Reimagining the energy corporation

Paiement, Phillip

Published in:
Netherlands yearbook of international law 2021

DOI:
10.1007/978-94-6265-587-4_11

Publication date:
2023

Document Version
Publisher's PDF, also known as Version of record

Chapter 11
Reimagining the Energy Corporation: *Milieudefensie and Others v Royal Dutch Shell Plc*

Phillip Paiement

Contents

Abstract The 2020 judgment in *Milieudefensie and others v Royal Dutch Shell plc* arose amid a second-wave of litigation and legal mobilizations against private corporations, such as oil and gas companies. Evaluating the judgment and its consequences in light of this broader wave of legal mobilizations, this chapter argues that these legal mobilizations effectively seek to re-imagine the contemporary energy corporation and its understandings of its profitability and accountability in a changing climate. Approaching the case from the context of other legal mobilizations undermines some of the key criticisms of the court's judgment, namely its ineffectiveness in preventing climate-related harm and its failure to consider the common and best practices of oil and gas companies when substantiating Shell's standard of care under Dutch tort law. Instead, *Milieudefensie*'s claim is positively evaluated for both presenting Shell with the societal pressure that it purportedly depends upon for formulating more ambitious emissions reduction policies, and for forcing the court to confront the fundamental incompatibility of the contemporary energy corporations 'business as usual' with the protection of Dutch residents' human rights in the climate crisis.

Keywords climate change litigation · climate change · tort law · Carbon Majors · strategic litigation · Royal Dutch Shell

P. Paiement (✉)
Tilburg Law School, Tilburg University, P.O. Box 90153, 5000 LE Tilburg, The Netherlands
e-mail: p.m.paiement@tilburguniversity.edu

D. Dam-de Jong and F. Amtenbrink (eds.), *Netherlands Yearbook of International Law 2021*, Netherlands Yearbook of International Law 52,
https://doi.org/10.1007/978-94-6265-587-4_11

11.1 Introduction

This review of the *Milieudefensie and others v Royal Dutch Shell* judgment argues that the case is best read in the broader context of strategic climate litigation—and other forms of legal mobilization—against Carbon Majors, the large corporate emitters of greenhouse gases (GHG) in the oil and gas sectors. In this context, the case represents one of many ongoing attempts at re-imagining the energy corporation as a business entity that is simultaneously accountable for, and vulnerable to, the changing climate and its associated harm. After first situating the case within a 'second wave' of private climate litigation, and identifying how the chances of success have improved in comparison to earlier litigation attempts (Sect. 11.2), the chapter offers a comprehensive account of the District Court of the Hague's judgment in the dispute (Sect. 11.3). The review of the judgment focuses specifically on the substantiation of Royal Dutch Shell's (RDS) obligation under the 'unwritten standard of care' in Dutch tort law, and the soft law instruments and scientific reports drawn upon in formulating this standard. Finally, the chapter discusses various critiques raised with respect to the judgment which characterize it as an instance of judicial activism and a poor method of developing tort liability standards of care. In response to these critiques, the chapter suggests the importance of reading the case within the broader context of strategic climate litigation, and illustrates how such a reading demonstrates the ambitions these legal mobilizations have in reimagining the energy corporation and its responsibilities vis-à-vis climate change (Sect. 11.4).

11.2 Background: The Improving Odds of Private Climate Litigation

The use of litigation as a regulatory tool for slowing down, preventing or disincentivizing greenhouse gas emitting activities has been routinely used by environmental activists since at least the 1990s. Initial uses of litigation are best described as 'indirect' climate litigation in so far that they sought to stall, pause or postpone specific activities contributing to climate change, such as the construction or renewal of coal-burning power plants, but did not raise claims directly related to the harm caused by climate change.[1] These indirect litigation efforts frequently revolved around challenges to the licensing or authorization of extraction activities, such as challenging

[1] For example, see US District Court for the District of Columbia, *Foundation on Economic Trends v. Watkins*, Judgment Pursuant to Defendants' Motion to Dismiss, 12 February 1990, 731 F. Supp. 530; Land and Environment Court of New South Wales, *Greenpeace v. Redbank Power Company*, Judgment on Appeal, 10 November 1994, 86 LGERA 143. Peel and Osofsky helpfully distinguish between direct and indirect regulatory effects of climate litigation. Here, indirect litigation is used to characterize litigation attempts that do not have the ambition of directly affecting climate change mitigation or adaption law and policy, but instead seek to indirectly effect harmful emissions activities, for example by delaying or preventing their licensing or increasing the costs of the activities and thereby reducing their profitability. Peel and Osofsky 2015, pp. 28–53.

