



CIGI PAPERS

NO. 79 — NOVEMBER 2015

**A CLIMATE CHANGE
LITIGATION PRECEDENT**
*URGENDA FOUNDATION
v THE STATE OF THE
NETHERLANDS*

ROGER COX



**A CLIMATE CHANGE LITIGATION PRECEDENT:
*URGENDA FOUNDATION v THE STATE OF THE NETHERLANDS***

Roger Cox



Copyright © 2015 by the Centre for International Governance Innovation

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.



This work is licensed under a Creative Commons Attribution — Non-commercial — No Derivatives License. To view this license, visit (www.creativecommons.org/licenses/by-nc-nd/3.0/). For re-use or distribution, please include this copyright notice.



67 Erb Street West
Waterloo, Ontario N2L 6C2
Canada
tel +1 519 885 2444 fax +1 519 885 5450
www.cigionline.org

TABLE OF CONTENTS

iv	About the ILRP
iv	About the Author
1	Acronyms
1	Executive Summary
1	Introduction and Background
1	Urgenda's Case in Context of Other Climate Litigation
4	The Position of Urgenda
5	The Counter Arguments of the Dutch State
5	The Issue of Standing
6	The Court's Assessment on the Substantive Issues
13	The Significance of the Dutch Climate Case
15	Works Cited
16	About CIGI
16	CIGI Masthead

ABOUT THE ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP will focus on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law.

ABOUT THE AUTHOR



Roger Cox is a CIGI senior fellow with the International Law Research Program. He is lead counsel in representing the Urgenda Foundation and almost 900 Dutch citizens in precedent-setting litigation in which The Hague District Court ordered the Dutch government to cut greenhouse gas emissions by at least 25 percent by 2020. The case was primarily based on tort law, human rights law and international environmental law. His 2011 book, *Revolution Justified*, provided the inspirational impetus for the successful Dutch climate case.

Roger is also one of the attorneys representing the Belgian non-governmental organization (NGO) Klimaatzaak and almost 10,000 citizens in the climate proceedings launched against the Belgian government at the beginning of 2015. Moreover, he is helping to set up a network of NGOs and lawyers for possible climate proceedings in other countries.

In addition to his climate litigation practice, Roger is a partner at the Dutch law firm Paulussen Advocaten in Maastricht, where he is head of real estate, city development, energy and infrastructure. He is also founder of the Planet Prosperity Foundation, through which he promotes the circular economy. The Dutch Green Building Council selected Roger as one of the most influential people in sustainable real estate development and he is listed in *Trouw* newspaper's Sustainability Top 100. Roger is a visiting university lecturer, publishes regularly and holds seats at several business councils on sustainable development.

ACRONYMS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPA	Environmental Protection Agency
EU ETS	European Union Emissions Trading System
GHG	greenhouse gas
NGO	non-governmental organization
IPCC	Intergovernmental Panel on Climate Change
KNMI	Royal Netherlands Meteorological Institute
PBL	PBL Netherlands Environmental Assessment Agency
TFEU	Treaty on the Functioning of the European Union
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

EXECUTIVE SUMMARY

On June 24, 2015, The Hague District Court rendered a historic judgment in the climate case of *Urgenda Foundation v the State of the Netherlands*. The ruling marks the first successful climate change action founded in tort law, as well as the first time a court has determined the absolute minimum emissions-reduction target for a developed state, based on the duty of care and regardless of arguments that the solution to the global climate problem does not depend on one country's efforts alone. This paper provides a summary of the case and background information to it, and some context with regard to the developments in climate change litigation. It closes with some observations on the significance of the decision for climate change litigation in other jurisdictions.

INTRODUCTION AND BACKGROUND

After more than two years of preparation, the Urgenda Foundation and 886 Dutch citizens brought a legal action in the Netherlands against the Dutch state for its ongoing contribution to climate change.¹ The action argued that by not adequately regulating and curbing Dutch greenhouse gas (GHG) emissions, the state commits a tort of negligence against its citizens.

On June 24, 2015, The Hague District Court rendered its decision in the Urgenda case, confirming, for the most part, the facts and legal argumentation presented by Urgenda. In this unprecedented decision, the court considered the current Dutch climate policies inadequate and unlawful, labelled them as hazardous negligence and ordered the Dutch government to limit the joint volume of Dutch annual GHG emissions by at least 25 percent at the end of 2020 compared to the 1990 level.

Based on the state's current policy, the Netherlands are targeting a 16 percent reduction while current prognoses show that the Netherlands will achieve a reduction of 17 percent at most in 2020. According to the court, this is below the norm of 25 to 40 percent deemed necessary in climate science and international climate policy for developed countries to achieve by 2020 to avoid a more than 2°C warming of the average temperature of the earth. Hence the order to curb emissions by at least 25 percent by 2020.

The Hague District Court apparently realized the significance and historic nature of its decision, as it was immediately made available in an English translation; the court probably expected it to generate worldwide attention, as it did.²

Indeed, the ruling marks the first successful climate change action founded in tort law as well as the first time a court has determined the appropriate emissions-reduction target for a developed state, based on the duty of care and regardless of arguments that the solution to the global climate problem does not depend on one country's efforts alone.

URGENDA'S CASE IN CONTEXT OF OTHER CLIMATE LITIGATION

The tort law approach in climate litigation has been tried before, but so far only against large fossil fuel companies such as the lawsuits against the US private companies

¹ An article about the case was published in the *Utrecht Journal of International and European Law* (Cox 2014a), and later in the *Journal of Planning and Environmental Law* (Cox 2014b).

² The English translation of the ruling is available from the website of Urgenda and the website of the court, respectively: www.urgenda.nl/documents/VerdictDistrictCourt-UrgendaVStaat-24.06.2015.pdf and <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RB-DHA:2015:7196>.

ExxonMobil³ and American Electric Power Company.⁴ Thus far, these US cases have been without success because the suits were dismissed by the US courts on the grounds that regulating GHG emissions is a political issue rather than a legal one, and must be resolved by the legislator and the executive branch.

Climate change litigation against political institutions, on the other hand, has mainly relied on administrative environmental and planning law and not on private (tort) law. Some of these administrative cases have been successful, such as the Australian case *Gray v the Minister of Planning*,⁵ in which it was held that the GHG impacts of burning coal had to be taken into account in the environmental impact assessment of a proposed coal mine in New South Wales, and most notably the case of *Massachusetts v Environmental Protection Agency* in the United States, in which 12 states and several cities

successfully brought suit against the EPA to force the federal agency to regulate GHGs as air pollutants.⁶

In the Urgenda case, it was a conscious decision to bring tort law to bear against a national government rather than against the fossil fuel sector. In contrast to companies, national governments have made quite explicit statements — in the context of the United Nations Framework Convention on Climate Change (UNFCCC) and its annual climate change conferences — regarding the danger of climate change and what should be done about it. They have consistently done so based on the scientific findings of the UN's Intergovernmental Panel on Climate Change (IPCC).

In international climate politics, for instance, countries that have signed the UNFCCC jointly decreed during the 2010 UN Climate Change Conference in Cancun that an increase in the average global temperature of 2°C or more (compared to the preindustrial baseline of 1850) must be regarded as dangerous climate change.⁷ This decree was preceded by a joint statement issued by the participating countries during the 2009 UN Climate Change Conference in Copenhagen: “[T]o achieve the ultimate objective of the Convention to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we shall, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius... enhance our long-term cooperative action to combat climate change” (UNFCCC 2009, 1).

Since the initial drafting of the UNFCCC in 1992, the industrialized countries (i.e., the Annex I countries⁸) have committed to take the initiative with respect to dealing

3 The village of Kivalina, Alaska, is coping with erosion of its coastline due to climate change, and has to be relocated. Wanting compensation for damages incurred, it filed suit against several energy companies, including ExxonMobil. The US Court of Appeals for the Ninth Circuit held that Kivalina's federal common law claim of public nuisance for global warming by GHGs was displaced by the Clean Air Act. “Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea,” concluded Circuit Judge Sidney R. Thomas. “But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.” See *Native Village of Kivalina v ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). See more at <http://blogs.law.columbia.edu/climatechange/2012/09/26/9th-circuit-affirms-dismissal-in-kivalina-v-exxonmobil/>.

