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Shell v Milieudefensie Confirms Major Developments in Climate Change Liability

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Towards a Bundle of Duties

This week's decision in *Shell v Milieudefensie* from the Hague Court of Appeals seemed like a blow to climate litigation: *Milieudefensie* was ultimately unsuccessful in convincing the Court that it could transpose a global requirement for 45% emissions reductions by 2030 into an obligation for a particular actor or sector. Yet, the Court of Appeals decision marks considerable progress in how we understand the civil liability of large Dutch economic actors for their contributions to climate change, especially for scope 3 emissions. The judgment affords those actors no sigh of relief.

The relevance of legislative frameworks

First, the decision states that a defendant's compliance with legislative and regulatory frameworks does not foreclose the possibility of separate civil liability claims. This argument was used by German courts when they quickly dismissed claims brought by *Deutsche Umwelthilfe* against a series of car manufacturers. And while the German courts also, in principle, observed that regulatory compliance and civil liability are theoretically separate, they also seemed to give considerable weight to the position that, in practice, legislative and regulatory frameworks largely inform a private law duty of care. In *Shell v Milieudefensie*, the Court of Appeal states clearly that there remains within the separation of powers doctrine an appropriate role for a robust judicial evaluation of obligations beyond the regulatory framework:

> "Neither the European nor the Dutch legislator has stipulated that companies that comply with existing schemes to combat climate change no longer have obligations to further reduce their CO2 emissions. Nor has Shell cited any examples of other countries where legislators have taken such exhaustive measures. Instead, governments have stressed that companies also have their own duty of care to reduce their emissions. Thus, obligations arising from existing regulations do not preclude a duty of care based on their social standard of care on the part of individual companies to reduce their CO2 emissions." (para. 7.53)

This confirms the legitimacy of civil liability claims for harm from climate change. Four years ago, this would have been heralded as a ground-breaking development in climate jurisprudence. It should still be seen as such today. The decision requires companies to keep their foot on the pedal of climate action even in political contexts where the urgency for climate action dissipates, as is the case now in the Netherlands and other states with far-right governments.

Global scope 3 emissions

Second, the Court finds that global scope 3 emissions (the emissions created by third parties in their consumption of Shell's products) are both relevant for an evaluation of a company's duty of care and within the jurisdictional scope of the court. While scope 3 emissions received considerable attention due to the evaluation of a possible absolute emissions reduction obligation, they could be equally important for future evaluations of alternative climate obligations.

One should not lose sight that the recognition of scope 3 emissions responsibilities massively changes the characterization of Shell and other major economic actors that facilitate greenhouse gas emissions. They constitute 95% of Shell's total emissions. If the Court had found that scope 3 emissions are categorically irrelevant for evaluating Shell's duty of care or outside the scope of the Court's jurisdiction, many Carbon Majors (a group of roughly 80 companies who have collectively emitted more than two thirds of all global greenhouse gas emissions since 1988) would no longer count as large emitters for the purposes of civil liability, and financial institutions would be equally let off the hook. In other words: by accepting, in principle, corporate obligations for scope 3 emissions, the Court reassembles responsibility for the diffused consumption of fossil fuels onto major economic actors whose policies and decision-making can transform the climate impacts of their sectors. In doing so, it points to a trend towards corporate obligations to reduce scope 3 emissions in the EU Emissions Trading System 2, the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive (para. 7.99).

Substitution and effectiveness: contradicting Urgenda?

Third, the Court found that an absolute reduction obligation for Shell's scope 3 emissions would be ineffective (para. 7.110). Two-thirds of Shell's scope 3 emissions arise from oil and gas products which Shell does not produce, but for which Shell Trading (a subsidiary) acts as a middleman, purchasing from other producers to sell to consumers, retailers or other entities. In effect, the scope 3 emissions of this type of business activity amount to the overall majority of Shell's emissions. They were the elephant in the room. The Court agreed with Shell that, in theory, global emissions reductions could be compatible with an expansion of Shell Trading's activities and an overall growth of Shell's scope 3 emissions. In other words, Shell Trading could grow overall by replacing coal-based energy products (which it does not

buy and sell) with its natural gas products, resulting in a net decline in emissions with stable or increasing consumption. Logically, then, an absolute reduction obligation could be ineffective: with an obligation to give up these market transactions to reduce its scope 3 emissions footprint, other actors would simply fill Shell's market position.