the sufficiency of Environmental Impact Assessments conducted in the preparation of a new coal-fired power plant. The 2007 landmark US Supreme Court decision in *Massachusetts v Environmental Protection Agency* (EPA) marked a turning point, since which litigation has increasingly aimed directly at achieving accountability for actors' contributions to global warming. In *Massachusetts v EPA*, the court found that the Environmental Protection Agency (EPA) was obliged to regulate greenhouse gases, such as carbon dioxide, methane and hydrofluorocarbons, as 'air pollutants' under the Clean Air Act.[2] Building on the success of *Massachusetts v EPA*, climate activists began using litigation to directly challenge the obligations of public authorities, often drawing on human rights-based arguments, to mitigate their contributions to climate change.[3] At the same time, a 'first wave' of private climate litigation took hold in the US exemplified by the *Comer v Murphy Oil* and *Kivalina v ExxonMobil* cases as well as those led by public authorities in California and Connecticut.[4] There were no significant successes in this first wave of litigation against private actors, as the plaintiffs struggled to convince the courts of their grounds for standing, their claims of the causality between the oil and gas companies' emissions and the harm they experienced, and their arguments that this was a justiciable conflict rather than a political question.[5] This was perhaps unsurprising as legal scholars at the time noted the many challenges to using tort and other private law doctrines to address climate change-related harm.[6] *Milieudefensie*'s lawsuit against Shell constitutes a major development in this trajectory of direct climate change litigation against private actors, one which seeks to reimagine the energy corporation as an actor both responsible for, and vulnerable to, the harmful consequences of a changing climate.

When *Milieudefensie* communicated a notice of liability letter to Royal Dutch Shell (RDS) on 4 April 2018, it entered into an emergent 'second wave' of private climate litigation around the world. The current second wave of private climate litigation has been built on the lessons learned from unsuccessful earlier attempts. As Ganguly, Setzer and Heyvaert argue, developments in both climate science and legal discourse have improved the odds of success for this second wave of private litigation.[7] Heede's 2013 'Carbon Majors' study offered litigants a robust historical analysis, spanning from 1854 to 2010, of the GHG emissions attributable to the largest 90 carbon producers in the world, the so-called 'Carbon Majors'.[8] Notably, it also found that more than half of all emissions from the Carbon Majors have been

[2] US Supreme Court, *Massachusetts v Environmental Protection Agency*, Judgment on Appeal, 2 April 2007, 549 US 497. See commentary on the case in Fisher 2013; Osofsky 2008.

[3] On the use of human rights based arguments in climate litigation, see Savaresi and Auz 2019; Peel and Osofsky 2018; Setzer and Vanhala 2019, pp. 10–11.

[4] US Court of Appeals for the Ninth Circuit, *Kivalina v ExxonMobil Corporation et al*, Judgment on Appeal, 21 September 2012, 696 F.3d 849, 2012 WL 4215921; US Court of Appeals for the Fifth Circuit, *Comer v Murphy Oil USA Inc*, Order to Dismiss Appeal, 28 May 2010, 607 F.3d 1049. For background on the 'first wave' of private climate litigation, see Ganguly et al. 2018, pp. 846–849.

[5] Ganguly et al. 2018, pp. 846–849.

[6] Faure and Nollkaemper 2007; Kysar 2011; Grossman 2003.

[7] Ganguly et al. 2018, pp. 846–849.

[8] Heede 2013.

released in the past 4 decades, underscoring the potential for litigation against these actors. Setzer and Higham found that, as of 2021, there were 33 ongoing litigation attempts against Carbon Majors corporations.[9] Alongside the Carbon Majors study, attribution science has developed increasingly accurate means of identifying the contribution of GHG emissions to the increased severity of single weather events, such as hurricanes and droughts.[10] Finally, the United Nations' Intergovernmental Panel on Climate Change's (IPCC) produces its 'Assessment Reports' every six to eight years, which offer systemic review of science on the climate crisis. These reports have crystallized as the leading account of scientific evidence about the contributions of human activities to climate change and the various pathways of mitigation.[11] Together, these scientific developments offer a robust evidentiary basis for initiating civil actions against Carbon Majors for the alleged harm caused, and at risk to be caused, by their failures to reduce their greenhouse gas emissions.

In addition to a more robust scientific basis, the second wave of private climate litigation is bolstered by an evolving legal discourse around accountability for climate change. Ganguly, Setzer and Heyvaert identify how lessons from strategic litigation against tobacco and asbestos manufacturers offer helpful lessons for climate litigation against Carbon Majors.[12] This includes successful: a. arguments around the issue of multiple sources of causation of harm; b. forms of liability that arise from misleading advertising, failure to warn and other product liability torts; and c. strategic litigation led by coalitions of public authorities for the public costs associated with harm from climate change.[13] Furthermore, this second-wave of private climate litigation is targeting an increasingly diverse group of corporate actors, including oil and gas companies (the aforementioned 'Carbon Majors'), as well as 'banks, pension funds, asset managers and major retailers, among others'.[14] It emphasizes the fundamental incompatibility of 'business as usual' for these corporate actors with the principle of a maximum 2 °C warming enshrined in the Paris Agreement. This evolving landscape of legal arguments and targets of litigation has resulted in headline-grabbing litigation against oil and gas companies, such as the case brought by a Greenpeace Southeast Asia, a number of Filipino non-governmental organizations (NGOs) and local communities to the Commission on Human Rights of the Philippines in 2015, following the damage caused by Super Typhoon Haiyan in 2013. The claim was brought against 47 Carbon Majors for their alleged contributions to the extreme weather event.[15] The Commission's final judgment, released in May 2022, affirmed

[9] Setzer and Higham 2021, p. 28.

