Avosetta Questionnaire on Climate Litigation

in

the Netherlands

Cork, 28-29 May 2021

Please keep your answers succinct – 2 pages max, excluding the questions.

[1] State of play at national level:

In the Netherlands (Member State), have cases been decided by the national courts, and / or are there cases pending before the courts, that aim to deliver better climate protection?

- *Yes. The successful (landmark) Urgenda case was decided by the Dutch Supreme Court on 20 December 2019 (ECLI:NL:HR:2019:2007; English), confirming that the Dutch Government (the State) had acted unlawfully by taking insufficient action to prevent dangerous climate change. The State was ordered to reduce greenhouse gas (GHG) emissions in the Netherlands by 25% in 2020 (compared to 1990) in accordance with its human rights (article 2 (life) and 8 (respect for private and family life ECHR) obligations.*

Are there "horizontal" cases between private parties and / or "vertical" ones between private parties and public authorities – or both? If yes, briefly characterise them. Actions challenging public authorities could be aimed: (1) at high level target setting for greenhouse gas emission (GHG) reduction; or (2) at the taking of more concrete measures reducing emissions (such as emissions limits for automobiles); or (3) at projects causing emissions as a side effect (such as a new runway or highway). Briefly indicate who are the claimants; what are the standing requirements; what is the objective of the action, and what is the reasoning on the substance of the case.

- *Horizontal? yes. The successful (landmark) case of Milieudefensie Nederland (Friends of the Earth Netherlands) against Royal Dutch Shell (RDS) was decided by the The Hague district court on 26 May 2021 (ECLI:NL:RBDHA:2021:5339; English). Also see: https://en.milieudefensie.nl/climate-case-shell. The court orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels' Based on a duty of care (interpreted using scientific facts/data, widespread consensus and internationally accepted standards, including a reference to human rights) and the fact that Friends of the Earth had*

sufficiently proven that the current Shell policy was insufficient to reduce the level of emission of Shell and its suppliers and buyers in line with the Paris climate agreement.

- *Vertical? 1) No, the Urgenda could be considered such a case but it does not include the public authorities as such (but the legal person/entity the Netherlands). The Dutch Climate Act requires government to introduce a Climate Plan that includes policy measures to ensure the Netherlands attains the goals stipulated in the Climate Act. In the explanatory memorandum of the Act the government states that the goals are to be considered (politically) binding but should not be viewed as a potential legal basis for a (Urgenda-like) law suit. If the Climate Plan is ill-suited to attain the goal, this is considered a political issue first (and perhaps not a legal issue at all)*
  2) In light of the just referred to Shell case the Dutch judiciary could now be facing several other lawsuits against other oil companies and perhaps against all sorts of (large) industries that cause climate change and do not have a sufficient policy in place to adhere to the goals of the Paris Agreement. However, I'm not aware of any such case at the moment.
  3) In several administrative court cases the word climate change has been used by claimants against decisions by administrative authorities. Those cases mostly concern new or renewed permits for either exploration and/or exploitation of oil and gas projects. As far as I know, such arguments have not been successful in light of the assessment framework in place for refusing/approving such permits. The same is – as far as I know – true when spatial development projects are granted; arguments concerning water management (climate adaptation) are relevant but e.g., an argument that holds that the buildings in a newly developed area should be build in a more sustainable way, are not (due to the fact that either those arguments are not considered spatially relevant and/or Dutch regulations provide norms that are to be considered exhaustive).

[2] Interconnections between developments at national and supranational level:

Where relevant, please connect the national experience to date with developments in climate litigation at the supranational level (e.g., proceedings before the CJEU and the ECtHR).

- *Well, in both the Urgenda case of 20 December 2019 and the Shell case of 26 May 2021 I think the Dutch judiciary has provided us with examples of the potential relevance of human rights (in the ECHR) in climate change litigation (even in horizontal cases) without having specific case law by the ECtHR on how to interpret those human rights in this sort of cases. Criticizing, comparing and discussing case law of courts in other countries and the CJEU and the ECtHR allows us to broaden our knowledge and reflect on developments.*
  See amongst others: https://brill.com/view/title/59537, https://www.beck-shop.de/climate-change-litigation/product/29341697 & https://link.springer.com/book/10.1007/978-3-030-46882-8.