



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING  
NETHERLANDS COMPARATIVE LAW ASSOCIATION

## **Climate Law in The Netherlands: The Search towards a National Legislative Framework for a Global Problem**

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### **1. Introduction**

Comparative studies of national and sub-national legal climate change approaches can help us to understand the strengths and weaknesses of different governmental choices made in practice. This Chapter aims to provide a modest contribution to such comparative research.<sup>1</sup> It provides a first overview and discussion of the current state of affairs with respect to developing national climate legislation in the Netherlands. In advance, it needs to be stated that providing a complete overview is an extensive task, since the amount of Dutch climate related rules is already enormous. Moreover, this vast framework is quite fragmented.<sup>2</sup> This Chapter hence intends to discuss only the most important current climate related laws and initiatives for such laws in the Netherlands, but this will be done under the recognition that more research is needed to get a full overview and, more importantly, to understand not only the content of each applicable law but also the linkages between the several relevant rules.<sup>3</sup>

The structure of this contribution is as follows. First, Section 2 will elaborate on the relevance of studying national climate law. Section 3 will turn to the Dutch laws containing mitigation measures (*mitigation refers to the reduction of greenhouse gases*), where also the influence of international and EU-law for the national policy discretion will be discussed.

\* This contribution has been finalized on April 1<sup>st</sup>, 2010.

<sup>1</sup> Thus far, most of the legal literature concerns international (en European) legal approaches, but attention to building national climate legislation is growing. See about a proposal for national approach towards climate legislation in the US: Wiener 2008. An example of what, in a federal state like the US, specifically states can do with respect to climate change policies is given by Dernbach, McKinstry Jr. & Peterson 2010. See for discussions of Canadian and Australian climate policies respectively Bernstein, Brunnée, Duff & Green 2008; Lyster 2007a, 281-321 and Lyster 2007, 450-479.

<sup>2</sup> The fragmentation is partly caused by EU law, also because of the presence of regulations which are directly applicable in the national orders to the addressees like industries. The enforcement of compliance with the rules given by a regulation is usually the task of the Member States. An example of such a regulation relevant for climate law is Regulation (EC) No. 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases, *OJ L* 161/1, 14 June 2006. See also the Treaty on the Functioning of the European Union, Art. 288.

<sup>3</sup> A report to the Dutch Ministry of the Environment has given a first, but not yet complete overview, see Peeters & Van Asselt 2010.

Section 4 will subsequently focus on adaptation measures (*adaptation refers to the protective measures against the negative effects of climate change*). Section 5 will provide a conclusion and forward look with an eye on further research.

## 2. The Relevance of Studying National Climate Law

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC)<sup>4</sup> and the Kyoto Protocol,<sup>5</sup> and is also a Member State to the EU. In that regard, much of its national climate law is heavily influenced by the supranational legal order. The international and European climate dossier has become already broad and complex, and it has become already quite a challenge to understand the core characteristics, let alone the details of these two legal frameworks.<sup>6</sup>

There are nevertheless several reasons why it is important to study also national climate law. First, national legal systems will be the frameworks through which international and European obligations will be implemented and/or enforced. Hence, in addition to the examination of international and European legal frameworks aiming at climate protection, it is also important to discuss national regulatory approaches that are needed to effectively implement and enforce the international and European obligations. Specifically the EU has already established a binding package that should lead to 20% reduction of greenhouse gas emissions in 2020 compared to 1990. That binding commitment is divided into (1) the European greenhouse gas emissions trading scheme that covers a large part of industrial installations (commonly called the EU ETS, which stands for the European emissions trading scheme), and (2) emission reduction targets for Member States concerning emissions not covered by the EU ETS (the so-called Effort sharing decision).<sup>7</sup> The latter approach, which counts for approximately 60% greenhouse gases EU-wide,<sup>8</sup> leaves in principle ample discretion for Member States to develop a national policy for meeting such targets.<sup>9</sup> Quite some flexibility has been provided to Member States in the form of emissions trading, which

<sup>4</sup> The Netherlands has ratified the UNFCCC (date of signature: 04 June 1992; date of ratification: 20 December 1993). The ratification has been done without adopting national laws: *Staten-Generaal*, 1992-1992, 23 299 (R 1479), Nos. 358 and 1. Later, in 2005, a Royal Decree has been adopted to regulate the national emission inventory as required by Art. 4(1) of the UNFCCC.

<sup>5</sup> Date of signature: 29 April 1998, date of ratification: 31 May 2002. The ratifying act entered into force on 12 April 2002: 'Rijkswet van 21 maart 2002, houdende goedkeuring van het op 11 december 1997 te Kyoto totstandgekomen Protocol van Kyoto bij het raamverdrag van de Verenigde Naties inzake klimaatverandering' (*Trb.* 1998, 170 and 1999, 110).

<sup>6</sup> There is ample literature with regard to the international climate law regime. A standard work that discusses the regime in an elaborated way is: Yamin & Depledge 2004. See also Bothe & Rehbinder 2005; this book also contains a part dedicated to EU climate change policies. For EU climate policy see the overview made by Peeters 2007, p. 179-210. See also Peeters & Deketelaere 2006. A recent discussion of EU climate law from a viewpoint of principles is provided by De Cendra de Larragan 2010.