[10] Ekwurzel et al. 2017; Marjanac and Patton 2018.

[11] Notably, in a number of recent climate litigation cases the disputing parties have agreed upon the climate science contained in the IPCC reports, removing it from the contentious issues in the proceedings. See for instance Hoge Raad, *The State of the Netherlands v. Urgenda*, Judgment on Appeal, 20 December 2019, ECLI:NL:HR:2019:2007, §2.1.

[12] Ganguly et al. 2018, p. 858.

[13] Olszynski et al. 2017, p. 1.

[14] Setzer and Higham 2021, p. 29.

[15] Savaresi and Hartmann 2020, p. 75.

the claims of the applicants and found that the Carbon Majors 'engaged in wilful obfuscation and obstruction to prevent meaningful climate action,' exposing them to possible liability for the associated harm, and that they hold a human rights-based obligation to undertake due diligence and offer remediation.[16] The Commission's judgment illustrates how developments in scientific methods and the legal discourse around accountability for climate change have improved the opportunity structures—the 'variables conditioning access to judicial governance' for civil society actors considering litigation as a tool for legal and political mobilization—for holding private actors legally accountable for the harm experienced by weather events that have become more extreme due to climate change.[17]

11.3 The Judgment

The Hague District Court—the same court of first instance that issued the 2015 *Urgenda* decision, although with a different bench of judges—released its judgment in *Milieudefensie and others v Royal Dutch Shell Plc* on 26 May 2021 following a year and a half of court proceedings. The plaintiffs claimed that RDS' failure to reduce its Scope 1, 2 and 3 emissions by 25-45% (relative to 2019) before 2030 would constitute an unlawful act towards the plaintiffs.[18] Scope 1 emissions are those which occur from sources directly owned (in full or in part) or operated by RDS; Scope 2 emissions are those emitted by third-parties from whom RDS has acquired electricity, steam or heating for its operations; and Scope 3 emissions are 'all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas.'[19] Importantly, the Scope 3 emissions include all of the emissions associated with oil and gas products sold by RDS and its subsidiaries, which constitute 85% of RDS' total emissions.[20] Specifically, and following the argumentation in the initial *Urgenda* judgment, the plaintiffs argued that RDS' obligation to reduce emissions associated with its activities stems from the 'unwritten standard of care' (also referred to as the 'open norm' in Dutch tort law) in Book 6 Section 162 of the Dutch Civil Code.[21] While the court accepted the class action in the case, it also limited it to the

[16] Commission on Human Rights of the Philippines 2022, pp. 104, 110.

[17] Vanhala 2012, p. 526. For background on the use of opportunity structures for the analysis of strategic litigation and other forms of legal mobilization, see Hilson 2002, p. 243.

[18] Rechtbank Den Haag, *Milieudefensie and others v Royal Dutch Shell Plc*, Judgment of the Court of First Instance, 26 May 2021, C/09/571932/HA ZA 19-379 (ECLI:NL:RBDHA:2021:5337), §3.1.

[19] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §2.5.4.

[20] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §2.5.5.

[21] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §3.2. Book 6, Section 162.2 reads: 'As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.' This was the

consideration of the interests of current and future generations of residents in the Netherlands and Wadden Sea region, ruling that the current and future generations of the entire world failed to meet the 'sufficient interest' criteria under Book 3, Section 305a of the Dutch Civil Code.[22] This ruling removed one of the co-applicants, ActionAid, from the case. Likewise, the claims of the 17,379 individual claimants who had appointed *Milieudefensie* as a representative *ad litem* for the case were also denied standing for lack of a 'sufficiently concrete individual interest' that distinguishes them from the common interest pursued by the class action.[23] This limitation of standing to public interest plaintiffs is broadly consistent with recent private climate litigation efforts in other jurisdictions.[24]

The court's resolution of applicable law in the case hinged on the parties' disagreement about the location of the 'event giving rise to the damage' and raises an important ontological conflict about climate change and the actions that constitute it. For the plaintiffs, RDS' enactment of corporate policy for the Shell group, in the Netherlands, is the event at the foundation of their claim which therefore requires the application of Dutch law.[25] In contrast, RDS argued that the act of actually emitting GHG—in Scope 1, 2 and 3 activities—ought to constitute the 'events giving rise to the damage', thus resulting in the 'applicability of a myriad of legal systems'.[26] Hence, at the heart of this question is a conflict over how the court ought to conceptualize the type of activities that cause climate change. Ultimately, the court found that Article 7 of the Rome II Regulation 'leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified' and that 'RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to the environmental damage and imminent environmental damage.'[27] This aspect of the judgment offers considerable opportunities for climate litigation in the Netherlands going forward as it embraces the multiplicity of both causes and consequences, each of which is understood to potentially extend across multiple jurisdictions, encompassed in climate change.

