated country like the Netherlands is not an easy task. In short, the Dutch government has made clear that it wants to be ambitious and in the years to come it has to prove it is.

With respect to emissions reduction of greenhouse gases the Netherlands is proactive in initiatives for reduction. As a Member State of the European Union, the country has a commitment for 20% reduction in CO2 emissions by 2020 on 1990 levels. Sectors in the EU Emission Trading System (EU ETS) are required to reduce emissions by 21% on 2005 levels in 2020. For those sectors not in the EU ETS, the Netherlands target is 16% reduction on 2005 levels in 2020. The Netherlands Environmental Assessment Agency (*Planbureau voor de leefomgeving*) has calculated that it is likely that the Netherlands will meet its Kyoto-targets and the (indicative) EU targets for the sectors not included in the EU ETS when it follows the existing policies that are in place but warns that progress is slow.

(3) Developments on Environmental Planning Legislation

(A) Restricting access to court: the Crisis and Recovery Act

One of the measures that the Netherlands has chosen to combat the economic crisis is the enactment of the Crisis and Recovery Act (*Crisis- en herstelwet*) in March 2010. The Crisis and Recovery Act is a special act, which was written and enacted in great haste. Its goal is to alleviate the economic crisis and to promote the recovery of the economic structure of the Netherlands. Its main instruments focus on accelerating decision-making processes and (administrative) court proceedings on a wide variety of economically relevant activities, especially in the fields of sustainability, green energy and innovation. Among other things, it involves the construction of roads and water defences as well as the construction of housing and wind farms, as well as innovative projects such as an energy neutral floating 'eco-home' and small scale wind turbines. All projects mentioned in the Annexes to the Act are deemed to be beneficial to economic growth, employment and sustainability in the Netherlands. With the Crisis and Recovery Act, the government wishes to make sure that in these economically difficult times the economic structure of the Netherlands is nevertheless reinforced, through implementing projects faster and sooner than otherwise possible.

One of the core objectives of the Crisis and Recovery Act is to ensure that court proceedings against any decision implementing a project mentioned in the Annexes are conducted as efficiently as possible and more expeditiously than court proceeding against other decisions. The idea is that faster court proceedings will lead to an earlier realisation of the projects concerned. In this way the CRA also tries to advance sustainability. To this end, Chapter 1 of the CRA contains several instruments relating to legal protection which differ from corresponding (general) provisions in the *General Administrative Law Act*. Some of these 'instruments' have been criticised. One of the most discussed provisions is Article 1.9 CRA that introduces a relativity-related requirement (*Schutznorm*) in Dutch administrative law (see Gerdy Jurgens, 'Introduction of a Relativity-related Requirement in Dutch Administrative Law. Will the Introduction of a Relativity-related Requirement in Dutch Administrative Law be in Breach of Community Law?', *JEEPL* 2007, p. 260-269). This provision was ruled not to be in breach of Articles 6 and 13 of the ECHR (access to court and effective remedy) (see Council of State 23 February 2011, case number 201006212/1/H2). It is furthermore believed that the interpretation of this provision by the highest administrative court in the Netherlands is not in breach of Article 9 of the Aarhus Convention.

One of the most interesting provisions from an international law perspective is Article 1.4 CRA, which aims at *restricting access* to administrative courts by denying local and regional

government authorities and bodies the right to judicial review by the administrative courts. It states that a legal entity established pursuant to public law and not being part of the central government, or an administrative body not being part of the central government, may not appeal against a decision, if that decision is not addressed to that legal entity or to an organ of the legal entity, or to that administrative body or the legal entity of which that administrative body is part.'

The provision could be in breach of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The highest general administrative court in the Netherlands, the Jurisdictional Division of the Council of State, didn't have any trouble dealing with those arguments. While several local governments argued that restricting their access to the administrative courts was in breach of Article 13 ECHR (right to an effective remedy) and probably Article 1 of the First Protocol of that convention (protection of property), the court ruled that the provisions of the ECRH do not apply to local, regional or national government bodies or public authorities. According to the interpretation of Article 34 ECHR ('The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.') the convention isn't meant to protect governmental bodies. This line of reasoning is in accordance with the judgements of the European Court of Human Rights (e.g. ECHR 9 November 2010, *Demirbaş and other* v. *Turky*, case 1093/08). In this respect there is no breach of the ECHR.