4 Several states filed a lawsuit against the American Electric Power Company and four other owners of fossil-fuel-fired power plants, together operating in 20 states. The states sought to curb the defendants' GHG emissions under public nuisance law due to their contributions to climate change. The court dismissed the lawsuit on displacement of federal common law by the Clean Air Act. The court found that Congress had entrusted the Environmental Protection Agency (EPA) in the first instance to decide how GHGs should be regulated, and that it is not for the federal courts to issue their own rules. See US Supreme Court in *American Electric Power Company v Connecticut*, 564 U.S. (2011). See more at: <http://blogs.law.columbia.edu/climatechange/2011/06/20/todays-supreme-court-decision-in-aep-v-connecticut/>.

5 The website of the Centre for Resources, Energy and Environmental Law, University of Melbourne, summarizes the case as follows: “This case concerned the adequacy of an environmental impact assessment of a proposed new coal mine in the Hunter Valley. [Justice Nicola Pain] held that the EIA needed to address the indirect impacts of the GHG emissions from the mine. Moreover, while her Honour noted that climate change is a global problem with many contributing sources, [Justice Pain] held that this did not mean that the contribution from a single large source should be ignored in the EIA process. [Justice Pain's] decision was based on the principles of ecologically sustainable development (ESD), in particular, intergenerational equity and the precautionary principle.” *Gray v Minister for Planning and Ors* (2006) 152 LGERA 258.

6 *Massachusetts v EPA* 549 U.S. 497 (2007) rendered a decision on whether the federal EPA has the mandate to regulate GHG emissions. The EPA initially took the position that it did not have the authority to regulate these emissions. The US Supreme Court ruled to the contrary and found that, on the basis of the Clean Air Act, the EPA had an obligation to regulate these emissions or provide an explanation for not doing so. On December 9, 2009, the EPA signed the Endangerment Finding regarding GHGs under section 202(a) of the Clean Air Act, establishing that the current and projected concentrations of six GHGs in the atmosphere threaten the public health and welfare of current and future generations. Simultaneously, the EPA signed the Cause or Contribute Finding, determining that motor vehicles contribute to the GHG pollution that threatens public health and welfare. The EPA subsequently implemented emissions standards for vehicles. See more at www3.epa.gov/climatechange/endorsement/.

7 “Dangerous climate change” is used here to refer to “dangerous anthropogenic interference with the climate system,” as described in article 2 of the UNFCCC.

8 Annex I countries include the industrialized countries that were members of the Organisation for Economic Co-operation and Development in 1992, plus countries with economies in transition, including the Russian Federation, the Baltic states, and several Central and Eastern European states.

with the climate problem. They have done so in light of their historic emissions of GHGs into the atmosphere, their prosperity accumulated due to the use of fossil fuels and their better economic, financial and technological position for dealing with climate change. At the 2010 UN Climate Change Conference in Cancun, the Annex I countries once again jointly acknowledged that they should be expected to take the initiative in combatting climate change and asserted their awareness that, based on the scientific findings of the IPCC, they would have to reduce their GHG emissions by 25 to 40 percent by 2020.⁹

Another reason that it is better to bring action against national governments than large fossil fuel companies is that the former have jointly adopted the IPCC reports and relied on them as points of departure during climate change conferences. As long as the claimant in a climate case bases its argumentation on the IPCC findings, there is little to nothing a national government can do from a legal perspective to contest these findings. This puts the judge in an easier position to pass judgment and reach a verdict.

For this and other reasons, wrongful act climate cases brought against national governments would appear to have better chances of success than lawsuits brought against the fossil fuel sector: a scientific basis has been established and governments have acknowledged the need to achieve a certain amount of reduction within a certain period of time. When it comes to demands for reduction, this is an important point.

This is not to say that it will not be possible in the present or near future to hold fossil fuel companies accountable for wrongful acts if they have no policy for contributing to the 2°C target; however, at the time the Urgenda case was submitted, the legal basis was better for bringing a case against the Dutch government than it was for bringing a case against a multinational oil company such as Royal Dutch Shell. Incidentally, it is becoming increasingly clear that the large fossil fuel companies are paying heed to the 2°C target and the corresponding need to achieve significant emissions reductions at both the national and international level. However, they are publicly speculating that the 2°C goal will not be achieved due to the increasing global demand for energy and the lack of signs that legislation will be implemented that could prevent the earth from warming by more than two degrees. In an open letter from 2014, for instance, Shell writes: “[W]e concur with the view in the recent Intergovernmental Panel on

Climate Change (“IPCC”) report that there is a high degree of confidence that global warming will exceed 2°C by the end of the 21st century....Shell does not believe that any of its proven reserves will become ‘stranded’ as a result of current or reasonably foreseeable future legislation concerning carbon.”¹⁰ This kind of argument is also used by other fossil fuel companies to assure shareholders that their recoverable fossil fuel reserves will retain their value over the long term and that there is no reason, therefore, to doubt the long-term right of existence and attractive financial valuation of fossil fuel companies.¹¹ The fact that fossil fuel companies knowingly continue to base their business model on the assumption that governments will not be capable of implementing sufficient effective legislation in time to prevent the dangerous temperature increase of more than 2°C might well improve the chances of bringing successful climate proceedings to bear against those companies.

That being said, it was a conscious decision that the action arising from a wrongful act was brought against the Dutch state rather than against a company. In the Urgenda case, it was also a conscious decision not to base the action taken against the state on administrative environmental law, as such cases mainly involve assessing the actions of the government in light of current environmental laws. The essence of the climate problem, however, is precisely the fact that current environmental laws do not provide sufficient protection against the risks of dangerous climate change. For this reason, it would not make sense to use environmental law to attempt to impose a stricter reduction obligation on the state than that which the state itself has taken as a point of departure. Achieving such an outcome would not appear to be likely by means of environmental law. In contrast, the open standard in tort law with respect to formulating the duty of care provides many more grounds for such an outcome. This is mainly because when establishing the civil duty of care in a specific case, judges can weigh a large number of facts and circumstances. In the case of duty of care with respect to climate change, the universal consensus regarding dangerous climate change and the consensus (based on scientific arguments) among industrialized countries regarding the contribution they should make in order to avert this danger can be important

9 In Cancun, the Annex I countries, among others, declared as signatories to the Kyoto Protocol: “Also recognizing that the contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change, indicates that achieving the lowest levels assessed by the Intergovernmental Panel on Climate Change to date and its corresponding potential damage limitation would require Annex I Parties as a group to reduce emissions in a range of 25–40 per cent below 1990 levels by 2020” (UNFCCC 2010).

10 See the 20-page open letter from Shell dated May 16, 2014, in response to enquiries from shareholders regarding the “carbon bubble” or “stranded assets” issue, which refers to the notion that about four-fifths of all proven reserves of fossil fuel companies should stay in the ground and should not be burned if we are to stay below a 2°C warming of the planet. See, in particular, pages 1 and 19 of this letter, at <http://s02.static-shell.com/content/dam/shell-new/local/corporate/corporate/downloads/pdf/investor/presentations/2014/sri-web-response-climate-change-may14.pdf>.

11 See, for example, the website of ExxonMobil, and in particular its report “Energy and Carbon — Managing the Risks”: http://cdn.exxonmobil.com/~/_/media/global/files/energy-and-environment/report---energy-and-carbon---managing-the-risks.pdf.

in defining what should be regarded as socially responsible behaviour.

