

Access to Justice for NGOs in Environmental Matters: current affairs and prospective legislation

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1.

Some remarks on Access to Justice for NGOs in Environmental Matters: current affairs and prospective legislation

In the 2015 Taskforce meeting the UNECE 'Study on the possibilities for NGO's to claim damages in relation to the environment in four selected countries' has been proposed.

The contents of that report were directed towards civil actions for environment-related damages brought about by non-governmental organizations promoting environmental protection (ENGOS).

My remarks are motivated by the general principles of the law of compensation for damages, as they are laid down in the Dutch Civil Law Code and other Statutory regulations in the field of Dutch law.

2.

Claims for financial damages by NGOs in the Netherlands can be raised under public law, under civil law and even within the scope of criminal proceedings.

Within a public law procedure, NGOs and individuals alike may be awarded financial compensation for damages suffered from unlawful decisions or actions by public authorities up to an amount of € 25.000, in case violation of the law can be established. Should this claim exceed the maximum amount of € 25.000, proceedings have to be pursued in a civil court, if claimants wish to do so.

Furthermore, within the framework of a criminal prosecution, Dutch criminal law offers the victim of a crime, the so called 'injured party', the possibility to claim financial compensation for damages suffered through the perpetration of the crime the defendant has to account for [cf. Dutch Criminal Prosecution Code, art. 51a and 51f]. If a defendant is criminally charged for breaking environmental laws, an NGO may join a criminal prosecution as a so called 'injured party' in order to raise a claim for financial damages. These claims can only comprise rather straightforward damages, so as to burden the criminal procedure not too much; the kind of damage awarded here, must be of a rather uncomplicated nature, otherwise the claim is referred to a civil law court.

3.

Under Dutch Civil Law, general tort law proceedings, established in art. 6:162 &c. Dutch Civil Code, can be used by ENGOs to stop or prevent environmental harm. Such general tort law actions are not used very often, but on a regular basis (about one or a few each year or one every few years). There are some 'famous' examples, like the Urgenda case, which at the moment (2017) is pending in appeal.¹

4.

Basic principle in tort law is the compensation of damages brought about by harmful actions somebody has to account for. The concept of 'damage' within the framework of the NGO's 'claims for environmental damages' must not be understood as 'financial damage' only.

Damages here mean 'material harm to the environment or moral damage caused by an unlawful act or omission' and accountability or 'liability' points to the parties legally accountable.

Claims for damages involve remedies which either may offer purely financial compensation for losses suffered, or consist of other legal remedies which can include some sort of specific performance.

5.

'Claims for damages according to civil law' therefore are not restricted to financial damages. In the context of art. 9 of the Aarhus Convention, damages can relate to 'damage to the environment and the ways to repair and compensate these'. This focal point can further different kinds of claims.

Dutch law of compensation rules, that damages primarily are compensated for financially, unless the plaintiff claims another form of remedies. Claims for damages therefore may consist in

- a. claims for financial compensation for losses suffered,
- b. injunctions [court order compelling a party to perform or refrain from certain acts],
- c. court orders to restore or prevent damage on duty of penalties,
- d. claims for some sort of specific performance, and
- e. declaratory judgments [judgment constituting the liability of the defendant only, not the damage] that subsequently may be used by other parties for claiming specific financial (or other) compensation.
- f. Furthermore, NGOs may ask for a declaratory judgment to establish liability of the responsible party for environmental damages, which

¹ See for the judgement of the court in first instance, District Court The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7145.

judgment individual persons may invoke separately in order to claim financial damages from this responsible party.

6.

NGOs aiming to proceed in a Dutch Court may focus on the so called class actions. One type has been incorporated in the 'Law on regulation of collective damage', a Statute of 27th July 2005 on class actions for collective damages, laid down in articles 7:907-910 of the Dutch Civil Code. The Statute enables an NGO and a party liable for environmental damage, to agree upon a settlement for financial compensation. Once a settlement has been established between the parties, they can request the Amsterdam Court of Appeal to declare this settlement mandatory for all other parties equally to have suffered the same damages. Under the terms of this settlement, other injured persons, although they did not partake in the settlement proceedings, can claim their financial damages in so far as these damages are agreed upon in the settlement. If certain injured parties do not agree with the settlement, for instance because they want to proceed in court themselves, they are free to express their wish not to partake in the settlement; the court will provide for this 'opting out' opportunity within a term at the court's discretion but of at least three months dating from the moment of notification of the settlement. An NGO may initiate such a settlement for class compensation suffered through environmental damage.