<sup>7</sup> The EU ETS is established by directive 2003/87/EC of the European Parliament and of the Council establishing a greenhouse gas emission allowance trading system, *OJ* 2003 L 275/32, as amended (see the consolidated version of 25 June 2009 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02003L0087-20090625:EN:NOT>>, last visited 28 March 2010). The Effort sharing decision is Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, *OJ* L 140/136. It is the successor to the so-called Burden sharing decision (Council Decision 2002/358/EC, *OJ* L 130/1).

<sup>8</sup> European Commission, 2008 (Question 1).

<sup>9</sup> Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, *OJ* L 140/136, 5.6.2009: see Arts. 3 and 5.

inter alia means that Member States can trade with each other part of their emission rights (which is in fact the possibility to emit as far as is allowed by the binding targets addressed to the Member States). In addition to these two core instruments (the EU ETS and the Effort sharing decision) a number of other climate related directives and regulations are applicable. Given this broad package of EU climate legislation it is necessary for EU Member States to examine which discretion is left to the national legislature for establishing a national climate policy.

From a viewpoint of accountability and compliance, it is furthermore important to see how national emission reduction targets are vested into binding law *within* national (and lower) legal regimes. Such targets can be a consequence of binding international law, like the emission reduction targets for the period 2008-2012 as concluded in annex B to the Kyoto Protocol. However, as progress on negotiating further international binding targets for the years after 2012 is lacking, it can also be the case that such targets follow from unilateral announcements (like the adherence to the Copenhagen Accord), or are even autonomous national choices without any clear link to an international document. As explained above, EU law already provides binding emission reduction targets for EU Member States to be complied with in the period 2013-2020, which leads to the question what should be regulated on the national level in view of ensuring compliance with such binding targets. The design of a national accountability mechanism to ensure compliance with those EU-targets, the distribution of the burden among the responsible sectors, and the decision-making by the national government to use international emissions trading are core topics in this regard. But also the role of scientific advice with regard to for instance the adoption of further going thresholds, like more intensive short-term targets, or the adoption of long-term targets and the specific national regulatory instruments in order to reach such targets deserve discussion with regard to their incorporation in national law.

And, finally, also the legal and economic position of private actors deserves a close examination from the viewpoint of national law. First, national climate law can heavily impinge upon sources, and it can be that they want to defend their case against for instance disproportional measures. Second, the need to develop alternatives for fossil fuel energy brings along changing circumstances for both economic operators as citizens. The latter can become confronted with wind-mills near their house or with a carbon storage area below their living. Third, the need to adapt the country to potential dramatic effects of climate change can affect the position of private actors (both economic actors and citizens). Moreover, decisions with regard to adaptation determine the level of protection towards possible victims. All in all, national climate law is extremely important not only for the protection of the climate but also for a balanced and justified approach towards private actors. Those actors are on the one hand economic operators whose activities possibly need to be restricted – but of course always in a justifiable way – in view of climate protection, but on the other hand also possible victims who need to be prevented from damaging effects or, in case that has not been done, who might need compensation for such damage.

And, last but not least, there is also a need to determine in particular both the incentives and barriers for national legal initiatives that would go beyond the ambition of the international and/or European obligations. The international decision-making process under the UNFCCC has thus far failed to produce a binding agreement with regard to emission reduction targets after the year 2012, and the EU has provided targets only up to 2020. In that regard, it will be interesting to see which responsibility will be taken by countries themselves, and whether such responsibilities will be vested into binding national law. Some Member States indeed have already announced further going targets for the year 2020 and/or have announced long-term targets, although these are not always yet concluded into national

binding law.<sup>10</sup> The UK, however, has already adopted in its Climate Change Act 2008 binding targets for 2020 and 2050, of which the 2020 target is more stringent compared to what this country should do according to EU law.<sup>11</sup> By having done so, this country gives an interesting example of providing a National Climate Act that indeed goes beyond the supranational legal order. In the meantime, also on subnational levels binding targets have emerged, like in Scotland and Upper-Austria.<sup>12</sup> Within the Netherlands, a coalition of NGO's started in 2007 to lobby for a specific Climate Act, with binding targets, but this idea has not got political support thus far.

### 3. Mitigation

#### 3.1. *The Supranational Context*

Since climate change is a global problem, coherent international action is needed but this is thus far short falling. If we follow the projections given by the Intergovernmental Panel on Climate Change, action should be undertaken in order to avoid the risk of dramatic climate change and resulting significant damage to nature and people. In this respect, a precautionary emission reduction of minus 25-40% in 2020 is given as policy guidance for developed countries by the IPCC.<sup>13</sup>

<sup>10</sup> Some Member States – like the UK and Germany – promote further going reductions as currently adopted by the EU (minus 20% in 2020 compared to 1990). The UK has already stipulated an emission reduction target of 26% in 2020 compared to 1990 of in its Climate Change Act 2008 (Part I sub 5), while in Germany an emission reduction target of 40 % in 2020 forms part of the political agreement of the current government (Koalitionsvertrag zwischen CDU, FDP,CSU: ‘Wir werden für Deutschland einen konkreten Entwicklungspfad festlegen und bekräftigen unser Ziel, die Treibhausgas-Emissionen bis 2020 um 40% gegenüber 1990 zu senken’). Within the Netherlands, the emission reduction goal of minus 30% in 2020 is part of the political agreement of the government formed by CDA, PvdA and ChristenUnie, albeit that it is expressed that this target preferably should be followed within the EU (Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA en ChristenUnie, 7 February 2007, <[http://www.regering.nl/Het\\_kabinet/Beleidsprogramma\\_2007\\_2011](http://www.regering.nl/Het_kabinet/Beleidsprogramma_2007_2011)>, accessed 23 December 2009). However, in the fifth national communication to the UNFCCC the 30% target has been mentioned, see Ministry of Housing, Spatial Planning and the Environment Fifth Netherlands ‘National Communication under the United Nations Framework Convention on Climate Change’, December 2009.