While parties such as Urgenda and private citizens cannot directly derive rights from treaty provisions or resolutions that have been adopted during the various climate change conferences, these provisions and resolutions can help — by means of the open standard of a socially responsible duty of care — in defining the duty of care standard that a government must practise in judicial matters. This applies even if these resolutions do not have any legally binding force between governments. As “soft law,” they can still carry weight — at least as it pertains to Dutch law. The court ruling also shows that the state’s obligations pursuant to other treaties, such as the European Convention on Human Rights (ECHR) and the Treaty on the Functioning of the European Union (TFEU), further define the duty of care standard. The same applies to the state’s constitutional obligations.

In essence, the combination of the open standard for the duty of care and its definition by climate science and international climate politics, its definition based on the various relevant treaties, the Dutch Constitution and the acknowledgements made by the state in the national context (in ministerial letters, policy documents, etc.) form the foundation upon which the ruling was based.

The decision of the Dutch court in *Urgenda v the State of the Netherlands* creates new angles for using a tort-law as an approach against governmental inaction to address climate change. Within the climate movement, the decision has generated hope that this kind of successful legal action can be replicated in other countries and be used to press for more governmental action on climate change. A similar climate case demanding at least a 25 percent reduction of emissions by 2020 is already pending in Belgium, instituted by a Belgian non-governmental organization (NGO) and no fewer than 9,000 Belgian citizens.¹²

Against this backdrop, this paper summarizes the positions taken by Urgenda and the State of the Netherlands and the main aspects and findings of The Hague District Court’s ruling. It concludes with some remarks about the ruling’s significance.

THE POSITION OF URGENDA

Briefly summarized, Urgenda supported its reduction claim as follows.¹³

The current global GHG emissions levels, particularly the carbon dioxide (CO₂) level, leads to or threatens to lead to a global warming of more than 2°C, and thus also to dangerous climate change with severe and even potentially catastrophic consequences. Such an emissions level is unlawful toward Urgenda, as this is contrary to the due care that should be exercised in society. Moreover, it constitutes an infringement of, or is contrary to, article 2 (“the right to life”) and article 8 (“the right to health and respect for private and family life”) of the ECHR, on which both Urgenda and the parties it represents can rely. The GHG emissions in the Netherlands additionally contribute to (imminent) hazardous climate change. The Dutch emissions that form part of the global emissions levels are excessive, in absolute terms and even more so per capita. This makes the GHG emissions of the Netherlands unlawful.

The fact that emissions occur on the territory of the state and the state, as a sovereign power, has the capability to manage, control and regulate these emissions, means that the state has “systemic responsibility” for the total GHG emissions level of the Netherlands and the pertinent policy. In view of this, the fact that the emissions level of the Netherlands (substantially) contributes to one of several causes of hazardous climate change can and should be attributed to the state. In view of article 21 of the Dutch Constitution, among other things, the state can be held accountable for this contribution toward causing dangerous climate change. Moreover, under national and international law (including the international law “no-harm” principle,¹⁴ the UN Climate Change Convention and the TFEU), the state has an individual obligation and responsibility to ensure a reduction of the emissions level of the Netherlands in order to prevent dangerous climate change. This duty of care principally means that a reduction of 25 to 40 percent, compared to 1990, should be realized in the Netherlands by 2020. A reduction of this extent is not only necessary to continue to have a prospect of a limitation of global warming of up to (less than) 2°C, but is furthermore the most cost effective. With its current

13 See also subsection 3.2 of the ruling. For a more extensive explanation of the claims, see Cox (2014b) or see the translated versions of Urgenda’s writ of summons and statement of reply, at www.urgenda.nl/en/climate-case/. The plea documents of Urgenda have not yet been translated from Dutch into English; they include, among others, the graphs that the court has incorporated in the decision and the explanations of these graphs.

14 The essence of the no-harm rule (deriving from the Trail Smelter Arbitration of 1941) is that no state has the right to use its territory, or have it used, to cause significant damage to other states.

12 See the website <http://www.klimaatzaak.eu/en/>.

climate policy, the state seriously fails to meet this duty of care and therefore acts unlawfully.

THE COUNTER ARGUMENTS OF THE DUTCH STATE

Briefly summarized, the state argued as follows (subsection 3.3). Urgenda’s claims are not allowable, as there is no real threat of unlawful actions toward Urgenda attributable to the state, while the requirements for liability based on tort law (Dutch Civil Code, book 6, section 162) have also not been met. In that context, the state, among other arguments, pointed out that there is a lack of causation between Dutch emissions and the climate change consequences against which Urgenda seeks protection. The Dutch emissions make a relatively small contribution to climate change, since no more than 0.5 percent of global emissions are discharged from the Dutch territory. The state acknowledged the need to limit the global temperature rise to less than 2°C, and claimed that its efforts are, in fact, aimed at achieving this objective. The current and future climate policies, which cannot be seen as separate from the international agreements or from standards and (emissions) targets formulated by the European Union, are expected to make this feasible. The state has no legal obligation — arising from either national or international law — to take measures to achieve the reduction targets stated in Urgenda’s claims. The implementation of the Dutch climate policy, which contains mitigation and adaptation measures, is not in breach of articles 2 and 8 of the ECHR. Allowing (part of) the claims is furthermore contrary to the state’s discretionary power. This would also interfere with the system of separation of powers and harm the state’s negotiating position in international politics.

THE ISSUE OF STANDING

The case was instituted by Urgenda, acting on its own behalf, as well as acting as representative of the 886 individual citizens who joined the lawsuit.

Urgenda is a foundation established under Dutch law with the statutory aim “to stimulate and accelerate the transition process to a more sustainable society, beginning in the Netherlands.” It relies on the definition of the word “sustainability” as set out in the 1987 report of the World Commission on Environment and Development of the United Nations, also known as the Brundtland Report, which reads as follows: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

The court started with the premise that, under Dutch law, NGOs are allowed to institute public interest cases. Under the Dutch Civil Code, a foundation or association with full

legal capacity may bring an action to the court pertaining to the protection of general interests or the collective interests of other persons, insofar as the foundation or association represents these general or collective interests based on objectives formulated in its bylaws (Dutch Civil Code, book 3, section 305a). Based on its bylaws, Urgenda is defending the interests of a “sustainable society.” The court agreed with Urgenda that it has standing to defend the rights of not just the current generation but also future generations to availability of natural resources and a safe and healthy living environment. The court considered that the term “sustainable society” has by its very nature an intergenerational dimension. The court also considered, in establishing standing (subsections 4.4–4.10), that Urgenda relied on legally relevant norms as laid down in, for instance, article 2 of the UNFCCC¹⁵ and articles 2 and 8 of the ECHR, and that invoking these articles can be viewed as being in line with the objectives of Urgenda’s bylaws. After all, the court said, these articles also aim at the protection of the interests that Urgenda seeks to defend, namely protection against activities that threaten to lead to serious threats to ecosystems and human societies.

The court concluded that Urgenda’s claims, insofar as it acts on its own behalf, are allowable and that the court therefore can assess the case in its entirety. Later on in the decision, once the court had determined that Urgenda’s own claim would be awarded, the court rejected the claim that was instituted on behalf of the 886 claimants. The court argued: “Even if it is assumed that the individual claimants can rely on articles 2 and 8 of the ECHR, their claims cannot lead to a decision other than the one on which Urgenda can rely for itself. In this situation, the court finds that the individual claimants do not have sufficient (own) interests besides Urgenda’s interest. Partly in view of practical grounds, this has led the court to reject the claim in so far as it has been instituted on behalf of the [individual] claimants. The question of *locus standi* can therefore be left unanswered” (subsection 4.109).

Because the question of *locus standi* of the individual citizens was left unanswered, it is not clear whether individual citizens could ask the court for protection against inadequate climate policies. However, the court seems to hint that if Urgenda’s own claim would not have been awarded, the individual citizens might have had sufficient interest and therefore standing, because the court considered: “In the opinion of the court, the possibility of damages for those whose interests Urgenda represents, including current and future generations of Dutch nationals, is so great and concrete that given its duty of care, the State must make an adequate contribution,

¹⁵ The UNFCCC, article 2, states that the ultimate objective of the treaty is “to prevent dangerous anthropogenic interference with the climate system.”

greater than its current contribution, to prevent hazardous climate change” (subsection 2.89).

