O abc da justiciabilidade do dever de prevenir as alterações climáticas. Início do fim da irresponsabilidade coletiva?

Judgment of
THE HAGUE DISTRICT COURT
Chamber for Commercial Affairs
case number: C/09/456689 / HA ZA 13-1396

Judgment of 24 June 2015 in the case of the foundation **Urgenda Foundation**, acting on its own behalf as well as in its capacity as representative ad litem and representative of the individuals included in the list attached to the summons, with its registered office and principal place of business in Amsterdam, claimant, (...) [and] **The State of the Netherlands** (Ministry of Infrastructures and the environment), seated in The Hague, defendant, (...).

SUMMARY of the case

The Hague District Court has ruled today that the State must take more action to reduce the greenhouse gas emissions in the Netherlands. The State also has to ensure that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990. The Urgenda Foundation had requested the court for a ruling.

Current policy below the norm - The parties agree that the severity and scope of the climate problem make it necessary to take measures to reduce greenhouse gas emissions. Based on the State's current policy, the Netherlands will achieve a reduction of 17% at most in 2020, which is below the norm of 25% to 40% for developed countries deemed necessary in climate science and international climate policy.

State must provide protection - The State must do more to avert the imminent danger caused by climate change, also in view of its duty of care to protect and improve the living environment. The State is responsible for effectively controlling the Dutch emission levels. Moreover, the costs of the measures ordered by the court are not unacceptably high. Therefore, the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this.

With this order, the court has not entered the domain of politics. The court must provide legal protection, also in cases against the government, while respecting the government's scope for policymaking. For these reasons, the court should exercise restraint and has limited therefore the reduction order to 25%, the lower limit of the 25%-40% norm.

The legal proceedings were instituted by the Urgenda Foundation, a citizens' platform which develops plans and measures to prevent climate change. The foundation also represents 886 individuals in this case.

2. THE FACTS

A. Parties

2.1. Urgenda (a contraction of "urgent agenda") arose from the Dutch Research Institute for Transitions (Drift) at Erasmus University Rotterdam, an institute for the transition to a sustainable society. Urgenda is a citizens' platform with members from various domains in society, such as the business community, media communication, knowledge institutes, government and non-governmental organisations. The platform is involved in the development of plans and measures to prevent climate change.

B. Reasons for these proceedings

2.6. In its letter to the Prime Minister dated 12 November 2012, Urgenda requested the State to commit and undertake to reduce CO2 emissions in the Netherlands by 40% by 2020, as compared to the emissions in 1990.

2.7. In her letter dated 11 December 2012, the State Secretary for Infrastructure and the Environment replied to Urgenda's letter as follows (among other things):

"I share your concerns over the absence of sufficient international action as well as your concerns that both the scale of the problem and the urgency of a successful approach in the public debate are insufficiently tangible (...).

The most important thing is to eventually have a stable and widely supported policy framework which will lead to sufficient action to keep the long-term perspective of a 80%-95% CO2 reduction by 2050 within reach (...)

It is also clear that collective, global actions are required to keep climate change within acceptable limits. In this context of collective actions, the 25%-40% reduction you refer to in your letter was always the objective. The EU's offer to pursue a 30% reduction by 2020, on the condition that other countries pursue similar reductions, falls within that range. It is a major problem that the current collective, global efforts are falling short and fail to monitor the limitation of the average global temperature rise to 2 degrees. I will cooperate with national and international partners to launch and support initiatives to tackle this (...).

D. Climate change and the development of legal and policy frameworks

2.34. In light of climate change, agreements have been made and instruments have been developed in an international and European context in order to counter the problems of climate change, which have impacted the national legal and policy frameworks. (...)

In a UN context (...) In a European context (...) In a national context (...)~.

3. THE DISPUTE

3.1. In summary, after the amendment, Urgenda's claim involves the court, with immediate effect, to rule that:

(1) the substantial greenhouse gas emissions in the atmosphere worldwide are warming up the earth, which according to the best scientific insights, will cause dangerous climate change if those emissions are not significantly and swiftly reduced;

(2) the hazardous climate change that is caused by a warming up of the earth of 2°C or more, in any case of about 4 °C, compared to the preindustrial age, which according to the best scientific insights is anticipated with the current emission trends, is threatening large groups of people and human rights;

(3) of all countries which emit a significant number of greenhouse gases in the atmosphere, per capita emissions in the Netherlands are one of the highest in the world;

(4) the joint volume of the current annual greenhouse gas emissions in the Netherlands is unlawful;

(5) the State is liable for the joint volume of greenhouse gas emissions in the Netherlands;

(6) *principally:* the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020;

alternatively: the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by at least 40% compared to 1990, by the end of 2030;

and furthermore orders the State to:

(7) *principally:* to reduce or have reduced the joint volume of annual greenhouse gas emissions in the Netherlands that it will have been reduced by 40% by the end of 2020, in any case by at least 25%, compared to 1990;

alternatively: reduce or have reduced the joint volume of annual greenhouse gas emissions in the Netherlands that it will have been reduced by at least 40% by 2030, compared to 1990;

(8) to publish or have published the text contained in the reply and also change of claim or a text to be drawn up by the court in the proper administration of justice immediately on the request of Urgenda, at a date to be determined by Urgenda and to be communicated to the State at least two weeks in advance, in no more than six national daily newspapers to be designated by Urgenda, full-page and page-filling, and by means of logos or other marks clearly and directly recognisable as originating from the State or the government;

(9) to publish and keep published on the homepage of the website www.rijksoverheid.nl the text referred to in (8), starting on the date of publication and also during two consecutive weeks, in such a manner that the text appears on screen clearly legible for all visitors to the website, without the need for any mouse-clicking, and which has to be clicked to be closed before being able to go to other pages of the website; and

(10) orders the State to pay the costs of these proceeding.

3.2. Briefly summarized, Urgenda supports its claims as follows.

The current global greenhouse gas emission levels, particularly the CO2 level, leads to or threatens to lead to a global warming of over 2 °C, and thus also to dangerous climate change with severe and even potentially catastrophic consequences. Such an emission level is unlawful towards Urgenda, as this is contrary to the due care exercised in society. Moreover, it constitutes an infringement of, or is contrary to, Articles 2 and 8 of the ECHR, on which both Urgenda and the parties it represents can rely. The greenhouse gas emissions in the Netherlands additionally contribute to the (imminent) hazardous climate change. The Dutch emissions that form part of the global emission levels are excessive, in absolute terms and even more so per capita. This makes the greenhouse gas 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 greenhouse gas emission level of the Netherlands and the pertinent policy. In view of this, the fact that the emission 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 towards causing dangerous climate

change. Moreover, under national and international law (including the international-law "no harm" principle, the UN Climate Change Convention and the TFEU) the State has an individual obligation and responsibility to ensure a reduction of the emission level of the Netherlands in order to prevent dangerous climate change. This duty of care *principally* means that a reduction of 25% to 40%, compared to 1990, should be realised 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. *Alternatively*, the Netherlands will need to have achieved a 40% reduction by 2030, compared to 1990. With its current climate policy, the State seriously fails to meet this duty of care and therefore acts unlawfully.

