REPORT OF THE NETHERLANDS

Access to Justice in matters of environmental law

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A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

In the Netherlands the right to take legal action on environmental decisions and spatial planning decisions (land-use plans and infrastructure routing plans) has been dependent on the term 'interested party' since 1 July 2005. Before that date this term was already generally applicable to other kinds of decisions. According to section 1:2, subsection 1 of the General Administrative Law Act (AWB), interested party means a person whose interest is directly affected by a decision. The 'interest' element should be understood as meaning that the person concerned may be exposed to the actual consequences of the decision. Legal entities may be interested parties in the same way as other persons, for example if their property or assets are adversely affected by a decision. What applies specifically to legal entities is that their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities (Section 1:2, subsection 3 of the General Administrative Law Act). On this basis, NGOs, including environmental protection associations, have greater access to the courts than natural persons since they can represent general interests, including environmental interests, which do not (or do not always) affect natural persons individually.

The right to challenge a decision by an administrative authority is not dependent on demonstrating that a subjective right has been infringed. However, the Administrative Procedural Law (Amendment) Act which has entered into force on 1 January 2013, has introduced a new section 8:69a of the General Administrative Law Act under which a so-called 'relativity requirement' (*relativiteitsvereiste*) must be fulfilled in administrative procedural law in its entirety. Under section 8:69a of the General Administrative Law Act, an administrative court may not reverse a decision on the ground that it is in conflict with a legal rule or general principle of law if this rule or principle manifestly is not intended to protect the interests of the party invoking it. By introducing this requirement the legislator has made clear that there must be a connection between the ground for review and the actual reason for challenging a decision in law and that the administrative courts may not reverse a decision for infringement of a legal rule that is not intended to protect an interest of the claimant that is actually in danger of being infringed. This requirement does not concern the standing of individuals or NGOs in the proper sense, but the assessment of an action on its merits.

Under civil law, legal actions can be taken by interested parties (point d' intéret, point d' action). A foundation or association with full legal capacity can file a civil action for the protection of similar interests of other persons, insofar as it promotes these interests according to its byelaws (section 3:305a, subsection 2, of the Civil Code). Legal restrictions for these institutions are as follows. 1) A Civil action is inadmissible when the organization hasn't previously tried to consult with the defendant. 2) A civil action for financial compensation is inadmissible. According to jurisprudence, these institutions also must have developed factual activities within its statutory field of interest. In the field of environmental litigation, in practice, these legal actions mostly are tort actions against

governmental bodies or individuals or private bodies, allegedly not operating in conformity with environmental law. An important restriction is that, according to long standing jurisprudence, in cases that could have been brought before an administrative law court (such as the Administrative Jurisdiction Division of the Dutch Council of State; *cf.* the answer to Question A.2.), civil tort actions will be declared inadmissible by the civil law courts (residual jurisdiction).

In criminal cases, the prosecution prerogative lays with the public prosecutor. Private persons or organisations have no right to start a criminal procedure. However, they can file a request with the public prosecutor to start an investigation or to start a criminal procedure against a suspect. If the public prosecutor refuses to start a criminal procedure, any directly interested party can file a complaint with the court of appeal. This court can order the public prosecutor to start a criminal procedure. Directly interested parties include legal bodies that, by virtue of their statutory interest and their factual activities, promote an interest that has been directly affected by the denial of the public prosecutor (section 12 of the Code for Criminal Procedure). Environmental protection foundations or associations are considered in principle to be legal bodies in this sense (e.g. Association for the protection of The Wadden Sea[1]).

The recent developments in the case law of the CJEU on standing of individuals and/or NGOs did not give rise to changes in any legislation in the Netherlands.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

The case law concerning the standing of individuals or NGOs, based on the General Administrative Law Act, is formed mainly by the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Dutch Council of State (*Raad van State*), henceforth referred to as the Council of State. As it comes to the standing of legal entities, including NGOs, it can be inferred from the case law of the Council of State that the criteria of the organisation's objects and its actual activities can be regarded as 'communicating vessels': the more wide-ranging the objects the more exacting are the requirements that the nature and scope of the actual activities must meet, and the more limited the objects in terms of function or territorial scope the fewer will be the actual activities necessary as a basis for admissibility. In practice, foundations and associations that represent environmental interests or nature conservation interests have ample opportunity to institute proceedings before the administrative courts. The thresholds are low. In this regard, it can be noted that the organisation is free to choose its own objects. This also applies to informal associations (i.e. associations not established by notarial deed).