THE COURT’S ASSESSMENT ON THE SUBSTANTIVE ISSUES

According to the court, the case had at its core the question of whether Urgenda can force the state to reduce the emissions of GHGs to a greater degree than would be effectuated by the policy intentions of the Dutch Government (subsection 4.1). As the court explained, the claims submitted by Urgenda involve many difficult and extensive “climate-related” issues on which the court does not have expertise (subsection 4.3). The court therefore based its assessment of these issues on the facts that both parties agreed on, relating to both current scientific knowledge and other data that the state recognized to be correct.

Since the state, as expected, did not deny the IPCC findings¹⁶ that were brought forward by Urgenda, nor the reports of other international institutions such as the United Nations Environment Programme (UNEP) (2013) and the International Energy Agency (2013), nor the reports of national agencies and institutions such as PBL Netherlands Environmental Assessment Agency (PBL) (2010) and the Royal Netherlands Meteorological Institute (KNMI) (2015), the court could rely, *de facto*, on the climate science that was put forward.

The court considered three main questions in this case:

- How severe is the problem, the scale of the alleged danger of climate change and what emissions reductions are needed to avert the danger?
- Does the Dutch state have a legal obligation to Urgenda to take further-reaching reduction measures in view of the alleged danger of climate change?
- If this is so, is this an appropriate matter to be decided in a courtroom?

The Severity of the Climate Problem and the Reductions Needed

With regard to the first question, about the severity of the problem of climate change, the court first considered that the IPCC has established that a worldwide change in climate is taking place and that it is very likely that human actions, particularly the combustion of fossil fuels and deforestation, are the main causes. Based on IPCC science and the acknowledgement thereof in the Cancun Agreements (UNFCCC 2010), the court found that the 2°C

target has globally been taken as the starting point for the development of climate policies (subsection 2.14).¹⁷

The court furthermore considered it certain that global emissions are still increasing rather than decreasing (subsection 2.15), and continued:

It is not disputed between the Parties that dangerous climate change has severe consequences on a global and local level. The IPCC has reported that the ice at the North and South Poles as well as alpine glaciers are melting due to global warming, which will result in a rise in sea levels. Moreover, the warming of the oceans is expected to result in increased hurricane activity, expansion of desert areas and the extinction of many animal species because of the heat, the latter causing a decline in biodiversity. People will suffer damage to their living environment because of these changes, for instance, a deterioration of food production. Furthermore, the temperature rise will lead to heat-related deaths, particularly among the elderly and children. The IPCC reports also state that the current temperature rise causes damage to man and the environment. The 2°C target, also assumed by the Netherlands, is intended to prevent climate change from becoming irreversible: without intervention, the aforementioned processes will become unstoppable. (subsection 4.16)

Specifically on the consequences for the Netherlands, the court considered as follows:

The reports of the PBL and KNMI are based on the IPCC reports and also describe that in the next hundred years the Netherlands will face higher average temperatures, changing precipitation patterns and a sea level rise. Chances of heatwaves in the summer will increase and extreme precipitation will become more prevalent. The basins of major rivers will on the one hand have to contend with more extreme precipitation, while on the other hand chances of a decreased amount of supplied water are high in the summer. High levels of river discharge, in combination with rising sea levels and high water levels at sea, could more frequently lead to dangerous situations in the downstream areas. Less water in the summer means, among other things, higher risks of salinization in the

¹⁶ The IPCC Fifth Assessment Report consists of three working group reports, and one synthesis report. It can be found at www.ipcc.ch.

¹⁷ The court also acknowledged the restriction for a number of countries in the Pacific Ocean, such as Tuvalu and Fiji, for which dangerous climate change, with the associated risk of destruction of their territories, probably will already occur at a temperature rise of 1.5°C. “The signatories therefore decided in Cancun to ‘maintain a view on’ a 1.5°C target,” the court said (subsection 4.14).

coastal areas and less freshwater for agriculture. The Netherlands will also feel the consequences of climate change elsewhere in the world. Some imported products will become more expensive. (subsection 4.17)

On the basis of considerations such as these, the court concluded that a highly hazardous situation for humans and the environment will occur with a temperature rise of more than 2°C compared to the preindustrial level, and that it is therefore necessary to stabilize the concentration of GHGs in the atmosphere, which requires a reduction of the current anthropogenic GHG emissions.

The court next established the maximum safe level of GHG concentrations in the atmosphere and the associated reduction targets and reached the following conclusions on the basis of IPCC science, decisions of various climate summits and decisions by the European Council and the Dutch government:

The foregoing leads to the further intermediate conclusion that according to the current scientific position, the prevention of dangerous climate change calls for a 450 scenario¹⁸ with an associated reduction target for the Annex I countries, which includes the Netherlands and the EU as a whole, of 25–40% in 2020, and 80–95% in 2050. The EU and the Netherlands have acknowledged this finding as such and (initially) focused on an emissions reduction target of 30%. However, the EU subsequently refused to commit to more than a 20% reduction, with the Netherlands joining this path from about 2010.¹⁹ For 2030, the EU and the Netherlands have committed to a 40% reduction target; and to an 80% reduction target for 2050. This brings the reduction target back in line with the IPCC's proposed reduction target for a 450 scenario for 2050. (subsection 4.29)

The court then determined that the Dutch target for 2020 is below the standard deemed necessary by climate science and international policy, meaning that a 25 to 40 percent

reduction target for Annex I countries (including the Netherlands) is necessary to realize the 2°C target and thus to prevent dangerous climate change (subsection 4.31, v).

The court then addressed (subsection 4.32 and following) the state's argument that the current Dutch target of 16 percent is nevertheless sufficient (effectively a maximum reduction of 17 percent) because the European Union is planning to implement a 40 percent reduction by 2030, and the Netherlands will be contributing to this reduction. Based on this new target for 2030, it would still be possible to achieve the set target of an 80 to 95 percent reduction by 2050. This would adequately contribute to achieving the 2 °C target, the state argued.

The court did not follow this line of reasoning because the result of a lower target for 2020 is that the Netherlands would, on balance, release more GHGs into the atmosphere over the entire period up to 2050 than would be the case if emissions were to be reduced by 25 percent or more by 2020. The court formulated its stance as follows:

