

Turkey-Climate Litigation

Avosetta Questionnaire

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[1] State of play at national level:

In your particular Member State, have cases been decided by the national courts, and / or are there cases pending before the courts, that aim to deliver better climate protection?

-There is no case directly aims either greenhouse gas reduction in particular or better climate protection in general. Under the administrative law this kind of cases (to force public authorities by individuals to do something with regard to governmental policies) is considered as “judicial activism” and “political issue”.

Are there “horizontal” cases between private parties and / or “vertical” ones between private parties and public authorities – or both? If yes, briefly characterize them.

- There are so many cases (horizontal) brought by NGOs and/or local people against consents given by the Government for the construction of **coal based power plants** as well as for illegal operation of already constructed ones. The former cases are related to the approval of the relevant EIA reports by the Ministry of Environment and Urbanization, and aim to annul the alleged approval decisions. The later cases are about the operation of existed coal based power plants without completing the necessary legal requirements with regard to ash storage and treatment facilities. Thus such cases aim to stop the operation of alleged power plants immediately by obtaining “stay of execution” orders from courts. In terms of the first group cases, one of the latest example is the Hema power plant planned to be constructed in a small village named *Amasra* located in the Western Black Sea side. The case has been brought to annul the approval decision regarding the relevant EIA report. That report has been challenged by the plaintiffs because it didn’t consider the connected projects. The Highest Administrative Court (*Danıştay*) accepted the alleged arguments and annulled the relevant decision because of inadequate EIA. The court underlined that it is not lawful to consider environmental impact assessment of *Hema* power plant alone because there are two other (ash storage and construction of Hema harbor) connected projects, and all the alleged negative impacts must be considered together as an integrated project¹.

- The latest major series of cases **that are not directly related to climate protection** are about **İstanbul Canal Project** (construction of an artificial canal parallel to the Bosphorus)². (The projects isn’t directly related to climate protection. However since it is a huge project which indeed named by the opponents as “crazy project” it will change the current ecological status of the region in a great extent. Consequently it will contribute to climate change in terms of several aspects. Millions of trees have already been cut down). Several governmental consents given for this project have been brought before administrative courts by local people, NGOs, chambers and Mayor of İstanbul (All the cases are still pending). In January 2020 the Ministry of Environment and Urbanization approved the relevant EIA report. The mentioned plaintiffs have also brought legal action against this decision alleging that it must be cancelled since the relevant report has not been properly prepared, and the project itself has so many disadvantages in

terms of every aspect including the possible immense negative effect on the current status of the relevant seas.

- Legal interest (standing to sue) for administrative cases: Plaintiff must have an interest to bring a legal action before administrative courts. This term is interpreted as “individual-personal, actual and legitimate interest” by the *Danıştay*. In that context only the persons who lives in the area of alleged polluting activity or have a property in that area can have such an interest³. NGOs and chambers who work to protect the environment as well as other related common public concerns according to their legal status are entitled to bring legal actions.

[II] Interconnections between developments at national and supranational level

- Turkey is among 33 defendant states in the case *Duarte Agostino and Others v. Portugal and 32 Other States* brought by four Portuguese children before the ECtHR on 2020⁴. The applicants allege that their right to life and to private life has been violated because of the defendants for not taking the necessary effective measures to reduce their greenhouse gas emissions. Turkey has to reply three questions until the end of May 2021 as other defendants. The major legal text relating the case is Paris Agreement. Turkey is not a party to this agreement (He signed but didn't ratify it). And it is likely that the Government will put forward this fact as a defense. However this cannot be considered as a strong defense ⁵ in the light of the previous judgments of the ECtHR regarding ratification⁶. The ECtHR does not consider the ratification as a strict requirement to clarify a provision of the Convention. He observed that “in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State”⁷. Indeed the ECtHR, when interpreting the state's obligation, took into consideration the Aarhus Convention even though Turkey is not a party to that convention⁸. Besides Turkey is a party to the United Nation Convention on Climate Change. The second defense of Turkey would be the argument of “lack of standing” because plaintiffs live in Portugal. As a third defense Turkey can argue that he has a special position in terms of the principle of “common but differentiated responsibility”.

- In 2005 the ECtHR judged that Turkey violated Article 6 (right to a fair trial) of the European Convention on Human Rights for the failure of authorities to implement a domestic court's order to eliminate pollution from three coal based power plants⁹.

¹ *Danıştay 14. D. E. 2018/2806. K. 2018/8205. 26.12.2018.*

² **Istanbul Canal** (*Kanal İstanbul*) is a project for the artificial sea-level waterway (45km. long, 350 meter maximum boat length), connecting the Black Sea to the Sea of Marmara, and thus to the Aegean and Mediterranean seas. The project includes also construction of ports (large container terminal in the Black Sea, logistic centers and artificial islands to be integrated with the canal) as well as constructing new residential areas along the channel.

³ The term of “interest” used to be interpreted widely under the earlier judgments of *Danıştay*. Even the persons who don't live in the area of the alleged polluting activities were entitled legal standing. For comments on the issue and the related judgments see. Turgut, Nükhet Yılmaz, *Çevre Hukuku Karşılaştırmalı İnceleme (Environmental Law - Comparative Analysis)*. Savaş Yayınları, 2001, second ed. p.325-329.

⁴ Requete No.39371/20.

⁵ See. **Turgut**, Nükhet Yılmaz, “İklim Davaları Portekiz Örneği-AIHM’ne Başvuru” (Climate Cases, the Example of Portugal -Application to the ECtHR). <https://www.herkesebilimteknoloji.com> 5 February 2021.

⁶ Many of these judgments have been given in the applications brought against Turkey. See. **Öneryıldız v. Turkey**. App. no.48939/99 (2004); **Demir and Baykara v. Turkey**. App. no. 34503/97 (2008). For a comment about the issue in general see. **Turgut**, Nükhet Yılmaz, “Çevreyi Koruyucu Uluslararası Sözleşmelerin Yadsınamaz Önemi” (Undeniable Importance of International Environmental Agreements). *Uluslararası çevre Koruma Sözleşmeleri (International Environmental Agreements)*. Turkish Bar Association, 2014, p.11-38.

⁷ **Demir and Baykara v. Turkey**. App. no. 34503/97 (2008), par.78.

⁸ **Öneryıldız v. Turkey**. App. no.48939/99 (2004).

⁹ **Okyay and Others v. Turkey**. App. no.36220/97 (2005). See. **Turgut**, Nükhet Yılmaz, “The European Court of Human Rights and the Right to the Environment”. *Ankara Law Review*, Summer 2007, Vol. 4, No.1, p,1-24,12.