<sup>11</sup> UK Climate Change Act (available at: <[http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga\\_20080027\\_en.pdf](http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080027_en.pdf)>). See for a critical discussion Stallworthy 2009, p. 412-462.

<sup>12</sup> Information obtained during the UNFCCC side-event ‘The Federated States and Regional Governments – active players in combating climate change’, organized by *inter alia* The Climate Group, 2 June 2010, Bonn. The precise definition and bindingness of those targets have yet to be examined in further research.

<sup>13</sup> The IPCC fourth assessment report states that with a low stabilization goal of 450 ppm CO<sub>2</sub> equivalent an emission reduction target of 25-40% in 2020 compared to 1990 should be followed by Annex I countries (which are the countries being mentioned in Annex I to the UNFCCC). See IPCC 2007, Chapter 13, Box 13.7, p. 776. See also <[http://www.ipcc.ch/presentations\\_and\\_speeches/presentations\\_and\\_speeches\\_presentations.htm#2](http://www.ipcc.ch/presentations_and_speeches/presentations_and_speeches_presentations.htm#2)>, slide 6. However, if a less ambitious stabilization goal will be followed, which implies a greater risk, the emission reduction target is – of course – less intense. An update of scientific findings stated that if society wants to stabilise greenhouse gas concentrations at the level of global warming *between 2.0 and 2.4 degrees Celsius*, ‘then global emissions should, theoretically, be reduced by 60-80% immediately, the actual amount being dependent upon the amount that will be taken up by oceans and land’, and ‘The 400 ppm CO<sub>2</sub>-equivalents target, about the same as today’s concentrations, is estimated to give a 75% chance of confining global warming to less than 2°C’. Richardson a.o. 2009, <<http://climatecongress.ku.dk/pdf/synthesereport>>, accessed 28 December 2009, p. 18 and p. 20.

The UNFCCC establishes a managerial framework for international decision-making with regard to climate change. The threshold for action is high: according to Article 2 of the UNFCCC, the ‘ultimate objective of this Convention ... is to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent *dangerous* anthropogenic interference with the climate system’ (emphasize in italic by this author). The term ‘dangerous’ suggests that the prevention of non-severe damage – which could for instance be economic damage – is not part of the UNFCCC framework. This means that national (and regional) approaches need to consider how to deal with non-dangerous but still damaging effects like economic effects of climate change.

The EU has set as a policy goal to prevent global warming that would exceed a *two degrees Celsius temperature rise*. By setting this policy aim, the EU in fact accepts a factual global warming up to two degrees and hence this is not the most stringent goal one strives for. The two degrees target is also part of the non-binding Copenhagen Accord from 2009, though it is stated that by 2015 a consideration needs to be done in view of strengthening the long-term goal towards 1.5 degrees Celsius.<sup>14</sup>

In the Netherlands the political parties do even not agree with regard to *the existence* of the global warming threat: one new and fast developing right wing party that is currently high in the polls contests the need to take climate protection actions.<sup>15</sup> The national elections on 9 June 2010 will hence be important in view of any further action to be taken on the national level, but it is expected that the new national government will consist of some political parties that take the need for climate action at least to some extent serious. However, the recent mistakes of the IPCC contribute to further debates with regard to the need of climate policies. Remarkably, there is no case law yet within the Netherlands dealing with the need for climate change measures. One can imagine that possible victims would ask for some mitigation of adaptation measures, while the ones that are addressed with obligations would argue that it is not necessary to take such action. It is hence to be seen whether such arguments will be discussed for the Dutch courts.

As already said in the previous paragraph, the EU has adopted an extensive climate and energy policy package aiming at 20% reduction in 2020 coupled with a 20% renewable energy target also for 2020.<sup>16</sup> This package entails quite a lot of binding measures for the Member States or – through regulations – direct for private actors. The package has largely reduced the discretion of the Member States, but still some room for manoeuvre exist. There is a need however to investigate how large that policy discretion really is given the broad and complicated set of EU climate law.

In principle, it is possible for EU member states to follow a more ambitious approach compared to the EU, but it always needs to be investigated whether a specific national measures additional to EU law is indeed lawful. This depends inter alia on the legal basis of a specific already adopted EU regulation, directive or decision. The room for additional measures is quite restricted in case an EU measure has been based on Article 114 TFEU (the internal market competence) compared to Article 192 TFEU (the EU competence for environmental legislation) or the new Article 194 TFEU (EU competence for energy legislation).

<sup>14</sup> Copenhagen Accord, Section 12, posted at <unfccc.int>.