The admissibility conditions applied in the case law flowing from the General Administrative Law Act enable an environmental protection association that is directly affected in the environmental interests it represents in accordance with its objects and as evidenced by its actual activities to bring proceedings before the Council of State challenging a decision that may be in breach of EU law. As this result is deemed to be in accordance with judgment C-240/09, neither article 9 (3) of the Aarhus Convention nor the requirement of effective legal protection of EU legal rights as set out in judgment C-240/09 necessitated a broader interpretation of these admissibility conditions.

Moreover, unlike the situation in judgment C-115/09, access in the Netherlands is dependent on showing not that there has been 'impairment of a right' but that there is a 'sufficient interest' in bringing the action. Access for environmental protection associations and also for natural persons is

[1] Court of Appeal Leeuwarden 30 juli 1976, ECLI:NL:GHLEE:1976:AB6454,

not limited to actions for infringement of 'individual public-law rights'. The General Administrative Law Act and case law do not deprive an environmental protection association of the possibility of claiming, in an action brought before the Council of State against a decision to grant a permit for a project, that an environmental protection provision resulting from EU law has been infringed. There was no need to adjust the conditions in the case law in this respect, either. As is comes to the 'relativity requirement' of section 8:69a of the General Administrative Law Act, the Council of State has not held that provisions of national law implementing EU environmental law or self-executing provisions of EU environmental law are manifestly not intended to protect the interests of environmental organisations. Therefore, the requirements specified in the case law of the Court of Justice did not necessitate widening up the case law in the respect, either.

In its case law the Council of State therefore has not relied on the principle of effective judicial protection nor has used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention.

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

In our opinion, the case law of the Council of State does not need to be modified as a consequence of the aforementioned judgments of the Court of Justice. Nor does the legislation require amendment.

Nevertheless, in some cases the question has arisen whether the legislation or the case law offers sufficiently wide access to justice.

Under section 1.4 of the Crisis and Recovery Act local and provincial administrative authorities have no right to apply to the administrative courts for review of decisions of the central government that come within the scope of the Act and are not addressed to them. In such cases the only remedy available to an administrative authority is to apply to the civil courts on the grounds that the matter falls within their residual jurisdiction. In practice, however, this has not yet occurred.

In a number of cases[2] local and provincial administrative authorities have claimed that section 1.4 of the Crisis and Recovery Act is not binding, *inter alia* because it infringes article 9 (2), (3) and (4) of the Aarhus Convention and article 10a of Directive 85/337/EEC.

The Council of State left aside the question of whether article 9 (2) and (4) of the Aarhus Convention had direct effect and merely ascertained whether the decision was in conformity with article 10a of Directive 85/337/EEC since the substance of these articles is the same. The Council of State held that even if the administrative authorities concerned had to be treated as 'members of the public concerned' as referred to in article 10a of Directive 85/337/EEC, section 1.4 of the Crisis and Recovery Act would not result in a breach of the obligations of article 10a of Directive 85/337/EEC since these administrative authorities could bring proceedings before the civil courts (*cf.* the answer to Question A.1.). The circumstance that civil proceedings were not regarded by the administrative authority concerned as the most favourable possibility did not mean that such proceedings could not be regarded as fair, equitable, timely and not prohibitively expensive within the meaning of article 10a (4) of Directive 85/337/EEC. The Council of State also held that the national procedural rules, including section 1.4 of the Crisis and Recovery Act, were not more unfavourable in the case of claims under EU law than for similar national proceedings, since they applied irrespective of whether the grounds for review derived from national or EU law. Moreover, section 1.4 of the Crisis and Recovery Act did not make it impossible or extremely difficult in practice to have access to a review procedure as referred to in article 10a of Directive 85/337/EEC as proceedings could be brought before the civil

