The Bonaire Climate Case

State Mitigation Obligations after KlimaSeniorinnen

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Once again, all eyes were on The Hague. After groundbreaking rulings in the *Urgenda* and *Shell* cases, the District Court in The Hague on 28 January delivered another important climate change decision in the case of *Greenpeace Netherlands v. The Netherlands (Bonaire)*.

The case stood out as it concerned the climate obligations of states with respect to their overseas territories. Bonaire is a small island in the Caribbean part of the Kingdom of the Netherlands. The District Court ruling was unique in that it found that the Dutch government had discriminated against the citizens of Bonaire by not taking sufficient and timely adaptation measures.

The ruling was also an important first opportunity for a national court to specify states' mitigation obligations in the wake of the European Court of Human Rights' (ECtHR) *KlimaSeniorinnen* judgment and the International Court of Justice's (ICJ) Advisory Opinion on climate change, which offered guidance on states' climate change obligations under international law.

In this contribution we focus on how the court approached the Dutch mitigation obligations. We argue that the court, acknowledging the contested political context in which the ruling was made, sought to square the circle of state mitigation obligations by balancing potentially far-reaching considerations about the mitigation efforts required from states like the Netherlands with an innovative procedural and dialogue-oriented remedy.

The Dutch Climate Act and Greenpeace's claims

The Netherlands adopted a framework climate law in the form of the 2019 Climate Act, which was amended in 2023 to align itself with the 2021 European Climate Law. The Act "provides a framework for the development of policy aimed at irreversibly and gradually reducing greenhouse gas emissions in the Netherlands in order to limit global warming and climate change", with the government committing to reducing net greenhouse gas emissions to net zero by 2050, whilst striving for negative emissions afterwards. Moreover, the Act includes an aspirational goal of reducing greenhouse gas emissions by 55% by 2030 compared to 1990 levels, a step up from a 49% reduction in the original Act.

Greenpeace claimed that these targets were far removed from what it argued to be the Dutch "fair share". Greenpeace principally demanded that the Netherlands be ordered to take the necessary measures to reduce its own emissions (minus emission reductions achieved through international climate finance) to net zero by 2030, and to reduce Dutch territorial emissions to net zero by 2040. Moreover, Greenpeace requested an order for the state to develop a national carbon budget with a clear explanation of how it is consistent with the country's fair share of global emissions. In short, Greenpeace sought a court order for more stringent targets.

The state's mitigation obligations

Three points stand out in the court's assessment of Dutch mitigation measures.

First among these is the court's engagement with *KlimaSeniorinnen*. Given that the claims concerned violations of Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR), it was to be expected that the court would draw on the ECtHR's guidance. Following *Urgenda*, the court reaffirms that it can review the compatibility of national climate policies with Articles 2 and 8 ECHR (¶¶9.1–9.6). Also referring to *Urgenda*, the court summarily rejects the

state's drop in the ocean and minimal contribution defenses (¶¶9.3–9.4). It then proceeds with unpacking the European Court's findings in *KlimaSeniorinnen* (¶¶10.1–10.31), filling in some of the gaps left by the ECtHR. Notably, it holds that while the ECtHR does not explicitly state whether Article 2 ECHR is applicable in collective actions, this applicability can be inferred from its reasoning (¶10.28). Ultimately, the court decides to focus on Article 8 ECHR rather than Article 2, since there is no acute threat to the right to life of the inhabitants of Bonaire (¶11.2).

Central to *KlimaSeniorinnen* is the margin of appreciation enjoyed by a state. This margin is limited when it comes to the necessity of greenhouse gas emissions reductions and the reduction goals to be pursued. The state enjoys a wider margin of appreciation with respect to the means chosen to achieve those objectives (¶10.21, referring to *KlimaSeniorinnen*, ¶543). This wider discretion is not unlimited: the measures adopted must be implemented and be suitable to achieve the goals (¶10.22). *KlimaSeniorinnen* itself, however, offers little guidance for assessing the substantive adequacy of specific reduction targets. For that assessment, the ECtHR refers back to the state's obligations under national and international law (¶10.24.3). The ruling in *Bonaire*, as will be discussed below, also sheds further light on the (possible) application of *KlimaSeniorinnen* when reviewing specific reduction targets. Remarkably, given the European origin of the Dutch climate goals, the court also comments on the compatibility of the European Climate Law targets with *KlimaSeniorinnen* and international climate change law.

Second, in its quest for substantive standards for assessing the Dutch climate measures, the court turns to international climate change law, including not only the climate treaties as interpreted in the ICJ's Advisory Opinion, but also treaty body (COP) decisions. For instance, the court finds that the non-legally binding 2023 Sharm el-Sheikh Implementation Plan, in which UN Framework Convention on Climate Change (UNFCCC) Parties "recognize" that "limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 relative to the 2019 level", constitutes a revision of an "interim target" (¶11.9.2), which Annex I (developed) countries like the Netherlands are bound by (¶11.13.2). Although the ICJ acknowledged that COP decisions can in limited instances be binding upon Parties and in other cases play a role in treaty interpretation, the court does not engage with the ICJ's reasoning, and seems to elevate COP decisions to the same level as treaty provisions, thereby identifying obligations without a clear legal basis.

Other standards referred to by the court could also have been better supported. For example, the court laments that Dutch (and EU) targets do not cover aviation and shipping emissions. The court presumably refers to *international* aviation and shipping emissions, which are indeed outside the scope of Dutch climate targets. In its reasoning the court mainly refers to Article 3 UNFCCC, which indicates that Parties "should take … policies and measures" that "comprise all economic sectors". However, this provision falls short of requiring Parties to adopt *targets* covering all sectors. Although there are good reasons to strengthen mitigation measures for international aviation and shipping, the court's argumentation here is incomplete.