<sup>15</sup> This party is called ‘Partij voor de Vrijheid’, the members in Parliament belonging to this Party have submitted several questions to the Dutch government critically questioning the need for a climate policy.

<sup>16</sup> See for renewable energy: Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ L* 140/16 of 5 June 2009.

The Netherlands has chosen to adopt such a more ambitious approach compared to EU law, albeit only in policy terms. In 2009 the following set of climate protection policy goals has been reconfirmed by the central government of the Netherlands:<sup>17</sup>

- 30% reduction of greenhouse gases in 2020 compared to 1990;
- 20% renewable energy use in 2020;
- An annual energy-saving with 2% in 2011 tot 2020.

In December 2009 the ‘Fifth National Communication under the United Nations Framework Convention on Climate Change’ has been submitted by Dutch government to the UNFCCC secretariat.<sup>18</sup> Also this document states an emission reduction target of minus 30% greenhouse gas emissions in the year 2020 compared to 1990. These policy goals go beyond the legally binding commitments for the Netherlands as required by EU law, but have not been vested in a legal binding document. Hence, it remains to be seen whether they will be upheld and complied with. Again, the elections in June 2010 will be crucial for the question whether the more ambitious targets will be upheld. The current *binding* emission reduction targets for the Netherlands are:

1. The Kyoto Protocol target for the period 2008-2012, which is according to the internal EU burden sharing decision a 6% reduction of greenhouse gas emissions compared to 1990;<sup>19</sup>
2. A 16% reduction target to be reached in 2020 compared to 2005 following the so-called effort sharing document.<sup>20</sup>

The National Environment Assessment Agency has already warned in September 2009 that with current approaches the climate policy goals will not be reached in 2015. The ‘National Inventory Report 2009 – Greenhouse gas Emissions in the Netherlands 1990-2007’ (published at <[www.broeikasgassen.nl](http://www.broeikasgassen.nl)>) shows that in 2007 the total direct greenhouse gas emissions – excluding LULUCF emissions – are estimated at (only) 2,7% lower than the emissions in the base years 1990 and 1995 (p. 31). In the period 1990-2007 carbon dioxide emissions increased with 8 %, while emissions of non-CO<sub>2</sub> greenhouse gases decreased with 36%. The effectiveness of the combined EU and national legal mitigation measures hence deserve close attention.

<sup>17</sup> Letter of 8 September 2009 to the Dutch Parliament, *Tweede Kamer*, 2009-2010, 30 196, No. 75.

<sup>18</sup> Posted at <[unfccc.int](http://unfccc.int)>.

<sup>19</sup> Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, *OJ L* 130/1-3.

<sup>20</sup> Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020, *OJ L* 140/136 of 5 June 2009.

### 3.2. *Mitigation Laws in the Netherlands*

#### 3.2.1. **Relevant Laws**

##### *No Climate Protection Act*

With regard to mitigation, we can first determine that no national legislative framework has been established for developing national emission reduction targets and for a procedure to control whether compliance will be reached with the binding supranational targets. There are also no binding rules for the use of international emissions trading by the country itself, and for the establishment of specific advice to the government in the field of climate change. Such specific provisions lack in the Netherlands. The governmental approach in the field of climate change can be qualified as quite informal, and it is even not always clear how the political responsibilities for climate policies have been allocated between the concerned Ministers like between the Minister for Housing, Spatial Planning and the Environment and the Minister for Economic and Energy affairs. Despite the pressure from the side of Environmental NGO's to establish a specific Climate Act with carbon budgets and a control mechanism for compliance with such targets, this idea has not been taken over by the national government. Such a national Climate Change Act (or, in other words, Climate Act or Climate Protection Act) should not necessarily be a sole Act standing on its own, but could be integrated – for instance as a separate Chapter on Climate Change – into the Environmental Management Act. This Act dates from 1993 and is intended to be the central legislative framework in the field of environmental law.

##### *Environmental Management Act*

Despite the lack of a national climate act, there are several laws that facilitate the imposition of restrictions towards private actors with regard to the emissions of greenhouse gases. Most of the climate related mitigation actions are included within the Environmental Management Act. This Act contains the following core instruments relevant for the reduction of greenhouse gases:

1. The national legal framework for the implementation of the European emissions trading scheme (Chapter 16);
2. A framework for the fluorinated gases which adds up to European legislation which mainly has been put into regulations (Chapter 9);
3. A permit regime for industrial installations, which is meant to implement the European directive on integrated pollution prevention and control (IPPC-directive).<sup>21</sup> This directive – currently under revision<sup>22</sup> – obliges the Member States to use a system of integrated environmental permits. This permit regime includes greenhouse gases as far as they can be regulated in addition to the EU ETS (see further below).
4. The competence to issue general rules to installations which are not covered by the integrated permit regime.

<sup>21</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version, the original directive is Directive 1996/96), OJ L 24/8 of 29 January 2008.

<sup>22</sup> Proposal for a directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control), Brussels, 21 December 2007, COM(2007) 844 final.