3.3. The State argues as follows – also briefly summarised. Urgenda partially has no cause of action, namely in so far as it defends the rights and interests of current or future generations in other countries. Aside from that, the claims are not allowable, as there is no (real threat of) unlawful actions towards Urgenda attributable to the State, while the requirements of Book 6, Section 162 of the Dutch Civil Code and Book 3, Section 296 of the Dutch Civil Code have also not been met. The State acknowledges the need to limit the global temperature rise up to (less than) 2°C, but its efforts are, in fact, aimed at achieving this objective. The current and future climate policies, which cannot be seen as being separate from the international agreements nor from standards and (emission) targets formulated by the European Union, are expected to make this feasible. The State has no legal obligation – either arising from 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.(...)

4. THE ASSESSMENT

A. Introduction

4.1. This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions – particularly CO_2 emissions –in addition to those arising from the plans of the Dutch government, acting on behalf of the State. Urgenda argues that the State does not pursue an adequate climate policy and therefore acts contrary to its duty of care towards Urgenda and the parties it represents as well as, more generally speaking, Dutch society. Urgenda also argues that because of the Dutch contribution to the climate policy, the State wrongly exposes the international community to the risk of dangerous climate change, resulting in serious and irreversible damage to human health and the environment. Based on these grounds, which are briefly summarised here, Urgenda claims, except for several declaratory decisions, that the State should be ordered to limit, or have limited, the joint volume of the annual greenhouse gas emissions of the Netherlands so that these emissions will have been reduced by 40% and at least by 25% in 2020, compared to 1990. In case this claim is denied, Urgenda argues for an order to have this volume limited by 40% in 2030, also compared to 1990. (...)

4.3. The court faces a dispute with complicated and "climate-related" issues. The court does not have independent expertise in this area and will base its assessment on that which the Parties have submitted and the facts admitted between them. This concerns both current scientific knowledge and (other) data the State acknowledges or deems to be correct. (...)

B. Urgenda's standing (acting on its own behalf)

(...) The State argues that Urgenda has no case in so far as it defends the rights or interests of current or future generations in other countries. (...)

4.7. Article 2 of Urgenda's by-laws stipulate that it strives for a more sustainable society, "beginning in the Netherlands". This demonstrates prioritisation – as it rightly argues – and not a limitation to Dutch territory. (...)

C. Current climate science and climate policy

(...) The court has made the following conclusions based on the foregoing.

i) In AR4/2007, the 450 scenario is presented as necessary for a more than 50% chance of realising the 2 °C target, according to the parties. In AR5/2013, the IPCC established this chance at 66%. In order to realise the 450 scenario, Annex I countries need to attain a reduction resulting in an emission in 2020 of 35-40% below the level of 1990.

ii) In accordance with this, the Netherlands has cooperated with the decision in Cancun (2010) in which it was established that the Annex I countries at least have to realise a 25-40% reduction in 2020.

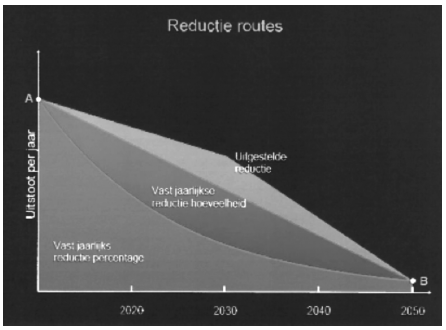
iii) In an international context the EU has committed to a reduction target of 20% for 2020, with an increase to 30% (both compared to 1990) if other Annex I countries commit to a similar reduction target. The standard of 20% for the EU is below the 30% standard deemed necessary by scientists.

iv) The Netherlands has committed to the EU target of 30% reduction in 2020, provided that the other Annex I countries do the same.

v) Up to about 2010, the Netherlands assumed a reduction target of 30% for 2020 compared to 1990, and after 2010 took on a reduction target that is derived from the EU reduction target of 20% and which is expected to result in a total reduction of 14-17% in 2020.

vi) The Dutch reduction target is therefore below the standard deemed necessary by climate science and the international climate policy, meaning that in order to prevent dangerous climate change Annex I countries (including the Netherlands) must reduce greenhouse gas emissions by 25-40% by 2020 to realise the 2°C target.

(...)The dispute between the Parties therefore does not concern the need for mitigation, but rather the pace, or the level, at which the State needs to start reducing greenhouse gas emissions. By way of explanation of the reduction percentages deemed necessary by Urgenda, the foundation argues that by not or no longer focusing on a reduction of 25-40% in 2020, but only on a reduction of 40% by 2030 and of 80-95% by 2050, the State will have higher emission levels than if it were to adhere to the intermediate objective of a 25-40% reduction in 2020. In this context, Urgenda refers to the graphs below (submitted during the plea):



Reduction paths
Y axis: annual emissions
X axis: Fixed annual reduction – percentage
Fixed annual reduction – amount
Delayed reduction (...)

Urgenda argues that the first graph – whose information is detailed further in the second and third graphs – shows that a delayed reduction path results in higher emissions than does a more evenly distributed reduction effort over the entire period up to the year 2050 or with a linear approach. Urgenda claims that graph also shows that a delayed reduction (less reduction until 2030 and more thereafter) will lead to higher total emissions and thereby increases the chances of exceeding the remaining "budget". (...)

The final target for 2050 and the required intermediate target for 2030 is not disputed between the Parties. The State concurs with Urgenda's argument that CO2 emissions will have to have been reduced by 80-95% in 2050, compared to 1990. Their dispute concentrates on the question whether the State is falling short – as argued by Urgenda – in its duty of care by pursuing a reduction target for 2020 that is lower than 25-40%, compared to 1990, which is the standard accepted in climate science and the international climate policy. First, the State argues that it cannot be forced at law towards Urgenda to adhere to the 25-40% target. Second, the State contests Urgenda's argument that it is failing to meets its duty of care by pursuing the proposed lower target of 25-40% for 2020. (...)

D. Legal obligation of the State?

4.35. As mentioned briefly above, Urgenda accuses the State of several things, such as the State acting unlawfully by, contrary to its constitutional obligation (Article 21 of the Dutch Constitution), mitigating insufficiently as defined further in international agreements and in line with current scientific knowledge. In doing so, the State is damaging the interests it pursues, namely: to prevent the Netherlands from causing (more than proportionate) damage, from its territory, to current and future generations in the Netherlands and abroad. Furthermore, Urgenda argues that under Articles 2 and 8 of the ECHR, the State has the positive obligation to take protective measures. Urgenda also claims that the State is acting unlawfully because, as a consequence of insufficient mitigation, it (more than proportionately) endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care. (...)The State contests that a duty of care arises from these sections for a further limitation of emissions than currently realised by it. The court finds as follows.