Third, the court confines itself to a negative determination of the *insufficiency* of the Dutch reduction targets, primarily assessing the justifications brought forward by the state for these targets, without making a positive determination of what sufficient reduction targets would be. For instance, the court held that there are "strong indications that both the Dutch and European reduction standards are indeed … *lower* than the UN minimum standards for Annex I countries" and that on the basis of the arguments brought forward by the State "it *cannot* be established that this *is not* the case" (¶11.13.3). In a similar way, it considered it to be a "negative factor" that "the State has *not* provided [an] explanation" why it is equitable that Dutch "emissions per capita … are significantly higher than the global average carbon budget per capita" (¶11.13.5) and that the current targets are based on grandfathering, meaning that past emission levels are taken as the baseline for future targets. Furthermore, the finding

that the State will most likely *not achieve* its current 2030 and 2050 reduction goals (¶11.14.1), the *lack* of intermediate targets and pathways for the period between 2030–2050 (¶11.14.2), and the *absence* of a clear quantification of the remaining Dutch emissions budgets (¶11.15) are decisive elements in the court's reasoning.

Some may see this negative approach as a missed opportunity for the court to provide clarity on the applicable targets. Others would approve of this deferential approach to reviewing government policies. Nevertheless, the *Bonaire* case differs from the other two major Dutch mitigation cases. In *Urgenda*, the court examined the reduction target that the government should adhere to, and the government was ordered to reduce its emissions by 25% by 2020 (compared to 1990). In the *Shell* case, the NGO Milieudefensie among others sought a 45% reduction by 2030 compared to 2019 for the company's emissions. One implication of the court's approach in *Bonaire* is that the inherent scientific uncertainties and ambiguities associated with determining the applicable reduction targets played no substantial role, whereas for instance in the appeal in the *Shell* case this issue proved to be a crucial point on which Milieudefensie's (scope 3) reduction claim failed.

Squaring the circle through remedial innovation

Another novel element of the ruling is that the court ordered the state to change its regulations within 18 months (¶12.2), thereby referring the *positive determination* of adequate reduction targets back to the state. This remedial approach reflects the constitutional positioning of the court vis-à-vis the legislature. First, partly in response to *Urgenda* there is a strong perception among (right-wing) politicians that civil courts are overstepping their mandate by issuing orders with far-reaching societal consequences that leave little room for a political balancing exercise. Such concerns have led to initiatives in the Parliament to restrict possibilities for interest groups to bring (civil) cases against the state.

Second, compliance by the state with court orders is becoming less self-evident. *Urgenda* serves as a cautionary tale: while the original District Court order was declared provisionally enforceable already in 2015, the state made little effort to implement the order. The COVID-19 pandemic and low gas prices were important external factors for the state ultimately complying. Other recent court orders to reduce Dutch nitrogen depositions and to address noise pollution caused by Schiphol Airport have also led to concerns about non-compliance by the government.

This combination of politicians challenging judicial authority and the prospect of non-compliance with judicial orders may lead to a downward spiral, in which non-compliance may necessitate more intrusive judicial intervention, which in turn fuels debate about the role of the judiciary and may increase political unwillingness to comply (and so on). For courts, this (political) dynamic requires a delicate balancing act, which in the *Bonaire* case can specifically be observed in the remedial design. As the court observes, urgency is required in the formulation and implementation of adequate mitigation policies, and the judiciary should provide legal protection when the state fails to do so. Partly for that reason, the court declares its order provisionally enforceable (¶11.61). However, the court must remain mindful of its constitutional position and operate with restraint in imposing orders on the state. That is particularly the case when the order implies the drafting of regulation that also affects the interests of third parties (¶ 11.53). In *Urgenda*, this restraint was exercised by imposing a minimum reduction target and leaving the means of implementation to the state. *Bonaire*'s innovation lies in imposing this more dialogue-oriented remedy.

The dialogical nature of the order stems from the fact that the court (1) declares the current targets insufficient, (2) refers the setting of new targets back to the state, and (3) provides that, in an execution dispute, it can review the (in)sufficiency of choices underpinning the new targets. Yet the court may still need to substantively review the adequacy of the new regulations.

In that regard, questions arise about the clarity of the ruling. Some elements of the order are formulated with a fair degree of specificity, and are therefore rela-

tively easy for the state to comply with and for an execution court to assess (e.g., does the state adopt new regulations within 18 months?). Other parts of the order, however, are more general in nature and complying with those elements requires normative, methodological, and political choices (i.e., what reduction targets are in line with fair share principles, and what methodology is used to arrive at those targets?). It is unclear whether the court's reasoning offers sufficient guidance for the state and the court that would oversee compliance with the order.

In addition, questions arise about the consequences if a court in an execution dispute considers the new regulations to be insufficient, and concerning the extent to which the courts need to provide more substantive guidance on the appropriate targets. In any event, for matters of procedural law, it is impossible for an execution court to impose a specific reduction order on the state, since that claim by Greenpeace has been dismissed. But even if the new regulation is not contested or considered to be adequate, the state remains under the looming prospect of new litigation challenging compliance with the new targets set in it.

To conclude, *Bonaire* is another milestone in the ongoing struggle to strengthen Dutch climate targets. But like *Urgenda*, it is unlikely to be the final word.

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