Some members of Dutch Parliament have tried to enhance the use of emissions limit values in the environmental permits for coal fired power plants. According to the IPPC-directive, however, an IPPC-permit for such a plant may not include an emission limit value for direct emissions of that gas unless it is necessary to ensure that no significant local pollution will be caused.<sup>23</sup> The rationale for this rule is that the functioning of the carbon market as provided by the EU ETS, and in this vein the freedom for operators to decide whether to reduce emissions or to buy carbon emission rights, should not be frustrated by ‘command and control’ emissions limits imposed by the IPPC-permit. According to the IPPC-directive and the EU ETS directive, Member States may allow permitting authorities to impose obligations with regard to the energy efficiency of carbon emitting utilities, but the Dutch legislator has chosen to exclude that possibility.<sup>24</sup> Instead of that, the government has entered into a voluntary agreement with representatives from several industrial sectors stating that they shall develop and execute energy-efficiency plans.<sup>25</sup>

Meanwhile, it is still open for consideration whether Member States would nonetheless be allowed to impose in one way or another greenhouse gas limits for sources covered by the EU ETS, in particular in view of Article 193 of the Treaty on the Functioning of the European Union. That article states that Member States may adopt further going environmental laws. Clearly, both directive 2003/87/EC and directive 1996/96/EC state that emissions limit values shall not be prescribed for direct carbon emissions from installations covered by the EU ETS. This qualifies as a rule of total harmonization.<sup>26</sup> If one would nonetheless argue that Member States can always adopt such stringent measures – as long as they are compatible with the EC Treaty (now: Treaty on the Functioning of the European Union),<sup>27</sup> then another problem arises: from 2013 onwards all these sources will fall under one EU-wide cap, hence the limitation of emissions for instance from power installations in one country will mean that other sources can use the allowances that are not needed anymore by these power installations. This effect – meaning that despite emission limit values in one country, the greenhouse gas emissions can still rise in another country – can only be prevented if the emissions saved by the emission limitations will be covered with the withdrawal of allowances: the government should then for instance decide not to auction such rights... this option seems however not a very realistic one. In sum, the current approach as laid down *within the EU legislation* is that power installations covered by the EU ETS will most likely not be confronted with emission limitations with respect to the direct emissions of carbon dioxide. In view of the wish of some Member States, like the UK, to move beyond the climate ambition of the EU, there is a debate whether in view of Article 193 TFEU Member States should nevertheless be able to adopt further going commitments such as a tax for the EU ETS installations like in particular coal fired power plants.

<sup>23</sup> Art. 9(3) Directive 2008/1 and Art. 26 Directive 2003/87/EC. According to the Commission this approach should be continued. See the Proposal for a directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control), Brussels, 21 December 2007, COM(2007) 844 final, the new proposed Art. 10.

<sup>24</sup> According to Art. 8.13a (2)(b) of the Dutch Environmental Management.

<sup>25</sup> Dutch Ministry of the Environment 2009.

<sup>26</sup> See about the role of Art. 176 EC Treaty (now Art. 193 TFEU) in view of total harmonisation Jans & Vedder 2008, p. 107. See also the recent interesting opinion of AG Kokott in case 378/08.

<sup>27</sup> Jans & Vedder 2008, take a contrary position, see p. 108-109.

## Energy Legislation

The Environmental Management Act provides some important regulatory tools, but in addition a range of other acts is relevant, notably in the field of energy law. The applicable legislation needs to be amended soon since the European Renewable energy directive has to be implemented before 5 December 2010.<sup>28</sup>

With respect to renewable energy, the Dutch government has notified to the European Commission in December 2009 that it expects no problem with complying to the binding European renewable energy target, which is, for the Netherlands, 14% renewable energy of the total energy consumption to be reached in 2020. This notification by the national government is obligatory (Article 4(3) directive EC/2009/28; the targets are specified in annex I to that directive). In the notification document the government states not to expect to use the flexibility mechanisms included in the Renewable energy directive in order to compensate a short falling compliance (these flexibility opportunities in fact mean that over-compliance in one member state will be used to offset under compliance by another state). The Dutch government however states to be interested into the ideas and initiatives of other member states. The government stipulates that it endorses a more intensive target than obliged by the directive, but fails to explain in the document how much stronger that national target is. Anyhow, the stronger national target is only a policy target, and has not been codified in national law.

In order to promote climate friendly energy also other legislative approaches are needed. Currently, access to the grid is a major problem: the government has proposed to adopt an act to give better access to renewable energy.<sup>29</sup> In order to advance the establishment of works in view of combating (not climate change but) the economic crisis, the government has proposed a 'Crisis and Restoration Act', which aims at *relaxing* substantive and procedural requirements for major construction activities like highways but also energy projects (like windmills and geological storage of carbon). This legislative proposal has been adopted – after much discussion about its usefulness – by Dutch Parliament and entered into force on 31 March 2010.<sup>30</sup> Just before the adoption, members of Parliament (the Senate) requested to leave the geological storage of carbon dioxide out of the scope of this project, but that has not been supported by the majority. In the meantime, a legislative initiative has been proposed to Parliament in order to implement the European directive concerning the geological storage of carbon dioxide.<sup>31</sup>

<sup>28</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ L* 140/16. See Art. 27(1) of this Directive.

<sup>29</sup> 'Wijziging van de Gaswet en de Elektriciteitswet 1998, tot versterking van de werking van de gasmarkt, verbetering van de voorzieningszekerheid en houdende regels met betrekking tot de voorrang voor duurzame elektriciteit'.