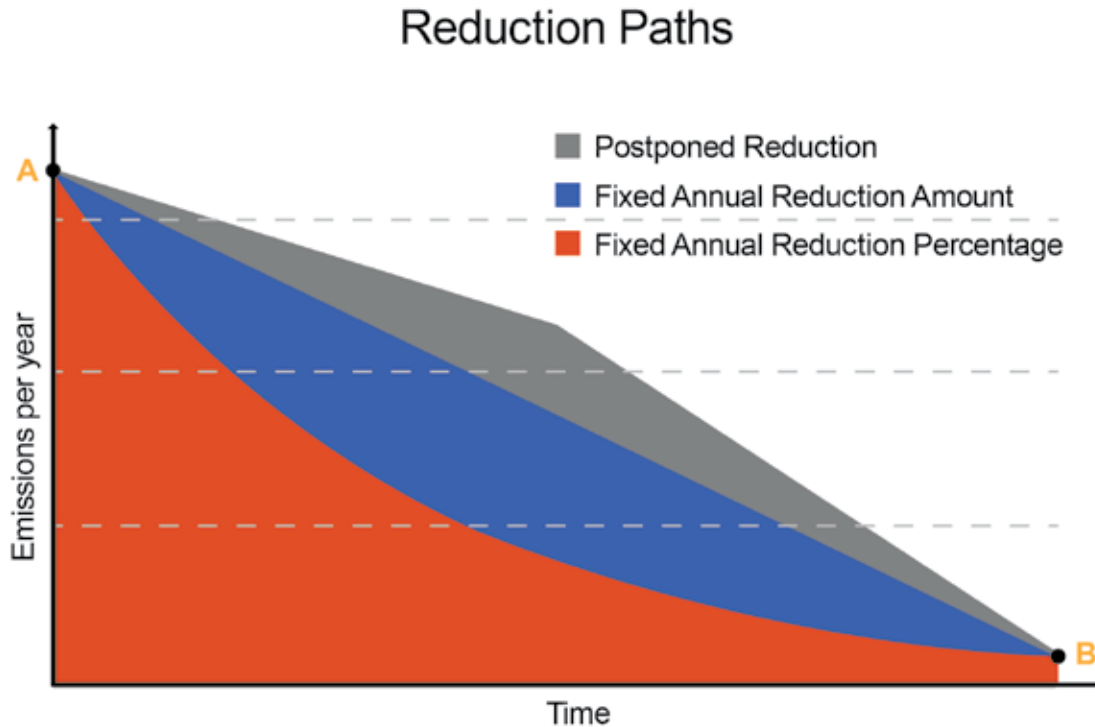
Urgenda is correct in arguing that the postponement of mitigation efforts, as currently supported by the State (less strict reduction between the present day and 2030 and a significant reduction as of 2030), will cause a cumulation [sic] effect, which will result in higher levels of CO₂ in the atmosphere in comparison to a more even procentual [sic] or linear decrease of emissions starting today. A higher reduction target for 2020 (40%, 30% or 25%) will cause lower total, cumulated GHG emissions across a longer period of time in comparison with the target of less than 20% chosen by the State. The court agrees with Urgenda that by choosing this reduction path, even though it is also aimed at realising the 2°C target, will in fact make significant contributions to the risk of hazardous climate change and can therefore not be deemed as a sufficient and acceptable alternative to the scientifically proven and acknowledged higher reduction path of 25–40% in 2020. (subsection 4.85)

In order to illustrate this difference in cumulative emissions, explanatory graphs were submitted to the court during the plea of Urgenda. A few of these graphs, including the one shown here, were included in the court's ruling.

18 On the basis of science and as accepted in international climate policy, in order to achieve the 2°C target, the GHG concentrations in the atmosphere have to stabilize at 450 ppm (ppm = parts per million), meaning that of every million molecules in the atmosphere only 450 can be GHGs.

19 On the basis of the European Union's Effort Sharing Decision, the Netherlands has to achieve a reduction target of 16 percent in 2020 (Decision No 406/2009/EC of the European Parliament and of the Council of April 23, 2009, on the effort of member states to reduce their GHG emissions to meet the community's GHG emissions reduction commitments up to 2020). The state's most current prognosis is that an actual reduction of 17 percent at most was feasible on the basis of existing and anticipated policies and that the actual reduction would be no less than 14 percent in 2020.

Figure 1: Emissions Reductions Paths



Source: Urgenda Foundation.

The following is the full text that was provided with this graph during the plea on behalf of Urgenda, which seems the best way to explain the importance of following the right emissions-reduction scenario:

1. If one starts at a particular emission level (shown on the graph as point A) and ultimately aims to arrive at a much lower emission level in 2050 (point B), there are essentially three reduction paths for getting there.
2. The first reduction path, shown in orange, is characterised by larger amounts of reductions at the beginning of the period than at the end of the period. While the curve exhibits a relatively sharp drop during the first phase until 2020, it becomes quite gradual towards the end of the period from 2040 onwards.
3. Of all three scenarios, this scenario features the least cumulative emissions during the entire period up to 2050 – represented by the total surface of the orange section.
4. This orange reduction path appears to require disproportionately severe reduction efforts at the beginning of the period and far too few reduction efforts at the end of the period. Appearances can be deceiving, however, as the efforts required remain the same from year to year between point A and B. The orange line in fact represents the fixed annual reduction percentage that is required for arriving at point B in 2050 when starting from point A.
5. If this fixed annual reduction percentage is 5%, for instance, the orange line shows what will happen if the emission level is reduced by 5% each year in comparison to the previous year.
6. If the starting point A represents 100 emission units, a 5% reduction during the first year would amount to a reduction of 5 units, meaning that the emission level would drop to 95 units.
7. During the second year, this emission level of 95 units would drop by 5%, which is now only 4.75 emission units, resulting in an emission level of 90.25 units after two years.
8. In the third year, this emission level of 90.25 would once again be reduced by 5%, which is now only 4.51 emission units.
9. The percentage thus remains the same from year to year (5%), while the annual reduction drops from 5 units, to 4.75 units, to 4.51 units and so on towards 2050. This is why the curve is at its steepest during

the first year and gradually begins to level off after that.

10. And since the requirement is the same each year in terms of percentage, this approach evenly spreads out the reduction efforts over the entire period up to 2050.
11. This reduction method also fits with the reality of emission reduction scenarios, in that larger steps can be taken early on due to the principle of “low-hanging fruit,” while later on reduction becomes increasingly more difficult.
12. The straight blue line represents a second possible reduction path. This path is linear from point A to point B, with emissions being reduced by the same amount of units each year until point B is reached in 2050. This is another way in which reduction efforts can be spread out evenly over the entire period.
13. It is clear, however, that this linear scenario leads to significantly more emissions than the orange scenario, as the emission volume is equal to the orange and blue sections of the graph combined.
14. The reason for the larger emission volume is that the emissions in 2020 and 2030 are much higher than they are in the orange scenario. Both paths arrive at the same point B in 2050, but the cumulative GHG emissions are much greater in the blue scenario because there were not enough reductions in 2020 and 2030. This demonstrates the importance of maintaining the right reduction percentages for 2020 and 2030, and that the focus cannot only be on achieving a reduction percentage in 2050.
15. As submitted in exhibit U96,²⁰ the British government puts it shortly and succinctly as follows: “[I]t is not simply the level of emissions in a future target year that we should be concerned about. It is cumulative emissions over the whole period that matter.”
16. The third scenario is represented by the bulging grey line on the graph. As can be seen, this scenario features a more gentle downward slope in the period up to 2030 than in the blue scenario. Reduction efforts seem to be more or less postponed, meaning that the cumulative emissions are even greater.
17. The postponed reduction scenario is thus the most dangerous path and the path which exhibits the least duty of care. Nevertheless, this is the scenario which

the EU has chosen to follow and which the State is defending in these proceedings.

Based on these differences in cumulative emissions, among other things, the court has arrived at the conclusion that if emissions are not reduced by at least 25 to 40 percent by 2020 as science prescribes, there is an increased risk of dangerous climate change. Lower emissions reductions by 2020 are therefore not an option.

The court’s conclusion regarding the first main question is therefore that climate change is a serious danger and that a global reduction of emissions is necessary in order to prevent the threat of a dangerous climate change of 2°C or more. From a scientific perspective, the Netherlands, as an industrialized nation, must realize a reduction of emissions of 25 to 40 percent by 2020 compared to 1990.

The State’s Legal Obligation to Urgenda

We then come to the second question, which addresses whether the state has a legal obligation to Urgenda. The court’s answer to this question is based on the “open standard” of the Dutch Civil Code (book 6, section 162). In this respect, the court has kept in mind the discretionary power accorded to the state and its bodies in the determination and execution of government policy, including matters relating to the climate.

The court first of all recognized that the stipulations included in the UNFCCC, the Kyoto Protocol and the no-harm principle of international law do not have a binding force toward citizens (private individuals and legal persons) (subsection 4.39). The parties had also already agreed to this. Urgenda could therefore not directly rely on this principle, the treaty and the protocol. However, the court argued:

This does not affect the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that a national-law²¹ standard — a statutory provision or an unwritten legal standard — may not be explained or applied in a manner that would mean that the state in question violates²² an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts,

²⁰ Exhibit U96 refers to a printout from the United Kingdom’s Committee on Climate Change regarding “Carbon Budgets and Targets.” See www.theccc.org.uk/tackling-climate-change/reducing-carbon-emissions/carbon-budgets-and-targets/.