The crux of the dispute lied in the substantiation of the 'unwritten standard of care' insofar as what may be expected of RDS with respect to residents of the Netherlands and the Wadden Sea region. In elucidating the specific content of RDS' obligation, the court first noted RDS' position as responsible for a significant proportion of global CO_2 emissions, 'exceed[ing] the CO_2 emissions of many states, including

principal cause of action articulated in the first *Urgenda* judgment, while the appellate and Supreme Court decisions in *Urgenda* focused more heavily on a human rights-based cause of action.

[22] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.2.3–4.2.5.

[23] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.2.7.

[24] Mayer 2022, p. 410.

[25] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.3.2.

[26] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.3.2.

[27] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.3.6. European Union Regulation (EC) No. 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II Regulation) [2007] OJ L 199/40. This is the EU's primary legislative framework for conflicts of law in non-contractual obligations.

the Netherlands.'[28] It also noted the risks posed by climate change to this group of residents, with a particular focus on health-related consequences of heat waves, increase in infectious diseases, poor air quality, increased UV-exposure, flooding, salinization of water supplies, and drought.[29] Subsequently, the court acknowledged how these consequences could result in violations of the European Convention of Human Rights (ECHR) Articles 2 and 8 rights to life and to private and family life for the residents within the scope of the claim. While these rights cannot be directly invoked by the NGO plaintiffs, the court found that 'due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between *Milieudefensie* et al. and RDS,' specifically in ascertaining the existence and substance of a standard of care held by RDS with regards to residents of the Netherlands.[30]

The court then engaged with a vastly diverse set of normative (hard and soft law) instruments and scientific reports to specify RDS' obligation under the unwritten standard of care. These texts range from soft law instruments pertaining to business and human rights (the United Nations (UN) Guiding Principles,[31] the UN Global Compact,[32] the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises),[33] human rights treaties (ECHR,[34] International Covenant on Civil and Political Rights[35]), the Paris Agreement,[36] IPCC Special Reports, and—perhaps most controversially—the 'Oxford Report', an unpublished academic report by Thomas Hale and the Oxford Net Zero network, cited only by title in the judgment ('Mapping of current practices around net zero targets').[37] Under the framework of the UN Guiding Principles, the court noted that RDS holds a general obligation to take 'appropriate action' 'to cease or prevent the [adverse] impact' on human rights caused indirectly by climate change, and that the scope of this general duty can be extended over other entities in its corporate family or value chain.[38]

---

[28] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.5. Oddly, the judgment never states the actual annual or cumulative emissions attributable to RDS, but instead only discusses its emissions relative to 2019.

[29] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.6.

[30] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.9.

[31] Human Rights Council 2011.

[32] United Nations Global Compact 2015.

[33] Organisation for Economic Co-operation and Development 2011.

[34] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights), 4 November 1950, ETS No. 005, 3 September 1953.

[35] International Covenant on Civil and Political Rights, 16 December 1966, UNTS 14668, 23 March 1976.

[36] Paris Agreement, 12 December 2015, UNTS 54113, 4 November 2016.

[37] Oxford University Net Zero Network 2020. Hösli notes that the court did not provide a formal reference to the document in its judgment, so it cannot ascertained with complete certainty that this is the report they are drawing upon. Hösli 2021, p 201.

[38] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.21.

RDS' specific obligation with regards to this claim is then substantiated by: a. the extent of its control over Scope 1, 2 and 3 emissions of the Shell group companies; b. the actions necessary to prevent harmful climate change; and c. the range of possible emissions reduction pathways. The court acknowledged RDS' influential policy-setting role over the Shell group companies, extending to all three categories of emissions: 'ultimately RDS determines the energy package of the Shell group' and 'RDS is free to decide not to make new investments in explorations and fossil fuels, and to change the energy package offered by the Shell group.'[39] It thus holds a 'significant best-efforts obligation' to remove or prevent serious risk ensuing from its Scope 1, 2 and 3 emissions.[40] The court then characterized the Paris Agreement as a 'universally endorsed and accepted standard' to justify its utility in substantiating RDS' obligation, treating it as an indicator of 'unwritten law' as to what constitutes 'proper social conduct' with respect to climate change mitigation obligations.[41] It further articulated the maximum 2 °C warming commitment and the maximum 1.5 °C warming ambition, along with the 450 ppm in 2100 carbon budget threshold, as essential criteria for evaluating the sufficiency of mitigation actions to prevent 'dangerous climate change'.[42]

The key question, then, is whether RDS' obligation is commensurate to the reduction obligations for state parties to the Paris Agreement, which was formulated according to emissions contributions per state, rather than per industry sector or corporate actor. While the IPCC identifies a 45% reduction of emissions in 2030, relative to 2010, as the pathway offering the best chance for avoiding dangerous climate change, the crux in the decision is the extent to which those reduction targets can be translated into commensurate obligations for specific corporate actors. The court relied heavily on the Oxford Report, noted above, in postulating a 'broad international consensus that each company must independently work towards the goal of net zero emissions by 2050'.[43] It also drew on the report's criteria for identifying the stringency of reduction obligations for a specific company—including the *capacity* of the company to undertake aggressive reduction targets, its *historical responsibility* in contributing to climate change, and the *scale* of its emissions with larger emitters subject to more stringent reduction standards.[44] In summary, the court articulates RDS' obligation under the unwritten standard of care as a 'significant best-efforts obligation' to formulate the corporate policy of the Shell group with the 'guideline that the Shell group's CO_2 emissions (Scope 1, 2 and 3) in 2030 must be net 45% lower relative to 2019 levels'.[45] Within that obligation, the court also affirmed the

[39] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.25.