<sup>30</sup> See the Official Journal of the Kingdom of The Netherlands: *Staatsblad van het Koninkrijk der Nederlanden*, 135, 2010 (see also the Nos. 136 and 137).

<sup>31</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No. 1013/2006, *OJ L* 140. The legislative proposal is called: 'Wijziging Mijnbouwwet i.v.m. o.m. implementatie Richtlijn Nr. 2009/31/EG betreffende geologische opslag van kooldioxide', proposed on 23 March 2010 to the Second Chamber of Dutch Parliament, No. 2009-2010, 32343.

### 3.2.2. Case Law

In the meantime, some conflicts arise between on the one hand climate protection and, on the other hand, the establishment of alternative approaches like renewable energy and the geological storage of carbon. First, one can note certain cases with strong resistance against windmills on land or near the land on water, and hence, viewable from land: the latter is at hand in a small town called Urk, an old fishery community. The establishment of a windmill park which would be visible from that town is a very sensitive case for the local community.<sup>32</sup> Second, there is a strong local resistance against the storage of CO<sub>2</sub> – in the form of a pilot project – just below a living area in a town called Barendrecht. The resistance by the people who live there is supported by the local government (municipality). Case law can be expected with regard to such conflicts.

As a result of the European greenhouse gas emissions trading scheme, there have been several rulings by the Administrative Court of the Council of State with regard to the allocation of tradable allowances in the Netherlands. Only a minor part of the appellants found their arguments justified by the court. The ruling shows (again) how complicated the administrative allocation of allowances is, and that the transparency and reviewability of the decision-making falls short. In this respect, it needs to be noted that the ‘Court of Audit’ (not a judge, but an independent institution that checks the spending of the government) has concluded that even this Court of Audit was not always in the position, due to lack of information, to check the validity of the allocation of the allowances.<sup>33</sup>

### 3.2.3. Conclusion

In sum, there is already a quite a lot of climate related legislation in the Netherlands. This largely results from EU climate law, as on that level a wide array of measures has been established that have to be implemented and/or enforced by the Member States. The national climate legislation needs to be amended in 2010 or short there-after in order to implement the EU climate and energy package that provided new rules with regard to emissions trading, renewable energy, and the geological storage of CO<sub>2</sub>. In the meantime the transparency and structure of the national climate legislation has become a great concern: it is far from easy to understand the content of the several measures and their interrelationships. However, the first step to improve the legislative framework has to be done on the EU level, as the EU climate and energy package has become extremely complicated. The package is provided through several types of legislation (directives, regulations, decisions) and, hence, is not provided through one single legislative framework. In addition, there is a need to discuss whether and how national law can even go beyond the EU climate legislation, as is currently debated with regard to additional restrictions to be imposed upon coal fired power plants. Moreover, Dutch law lacks specific arrangements with regard to target setting, international emissions trading by the national government, and specific independent climate advice.

## 4. Adaptation: Relevant Laws

Much attention in the Netherlands goes to adaptation: how can we protect this country against negative climate effects, in particular flooding? The Netherlands might suffer from sea-level rise and floods, while also wetter winters and drier summers are expected, and changes in

<sup>32</sup> See for another case with respect to the wind-energy AB RvS 25 February 2009, *Milieu en Recht* 2009, 42 annotated by KB.

<sup>33</sup> *Tweede Kamer*, 2009–2010, 31 252, No. 9.

biodiversity.<sup>34</sup> There is a growing common opinion within the Netherlands and by the European institutions that governments have a crucial role to play with regard to adaptation to climate change.<sup>35</sup> The Dutch Scientific Council for Government Policy in 2006 quite strikingly advised the national government to pay substantially more attention to adaptation in the Netherlands (such governmental investments benefit the Dutch people directly) *instead of* conducting mitigation efforts (from which the whole world benefits on a rather long term).<sup>36</sup>

Another Dutch council, the Council on Housing, Spatial Planning and the Environment, argues that the government should take *a leading role* with respect to dealing with climate change effects, especially since citizens have hardly any knowledge or awareness about risks from changing weather patterns. Moreover, (Dutch) citizens appear to have a strong confidence in the government in order to protect society against these risks, specifically where it concerns water related policies.<sup>37</sup> Following these observations, the Council advises that citizens and firms should not be expected to bear important responsibilities with regard to climate related risks. The Dutch Council on Housing, Spatial Planning and the Environment argues furthermore that there should be one responsible authority for adaptation and strategic spatial planning. By nature, this adaptation strategy should however be a flexible one, given the many uncertainties with regard to the development of global warming and its precise effects.

Given these observations, the Dutch government has started in November 2007 a ‘national adaptation strategy’ in order to make the Netherlands ‘climate proof’.<sup>38</sup> The focus of this strategy goes to spatial planning policies in order to make them fit for dealing with climatic change. Besides safeguarding the dikes, the policy focuses on giving water more space.<sup>39</sup> In the meantime, specific legislation has been proposed in order to support the adaptation policy. In early 2010 the Dutch government submitted to the Dutch Parliament a legislative proposal for a Delta Act (*Deltawet waterveiligheid en zoetwater-voorziening*).<sup>40</sup> The proposed Act aims to protect specifically against *flooding* and to protect the *availability of freshwater*. The proposed act entails a Delta-Program, a Delta-Committee, a Delta-commissioner (who has to manage the implementation of the Delta-Program) and a Delta-Fund. However, the procedure for the adoption of this legislative proposal has been suspended after the fall of the government in early 2010. Only after the elections in early June 2010, resulting in a new Second Chamber and a new government, the deliberations will be resumed. The fact that one of the fast-growing political parties questions the need for climate policies – also in view of the mistakes within some IPCC reports – has been a major factor for the decision to delay the procedure.<sup>41</sup> In anticipation of the Delta Act some institutional steps have nevertheless already been made, like the appointment of the Delta-commissioner and the Delta-committee: both took office from 1 February 2010.