Article 1.4 of the Crisis and Recovery Act could well mean a violation of Article 9 of the Aarhus Convention (access to justice in environmental matters). As is well known without a doubt, the Convention provides in Article 9(2) that *members of the public concerned* should have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive and procedural legality of any decisions within the scope of the convention. The Convention grants this right to those members of the public concerned who either have 'a sufficient interest' or alternatively claim 'impairment of a right', where the national administrative procedural law requires this as a precondition. In Article 9(3) of the Aarhus Convention it is stipulated that *members of the public*, where they meet the national criteria, shall have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national law relating to the environment. As for a possible breach of the Aarhus Convention by the Netherlands for adopting Article 1.4 Crisis and Recovery Act, it should be noticed that this convention is a so-called mixed treaty, which means that both the European Union and the Netherlands are party to the convention, which implies that the Aarhus Convention is an integral part of the legal order of the European Union and of the Netherlands. It was implemented by the EU Regulation 1367/2006 that deals with the legal implications of the convention for EU institutions and bodies. More relevant is that the convention was implemented by adopting Directive 2003/35 on public participation with respect to the drawing up of certain plans and programmes relating to the environment. This implementation focuses on Article 9(2) and 9(4) of the Aarhus Convention and more specific on plans and programmes that are subject to an Environmental Impact Assessment (EIA). The EU didn't implement Article 9(3) Aarhus Convention.

The European Court of Justice has held that the jurisdiction to ascribe direct effect to a provision of a mixed treaty depends on whether that provision is found in a sphere in which the EU has legislated (ECJ 11 September 2007, *Merck Genéricos Produtos Farmacêuticos*, Case C-431/05, ECR I-7001). As the EU has implemented legislation to comply with Articles 9(2) and

9(4) Aarhus Convention, EU law applies. The Jurisdiction Division of the Council of State – therefore – refrained from examining the legal consequences of those provisions and just interpreted the EU legislation that was meant to implement them, in particular Article 10bis of the EIA-Directive that grants 'members of the public concerned' access to justice (see Council of State 29 July 2011, case number 201011757/14/R1, AB 2011/281; Council of State 7 December 2011, case number 201107071/1/H1). The Dutch court ruled that even if a decentralised public body could be considered a 'member of the public concerned' as meant in Article 10bis of the EIA-Directive (also see Article 11 of Directive 2011/92), the obligation upon the member state of the EU isn't breached as the possibility remains to bring the case before a civil court which would be considered fair, equitable, timely and not prohibitively expensive. If a provision of a mixed treaty isn't found in a sphere in which the EU has legislated, as is the case with Article 9(3) Aarhus Convention, the Netherlands is at liberty to decide whether individuals have the right to rely directly on the provision in question. Article 93 of the Dutch Constitution arranges for the possible direct effect of international (environmental) law in the Netherlands. It states that provisions of treaties which may be binding on all persons by virtue of their contents, shall become binding after they have been published. First, the Jurisdiction Division of the Council of State ruled that Article 9(3) Aarhus Convention does not contain such specific rights or obligations that they may bind all persons by virtue of their contents; it did so by referring to the case law of the European Court of Justice on Article 9(3) Aarhus Convention (ECJ 8 March 2011, *Lesoochranárske zoskupenie VLK*, case C-240/09). Second, it referred to the general idea that national law must be interpreted in such a manner as to comply with international law; this obligation of the national courts was also referred to in the case law of the European Court of Justice. In that respect the highest general administrative court in the Netherlands ruled that, since Article 9(3) Aarhus Convention refers to the application of national procedural requirements, there is no sound reason to conclude that the possibility for decentralised public bodies to bring a case before a civil court would be in contravention with the goals of that provision.

The procedural provisions of Chapter 1 of the Dutch Crisis and Recovery Act have been challenged more than once in court because of Article 1.4, but the Administrative Jurisdiction Division of the Council of State has ruled that this provision is not in breach of any treaty or provision of international (environmental) law for the possibility remains to bring the case before the civil court.

(B) Environmental Planning Act

In the 2010 country report it was mentioned that the Minister responsible for the environment had announced a restructuring of Dutch environmental, spatial and planning law into one Environmental Planning Act (hereafter EPA). A fundamental system change is needed in order to simplify and improve the current complex system. The outlines of the new EPA are sketched by the Minister in the spring of 2012. Fifteen acts of parliament will be integrated fully into the EPA (including the General Environmental Law Act, the Water Act, the Crisis and Recovery Act and the Spatial Planning Act), two acts will be repealed and elements from around 25 acts will also be incorporated into the new act. One of the points of departure in drafting the EPA is that the system is more closely in line with EU legislation in terms of aims, terminology and instruments. The EPA has to ensure that environmental law is tailored for the implementation of EU legislation. An aspect worth further consideration is that EU legislation itself does not always

adopt an integrated approach to environmental law. The government plans to play an active role in the coming period in the field of simplifying and integrating EU environmental legislation. At EU level it will call for a more integrated, modern approach to environmental legislation, similar to the developments taking place in the Netherlands. To this end, it will also fit in with the EU's Smart Regulation initiatives. The introduction of the EPA in the future will also contain regulation arising from international agreements to which the Netherlands is party. The current government will deliver a first draft legislative proposal in spring of 2013 (coalition agreement, p. 38).