²¹ The English translation of this section of the Dutch verdict mistakenly uses the words “an international-law obligation.” The Dutch verdict, however, uses the words “een norm van national recht,” and therefore the translation should be as shown above.

²² The English translation of this section of the Dutch verdict mistakenly uses the words “has violated.” The Dutch verdict, however, uses the word “schendt” (“violates”), and therefore the translation should be as shown above.

including social propriety, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a ‘reflex effect’ in national law. (subsection 4.43)

Hence the court found that the stipulations included in the UNFCCC, the Kyoto Protocol and the no-harm principle of international law need to be taken into account when determining the state’s duty of care in relation to climate change.

The court proceeded: “The comments above regarding international-law obligations also apply, in broad outlines, to European law, including the TFEU stipulations, on which citizens cannot directly rely. The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. Urgenda may not derive a legal obligation of the State towards it from these legal rules. However, this fact also does not stand in the way of the fact that stipulations in an EU treaty or directive can have an impact through the open standards of national law described above” (subsection 4.44). With this the court refers to its earlier considerations with regard to article 191 of the TFEU, which states that EU policy on the environment shall aim at a high level of protection, as well as to the EU directives and decisions that are relevant to the topic of climate change, such as the Emissions Trading System Directive and the Effort Sharing Decision (subsections 4.40 and 4.41).

As for articles 2 and 8 of the ECHR, which Urgenda relied on, the court considered “that Urgenda itself cannot be designated as a direct or indirect victim within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8. After all, unlike with a natural person, a legal person’s physical integrity cannot be violated nor can a legal person’s privacy be interfered with” (subsection 4.45). The court thus found that Urgenda could not rely on the ECHR to uphold its claims. However the court did hold that the jurisprudence of the European Court of Human Rights (ECtHR) on articles 2 and 8 were relevant: “[B]oth articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards in the manner described above, such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code” (subsection 4.46). The court then reflected on the environmental law principles and scope of protection of articles 2 and 8 of the ECHR, such as those that can be derived from the ECtHR’s rulings, and also referred (subsections 4.47–4.50) to the *Manual on Human Rights and the Environment* (Council of Europe 2012).

As already mentioned in the brief summation of Urgenda’s position, Urgenda also relied on article 21 of the Dutch Constitution, which imposes a duty of care on the state relating to the livability of the country and the protection and improvement of the living environment. For the densely populated and low-lying Netherlands, this duty of care concerns important issues such as the country’s water defences, water management and the living environment. According to the court, this rule and its background do not provide certainty about the manner in which this duty of care should be exercised, nor about the outcome of the consideration in the case of conflicting stipulations. The court found that the manner in which this task should be carried out is covered by the government’s own discretionary powers (subsection 4.36).

After these and other related considerations, the court then concluded: “The foregoing leads the court to conclude that a legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution, the ‘no harm’ principle, the UN Climate Change Convention, with associated protocols, and Article 191 TFEU with the ETS Directive and Effort Sharing Decision based on TFEU. Although Urgenda cannot directly derive rights from these rules and Articles 2 and 8 of the ECHR, these regulations still hold meaning, namely in the question discussed below whether the State has failed to meet its duty of care towards Urgenda. First of all, it can be derived from these rules what degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it. Secondly, the objectives laid down in these regulations are relevant in determining the minimum degree of care the State is expected to observe. In order to determine the scope of the State’s duty of care and the discretionary power it is entitled to, the court will therefore also consider the objectives of international and European climate policy as well as the principles on which the policies are based” (subsection 4.52).

For the court, the principles involved in this case include, among others, the fairness principle, the precautionary principle (sometimes called the prevention principle; in short, prevention is better than cure) and the sustainability principle contained in article 3 of the UNFCCC. The fairness principle signifies that extra effort is required from the developed countries that have been responsible for most emissions and have also profited most from these emissions. Moreover, the court considered that it follows from the fairness principle that future generations must be borne in mind, as the UNFCCC states that the parties to the convention “should protect the climate system for the benefit of present and future generations of humankind” (UNFCCC, article 3, paragraph 1). The court argued: “The principle of fairness means that the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively

and disproportionately burdened with the consequences of climate change” (subsection 4.57). The court also established that the TFEU (article 191, paragraph 2) also includes a number of principles relevant to this case, such as the principle of a high level of protection and — once again — the precautionary principle (subsection 4.60).

The court reiterated that these objectives and principles constitute an important viewpoint in assessing whether or not the state acts wrongfully toward Urgenda and stated (subsection 4.63):

With due regard for all the above, the answer to the question whether or not the State is exercising due care with its current climate policy depends on whether according to objective standards the reduction measures taken by the State to prevent hazardous climate change for man and the environment are sufficient, also in view of the State’s discretionary power. In determining the scope of the duty of care of the State, the court will therefore take account of:

- (i) the nature and extent of the damage ensuing from climate change;
- (ii) the knowledge and foreseeability of this damage;
- (iii) the chance that hazardous climate change will occur;
- (iv) the nature of the acts (or omissions) of the State;
- (v) the onerousness of taking precautionary measures;
- (vi) the discretion of the State to execute its public duties — with due regard for the public-law principles, all this in light of:
 - the latest scientific knowledge;
 - the available (technical) option to take security measures; and
 - the cost-benefit ratio of the security measures to be taken.

With regard to the first three factors, the court was of the opinion that it is an established fact, based on the science that was put before it, that the current global emissions and reduction targets of the signatories to the UNFCCC are insufficient to realize the 2°C target and therefore the chances of dangerous climate change should be considered as very high — and this with serious consequences for humans and the environment, both in the Netherlands and abroad. Therefore the court took the view that the state is obliged to take measures in its own territory to prevent dangerous climate change (mitigation measures). The court also accepted as an established fact that, without far-

reaching reduction measures, the concentration of global GHG emissions will have reached such a high level in the atmosphere at around 2030, that realizing the 2-degree target will have become all but impossible. Therefore, mitigation measures should be taken expeditiously. The court argued that the faster the reduction of emissions can be initiated, the greater the chance that the danger will subside. The court also took account of the fact that the state has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors led the court to the opinion that, given the high risk of hazardous climate change, the state has a serious duty of care to take measures to prevent it (subsection 4.65).

In relation to the fifth factor (the onerousness of taking measures) the court considered that the Netherlands had originally adopted a reduction target of 30 percent for 2020 and that in 2009 the Cabinet argued that this was needed on the basis of science to stay on a plausible course to keep the 2-degree target within reach. The state had not argued that the decision of the new cabinet in 2010 to let go of that target was driven by improved scientific insight or because it was allegedly not economically responsible to continue to maintain that 30 percent target. Nor did the state argue that a reduction path of 25 to 40 percent in 2020 would lead to disproportionately high costs, or would not be cost effective in comparison with the slower reduction path for other reasons. The court also pointed out that neighbouring countries have adopted targets within the 25 to 40 percent range, such as Denmark (40 percent) and the United Kingdom (35 percent), and have therefore adopted stricter climate policies on top of the EU policies and that there is no indication that it hurts their economies and the competitiveness of their businesses. Based on this, the court concluded that there is no serious obstacle from a cost consideration point of view to adhere to a stricter reduction target. Furthermore, the court pointed out that taking immediate action, as argued by Urgenda, is more cost effective, and that this is also supported by reports of the IPCC and UNEP. In these reports it is also emphasized that later intervention increases the risks of dangerous climate change and also increases the need for new technologies that are now insufficiently available, while the risks and options for these technologies are still uncertain. The court was therefore of the opinion that the state has a duty of care to mitigate as quickly and as much as possible (subsections 4.70–4.73 and 4.82).