This is, in my view, a replication of the "substitution" version of an effectiveness argument that was already rejected by the Hague Court of Appeal in its *Urgenda* decision from 2018. There, the Dutch State argued that a reduction obligation for 2020 would risk a result of "carbon leakage" whereby "companies will move their production to other countries with less strict greenhouse gas reduction obligations" (para. 57). The Court found the argument to be speculative and, as a point of principle, that the limited effectiveness of an obligation cannot categorically eliminate the possibility of an obligation when considering diffuse "global problems":

> "The Court, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change" (para. 62).

This position from *Urgenda* seems to contradict the Court's new ruling in *Shell v Milieudefensie*. And importantly, Shell's trading activities shifting to other actors is precisely the kind of movement of business activities to other jurisdictions that the Court found to be irrelevant in *Urgenda*. While the contexts are undoubtedly different – private actors versus states, and a business activity that is much more easily transferred than industries or companies – the conceptual question about how *effectiveness amid the risk of substitution* ought to affect the Court's articulation of a duty of care remains the same. In one it was irrelevant, and in the other it was found to be decisive. Yet, in its *Shell v Milieudefensie* decision, the Court does not directly speak to how the different context results in a different outcome. I would expect this to be a point of attention if the case is appealed to the Supreme Court.

Towards a bundle of duties

A fourth lesson from this case is that major economic actors contributing to climate change (Carbon Majors, financial institutions, etc.) could be more efficiently held accountable with a bundle of obligations rather than a single absolute emissions reduction obligation. Nollkaemper rightly critiques *Milieudefensie*'s strategy of pursuing a 45% reduction obligation but stops short of offering a concrete alternative. My view of an alternative formulation of a duty of care for major emitters would be to conceptualize it as a bundle of duties, rather than a single duty. This approach would reflect the complex business activities in which major emitters engage, articulating corresponding obligations, e.g. for their financial investments that result in carbon "lock in" effects, their separate production, wholesale and retail activities

as well as how they market their products (with the new EU Green Claims Directive having considerable impact). Such an approach might focus on *production* limitations rather than emission reductions that result in *sale* limitations, as hinted at by the Court:

> "There may be a causal relationship between a production limitation and emission reduction […] but Milieudefense et al have failed to put forward sufficient grounds to assume that in this case a causal relationship exists between a sales limitation and emission reduction" (para. 7.106).

In *Milieudefensie*'s other pending climate case, against ING, this bundling of duties is exactly the approach they are pursuing. Their notice of claim articulates ING's purported obligations to: a. develop a corporate climate policy that is in accordance with the Paris Agreement's 1.5°C target, b. require its large clients to also develop and implement sufficient climate plans, and cease financing clients who refuse to do so, c. require clients to develop and implement fossil fuel phase-out plans, and cease financing clients who refuse to do so, and, d. for ING to reduce its emissions by 48% by 2030. While the last argument will be very difficult to win in light of the Shell decision, the other obligations claimed are more promising. However, the "sufficient plan" risks becoming an empty signifier if the Court cannot find broad scientific consensus on minimum absolute emissions reductions for industries. Instead, plaintiffs may be more successful establishing other clear grounds for obligations: e.g. no financing or constructing of new extraction projects and a complete prohibition of any new activities (development or sale) involving coal.

Finally, the Shell decision is important for a future that seems all too certain to blow past the Paris Agreement's 1.5°C maximum warming target. Loss and damage claims are uncommon but increasing across Europe. The combination of the Court's approach to responsibility for scope 3 emissions and its emphasis on the normative value of the 1.5°C target makes loss and damage claims more likely. Shell (and many other actors) is not fulfilling their duty of care if they carry on emitting beyond the carbon budget associated with the threshold. The decision in *Shell v Milieudefensie* gives considerable legal grounds for courts to rule on liability for resulting damages. This consequence, more than any other, should have major economic actors urgently developing climate policies that contribute their fair share of mitigation effort to remain under the Paris 1.5°C target.

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