<sup>34</sup> Dutch Government 2005, p. 5.

<sup>35</sup> See for instance about the justification to focus on adaptation policy as such Berkhout 2005, p. 377-391.

<sup>36</sup> WRR 2006.

<sup>37</sup> VROM-raad 2007, p. 33.

<sup>38</sup> Letter to the Second Chamber of the House of Representatives of the Netherlands (2 November 2007), File 31 269, No. 1.

<sup>39</sup> VROM 2005.

<sup>40</sup> *Deltawet waterveiligheid en zoetwatervoorziening*, *Second Chamber* 2009-2010, File 32 304.

<sup>41</sup> This party is called ‘Partij voor de Vrijheid’. Other parties that supported the suspension are the VVD (liberal party) and the SP (Socialist Party). Smeets 2009.

In the meantime, existing laws already provide a legislative framework within which the government can undertake adaptation measures. First, a comprehensive Water Act (*Waterwet*) provides a broad framework for water-related management issues.<sup>42</sup> This Act is new and has entered into force late 2009. It aims at the protection against floods and water shortages, water quality, and the fulfillment of societal needs with regard to water. It provides safety-norms for dikes, the development of water plans (the first Dutch National Water Plan has been concluded in December 2009),<sup>43</sup> and permit systems. The proposed Delta Act would become integrated into this Water Act. The National Water Plan connects to the framework as being regulated in the Spatial Planning Act, which means that instruments to manage spatial planning can be used in the course of implementing the National Water Plan. The proposed Delta Program is to be seen as an instrument to implement the National Water Plan. Furthermore, the recently adopted a ‘Crisis and Restoration Act’ is to a limited extent also relevant to for adaption measures (for example with regard to strengthening of the coast) as well.

The Water Act and the proposed Delta Act focus on water. However, other effects can be caused by climate change as well, like hot summers and heat-waves. Contrary to the Climate Change Act in the UK, there is no general legislative duty for the Dutch government to assess all the significant risks (so, not only water-related risks) specifically for the country in view of the possible impact of climate change.<sup>44</sup>

## 5. Conclusion

### 5.1. *General Picture: A Differentiated Approach to Mitigation and Adaptation*

The Netherlands is both a developed *and* a low-lying country. In view of climate change the Dutch government is hence faced with at least two challenges: this is on the one hand *mitigation*, which is the need to fulfil its responsibility to reduce greenhouse gas emissions in order to help to avoid damaging global warming. On the other hand there is a need for *adaptation*, which concerns the protection of the country and its society against the possible damaging effects resulting from climate change, like notably flooding. A third complementary challenge is to develop an international policy with regard to funding towards developing countries for mitigation and adaptation purposes, the latter especially with regard to the most vulnerable countries.

With regard to national mitigation and adaptation the Netherlands has already adopted a range of legislative measures while additional legislative measures have been initiated. The national mitigation laws are for a large part resulting from EU law, while in the field of adaptation to a larger extent sovereign national choices can be made.

The Dutch Environmental Management Act serves as the core act where it concerns the direct mitigation of greenhouse gases. However, a coherent set of climate rules for the reduction of emissions, including in particular rules for (further) target-setting and target-implementation like has been done in the United Kingdom, lacks. In fact, there is no overall national regime covering the whole set of greenhouse gases, stipulating which authorities are responsible for the reduction of these gases. There is hence a need to investigate how to systemize and complement the fragmented national climate related regulations. In general, the need for integrating laws has already got large attention within the Netherlands. The adoption

<sup>42</sup> The act has entered into force on 22 December 2009: *Staatsblad* 549, 2009 (entry into force), *Staatsblad* 490, 2009 (text of the Act) and *Staatsblad* 489, 2009 (implementing legislation).

<sup>43</sup> See *Second Chamber*, 2009-2010, File 31710, No. 12 (Appendix).

<sup>44</sup> Climate Change Act 2008, Part 4: Impact of and Adaptation to Climate Change.

of the Environmental Management Act in 1993 is an illustrative example of this. More recently, the Dutch government conducted a legislative project to harmonise and integrate its environmental and spatial permit regimes, which has led to a new General Ambient Law Act (*Wet algemene bepalingen omgevingsrecht*).<sup>45</sup> This would indeed mean that two central acts will be relevant, also for climate policies: the Environmental Management Act and the General Ambient Law Act. Besides that, other acts will stay relevant, like the rather new integrated Water Act which deals with all water-related issues among which water quality, and a separate Soil Protection Act. There is yet no initiative at the side of the government to systemize or codify the climate related rules into one Climate Act or into one Chapter to the Environmental Management Act. The environmental movement, a coalition of Environmental NGO's, urged the government by means of a large press campaign to establish a Climate Act, with long-term binding emissions targets and an accountability mechanism for ensuring compliance with such targets. According to the proposal the Climate Act should set emission budgets and would make governmental authorities responsible for complying with them. There is however not (yet) enough political support for adopting such an act, let alone an Act that would go beyond EU obligations. On the contrary, there is an overall resistance against adopting further going legally binding measures compared to what international and European law asks for (no 'goldplating' of European law).