With regard to the fourth and sixth factors (the nature of the state’s acts and omissions and the state’s discretion), the court rejected the state’s argument that it cannot be seen as one of the causes of climate change, as it does not emit GHGs. The court did not find this a persuasive argument. First, based on Article 21 of the Constitution, the state’s concern must be focused on the protection and improvement of the living environment; that means a duty of care. Second, the state also has the power to exercise

effective control over emissions levels in the Netherlands (and indeed controls such levels). Third, when it became a signatory to the UNFCCC and the Kyoto Protocol, the state expressly accepted its responsibility for the national emissions level and in this context accepted the obligation to reduce this emissions level as much as needed to prevent dangerous climate change. The court found that for these and other reasons, the state plays a crucial role in the transition to a more sustainable society and therefore has to take on a high level of care for establishing an adequate and effective statutory and instrumental framework to reduce GHG emissions in the Netherlands (subsections 4.66 and 4.74).

According to the court, it is also not decisive that a reduction in Dutch emissions would only have a minor effect on global emissions. The court held that it is a scientific fact that every emission contributes to the rising global concentration of CO₂, and therefore no single country, large or small, can hide behind the argument that the prevention of dangerous climate change does not depend on that country's individual efforts alone. According to the court, emissions reduction is both a joint and individual responsibility of the signatories to the UNFCCC. The court also held that, since Dutch emissions reduction is determined by the state, the state may not reject possible liability by dismissing its contribution as minor.²³ Furthermore, the court argued that the Netherlands, as an Annex I country, must assume a leading role. Moreover, it was beyond dispute that the Dutch per capita emissions are among the highest in the world (subsections 4.76, 4.78 and 4.79).

The court carefully considered whether the obligations of the Netherlands with regard to the European Union, based on the ETS Directive and Effort Sharing Decision, should give cause to a different judgment. The court determined, however, that these do not prevent farther-reaching reduction measures from being taken. Other EU countries bound by the directive (such as the United Kingdom and Denmark) have accepted targets in their national climate policy that go over and above the percentages set at the EU level and EU legislation does not prevent setting higher national targets (subsection 4.80). The court also did not follow the state's argument that other European countries will neutralize reduced emissions in the Netherlands, and that GHG emissions in the European Union as a whole will therefore not decrease (so-called carbon leakage). The court pointed to IPCC findings that in general only about 12 percent of carbon losses occur and to an assessment document of the European Commission that concludes that "so far there have been no signs of carbon leakage" (European Commission 2014). In view of this, the court

argued, it cannot be maintained that extra reduction efforts of the state would be without substantial influence (subsection 4.81).

It is noteworthy that the court found that, due to the principle of fairness, the state, in choosing measures, will also have to take into account that costs are to be distributed reasonably between the current and future generations. If, according to the current insights, it is cheaper on balance to act now, the state has a serious obligation, arising from due care, toward future generations to act accordingly (subsection 4.76). The court also considered that the only effective remedy against hazardous climate change is to reduce the emissions of GHGs, since adaptation measures will not be sufficient to protect citizens in the long run (subsection 4.75).

From all the above considerations it follows, according to the court, that a sufficient causal link can be assumed to exist between the Dutch GHG emissions, global climate change and the effects (now and in the future) on the Dutch living climate. The court argued that the fact that Dutch emissions are limited on a global scale does not alter the fact that these emissions do contribute to climate change. The court also took into consideration that the Dutch GHG emissions have already contributed to climate change and by their nature will continue to contribute to climate change (subsection 4.90).

The court concluded that the severity and the scale of the climate problem make it necessary — in view of the fact that no other effective solutions to the problem yet exist — to take mitigation measures and not to wait for measures that will only take effect at a later date. The court pointed out that the greater and more serious the danger becomes, the more the state's discretionary power and freedom of choice will be diminished. However, the court did conclude that the state is free to make its own deliberations with respect to the reduction target to be chosen, within the range of 25 to 40 percent. In principle, the court considered a reduction in line with the lower limit to be appropriate. This therefore amounts to a reduction of emissions of at least 25 percent by 2020 compared to 1990 (subsection 4.86).

The court therefore answered the second main question as follows: in principle — that is, independent of the answer to the third main question with regard to the separation of powers — the state has a legal obligation to Urgenda to effect a reduction in emissions in the Netherlands of at least 25 percent by 2020 in comparison with the year 1990. In other words, the government's adoption of a lesser level of reduction constitutes unlawful conduct against Urgenda.

²³ A similar argument was adjudicated *mutatis mutandis* in the Kalimijnen ruling (the Potash Mines ruling) of the Dutch Supreme Court. See Cox (2014b, footnote 1).

The Separation of Powers

The third main question addresses the distribution of power within the state authorities, also known as *trias politica*. For many, the question will arise whether it is appropriate for an unelected judge to rule on this matter. Indeed, the state asserted that climate policy is a political matter that does not belong in a courtroom.

The court held that Dutch law has no complete separation of state authorities, in this case between the executive and judicial authorities. According to the court, it is better to say that the distribution of authorities between these two bodies (and the legislative authority) is intended to achieve a balance between the state authorities. In this regard, no single authority has primacy over the others in a general sense or in all circumstances, said the court.

The court's position is that each state authority has its own mandate and responsibilities, and the responsibility of the judge is to offer judicial protection and make decisions on legal disputes. They must do this if they are asked to, said the court. In this respect, the court considered it worthwhile to note that judges, although not elected, have democratic legitimacy in another, vital respect: their authority and ensuing "power" are based on democratically established legislation, whether national or international, which has assigned them the task of settling disputes, including in cases in which citizens have turned against government authorities.

The court said that the task of providing legal protection from government authorities (such as the state), predominantly belongs to the domain of a judge and that this task is also enshrined in legislation. The court held that by performing its task it does not enter the political domain with the associated considerations and choices. Separate from any political agenda, the court has to limit itself to its own domain, which is the application of the law, the court ruled. The fact that a court ruling can have political consequences does not in itself make it a political issue:

This does not mean that allowing one or more components of the claim can also have political consequences and in that respect can affect political decision-making. However, this is inherent in the role of the court with respect to government authorities in a state under the rule of law. The possibility — and in this case even certainty — that the issue is also and mainly the subject of political decision-making is no reason for curbing the judge in his task and authority to settle disputes. Whether or not there is a 'political support base' for the outcome is not relevant in the court's decision-making process. (subsection 4.98)

Finally, the court had to respond to the argument of the state that allowing the claim regarding the reduction order would damage the Netherlands' negotiating position at, for instance, the Conference of the Parties to the UNFCCC in Paris in late 2015. In the opinion of the court, this did not have independent significance in the sense that, if the court would rule that the law obliges the state toward Urgenda to realize a certain target, the government is not free to disregard that obligation in the context of international negotiations.

The court also considered, however, with regard to all the above, that it must be cautious if the order would lead to measures that would have consequences for third parties of which it does not have a good grasp. Due to the severity of the danger, the court argued, the greater the government's legal obligation, the less reason there is to issue a cautious judgment. In any case, this cautiousness did provide an additional reason for the court to restrict the order to a minimum of a 25 percent reduction in 2020 and to not award Urgenda the 40 percent reduction it had initially requested.

The court's answer to the third main question was therefore that the *trias politica* does not constitute a decisive counter-argument.

THE SIGNIFICANCE OF THE DUTCH CLIMATE CASE

It always seems impossible until it's done, Nelson Mandela once said. And once it's done, it becomes easier to do it again, to replicate it. That's what makes the Dutch climate case significant: it is precedent setting. Up front, many lawyers and legal scholars thought such a decision impossible, but here it is and the 60-page decision seems well reasoned. While the ruling is obviously not binding for any other country, it sets an example for the world that will hopefully be replicated many times.

It should be noted that the Dutch state formally appealed the case on September 23, 2015. Notwithstanding the appeal, the Dutch government has declared that it will raise its 2020 target to 25 percent and will inform the Dutch Parliament in the first half of 2016 how they expect to achieve that target.