[40] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.24.

[41] See n. 19 above.

[42] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.27. On the increasing importance of the concept of carbon budgets in strategic climate litigation, see Dehm 2020, p 244.

[43] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.34. See n. 35 above.

[44] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.34

[45] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.4.39.

discretion which RDS holds in determining its specific reduction pathway to 45% by 2030.

Finally, the court reviewed RDS' current policy in order to determine whether it is currently fulfilling it. In its evaluation, 'RDS' policy, policy intentions and ambitions for the Shell group largely amount to rather intangible, undefined and non-binding plans for the long-term (2050)' and its '[e]missions reduction targets for 2030 are lacking completely.'[46] As such, RDS' current policies at the time of judgment amounted to an 'imminent violation' of its reduction obligation.[47] The court also declared the order for RDS to reduce its emissions by 45% by 2030 to be provisionally enforceable, effectively declaring that the urgency of mitigation outweighs the considerable costs and lost opportunities faced by RDS in complying with the court's order while the case is appealed.[48] In July 2021, RDS appealed the decision and those proceedings are ongoing, with a judgment expected in the end of 2023 or early 2024.

11.4 Discussion: Reimagining the Energy Corporation Through Climate Litigation

The significance of the *Milieudefensie and others v Shell* judgment is best evaluated in its relationship with other strategic mobilizations of law against corporate actors who are involved in substantial emissions-producing activities and products. As identified at the outset of this chapter, the case is situated within a 'second wave' of climate litigation against private actors, one which holds greater potential for success for climate activists than its predecessor one decade ago. This is attributed, in part, to a coherent and multifaceted reimagining of the energy corporation through legal mobilization. Specifically, these legal mobilizations attempt to re-define how energy companies understand both profitability and accountability in the context of a changing climate.

Milieudefensie's successful attempt to articulate an obligation to substantially reduce emissions by 2030 coincides with a series of successful climate activism initiatives during the 2021 annual general shareholder meetings (AGMs), as well as a May 2022 shareholder derivate lawsuit filed in the United Kingdom (UK) against Shell's Board of Directors. The 2021 season of AGMs was met with a series of shareholder climate activists successfully placing climate mitigation proposals on the meeting agendas, with some initiatives being adopted at the voting stage.[49] Among

[46] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.5.2.

[47] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.5.3.

[48] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.5.7.

[49] For a helpful overview of the climate actions during the 2021 AGM season, see Slaughter and May (2021) Shareholder Climate Change Activism in the 2021 AGM Season—and What's Coming Next. https://my.slaughterandmay.com/insights/client-publications/shareholder-climate-change-activism-in-the-2021-agm-season-and-whats-coming-next. Accessed 17 August 2022.

the larger victories for climate activists was the replacement of three positions on ExxonMobil's Board of Directors with individuals nominated by the leading US-based climate activist hedge fund, Engine No. 1.[50] Notably, this vote was taken the same day that the Hague District Court released its judgment in *Milieudefensie and others v RDS*. In the Netherlands, the Amsterdam-based activist shareholder organization Follow This also commanded press headlines with successful attempts to force climate initiatives onto voting agendas.[51] Furthermore, in March 2022, ClientEarth filed a derivative action claim in the UK against Shell's Board of Directors, alleging that they are violating their fiduciary duties towards their shareholders to 'promote the success of the company' and to 'exercise reasonable care, skill and diligence' in their failure to adopt a climate policy for the company that aligns with the reduction goals established under the Paris Agreement.[52] Collectively, these transnational legal mobilizations around climate mitigation are developing a new narrative of the corporate actor—more specifically, the Carbon Major—as a business entity that must take climate mitigation seriously in order to fulfil its obligation to its shareholders.[53] While traditionally climate action was presumed to conflict with the profitability of oil and gas companies, these legal actions stand to reimagine the profit timelines and corresponding concerns of the Carbon Majors, insisting that shareholder value is premised on the long-term viability of the company in an imminently imperative carbon-neutral future.[54]

With this context of reimagining the corporate actor in mind, the *Milieudefensie and others v Shell* judgment is not without its controversies. Many legal commentators have critiqued the decision—as well as the previous *Urgenda* decisions—as an unwarranted form of judicial activism.[55] The most percipient critique of the case

[50] Christie (2021) Battle for the Board: Climate Rebellion at Exxon Marks a New Era of Shareholder Activism. https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/battle-board-climate-rebellion-exxon-marks-new-era-shareholder. Accessed 17 August 2022. For background on the use of shareholder activism for climate mitigation, see Rodrigue and Michelon 2021.