Contravention of a legal obligation

(...) 4.36. Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the liveability 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 water defences, water management and the living environment. 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 case of conflicting stipulations. The manner in which this task should be carried out is covered by the government's own discretionary powers.

4.37. The realisation that climate change is an extra-territorial, global problem and fighting it requires a worldwide approach has prompted heads of state and government leaders to contribute to the development of legal instruments for combating climate change by means of mitigating greenhouse gas emissions as well as by making their countries "climate-proof" by means of taking mitigating measures. These instruments have been developed in an international context (in the UN), European context (in the EU) and in a national context. The Dutch climate policy is based on these instruments to a great extent.

4.38. The Netherlands has committed itself to UN Climate Change Convention, a framework convention which contains general principles and starting points, which form the basis for the development of further, more specific, rules, for instance in the form of a protocol. The Kyoto Protocol is an example of this. The COP with a number of subsidiary organs was set up for the further development and implementation of a climate regime. Almost all COP's decisions are not legally binding, but can directly affect obligations of the signatories to the convention or the protocol. This applies, for instance, to several decisions taken pursuant to the Kyoto Protocol. These involve mechanisms which enable the trade in emission (reduction) allowances and which allow collaboration between the parties so that greenhouse gas emissions can be reduced where it is cheapest.

4.39. In this context, Urgenda also brought up the international-law "no harm" principle, which means that no state has the right to use its territory, or have it used, to cause significant damage to other states. The State has not contested the applicability of this principle.
(...)The court – and the Parties – states first and foremost that the stipulations included in the convention, the protocol and the "no harm" principle do not have a binding force towards citizens (private individuals and legal persons). Urgenda therefore cannot directly rely on this principle, the convention and the protocol (...)

4.43. This does not affect the the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. (...)This means that when applying and interpreting national-law open standards and concepts, including social proprietary, 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.

4.44. 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.

Violation of a personal right
(...) Although Urgenda cannot directly derive rights from these rules and Articles 2 and 8 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 determing 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.

Breach of standard of due care observed in society, discretionary power
4.53. The question whether the State is in breach of its duty of care for taking insufficient measures to prevent dangerous climate change, is a legal issue which has never before been answered in Dutch proceedings and for which jurisprudence does not provide a ready-made framework. The answer to the question whether or not the State is taking sufficient mitigation measures depends on many factors, with two aspects having particular relevance. In the first place, it has to be assessed whether there is a unlawful hazardous negligence on the part of the State. Secondly, the State's discretionary power is relevant in assessing the government's actions. From case law about government liability it follows that the court has to assess fully whether or not the State has exercised or exercises sufficient care, but that this does not alter the fact that the State has the discretion to determine how it fulfils its duty of care. However, this discretionary power vested in the State is not unlimited: the State's care may not be below standard. (...)

Factors to determine duty of care (...)

4.55. In principle, the extent to which the State is entitled to a scope for policymaking is determined by the statutory duties and powers vested in the State. As has been stated above, under Article 21 of the Constitution, the State has a wide discretion of power to organise the national climate policy in the manner it deems fit. However, the court is of the opinion that due to the nature of the hazard (a global cause) and the task to be realised accordingly (shared risk management of a global hazard that could result in an impaired living climate in the Netherlands), the objectives and principles, such as those laid down in the UN Climate Change Convention and the TFEU, should also be considered in determining the scope for policymaking and duty of care.

4.56. The objectives and principles of the international climate policy have been formulated in Articles 2 and 3 of the UN Climate Change Convention (see 2.37 and 2.38). The court finds the principles under (i), (ii), (iii) and (iv) particularly relevant for establishing the scope for policymaking and the duty of care. These read as follows, in brief:

(i) protection of the climate system, for the benefit of current and future generations, based on fairness;

(iii) the precautionary principle;

(iv) the sustainability principle.

4.57. The principle of fairness (i) 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. The principle of fairness also expresses that industrialised countries have to take the lead in combating climate change and its negative impact. The justification for this, and this is also noted in literature, lies first and foremost in the fact that from a historical perspective the current industrialised countries are the main causers of the current high greenhouse gas concentration in the atmosphere and that these countries also benefited from the use of fossil fuels, in the form of economic growth and prosperity. Their prosperity also means that these countries have the most means available to take measures to combat climate change.

4.58. With the precautionary principle (ii) the UN Climate Change Convention expresses that taking measures cannot be delayed to await full scientific certainty. The signatories should anticipate the prevention or limitation of the causes of climate change or the prevention or limitation of the negative consequences of climate change, regardless of a certain level of scientific uncertainty. In making the consideration that is needed for taking precautionary measures, without having absolute certainty whether or not the actions will have sufficient effects, the Convention states that account can be taken of a cost-benefit ratio: precautionary measures which yield positive results worldwide at as low as possible costs will be taken sooner.

4.59. The sustainability principle (iv) expresses that the signatories to the Convention will promote sustainability and that economic development is vital for taking measures to combat climate change.

4.60. The objectives of the European climate policy have been formulated in Article 191, paragraph 1 TFEU (see 2.53). The following are the principles relevant to this case (as evidenced by paragraph 2 of this article):

- the principle of a high protection level;
- the precautionary principle;
- the prevention principle.

4.61. With the principle of a high protection level, the EU expresses that its environmental policy has high priority and that it has to be implemented strictly, with account taken of regional differences. The precautionary principle also means that the Community should not postpone taking measures to protect the environment until full scientific certainty has been achieved. In short, the prevention principle means: “prevention is better than cure”; it is better to prevent climate problems (pollution, nuisance, in this case: climate change) than combating the consequences later on.

4.62.Article 191, paragraph 3 TFEU also means that in determining its environmental policy, the EU takes account of:

- the available scientific and technical information;
- the environmental circumstances in the various EU regions;
- the benefits and nuisances that could ensue from taking action or failing to take action;
- the economic and social development of the Union as a whole and the balanced development of its regions.

4.63. The objectives and principles stated here do not have a direct effect due to their international and private-law nature, as has been considered above. However, they do determine to a great extent the framework for and the manner in which the State exercises its powers. Therefore, these objectives and principles constitute an important viewpoint in assessing whether or not the State acts wrongfully towards Urgenda. 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.

Duty of care

(i-iii) the nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of this damage and the chance that hazardous climate change will occur

4.64. As has been stated before, the Parties agree that due to the current climate change and the threat of further change with irreversible and serious consequences for man and the environment, the State should take precautionary measures for its citizens. This concerns the extent of the reduction measures the State should take as of 2020.