[2] Administrative Jurisdiction Division 29 July 2011, case no. 201011757/14/R1; Administrative Jurisdiction Division 7 December 2011, case no. 201107071/1/H1; Administrative Jurisdiction Division 2 May 2012, case no. 201105967/1/R1.

courts. The Council of State also held in this connection that it did not follow from the principle of effective legal protection under EU law that compliance with the obligations resulting from European law had to be supervised by the administrative courts. The Council of State referred in this connection by way of analogy to the judgment of the Court of Justice of 13 March 2007, C-432/05, Unibet, paragraph 65. Furthermore it cannot be concluded, in the opinion of the Council of State, that the objectives of article 9 (3) of the Aarhus Convention are not compatible with the application of section 1.4 of the Crisis and Recovery Act within national procedural law.

In other cases[3], concerning the so called 'relativity requirement', the question has arisen before the Council of State whether provisions of national law, such as provisions of the Nature Conservancy Act 1998, which serve to implement nature conservation provisions of EU law (in these cases Directive 92/43/EEC), clearly did not extend to the protection of the interests of the party invoking these provisions, and consequently could not be relied upon by that party. The provisions of the Nature Conservancy Act 1998 serve the general interest in that they are intended to protect nature and the landscape. In its judgment of 14 September 2011, concerning an NGO, the Council of State held that, now that the objects of an association which appealed against a decision to grant authorization under the Nature Conservancy Act 1998 for a hydroelectric power plant also related to the protection of certain natural values, these interests coincided with the interests the Nature Conservancy Act 1998 aims to protect. Therefore it could not be held that the relevant provisions of the Nature Conservancy Act 1998 clearly did not intend to protect the association's interests. In its judgment of 13 July 2011 the Council of State ascertained that the interests of the natural persons concerned in maintaining the quality of their living environment were sufficiently interwoven with the general interest. In other situations, however, natural persons could not claim the protection of these rules even though they had *locus standi* as interested parties. In the case judged at 27 June 2012 the natural persons lived at such a distance from the area concerned that their interest in maintaining the quality of their living environment was not so closely meshed with the general interest, which the provisions were intended to protect, that the provisions could be deemed to extend to the protection of their interests. Nor, according to the Council of State in its judgment of 4 January 2012, did the provisions of the Nature Conservancy Act 1998 extend to the protection of the interests of a lessee of office premises situated close to a motorway intersection at a distance of more than three kilometres from a Natura 2000 protection area.

In judgment C-115/09 the Court of Justice held – in brief – that article 10a of Directive 85/337/EC, as amended by Directive 2003/35/EC (below: Directive 85/337/EC), precludes legislation which does not permit an environmental organisation to rely before the courts, in an action contesting a decision authorising a project likely to have significant effects on the environment, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that the rule protects only the interests of the general public and not the interests of individuals. Since there is no reason to suppose that the Council of State will hold that provisions of nature conservancy are manifestly not intended to protect the interests of environmental organisations that represent the interest of nature conservancy in accordance with their objects and as evidenced by their actual activities, the requirements of this judgement in relation to environmental organisations will be met. The judgment of the Court of Justice in judgment C-115/09 is not about natural persons. However, the Court of Justice did hold in paragraph 37 of judgment C-115/09 'that the first paragraph of article 10a of Directive 85/337/EEC provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure "to challenge their substantive or procedural legality", without in any way limiting the pleas that could be put forward in support of such an action.' We take this to mean that article 10a of Directive

[3] Administrative Jurisdiction Division 13 July 2011, case no. 201008514/1/M3; Administrative Jurisdiction Division 14 September 2011, case no. 201011817/1/R2; Administrative Jurisdiction Division 4 January 2012, cases nos. 201104518/1/R4 and 201111577/1/R4, Administrative Jurisdiction Division 27 June 2012, case no. 201111729/1/R2.