[51] Bijlo (2021) Activistische Aandeelhouders van Follow This Stellen Het Klimaatbeleid van Shell Weer Op de Proef. Trouw, Amsterdam, 16 May 2021.

[52] These duties are articulated in Articles 172 and 174, respectively, of the UK Companies Act, 2006.

[53] On the consequences of climate change litigation for narrative building, see Paiement 2019, p. 121; Nosek 2018, p. 733; Hilson 2019, p. 81.

[54] As an illustration, see Follow This' resolution at the 2021 RDS AGM in which they call on RDS to 'invest accordingly in the energy transition to a net-zero energy system' and highlight the 'international consensus' that 'climate-related risks are a source of financial risk, and therefore achieving the goal of Paris is essential to risk management and a responsible stewardship of the economy.' Follow This 2021. Resolution at the 2021 AGM of Royal Dutch Shell plc. https://www.follow-this.org/wp-content/uploads/2021/01/CR2102-Shell-Climate-Targets-Resolution-2021.pdf. Accessed 17 August 2022. In contrast, Peel and Osofsky describe increased costs and project delays as an indirect regulatory impact associated with earlier litigation attempts, particular those targeting the utilization of coal-fired power plants in the United States. See Peel and Osofsky 2015, pp. 48–49.

[55] The most forceful critiques of the *Urgenda* decisions by Dutch legal scholars are seen in Bergkamp 2015, p. 2278; Schutgens 2015, p. 2270. Mayer characterizes Urgenda's arguments pertaining to the necessary mitigation target, and accepted by the court, as 'rudimentary and often unconvincing'.

is raised by Smeehuizen, who acknowledges the potentially legitimate role of civil lawsuits in addressing climate change harm caused in a context of regulatory failures and that the current climate policy framework in the Netherlands constitutes such a failure.[56] However, for Smeehuizen, the decision's inability to materially affect the potential harm to Dutch residents caused by climate change diminishes its legitimacy. This shortcoming arises out of two problems in the case, as read by Smeehuizen: first, RDS' belief that emissions reductions achieved by the Shell group would only transfer emissions to other oil and gas companies without a corresponding reduction in market demand; and second, the small proportion of global emissions that are impacted by the decision.[57] His critique reflects the concern that Shell, as a supposed sustainability leader among Carbon Majors, will lose market share to less sustainable competitors, resulting in a net negative effect for climate action.[58] These concerns only hold if the case is viewed in isolation of other climate litigation activities. If, however, the broader landscape of climate litigation is considered, one sees a more robust mobilization of legal tools that seek to prevent the transfer of emissions to other Carbon Majors and extend to much greater proportions of global emissions.[59] Furthermore, in January 2022 *Milieudefensie* announced its intention to file similar claims against the next twenty-nine largest corporate emitters in the Netherlands if they do not produce concrete policies for reducing their emissions by 45% by 2030.[60] Simply put, it is erroneous to assume, as Smeehuizen seems to do, that RDS is being treated exceptionally by climate activists and that the other Carbon Majors are not experiencing similar legal pressures to reduce their emissions more quickly.

A narrower point of criticism deserving attention is the role of soft-law instruments used by the court to substantiate the unwritten standard of care. Prior to the judgment, Fleurke and Smeehuizen drew attention to the questionable 'representativeness' of the institutions or actors responsible for creating the soft law texts that would be drawn upon for filling in this 'open norm'.[61] Likewise, Mayer criticizes the court for postulating a norm which no company in the oil and gas sector complies with: 'The District Court should have considered not only these global [mitigation] objectives,

---

Mayer 2019, p. 192. Wegener critiques the decision and its impact on the separation of powers, and in doing so, he characterizes the purported importance of court decisions in climate law and policy as 'utterly misleading'. Wegener 2019, p. 125. Van der Schyff offers a more nuanced critique of the decision, noting the court's application of international public law as an instance of 'over-stretching', while also asserting that the problem arises from the unique constitutional framework in the Netherlands, which prohibits constitutional review, rather than purely out of judicial activism. Van der Schyff 2020, p. 210.

[56] Smeehuizen 2022, p. 548.

[57] Smeehuizen 2022, pp. 545–547.

[58] Graafland (2021) Uitspraak Tegen Shell Kan Ook Ongunstig Uitpakken Voor Klimaat. Trouw, Amsterdam, 4 June 2021.

[59] Even the IPCC has noted the quantity of climate litigation activities in recent years, and its necessary role in driving mitigation. Intergovernmental Panel on Climate Change 2022, §13.4.2. Setzer and Higham 2021, p. 28.

[60] Milieudefensie 2022.