4.65. Since it is an established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high – and this with serious consequences for man and the environment, both in the Netherlands and abroad – the State is obliged to take measures in its own territory to prevent dangerous climate change (mitigation measures). Since it is also an established fact that without farreaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously. After all, the faster the reduction of emissions can be initiated, the bigger the chance that the danger will subside. In the words of Urgenda: trying to slow down climate change is like trying to slow down an oil tanker that has to shut down its engines hundreds of kilometres off the coast not to hit the quay. If you shut down the engines when the quay is in sight, it is inevitable that the oil tanker will sooner or later hit the quay. The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead 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.

(iv) the nature of the acts (or omission) of the State

4.66. The State has argued that it cannot be seen as one of the *causers* of an imminent climate change, as it does not emit greenhouse gases. However, it is an established fact that the State has the power to control the collective Dutch emission level (and that it indeed controls it). Since the State's acts or omissions are connected to the Dutch emissions a high level of meticulousness should be required of it in view of the security interests of third parties (citizens), including Urgenda. Apart from that, when it became a signatory to the UN Climate Change Convention and the Kyoto Protocol, the State expressly accepted its responsibility for the national emission level and in this context accepted the obligation to reduce this emission level as much as needed to prevent dangerous climate change. Moreover, citizens and businesses are dependent on the availability of non-fossil energy sources to make the transition to a sustainable society. This availability partly depends on the options for providing "green energy" (compare, for instance, legislative proposal 34 058, Wind energy at sea, which is currently being reviewed by the Senate). The State therefore plays a crucial role in the transition to a 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 the greenhouse gas emissions in the Netherlands.

(v) the onerousness of taking precautionary measures

4.67. In answering the question if and if so, to what extent, the State has the obligation to take precautionary measures, it is also relevant to find out whether taking precautionary measures is onerous. Various aspects can be discerned in this. For instance, it is important to know whether the measures to be taken are costly. Moreover, it may also be important to establish whether the precautionary measures are costly in relation to the possible damage. The effectiveness of the measures can also be relevant. Finally, significance should be attached to the availability of the (technical) possibilities to take the required measures.

(...)The State has not argued that the decision to let go of this national reduction target of 30% and instead follow the EU target of 20% for 2020, compared to 1990 (which according to the current prognoses comes down to a reduction in the Netherlands of about 17%), was driven by improved scientific insights or because it was allegedly not economically responsible to continue to maintain that 30% target. Nor did the State issue concrete details from

which it could be derived that the reduction path of 25-40% in 2020 would lead to disproportionately high costs, or would not be cost-effective in comparison with the slower reduction path for other reasons. (...)Based on this, the court concludes that there is no serious obstacle from a cost consideration point of view to adhere to a stricter reduction target.

4.71. The court also considers that in climate science and the international climate policy there is consensus that the most serious consequences of climate change have to be prevented. It is known that the risks and damage of climate change increase as the mean temperature rises. Taking immediate action, as argued by Urgenda, is more cost-effective, is also supported by the IPCC and UNEP (see 2.19 and 2.30). The reports concerned also prove that mitigation of greenhouse gas emissions in the short and long term is the only effective way to avert the danger of climate change. Although adaptation measures can reduce the effects of climate change, they do not eliminate the danger of climate change. Mitigation therefore is the only really effective tool.

(...) 4.73. Based on its considerations here, the court concludes that in view of the latest scientific and technical knowledge it is the most efficient to mitigate and it is more cost-effective to take adequate action than to postpone measures in order to prevent hazardous climate change. The court is therefore of the opinion that the State has a duty of care to mitigate as quickly and as much as possible.

(vi) the discretion of the State to execute its public duties – with due regard for the public-law principles

4.74. In answering the question whether the State is exercising enough care with its current climate policy, the State's discretionary power should also be considered, as stated above. Based on its statutory duty – Article 21 of the Constitution – the State has an extensive discretionary power to flesh out the climate policy. However, this discretionary power is not unlimited. If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. (...)

4.75. The court emphasises that this first and foremost should concern mitigation measures, as adaptation measures will only allow the State to protect its citizens from the consequences of climate change to a limited level. If the current greenhouse gas emissions continue in the same manner, global warming will take such a form that the costs of adaptation will become disproportionately high. Adaptation measures will therefore not be sufficient to protect citizens against the aforementioned consequences in the long term. The only effective remedy against hazardous climate change is to reduce the emission of greenhouse gases. Therefore, the court arrives at the opinion that from the viewpoint of efficient measures available the State has limited options: mitigation is vital for preventing dangerous climate change. (...)

Due to this principle of fairness, the State, in choosing measures, will also have to take account of the fact that the costs are to be distributed reasonably between the current and future generations. If according to the current insights it turns out to be cheaper on balance to act now, the State has a serious obligation, arising from due care, towards future generations to act accordingly. Moreover, the State cannot postpone taking precautionary measures based on the sole reason that there is no scientific certainty yet about the precise effect of the measures. However, a cost-benefit ratio is allowed here. Finally, the State will have to base its actions on the principle of "prevention is better than cure". (...)

4.78. The State has argued that allowing Urgenda's claim, which is aimed at a higher reduction of greenhouse gas emission in the Netherlands, would not be effective on a global scale, as such a target would result in a very minor, if not negligible, reduction of global greenhouse gas emissions. After all, whether or not the 2°C target is achieved will mainly depend on the reduction targets of other countries with high emissions. More specifically, the States relies on the fact that the Dutch contribution to worldwide emissions is currently only 0.5%. If the reduction target of 25-40% from Urgenda's claim were met the State argues that this would result in an additional reduction of 23.75 to 49.32 Mt CO2-eq (up to 2020), representing only 0.04-0.09% of global emissions. Starting from the idea that this additional reduction would hardly affect global emissions, the State argues that Urgenda has no interest in an allowance of its claim for additional reduction.

4.79. This argument does not succeed. It is an established fact that climate change is a global problem and therefore requires global accountability. It follows from the UNEP report that based on the reduction commitments made in Cancun, a gap between the desired CO2 emissions (in order to reach the climate objective) and the actual emissions (14-17 Gt CO2) will have arisen by 2030. This means that more reduction measures have to be taken on an international level. It compels all countries, including the Netherlands, to implement the reduction measures to the fullest extent as possible. The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care. After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO2 levels in the atmosphere and therefore to hazardous climate change. Emission reduction therefore concerns both a joint and individual responsibility of the signatories to the UN Climate Change Conven-

tion. (...) Therefore, the court arrives at the opinion that the single circumstance that the Dutch emissions only constitute a minor contribution to global emissions does not alter the State's obligation to exercise care towards third parties. Here too, the court takes into account that in view of a fair distribution the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionte contribution to reduction. Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world. (...)