(4) Nature

(A) Restructuring Nature Conservation Legislation

The State Secretary responsible for nature conservation presented on 22 August 2012 a proposal for a new Nature Conservation Act (*Wet natuurbescherming*) to the Second Chamber of Dutch Parliament. The main goal is to simplify and sober down the current nature conservation legislation. Three acts (*Natuurbeschermingswet 1998*, *Flora- en Faunawet* and the *Boswet*) will therefore be integrated into the new Nature Conservation Act. A draft proposal that was published on 6 October 2011 received a lot of criticism from environmental associations, scholars and the Advisory Division of the Dutch Council of State. For example, the International Union for Conservation of Nature (IUCN) is concerned that the new act would not guarantee full compliance with international treaties such as the Convention on Biological Diversity, the Ramsar Convention on Wetlands en the Convention on International Trade in Endangered Species. The Council of State underlines that several parts of the proposal have strained relations to the obligations deriving from European Law. The criticism is mostly caused by the Dutch policy to remove so-called gold-plating from nature conservation legislation and the definition of gold-plating that is used. When implementing European Directives into national law, the policy states that the legislation for implementation should refrain from introducing any additional measure to national law that is not strictly necessary according to the specific European Directive. It is possible that the Dutch government is ignoring its duty to take care of a complete and correct implementation of international treaties (such as the Bern and Bonn Conventions) by applying the no-gold-plating policy. One of the measures, for example, is to remove the legal regime for the protection of nature conservation areas that are not a part of the European Natura 2000 project. It is questionable whether this legal regime for the protection of these areas can be removed because of the function that these areas have in light of the provisions on area protection such as Article 4 (1) Bern Convention (see more and other examples L. Squintani & J. Zijlstra, 'Nationale koppen en de doorwerking van natuurbeschermingsverdragen', in: *Milieu en Recht* 2013, nr. 3).

The proposal of the Nature Conservation Act was declared controversial on 23 October 2012 by the Second Chamber of Dutch Parliament. This means that government was not allowed to take any decisions with regard to the Nature Conservation Act. The new government that came in to power on 5 November 2012 has stated in their coalition agreement that the proposal for the Nature Conservation Act will be readjusted (coalition agreement, p. 38). Where appropriate, the level of protection will be harmonized and brought in line with Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive) and

article 7 Directive 79/409 on the Conservation of Wild Birds (Wild Birds Directive) and other relevant legislation.

(B) International conflict with regard to nature conservation in de Scheldt

The long-lasting dispute between Belgium and the Netherlands on the compensation of nature damage resulting from the deepening of the river Scheldt finally ended in 2012. The Scheldt is a trans boundary river which runs through Belgium and the Netherlands. In 2005 Flanders and the Netherlands reached agreement on a series of treaties on the international management of the Scheldt Estuary, which enabled a further deepening of the navigation channel. The Netherland is obliged to compensate nature damage by means of flooding a polder. Strong local opposition however led the Dutch government to attempt to think of alternatives for flooding the polder. No decision to flood the polder where taken. Several studies on alternative measures for nature compensation were carried out. On 22 May 2012 the Flemish government decided to start up a dispute resolution proceeding on the basis of article 10 of the Scheldt Convention (*Verdrag uitvoering Ontwikkelingsschets 2010 Schelde-estuarium*). On 31 May 2012 the European Commission started infringement proceedings against the Netherlands for failing to comply with article 6 (2) of the Habitats Directive and with article 7 of the Wild Birds Directive (infringement nr. 2012/2089). In reaction the resigned Dutch government answered that in its view the Netherlands fully complied with the Habitats Directive and the Wild Birds Directive. However, in the coalition agreement of 29 October 2012 the new government stated to flood the polder as soon as possible. The planning is that the realization of nature compensation will be finished in the summer of 2019.

(5) Waste management

(A) Illegal Waste Transport and Deposit (Probo Koala)

There is also news with regard to the illegal export of waste from the Netherlands to the Ivory Coast with the ship Probo Koala in 2006. In order to head off a lengthy appeal process the Dutch Public Prosecution and the company Trafigura, its director and one of its employees settled their disputes out of court in November 2012. The public prosecution stated: 'Continuing the proceedings might take many more years. The cases will be concluded in a way that makes clear violation of international regulations for hazardous waste will not be tolerated'. Earlier in 2011 the Appeals Court in Amsterdam fined Trafigura 1 million euro for illegal export of hazardous waste (Appeals Court 23 December 2011, case numbers 23-003334-10, 23-003335-10 and 23-004035-10, *Milieu en Recht* 2012, nr. 42 with note Douma & Van Ham). Trafigura has now agreed to pay a further 300.000 euro as a compensation for its earnings from the illegal export. The case against the director is dropped in return for a fine of 67.000 euro (this is equal to the maximum fine that can be imposed for the illegal export of waste). The case against the employee is also dropped in return of a fine of 25.000 euro.