[61] Fleurke and Smeehuizen 2018, p. 2238.

but also the practice of other companies involved in the same sector, to determine what Shell can *realistically* be expected to do with regard to climate change mitigation.'[62] He characterizes it as a reasoning premised entirely on descending logic, driven by the standards found in political agreements and scientific reports, with no effort to balance these texts against an ascending evaluation of the actual corporate behaviour and best practices found in the oil and gas industry. In particular, the significance given to the 'Oxford Report' by the court raises serious questions about the role of climate science in establishing legal duties of care. While the IPCC's reports are heavily scrutinized by hundreds of peer scientists, allowing them to be accepted in good faith as statements of broad scientific consensus, the Oxford Report constitutes a self-published research report by an academic research institute. Its inclusion, and importance, in the judgment raises concerns about the breadth of sources that courts may rely on in identifying standards of care under tort law, and how this extreme breadth could potentially undermine the importance currently given to products of broad scientific consensus, such as the work of the IPCC. Therefore, the Oxford Report's key function in the judgment—translating the Paris Agreement reduction targets to individual corporate actors—is likely to be a principal point of focus at the appellate stage.

The court's judgment stands in stark contrast to the dense legislative and regulatory requirements faced by oil and gas companies. In this sense, the case is similar to earlier litigation against tobacco products, in which tobacco manufacturers relied on their compliance with comprehensive legislative requirements to rebut tort liability claims for the harm caused by the consumption of their products. In their view, how could tort liability arise from the lawful placement of a properly functioning product, subject to extensive regulation, on the market?[63] The same question could be raised with respect to the Scope 1 and 2 emissions aspect of the claim against RDS, while the Scope 3 emissions portion moves *Milieudefensie*'s claim beyond the regulatory framework for oil and gas companies.[64] However, this argument rebutting liability opens the door for further scrutiny of the extent of RDS' internal studies on the contribution of emissions to harmful forms of climate change, and the consequences that this knowledge had (or did not have) on their operations.[65] The court's scrutiny over this aspect of the case was fairly limited, and could very well be a point of greater attention at the appellate stage. In particular, reports of RDS' awareness of climate change concerns as early as the mid-1980s could have served a more explicit role in the court's substantiation of the unwritten standard of care.[66]

---

[62] Mayer 2022, p. 408 (emphasis in the original text). See also Burgers' response to Mayer's critique: Burgers 2022.

[63] Such an argument is coupled in tobacco litigation with the 'freedom of choice' argument, i.e. that the plaintiffs chose to use a product that posed a risk to their health. Rabin 1992, pp. 870–873.

[64] See n. 19 and n. 20 above.

[65] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 15, §2.5.9.

[66] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 15, §2.5.9. Fleurke and Smeehuizen 2018, p 2237. Based on her historical analysis of RDS' strategic scenario exercises from 1967 onwards, Andersson estimates that global greenhouse gas emissions only factored into RDS' scenario planning in the late 1980s. Andersson 2020, p. 731.

With these aforementioned criticisms of the judgment in mind, one should not overlook the extent to which the judiciary may lack sympathy with those critiquing the inappropriateness of resolving this conflict in the courts rather than through political processes. It should be kept in mind that, at the time of decision, the Dutch State has yet to comply with the Supreme Court's 2019 order *Urgenda* decision, as they have failed to reduce emissions in the Netherlands by 25% in comparison to 1990 levels—in fact, emissions rose from 2020 to 2021.[67] Likewise, Smeehuizen indicates that *Milieudefensie*'s claim is situated in a context of regulatory failure.[68] For example, in its 2021 Climate Report (*Klimaatnota*) the *Raad van State* noted that the government's 2030 and 2050 emissions reduction goals are not clearly achievable under the existing policy framework.[69] In Burgers' review of the decision, it is precisely this regulatory failure which justifies the court's intervention: 'The judgment could also be read as a call to the Dutch legislature to (finally) come up with more detailed guidelines for various actors in society at large, so as to ensure that the government's own target is achieved.'[70] In this context, the courts may indeed be more willing to take decisions that prompt mitigation activities in both the public and private sector, insofar that it is convinced of the rights-violations that would manifest if substantial mitigation were not to occur.[71] The Dutch government could directly address the perceived activism of the courts by developing a clear policy framework that incorporates the necessary actions and decision for achieving the reduction goals that the Dutch state had agreed to under the Paris Agreement and which were imposed (or reaffirmed) in the *Urgenda* ruling. Without a clear framework for achieving the stated reduction goals, the previously described argument about RDS' compliance with a comprehensive regulatory framework rings hollow. The court has little reason to weigh heavily RDS' compliance with a regulatory framework that has already been found to insufficiently protect the human rights of Dutch residents.

Taking a step back from *Milieudefensie*'s specific claim, Mayer's critique of the court's unbalanced, descending logic in formulating the unwritten standard of care inadvertently highlights the critical reimagining that strategic climate litigation against Carbon Majors is performing. Mayer argues that a traditional approach to formulating the standard of care under tort law doctrine would necessarily consider the common and best practices of the industry, RDS' capacity to transition its operations and products in order to reduce emissions, and its track record in pursuing energy products with smaller carbon footprints.[72] Such an approach would inevitably

[67] According to the Dutch national statistics office emissions in 2021 were 2.1% higher than in 2020. Centraal Bureau voor de Statistiek 2022.