Urgenda was right in arguing that regardless of the ceiling Member States have the option to influence (directly or indirectly) the greenhouse gas emissions of national ETS businesses by taking own, national measures. In its argument, Urgenda has named several of such measures taken in other Member States, such as increasing the share of sustainable energy in the national electricity network in Denmark and the introduction of the carbon price floor taks in the United Kingdom, with which the price of CO2 emission has been increased. (...)

4.81.The court also does not follow the State's argument that other European countries will neutralise reduced emissions in the Netherlands, and that greenhouse gas emission in the EU as a whole will therefore not decrease. (...). In view of this, it cannot be maintained that extra reduction efforts of the State would be without substantial influence.

4.82.In so far as the State argues that a higher reduction path will decrease the "level playing field" for Dutch businesses, it failed to provide adequate explanations or supporting documents. This road would have been open to the State, as the Parties agree that some of the countries neighbouring the Netherlands have implemented a stricter national climate policy (United Kingdom, Denmark and Sweden) and as there are no indications that this has created an unlevel "playing field" for business in those countries. It is furthermore unclear which businesses the State is referring to: the climate policy can have a negative effect on one sector, while it can also have a positive effect on another sector. It is also unclear if and if so, to what extent, on a global level a stricter climate policy in the Netherlands will have any sort of effect on the position of businesses (including multinationals) compared tot heir nationally and internationally operating competitors. This argument is therefore rejected.

Conclusion about the duty of care and determining the reduction target

4.83.Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this. Now that at least the 450 scenario is required to prevent hazardous climate change, the Netherlands must take reduction measures in support of this scenario. (...)

4.85.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 effect, which will result in higher levels of CO2 in the atmosphere in comparison to a more even procentual or linear decrease of emissions starting today. (...)

Attributability

4.87.From the aforementioned considerations regarding the nature of the act (which includes the omission) of the government it ensues that the excess greenhouse gas emission in the Netherlands that will occur between the present time and 2020 without further measures, can be attributed to the State. After all, the State has the power to issue rules or other measures, including community information, to promote the transition to a sustainable society and to reduce greenhouse gas emission in the Netherlands.

Damages (...)

4.89.The court finds as follows. It is an established fact that climate change is occurring partly due to the Dutch greenhouse gas emissions. It is also an established fact that the negative consequences are currently being experienced in the Netherlands, such as heavy precipitation, and that adaptation measures are already being taken to make the Netherlands "climate-proof". Moreover, it is established that if the global emissions, partly caused by the Netherlands, do not decrease substantially, hazardous climate change will probably occur. 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, greater than its current contribution, to prevent hazardous climate change.

Relativity (...)

4.92.No decision needs to be made on whether Urgenda's reduction claim can also be successful in so far as it also promotes the rights and interests of current and future generations from other countries. After all, Urgenda is not required to actually serve that wide "support base" to be successful in that claim, as the State's unlawful acts towards the current or future population of the Netherlands is sufficient. (...)

E. The system of separation of powers (...)

4.95.The court states first and foremost that Dutch law does not have a full separation of state powers, in this case, between the executive and judiciary. The distribution of powers between these powers (and the legislature) is rather intended to establish a balance between these state powers. (...) It is an essential feature of the rule of law that the actions of (independent, democratic, legitimised and controlled) political bodies, such as the government and parliament can – and sometimes must – be assessed by an independent court. This constitutes a review of lawfulness. The court 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 law. Depending on the issues and claims submitted to it, the court will review them with more or less caution. (...)

4.97. It is worthwhile noting that a judge, although not elected and therefore has no democratic legitimacy, has democratic legitimacy in another – but vital – respect. His authority and ensuing "power" are based on democratically established legislation, whether national or international, which has assigned him the task of settling legal disputes. This task also extends to cases in which citizens, individually or collectively, have turned against government authorities. The task of providing legal protection from government authorities, such as the State, preeminently belong to the domain of a judge. This task is also enshrined in legislation. (...)

H. Costs of the proceeding

(...)The State is hereby ordered to pay € 13,521.82 in costs of the proceedings incurred by Urgenda, plus statutory interest as claimed. (...)

5. THE RULING

The court:

5.1. orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf;

5.2. orders the State to pay the costs of the proceedings incurred by Urgenda (acting on its own behalf) and estimates these costs at € 13,521.82, plus statutory interest, as from fourteen days following this judgment;

5.3. declares this judgment provisionally enforceable to this extent;

5.4. compensates the other costs of the proceedings, in the sense that the Parties bear their own costs to this extent;

5.5. rejects all other claims.

This judgment was passed by *mr.* H.F.M. Hofhuis, *mr.* J.W. Bockwinkel and *mr.* I. Brand and pronounced in open court on 24 June 2015.

1. Comentário do Acórdão proferido pelo Tribunal distrital de Haia, em 24 de junho de 2015, no processo n.º C/09/456689 / HA ZA 13-1396

Autor: "Urgenda", organização não-governamental de ambiente dos Países Baixos agindo em nome próprio e como representante de 886 cidadãos.
Réu: O Estado neerlandês, representado pelo Ministro do Ambiente.
A causa de pedir: insuficiência das metas de redução de gases com efeito de estufa assumidas pelo Governo neerlandês para combater as alterações climáticas e respeitar os objetivos climáticos internacionais.
O pedido: condenação do Estado à adoção de medidas mais fortes e eficazes na contenção das emissões de gases com efeito de estufa;
Condenação do Estado à informação dos cidadãos sobre a gravidade dos riscos climáticos.

Telegraficamente, eis o *croquis* do processo judicial decidido no verão de 2015 por um dos dezanove tribunais de instância existentes nos Países Baixos. A decisão judicial deu origem a uma onda de elogios por ter conseguido demonstrar que, mesmo respeitando o princípio da separação de poderes e a margem de discricionariedade própria do Estado, é possível proferir decisões úteis em matérias de elevada sensibilidade política, tradicionalmente rotuladas como *injusticializáveis*.

2. A petição

Na petição, a associação *Urgenda* (acrónimo de "urgent agenda", ou *agenda urgente,* numa alusão à premência das questões ambientais) alega que as emissões de gases com efeito de estufa da Holanda são excessivas especialmente se se considerarem as emissões *per capita*.

	Países Baixos	China	EUA	Brasil	Índia	Rússia
Absoluta*	0,42%	21,97%	13,19%	5,7%	5,44%	5,11%
Toneladas *per capita***	11,72	9,04	19,98	15,05	2,43	19,58

* Dados de 2010 ** Dados de 2011

A atual política climática do Estado é ilegal porque não dá provas de vir a conseguir cumprir as metas internacionais, *maxime,* uma redução de 25% a 40% das emissões (comparadas com o ano base de 1990) até 2020.

A atual política climática holandesa expõe ilegalmente a comunidade internacional a perigosas mudanças climáticas e a risco de danos irreversíveis para a saúde humana e o ambiente.