Another, by NGOs more widely used 'collective action', is provided for under article 3:305a of the Dutch Civil Code. Under this art. 3:305a, foundations and associations with full legal personality (capacity) may take legal action on behalf of the (legal) interests they protect; personal, private interests (like all individuals suffering from a particular kind of wrongful practice) as well as general public interests touching society as a whole, such as environmental causes. (Art. 3:305b Civil Code extends this possibility to corporations according to public law.)

NGOs that are constituted as legal foundations or legal associations to protect environmental interests, therefore, may claim damages; in order to being admitted to raise a claim in court, they must have the protection of environmental causes as a goal written down in their bylaws or statutes. The Urgenda-foundation for instance, proceeds under this article.

However, it is not possible for an NGO under this article – or under civil law for that matter - to claim financial damages on behalf of group(s) of unidentified numbers of individual persons whose interests the NGO protects or aims to protect; the civil law rules this out positively. This exclusion has to do with the principles upon which the Dutch law of compensation is founded. Within the legal system of Dutch civil law, financial damages for individual persons can only be judged individually, whereas the judge has to take into account the specific

circumstances of each individual case, such as individual liability for fault, and the individual's duty to limit or control damage.

7.

Are we to conclude now, that NGOs under Dutch Law cannot bring about effective remedies in environmental law? Not at all.

Currently, all other than financial claims for civil remedies are possible for NGOs to raise in civil law courts. These other civil remedies, such as natural redress or *restitutio in integrum*, court orders to prevent injuries, injunctions on duty of penalties, claims nullifying contracts that have been closed contrary to environmental laws, are all equally disposable under article 3:305a Civil Code. In civil law no claim for damages will succeed without some form of liability of the defendant. Once liability of the defendant has been established, as well as the causal connection between the damage done and the defendant's actions which he has to account for, a claim may be awarded to an NGO. The famous and groundbreaking Urgenda-case is a good example of such a claim that was raised successfully, in first instance.

Apart from this kind of class actions there is the possibility for NGOs to claim financial compensation for damage the NGO suffered itself, brought about e.g. for cleaning up environmental pollution; such a claim of course does not constitute a class action but is settled through the general law of torts. As any individual or legal corporation, NGO's can claim damages suffered directly.

8.

So at present in the Netherlands NGOs, compared to individual parties, are limited within the civil law as to their claiming financial compensations for the interested parties they represent; this limitation will disappear within due time altogether. Legislation is being prepared to alter art. 3:305a Dutch Civil Code: amongst other adaptations the limitation for NGOs not being able to claim financial damages will be removed from the law.² In November 2016, Dutch government proposed new legislation to Parliament in order to introduce this new type of Class actions for collective damage. Most important change is the possibility for NGO's to ask for financial damages on behalf of the individuals they represent. In order to meet the general requirements of the law of compensation that hinder the award of collective damages, provisions are made that tighten the admissibility of the NGOs and the claims they want to raise.

In order to be admitted under the new law, an NGO has to prove its credibility concerning the interests and the individuals it represents; requirements are made concerning governance, finances of the NGO and the level of representativeness (participation of individuals, legal structure, legal purpose as laid down in statutes or bylaws etc.). The NGO has to establish that the damage

² Acts of Parliament: Kamerstukken II, 2017-2017, 34 608.

at stake can be more effectively and efficiently dealt with collectively, in a class action than in an individual procedure. Then, the claim itself should be connected sufficiently with the Dutch jurisdiction: the NGO must make it reasonably clear that most individuals represented have their domicile in the Netherlands, or: the defendant has his domicile in the Netherlands, or: the event causing the damage claimed has occurred within the Dutch territories. Furthermore, the NGO must have tried to settle the affair with the defendant before going to court.

Competent jurisdiction has only one Dutch court: claims have to be brought before the District Court of Amsterdam.

9.

When more than one NGO-party comes up to establish the same kind of claim, the Court will appoint one party as the most competent 'exclusive representative'. Parties who do not want their claims to fall under a class action of this kind are given the opportunity of opting out: the Court shall notify this opportunity to all the parties concerned, before proceedings start, whereby a term of at least one month is given.

Finally, when financial damages are demanded, the Court will decide on a collective settlement for all the parties concerned, according to the general principles of the law of compensation. The settlement will bind all parties under its scope, as far as they did not use their opting out-possibility. Aim of this procedure is first and foremost to reach a collective settlement. Parties can appeal from the Court's decision, at the Amsterdam Court of Appeal. An appeal for revision by the Supreme Court is only possible when the settlement is refused by the lower courts.

It is uncertain yet, when the proposal will be accepted by parliament as Law.