For adaptation however, a much stronger and coherent national legislative approach is developing within the Netherlands, in particular with regard to the protection against flooding and fresh water-scarcity. The proposal for a specific 'Delta Act' aims at floods and fresh water, and provides for the establishment of a Delta Commissioner together with a Delta-Committee, a Delta-Fund and a Delta-Program. In fact, the Delta-Commissioner and the Delta-Committee have already been appointed in advance of the adoption of the relevant legislation. In the field of mitigation, such a steering approach with for instance a Climate Commissioner, a Climate Program, a Climate Committee and a Climate Fund lacks. It remains to be seen however whether after the election in early June the suspended procedure with regard to the adoption of the Delta Act will be resumed by the new Parliament. This inter alia depends on the composition of the new government but also on the trust into the IPCC projections with regard to climate change.

In sum, we can conclude that within the Netherlands different legislative frameworks exist for mitigation and adaptation. In the field of mitigation the fragmentation and the lack of a comprehensive steering and accountability mechanism in order to reach the needed emission reduction goals (or even further going goals compared to EU and international law) are core concerns, while in the field of adaptation a directive (but not comprehensive) legal framework towards establishing adaptation measures is foreseen. Given this picture, one could indeed get the impression that the need to protect the country itself is much stronger felt by the Dutch politicians than the need to contribute to combating the global problem of climate change.

## **5.2. *Points for Further Research***

In contrary to the just explained fragmentation of climate law in the Netherlands, the UK has adopted a 'Climate Change Act' that contains provisions for mitigation *and* adaptation. It is however yet to be examined what kind of governmental approach and connected legislative

<sup>45</sup> Here, a translation problem arises. In Dutch law and doctrine, a distinction is made between environmental law, which can be qualified as the law with regard to polluting activities and polluting products and substances, nature conservation law, water law (encompassing all the water-related aspects) and 'ambient' law, which encompasses all the law relevant for the protection of space, nature, water and the protection against pollution.

framework fits best for dealing with climate protection, and hence also the British Climate Change Act (and its relationship with other legislation, like planning and/or energy legislation) needs a close review. Moreover, in course of the strive towards developing a coherent national climate law the structure and content of EU climate law is a major concern. The EU climate legislation in the form of directives, regulations and decisions has become a complicated framework in the field of mitigation. Moreover, also in the field of adaptation the EU is already adopting regulation.<sup>46</sup> This vast package of EU legislation heavily influences and perhaps even limits national legislators in their attempt to provide a well-structured and transparent legislative approach. Moreover, it is not yet clear to what extent EU law limits or stimulates national measures that go beyond the EU ambition. The use of emissions trading, in particular also for Member States as provided by the Effort Sharing Decision, implies that if a Member State would strive for a tougher reduction target than the applicable EU one, this Member State might be able to sell part or in full this room for emission. This would mean that any achieved reduction in one country would be balanced with extra emissions in another country. Whether this so-called ‘waterbed effect’ of EU wide emissions trading implies a stimulus (the emission-saving Member State can make a financial profit by selling) or even a barrier to further going national climate targets remains to be seen.<sup>47</sup> After all, if a Member State with a national target which is stricter than the EU sells its emission right to a country which then accordingly will have additional emissions, the total EU emissions will not decrease. Whether hence the possibility of trading among Member States serves as an incentive or not for further going national policies, remains to be seen.

This Chapter has focused on the current state of affairs with developing a national legislative framework towards climate protection, which is a new question of environmental law. It is also a challenging one, because the climate change problem is extremely complex with many different sources and quite some uncertainties. The legislator needs to consider how to require reductions of greenhouse gas emissions from many different sources, how to reform the energy structure, and how to establish a range of adaptation measures. Besides legislation, the state can invoke climate protection action by other means. We can think of education, although also that needs to be guided with sound procedures notably ensuring sound information and freedom of education. Second, in particular in the Netherlands, the conclusion of voluntary agreements with industries and decentralised governments is a popular approach of the central government, also in the area of climate change, and the effectiveness of this approach (and its relationship with regulation) should be assessed as well. Moreover, also purely voluntary initiatives pop up within society, among which the voluntary offsetting of emissions, which raises new questions from a legal perspective.<sup>48</sup> Furthermore, insurance companies increasingly consider the risks of climate change, which can move private parties to get engaged into considering or even adopting preventive measures. And, last but not least, even the possible meaning of liability law for taking mitigation and adaptation action should be examined in order to get a full understanding of how and to what extent law can contribute to climate protection.

<sup>46</sup> Notably Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks.

<sup>47</sup> The term waterbed effect has been used for the context of the EU ETS applying to European industries by the Netherlands Environmental Assessment Agency 2008, p. 38.

<sup>48</sup> Peeters 2009, p. 337-362.

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