Em consequência, considera que o Estado se encontra em violação dos artigos 2 e 8 da Convenção Europeia dos Direitos Humanos, do princípio de proibição de causar dano significativo a outrem em virtude de atividades desenvolvidas no seu território (*"no harm principle"*), e do dever de cuidado que exige que os Estados atuem preventivamente, antes de atingir a data limite estabelecida, quando há indícios de que as metas não vão ser alcançadas.

3. A contestação

Para refutar a posição da URGENDA, o Governo Holandês[1] desenvolve uma estratégia de contestação implacável, baseada em argumentos hábeis e certeiros. No plano formal, recorre a argumentos relativos à ilegitimidade processual de uma associação nacional para litigar no interesse quer de cidadãos não holandeses, quer das gerações futuras.

Num plano mais substancial, apesar de não contestar em momento algum a gravidade do problema climático nem a urgência da sua resolução, avança objeções relativas à natureza da obrigação e à insignificância das emissões nacionais.

Os argumentos principais do Estado podem ser formulados do seguinte modo:

Argumento 1. O Estado contesta a legitimidade da associação Urgenda na medida em que ela apenas tem o direito de defender os direitos ou interesses das presentes gerações de cidadãos da Holanda e não os direitos ou interesses das presentes e futuras gerações de cidadãos fora da Holanda.

Argumento 2. No plano mundial, o peso das emissões de gases com efeito de estufa provenientes da Holanda é mínimo, especialmente se confrontado com as emissões de Estados ou regiões muito maiores, como a China, os Estados Unidos da América, a União Europeia, Brasil, Índia e Rússia. Mais: a Holanda, sozinha, não vai conseguir infletir um fenómeno que é global.

Argumento 3. A obrigação não é suscetível de execução judicial. As metas definidas não passam de objetivos programáticos do Governo e não obrigações vinculativas, estabelecendo metas imperativas.

Argumento 4. O Estado desenvolve uma política climática adequada e não pode ser obrigado judicialmente a alterá-la. Atualmente a meta assumida é de 40% (em relação aos níveis de 1990) de redução das emissões até 2030 e o Tribunal não pode obriga-lo a limitar as emissões de gases com efeito de estufa ultrapassando uma decisão política.

4. O acórdão

Na análise a que procederemos em seguida, acompanharemos de perto o raciocínio e a fundamentação jurídica construída pelo Tribunal, criticando-a, sempre que se justifique.

Como primeira apreciação diremos que num acórdão tão extenso, detalhado e cientificamente fundamentado como a complexidade do tema exigia, o Tribunal Distrital de Haia transmite uma mensagem clara a favor da intervenção dos tribunais nas questões climáticas.

Deste modo, o pano de fundo da análise são os dados científicos, validados politicamente, relativos às emissões de gases com efeito de estufa e às alterações climáticas consequentes, dados estes retirados dos relatórios do Painel Intergovernamental para as Alterações Climáticas.

[1] Por uma questão de simplicidade do discurso, ao longo do texto vamos utilizar como sinónimas as designações Países Baixos e Holanda.

No entanto, o Tribunal não se limita a assentar o seu raciocínio em meras remissões para os documentos técnicos em que se apoia. Pelo contrário, faz um esforço pedagógico para analisar, compreender e tornar inteligível, mesmo para não especialistas em alterações climáticas, os meandros dos estudos científicos e as subtilezas das conclusões mais relevantes a ter em consideração pelos tribunais. Para isso, uma parte significativa do acórdão é dedicada à descrição explicativa do *estado da arte* das ciências climáticas.

Assim, o Tribunal procurou explicar, com clareza mas sem fugir ao rigor científico, os contornos da situação climática mundial atual e o contexto em que os compromissos de redução da Holanda se inserem. Explicou, com um didatismo notável, a natureza jurídica e forma de organização do Painel Intergovernamental para as Alterações Climáticas, retirando daí conclusões sobre o seu papel na evolução da ciência e da política climáticas. Descreveu os relatórios adotados pelo Painel e escrutinou o conteúdo do quinto e último relatório disponível, o de 2014. Aqui, debruça-se especialmente sobre três cenários relativos ao esforço de redução de emissões para os horizontes de 2020 e 2050, considerados nos relatórios: um cenário de redução mínima, que conduz à redução das emissões até atingir uma concentração de "apenas" 450 partes por milhão de gases com efeito de estufa na atmosfera; o cenário intermédio de 550 partes por milhão; e o cenário catastrófico de 650 partes por milhão. Só o primeiro cenário permite aproximar a situação climática mundial das metas desejáveis de redução das emissões, em relação aos níveis de 1990.

Em seguida, o Tribunal dedica-se à análise dos enquadramentos políticos e legislativos internacionais no âmbito das Nações Unidas, com a Convenção Quadro das Nações Unidas sobre Alterações Climáticas e as sucessivas Conferências das Partes da Convenção (as denominadas COPs); no âmbito do direito da União Europeia, com os sucessivos documentos políticos da União: comunicações do Conselho, resoluções do Parlamento Europeu e comunicações da Comissão Europeia.

Em matéria de protecção internacional dos direitos humanos, sinaliza a jurisprudência do Tribunal Europeu dos Direitos do Homem na sua atuação relativa à tutela do ambiente para garantia do direito à vida, à saúde, à intimidade da vida privada e à propriedade.

Por fim, na avaliação do próprio direito neerlandês toma em consideração tanto as obrigações constitucionais como os atos legislativos de transposição das diretivas europeias sobre o tema, os memorandos explicativos da legislação, os documentos de estratégia climática (a Agenda Climática de 2013 intitulada *"Resilientes, prósperos e verdes"*), comunicações internas entre órgãos de soberania (cartas dirigidas pelos Ministros do Ambiente à Câmara dos Representantes a propósito de questões climáticas, como cimeiras das Nações Unidas sobre o clima, relatórios de centros de investigação científica sobre energia e clima) e os acordos celebrados entre o Governo e organizações da sociedade civil (o *Acordo Energético para um crescimento sustentável*, de 2013).

4.1. Apreciação dos argumentos: a legitimidade processual

Quanto à legitimidade processual, o Tribunal não hesita em reconhecer a legitimidade da Urgenda, por várias razões:

Primeiro, porque os seus estatutos referem que os fins da associação são a luta por uma sociedade mais sustentável "começando pelos Países Baixos". Logo, trata-se de uma

mera prioridade em relação ao território holandês mas não uma limitação no seu âmbito de atuação aos interesses exclusivamente holandeses.

Segundo, porque os cidadãos de outras nacionalidades, residentes fora da Holanda, também podem ser afetados pelas emissões provenientes dos Países Baixos.

Terceiro, porque a expressão "sociedade sustentável", usado nos estatutos da associação, tem uma dimensão internacional incontornável.