As we have seen in asbestos and tobacco lawsuits, momentum seems to be gained after an initial — and thus historic — ruling sets a precedent. It is almost a rule that more judgments will follow. Subsequent condemnatory rulings will then begin to change the public perception of the problem. Twenty years ago, the idea of a ban on smoking in cafés or public buildings would have been unimaginable. After various court rulings, however, it is now generally accepted that smokers should not be

permitted to pose a risk to the health of others. It is to be hoped that cases dealing with the climate problem will follow the same course. That is why this ruling, the first of its kind in the world, is so important. It will hopefully help change the public perception of the problem and bring it in line with what climate scientists have been trying to make clear to us for so many years: climate change poses a major threat to society and states, and companies and citizens will have to do their share to stop it while the worst can still be avoided. States bear a special responsibility in this respect.

In the legal community, there has been an increasing conviction in recent years that the law and the judiciary may have a role to play in urging states and large fossil fuel companies to deal with the climate problem.²⁴ The general consensus is that politicians have put off dealing with the climate problem for far too long; as a result, the risk of a 2°C rise in global temperature has increased, and with it the risk of large-scale violation of human rights around the world. Prior to the ruling, the most conspicuous legal development in the field was the drafting of the Oslo Principles on Global Climate Change Obligations, a document that was put together by a group of lawyers and scientists, including supreme court judges from various countries, and issued in March 2015. The Oslo Principles point to the principles in existing law that are applicable to climate policy and argue that there are sufficient legal means by which countries and large fossil fuel companies can be compelled to limit GHG emissions. They conclude that judges can draw on international law, human rights and international environmental law to order states to enact better climate policies and thus prevent the harmful effects of climate change. According to the Oslo Principles, the right to life and health, international peace and security, access to water and food supplies, and economic progress, among other things, are at stake.

The principles in the Dutch climate case and the Oslo Principles are substantially the same, and offer good points of departure for climate proceedings in other countries, especially since both rely on the climate science of the IPCC, treaties such as the UNFCCC and human rights treaties, and the principles of international environmental law as laid down in various treaties and other forms of soft law, such as unanimous statements that have been made and laid down in (or in response to) treaties. It is hoped that legal scholars from around the world and in various fields will further explore the potential of these developments for their jurisdictions and for bringing new national and international climate cases to court. Those in government — particularly within countries whose current climate efforts and policies lag behind those of the Netherlands and the European Union — should consider

how they would respond to a potential legal challenge. In these ways, the law — and, in particular, tort law, human rights law and international environmental law — will be able to play the greater role it seems to deserve with respect to climate change. It is a role that is at least worth exploring, given what is at stake for global communities if the earth's temperature increases by more than 2°C. The law seems to provide us with the possibility of averting such disastrous global warming, thereby securing our safety and that of subsequent generations.

Belgium is the first country to follow the example of the Netherlands. In the spring of 2015, a Belgian NGO, Klimaatzaak, and more than 9,000 Belgian citizens, served a summons to the federal government and the country's three regions on the same grounds as in the Dutch case. The Belgian government, too, is being legally blamed for not taking sufficient measures to keep climate change in check. The claimants are also demanding that the Belgian government curb emissions by at least 25 percent in 2020. The ruling of the district court in The Hague can serve as a basis for the Belgian judge, in light of the many similarities between Dutch and Belgian law. This will give the claimants in Belgium good reason to hope that the same result can be achieved as in the Netherlands.

There has also been a breakthrough in the United States, in the state of Washington, involving a legal case in which eight youth petitioners submitted a petition for rulemaking to prevent dangerous climate change. The petition was rejected by the Washington State Department of Ecology and the youth petitioners started a lawsuit, *Zoe & Stella Foster v Washington Department of Ecology*. On June 23, 2015, Seattle-based Judge Hollis Hill ordered the state of Washington to reconsider the petition in light of current climate science and inform the court whether it will agree to more stringent emissions-reduction rules (*Superior Court of the State of Washington for King County, no. 14-2-25295-1 SEA*).²⁵

The ruling of the Dutch court, the developments surrounding the climate case in Belgium, the ruling of the court in Seattle, and the Oslo Principles are indications that countries and large fossil fuel companies have to pay more serious attention than in the past to the fact that tort law and human rights law will play a greater role in the climate debate and that they could be held liable in the long term if they fail to make sufficient contributions to solving the climate problem.

²⁴ See, for instance, Jaap Spier and Ulrich Magnus (2014), and Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunée (2012).

²⁵ See also www.westernlaw.org/article/washington-state-youth-win-unprecedented-decision-their-climate-change-lawsuit-press-release.

WORKS CITED

- Council of Europe. 2012. *Manual of Human Rights and the Environment*. Strasbourg, France: Council of Europe Publishing.
- Cox, R. H. J. 2014a. "The Liability of European States for Climate Change." *Utrecht Journal of International and European Law* 30 (78). doi:<http://dx.doi.org/10.5334/ujiel.ci>.
- . 2014b. "The Liability of European States for Climate Change." *Journal of Planning and Environment Law* 9: 961–71.
- European Commission. 2014. *Commission Staff Working Document: Executive Summary of the Impact Assessment*. Brussels: European Commission. http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2014/swd_2014_0016_en.pdf.
- International Energy Agency. 2013. *Redrawing the Energy-Climate Map*. Paris: International Energy Agency. www.worldenergyoutlook.org/media/weowebiste/2013/energyclimatemap/RedrawingEnergyClimateMap.pdf.
- KNMI. 2015. *KNMI '14: Climate Scenarios for the Netherlands*. De Bilt, Netherlands: KNMI. www.climatescenarios.nl/images/Brochure_KNMI14_EN_2015.pdf.
- Lord, Richard, Silke Goldberg, Lavanya Rajamani and Jutta Brunée. 2012. *Climate Change Liability: Transnational Law and Practice*. Cambridge, UK: Cambridge University Press.
- PBL. 2010. *Evolution of the Copenhagen Accord: Chances and Risks for the 2° Climate Goal*. The Hague: PBL and Ecofys.
- Spier, Jaap and Ulrich Magnus. 2014. *Climate Change Remedies: Injunctive Relief and Criminal Law Responses*. The Hague: Eleven International Publishing.
- UNEP. 2013. *The Emissions Gap Report 2013*. Nairobi: UNEP. www.unep.org/pdf/UNEPemissionsgapreport2013.pdf.
- UNFCCC. 2010. *The Cancun Agreements*. <http://cancun.unfccc.int/>.
- UNFCCC. 2009. *Copenhagen Accord*. <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>.

ABOUT CIGI

The Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and publications, CIGI's interdisciplinary work includes collaboration with policy, business and academic communities around the world.

CIGI's current research programs focus on three themes: the global economy; global security & politics; and international law.

CIGI was founded in 2001 by Jim Balsillie, then co-CEO of Research In Motion (BlackBerry), and collaborates with and gratefully acknowledges support from a number of strategic partners, in particular the Government of Canada and the Government of Ontario.

Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

For more information, please visit www.cigionline.org.

CIGI MASTHEAD

Executive

President	Rohinton P. Medhora
Director of the International Law Research Program	Oonagh Fitzgerald
Director of the Global Security & Politics Program	Fen Osler Hampson
Director of Human Resources	Susan Hirst
Director of Communications and Digital Media	Joseph Pickerill
Director of the Global Economy Program	Domenico Lombardi
Vice President of Finance	Mark Menard
Chief of Staff and General Counsel	Aaron Shull

Publications

Managing Editor, Publications	Carol Bonnett
Publications Editor	Jennifer Goyder
Publications Editor	Patricia Holmes
Publications Editor	Nicole Langlois
Publications Editor	Lynn Schellenberg
Graphic Designer	Melodie Wakefield
Graphic Designer	Sara Moore

Communications

Communications Manager	Tammy Bender	tbender@cigionline.org (1 519 885 2444 x 7356)
-------------------------------	--------------	--



67 Erb Street West
Waterloo, Ontario N2L 6C2, Canada
tel +1 519 885 2444 fax +1 519 885 5450
www.cigionline.org