85/337/EEC in itself does not contain a 'relativity requirement', nevertheless does not prevent the application in the above manner of a 'relativity requirement' in respect of natural persons. In this connection, we would point out that according to paragraph 45 of judgment C-115/09 'the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions […] referred to in Article 10a of Directive 85/337'. In our opinion, this applies *a fortiori* to a 'relativity requirement' of the kind that applies in the Netherlands, which concerns not standing but the assessment of an action on its merits.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

In Dutch administrative law there is no mandatory legal representation, neither for individuals nor for legal entities. Consequently, attorneys' costs need not be made necessarily. If a party has chosen to make use of professional legal assistance, the administrative authority will be ordered to pay the costs according to a flat rate system, in case of a successful appeal. The costs of experts and the administrative procedure are reimbursed according to the same flat rate system. It must be admitted that the reimbursement often cannot by far outweigh the costs actually incurred. In particular for industrial companies the benefits of a successful appeal, however, normally surpass the remaining costs considerably. For individuals and NGOs this system has not appeared to be prohibitively expensive.
The court fees in environmental cases, as in general cases, are € 160 for individuals and € 318 for legal entities. In case of a successful appeal the court fee must be reimbursed by the administrative authority. The court fees do not seem to be having a restrictive character. A governmental proposal to increase the court fees substantially in order to make the judicial system financially self-supporting met with vehement resistance from the legal world and has subsequently been withdrawn.

In Dutch civil procedure, legal representation is mandatory in first instance for cases with a monetary value over € 25.000; in appeal legal representation is always mandatory. Lawyers' fees are not regulated and start at around € 200 per hour. Expert fees are not regulated either and experts can be quite expensive. Court fees in first instance vary from € 75 to € 1.474 (depending on the monetary value of the case) for individuals and from € 589 to € 3.715 for legal persons. In appeal court fees vary from € 299 to € 1.553 for individuals and from € 683 to € 4.961 for legal persons. The party that loses the case will in principle be ordered by the court to pay the court fee of the winner, the costs of witnesses heard on behalf of the winner, expert costs of the winner as far as considered reasonable, and a limited part of the lawyers' costs of the winner, related to the monetary value of the case. For larger environmental organizations this system poses no problem; however smaller ones will have to look for specific funding.

In criminal procedure, legal representation is not mandatory; there are no court fees.

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible,**

please deal with all the examples. *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

Interested parties cannot apply to the Council of State for review of an action plan on air quality, because under the Dutch legal system judicial review before the administrative courts is confined to 'administrative decisions'. This means a written decision of an administrative authority constituting a public law act, whereas an action plan should be qualified as a 'policy rule'. However, interested parties may pursue a claim before the civil courts alleging a wrongful act by the competent authority, since the matter falls within their residual jurisdiction (*cf.* the answer to Question A.1.). The civil courts may direct that the plan should not be applied or give orders. The plaintiff will be required to provide evidence on potential harm/damage and to specify the measures that should have been taken.
In some cases[4] it has been argued that it follows from European law that legal protection against an action plan on air quality should be provided by the Council of State. The Council of State ruled that neither from judgement C-237/07, Janecek, nor from the principle of effective legal protection it follows that the review referred to by the Court of Justice should be exercised by the administrative courts. The Council of State referred in this connection by way of analogy to the judgment of the Court of Justice of 13 March 2007, C-432/05, Unibet, paragraph 65. The circumstance that applying to the civil court in the opinion of the claimant is not the most favorable procedure, does not mean that the proceedings before the civil court do not offer effective legal protection.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

The entitlement to challenge a permit for an infrastructural construction project (in the Netherlands this normally is a spatial planning decision) follows the general rules (*cf.* the answer to Question

[4] Administrative Jurisdiction Division 31 March 2010, case no. 200902395/1/M1; Administrative Jurisdiction Division 4 August 2010, case no. 201000543/1/H3.

A.1.). This means an appeal can be lodged by interested parties, which may include individuals, legal entities and administrative authorities. To be 'interested', it is required that the person concerned may be exposed to the actual consequences of the decision. Individuals should have an interest that is their own, personal, direct and objectively determinable. It does not make difference whether the project is subject to an EIA or not. Under section 1.4 of the Crisis and Recovery Act local and provincial administrative authorities have no right to apply to the administrative courts for review of decisions of the central government that come within the scope of the Act and are not addressed to them (*cf.* the answer to Question A.3.).