Quarto, porque de acordo com a definição constante do Relatório Bruntland, uma "sociedade sustentável" pressupõe uma dimensão intergeracional da sustentabilidade, pelo que a Urgenda tem legitimidade para defender até os interesses das gerações futuras.

O Tribunal chega a afirmar que há uma coincidência entre os objetivos estatutários da Urgenda e os grandes documentos internacionais sobre o clima, designadamente a Convenção das Nações Unidas de 1992.

Depois de tudo isto, surpreendentemente, acaba por não decidir sobre a principal objeção do Estado: a ilegitimidade processual da Urgenda para agir em defesa dos cidadãos estrangeiros e gerações futuras. Porquê? Simplesmente porque considera que os riscos que as alterações climáticas representam ***apenas*** para os cidadãos holandeses e residentes na Holanda já seriam suficientes para reconhecer legitimidade à associação.

4.2. Apreciação dos argumentos: a irrelevância das emissões

Quanto ao argumento da exígua dimensão do país o Governo pode ter razão. Globalmente, as emissões da Holanda correspondem a menos de meio por cento, portanto são insignificantes. Mas será isso razão para este país não assumir a sua quota-parte de responsabilidade? Neste ponto, os juízes são peremtórios: mesmo as mais pequenas emissões contribuem para aumentar o efeito de estufa. Logo, mesmo os mais pequenos esforços de redução podem contribuir para melhorar o clima. O facto de cada contribuição individual ser mínima à escala global, não iliba nenhum Estado de se esforçar por alcançar melhores performances ambientais. Este é também o espírito do princípio da responsabilidade comum mas diferenciada. Sendo um princípio fundamental no sistema principial do direito do clima, não foi expressamente invocado pelo Tribunal. Uma lacuna difícil de compreender numa decisão judicial tão completa e informada. Do princípio da responsabilidade comum mas diferenciada decorre que cada Estado, dentro do limite das suas responsabilidades e na medida das suas capacidades, se deve esforçar por fazer algo, por pouco que seja.

Além disso, refere ainda o Tribunal que as emissões per capita continuam a situar-se entre as mais elevadas do mundo.

4.3. Apreciação dos argumentos: a juridicidade da obrigação

O ponto fulcral do julgamento reside em saber se há ou não uma obrigação jurídica do Estado relativamente a um certo objetivo quantificado de redução de emissões.

Efetivamente, muitos dos documentos internacionais que estabelecem objetivos relativos à luta contra as alterações climáticas são instrumentos de *soft law*. No entanto, a distinção

entre *hard law* e *soft law* dilui-se na medida em que o Tribunal afirma que mesmo os instrumentos não vinculativos influenciam e afetam diretamente as obrigações dos signatários da Convenção e do Protocolo de Kyoto.

Assim, ao interpretar conceitos abertos, o Tribunal deve ter em consideração todas a fontes de direito internacional, incluindo as decisões das COPs, as disposições não diretamente aplicáveis dos Tratados, os artigos 2º e 8º da Convenção Europeia dos Direitos do Homem e os princípios relevantes de direito do clima, identificados pelo Tribunal: proibição de causar dano ("no harm principle"), justiça internacional e intergeracional ("fairness principle"), sustentabilidade, prevenção, precaução e nível elevado de protecção.

Desta forma, para usar as palavras do Tribunal, diríamos que mesmo o *soft law* tem um "efeito reflexo" sobre o direito nacional. Todos servem como fonte de interpretação, nomeadamente, do dever de cuidado constante da Constituição e do Código Civil neerlandês.

Com efeito, a Constituição Holandesa impõe, no artigo 21, um **dever de cuidado** do Estado relativamente à habitabilidade do país e ao dever de proteger e melhorar o ambiente no plano internacional. No entanto, ainda de acordo com a Constituição, o Estado tem amplos poderes discricionários para organizar a política climática nacional.

Ora, na opinião do Tribunal, considerando a natureza global dos riscos e as obrigações de gestão partilhada que dela decorrem, há um conjunto de elementos que devem ser tidos em consideração para determinar em concreto o âmbito do dever de cuidado na execução da política climática:

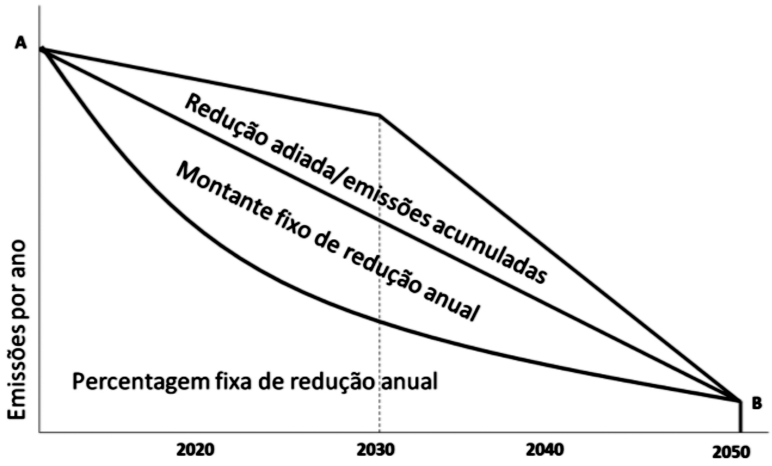
a) A natureza e extensão dos danos resultantes das alterações climáticas
b) O conhecimento e previsibilidade destes danos
c) A probabilidade de ocorrerem alterações climáticas perigosas
d) A natureza dos atos ou omissões do Estado
e) Os custos da adoção de medidas precaucionais
f) A discricionariedade do Estado, à luz dos conhecimentos científicos mais recentes, atendendo à disponibilidade de medidas técnicas e da relação custo-benefício.

Acompanhemos o raciocínio do Tribunal relativamente a cada um dos elementos:

a) Quanto à natureza e extensão dos danos

As partes estão de acordo quanto às consequências graves das alterações climáticas, pelo que o desacordo entre as partes se limita ao ritmo ou nível até ao qual o Estado tem que reduzir as emissões e não quanto à necessidade de mitigação dos gases com efeito de estufa.

Os dois objetivos que estão em causa são diminuir entre 25% a 40% até 2020 ou reduzir 40% em 2030. Qual a diferença entre os dois objetivos? Aqui, o Tribunal não se esquiva a recorrer a gráficos para mostrar os factos determinantes em que apoia o seu raciocínio. A utilização de um gráfico tem a virtualidade de tornar bem visível o excedente de emissões acumuladas que resulta de protelar o prazo por mais 10 anos, apesar de aumentar a fasquia de redução de emissões.



Com uma redução gradual até 2030 o valor global de emissões acumuladas durante os anos intermédios é maior. Por isso, baseando-se na abordagem precaucional do Painel Intergovernamental para as Alterações Climáticas, e considerando que o cenário de 450 partes por milhão é indispensável para conter o aquecimento global a 2 graus Celsius, o Tribunal considera que a primeira opção, que começa a reduzir mais cedo, é a mais eficaz.

Sendo assim, o primeiro fator a considerar aponta para uma obrigação positiva do Estado quanto à adoção da meta mais apertada.

b) Quanto ao conhecimento e previsibilidade dos danos

Também aqui o dever de cuidado é elevado, na medida em que o Estado já tem conhecimento dos riscos associados ao aquecimento global desde 1992 (data da assinatura da Convenção das Nações Unidas) e a confirmação desses mesmos riscos desde 2007 (data do relatório do Painel Intergovernamental onde surge o cenário desejável de 450 partes por milhão como sendo o único capaz de evitar drásticas alterações climáticas).

c) Quanto à probabilidade de ocorrerem alterações climáticas perigosas

Este é o fator que aponta mais fortemente para a urgência da atuação do Estado. Se as metas de redução de emissões forem insuficientes para alcançar os objetivos, o risco de alterações climáticas com sérias consequências para o Homem e o ambiente, dentro e fora da Holanda é elevado. Pelo contrário, quanto mais cedo forem adotadas, maior a possibilidade de serem eficazes. A Urgenda utiliza a metáfora de um grande navio que, devido ao movimento inercial, colidirá necessariamente com o Porto se não travar com grande antecedência. Daí as medidas deverem ser adotadas de forma célere.

d) Quanto à natureza dos atos ou omissões do Estado

Descartando rapidamente o argumento ridículo de que o Estado não emite dióxido de carbono, o Tribunal é peremtório em afirmar que o Estado tem o poder-dever de controlar os níveis de emissões de gases com efeito de estufa nos Países Baixos.

Além disso, quando assinou a Convenção do Clima, o governo neerlandês aceitou expressamente a responsabilidade pelo nível nacional de emissões e aceitou também a obrigação de reduzi-las na medida necessária para evitar alterações climáticas perigosas.

Em suma, o Estado tem um papel fundamental na transição para uma sociedade sustentável e por isso tem que assumir um nível elevado de cuidado, criando um enquadramento legal adequado para reduzir efetivamente as emissões de gases com efeito de estufa.

e) Quanto ao custos da adoção de medidas precaucionais

O argumento económico não foi tido em consideração, já que o Governo não alegou que as medidas sejam dispendiosas, nem que a alteração das metas tenha decorrido de uma reavaliação do custo das medidas. A alegação de que a economia holandesa iria sofrer e perder capacidade concorrencial com a redução das emissões não colhe, porque se há setores que perdem, há outros que ganham, e muito, com as políticas climáticas. É o caso da produção de energias renováveis. Assim, continua a ser economicamente viável aderir a uma meta mais rigorosa e começar a tomar medidas o mais rapidamente possível.

f) Quanto à discricionariedade do Estado à luz dos conhecimentos científicos mais recentes, da disponibilidade de medidas técnicas e da relação entre custos e benefícios.

O Tribunal não se pronuncia quanto à escolha das medidas, que podem ir desde limitações ao uso de combustíveis fósseis, a medidas fiscais; desde o comércio de licenças de emissão até introdução de fontes de energia renováveis, passando pela redução do consumo de energia, reflorestação, redução da florestação e até captura e sequestro geológico de carbono.

Por outro lado, se em virtude da dimensão intergeracional do princípio da justiça (fairness) for mais barato agir já, o Estado tem o dever de não adiar medidas preventivas e precaucionais, garantindo que os custos são distribuídos de forma razoável entre as gerações presentes e futuras.

4.4. Apreciação dos argumentos: a distribuição de poderes

Constituirá o pedido da Urgenda — e a subsequente decisão judicial que verse sobre ele — uma interferência inadmissível na distribuição de poderes num sistema democrático?

Neste ponto, o Tribunal Distrital de Haia começa por citar o Tribunal Europeu dos Direitos do Homem quando invoca o princípio da subsidiariedade, para dizer que não lhe cabe a si, mas sim às autoridades nacionais, determinar as medidas necessárias para proteger o ambiente. Estas estão numa posição melhor para avaliar os aspetos sociais e técnicos das decisões.

Por outro lado, o Tribunal clarifica que o direito neerlandês não se baseia numa estrita separação de poderes mas antes num *equilíbrio* de poderes *(balance of powers)*. Logo, nenhum tem primazia sobre outro e cada um tem as suas funções e responsabilidades.

Cabe aos tribunais conferir proteção legal e resolver os litígios jurídicos que lhes sejam submetidos. O princípio do Estado de Direito implica que as atuações (democráticas e legitimadas) de órgãos políticos, como o governo ou o Parlamento, possam ser avaliadas pelos tribunais. Independentemente das agendas e das opções políticas, os tribunais podem fazer

juízos sobre a aplicação do direito, isto é, revisões de legalidade. Especialmente em casos em que os cidadãos — individual ou coletivamente — estão em oposição às autoridades governamentais.

5. Conclusão

Na decisão final, o Tribunal Distrital de Haia dá razão à associação Urgenda e condena o Governo à redução de emissões até 40%, e num mínimo de 25% dentro dos próximos 5 anos, ou seja, até 2020.

Recusou, ainda assim, a condenação do Estado à prestação de informações aos cidadãos, sobre alterações climáticas, nos moldes pedidos pela Urgenda, por considerar que cabe ao Estado determinar as formas de execução do dever de informação.

Considerando que a Urgenda teve sucesso, o Estado foi ainda condenado a pagar as custas da Urgenda.

Vale a pena frisar, mais uma vez, as múltiplas dimensões de *coragem judicial* do Tribunal holandês de primeira instância, na decisão de condenação do seu próprio Estado:

Coragem judicial para não recusar decidir a questão escudando-se atrás de argumentos formalísticos relativos à legitimidade das partes, numa questão de tamanha relevância social. Mesmo sem a teoria dos interesses difusos a respaldar-lhe o raciocínio, o Tribunal neerlandês decidiu, com desassombro, reconhecer legitimidade à Urgenda e avançar para a apreciação do mérito da causa.

Coragem judicial para não se respaldar no caráter puramente político e judicialmente incontrolável das obrigações internacionais do Estado. Sem adotar uma postura excêntrica ou de rutura com a tradicional contenção judicial, o Tribunal desenvolve uma fundamentação sólida para justificar uma decisão moderada mas de condenação firme do Estado.

Coragem judicial para compreender que não podem os tribunais manter-se alheados de um dos mais sérios problemas da atualidade, por mais complexo que seja, desempenhando assim a sua nobre função de decidir casos difíceis.

Neste emblemático caso, o Tribunal não se recusou a entrar nem em questões científicas nem em questões supostamente políticas. Procurou compreender a ciência e procurou avaliar a política à luz da Ciência e do Direito, assim fazendo justiça.

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