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

Applications to the administrative courts for judicial review do not have suspensive effect, either generally or in the particular case of environmental decisions or spatial planning decisions. However, decisions prepared in accordance with the so called 'uniform public preparatory procedure', which is mandatory in the case of most environmental decisions and spatial planning decisions, take effect only on the day after the time limit for review passes. In addition, where a request for interim relief is lodged in the case of decisions prepared in accordance with the uniform public preparatory procedure, the decisions do not take effect until after the judge has ruled on the request for interim relief. To this extent, therefore, a request for interim relief has suspensive effect.

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

The president of the Administrative Jurisdiction Division of the Council of State may, on request, grant a provisional remedy where speed is of the essence because of the interests involved. The President may base his judgment on a provisional judicial review of the decision, or on a balancing of interests involved with the immediate or delayed execution of the decision. The remedy may take the form of a suspension or another provisional measure, such as an order, a prohibition or a permission. The president may terminate or alter a provisional remedy either on its own initiative or otherwise.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

According to section 2.14, subsection 1, c, of the Act on General Provisions of Environmental Law, the competent administrative authority must take into account that at least the applicable best available techniques must be applied in the installation. Section 5.4, subsection 3, i, of the Environmental Law Decree rules that the competent administrative authority, when determining the best available techniques, shall take into account the consumption and the nature of the raw materials, including water, and energy efficiency. Section 5.5, subsection 6 of the Environmental Law Decree rules that

emission limit values must ensure that emissions under normal operating conditions shall not exceed the BAT associated emission levels as determined in BAT-conclusions. These provisions can be invoked by individuals, except when these provisions are manifestly not intended to protect the interests of the party invoking it, *i.e.* when the interest of the claimant that is actually in danger of being infringed is different from the interest protected by the aforementioned provisions. <An example of this situation could be that the claimant alleges he will be harmed by emissions of the installation, while his motives are clearly in the field of commercial competition.>

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

Interested parties, including NGOs that represent the interest of environmental protection in accordance with their objects and as evidenced by their actual activities, are entitled to judicial review of the permit decision. On most environmental and spatial planning decisions, including permit decisions for installations falling under the scope of the IED, the 'uniform public preparatory procedure' has been declared applicable to the preparation of the decision. If the uniform public preparatory procedure applies, a draft decision is first deposited for inspection. According to section 6:13 of the General Administrative Law Act no application for judicial review may be made by an interested party who has unreasonably failed to present his views on the draft decision. This provision is applicable to individuals and legal entities, amongst which NGOs, the like.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

Interested parties are entitled to ask the competent authority to take an enforcement decision. The decision can mean that enforcement action is to be taken. 'Enforcement action' means physical acts taken by or on behalf of an administrative authority against what has been or is being done, kept or omitted in breach of obligations laid down by or pursuant to any statutory regulations. An administrative authority which is entitled to take enforcement action may instead impose on the offender a duty backed by an astreinte.

In case the administrative authority does not take any decision, it is due a penalty fee to the applicant when two weeks have elapsed from the date on which the period for giving the decision has expired and the administrative authority has received written notice from the applicant. Furthermore, interested parties can make objections and lodge an appeal against the failure to take a decision in due time. The judge may impose on the administrative authority a duty to take a decision, backed by an astreinte.

In case the administrative authority explicitely refuses to take action, or decides to take other action than the applicant deems right, interested parties can make objections or lodge an appeal. The judge may *inter alia* impose on the administrative authority a duty to take a new decision, taking into account the considerations of the judgment.

The operation of a landfill in breach of a permit is unlawful. Anyone who is incurring material damage caused by the illegal operations may take a civil action against the trespasser. The same applies for environmental organizations (*cf.* the answer to Question A.1.) Furthermore, such an operation is a criminal act under the Economic Offences Act. Directly affected individuals and environmental organizations can report the issue to the public prosecutor (*cf.* again the answer to Question A.1.)