[68] Smeehuizen 2022, p. 543.

[69] Raad van State (2021) Concept Klimaatnota 2021, Bijlage bij *Kamerstukken II* 2021/22, 32813, nr. 901, 28 October 2021, p. 7.

[70] Burgers 2022, p. 428.

[71] The regulatory failure context as a justification for court intervention in climate policy is also reflected in the Irish Supreme Court's recent climate case decision. Supreme Court, *Friends of the Irish Environment v. The Government of Ireland & Others*, Judgment on Appeal, 24 April 2020, [2020] IESC 49.

[72] Mayer 2022, p. 417.

result in a glaring condemnation of the legal framework governing the oil and gas sector, for it is inconceivable that this ascending evaluation would result in a standard of care consistent with a maximum 2 °C warming trajectory. As the court itself asserted, RDS' current emissions reduction policies for 2050 are 'intangible, undefined and non-binding' and those for 2030 are 'lacking completely'.[73] If RDS were considered an 'average' Carbon Major on this issue, it is hard to ascertain how such a corporate policy landscape could offer a worthwhile evaluative framework for the court to identify what constitutes the expectations of a 'reasonable' or 'careful' oil and gas company in the climate crisis.[74] Burgers argues that such an approach is 'dangerously apologetic and risks hollowing out the duty of care required under tort law.'[75] Notably, Mayer refuses to offer an alternative reduction target derived from his purported 'ascending' methodology for filling in the substance of the unwritten standard of care.

The underlying goal of the current wave of private climate litigation is to emphasize the fundamental incompatibility of 'business as usual' in the oil and gas sector with the principle of a maximum 2 °C warming enshrined in the Paris Agreement. Mayer's suggested alternative reasoning would further underscore the regulatory failure at the heart of the current climate law framework. *Milieudefensie*'s claim places the court in a challenging situation: either it is forced to re-envision how it substantiates tort obligations in light of the increasingly clear and alarming consensus of climate scientists, or it must reaffirm the conventions of tort law doctrine, including its fundamental insufficiency for resolving conflicts about the complex forms of harm already experienced, and to be experienced, as a result of climate change. This is the crux of the purported 'gap' between what Mayer characterizes as ascending and descending methods for substantiating the unwritten standard of care attributed to RDS, a gap which cannot be reconciled or transcended.[76] Both outcomes fit into a broader effort to reconceptualize the position of the energy corporation in the climate crisis, and the expectations that its shareholders, as well as society writ large, hold with respect to its accountability for and vulnerability to the harm posed by climate change.

Finally, this account of the case would be incomplete without reflecting on an apparent contradiction in RDS' argument. In its 2020 third-quarter figures presentation, RDS acknowledges its 'ambition to be a net-zero emissions energy business by 2050 or sooner, in step with society and its customers.'[77] Routinely in its judgment, the court highlighted (and dismissed) RDS' argument that society, rather than individual corporate actors, ought to lead the pathway to a net-zero future.[78] RDS' argument reveals its misreading of the *Milieudefensie* claim, posed as a class action, a representation of a broad interest group within Dutch society. In this reading, the

[73] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.5.2.

[74] Mayer 2022, p. 418.

[75] Burgers 2022, p. 421.

[76] Mayer 2022, p. 415.

[77] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §2.5.21.

[78] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 18, §4.5.2.

litigation itself is one example among many of 'society' leading the path to a net-zero future.[79] Wittgenstein describes a similar confusion:

> Someone says to me: "Show the children a game." I teach them gambling with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[80]

While 'society' is a concept with blurred edges, as is the concept 'game' in Wittgenstein's example, a more cynical reading of RDS' argument is that they do not intend to follow society, but rather the economy, in transitioning to a net-zero emissions future. Yet, the power displayed by the second wave of private climate litigation, as exemplified in *Milieudefensie*'s case, arises precisely in the reimagination of the energy corporation and its perceptions of profitability and accountability as impacted by a changing climate. Society, using the tools of tort law, is reconfiguring economic relationships in accordance with worldviews that affirm the disastrous consequences of climate change, now and in the near future. In the reading offered here, contextualized by the broader group of second-wave private climate litigation and other legal mobilizations again Carbon Majors, *Milieudefensie*'s claim is an example of precisely the social and economic pressure that RDS purportedly seeks to follow in formulating its emissions reduction policies. The art of their claim, viewed in this context, is that it both undermines RDS' main defence—that a 'reasonable' or 'careful' oil and gas company would follow 'society' or market demand in determining its emissions reduction policies—and emphasizes the fundamental incompatibility of traditional tort methods of legal modernism, as defended by Mayer, and an energy transition that is more likely-than-not to meet a maximum 1.5 C warming threshold and avoid disastrous impacts on the human rights of Dutch residents.[81]

With this optimistic reading of the case's ambitions towards re-imagining the energy corporation in mind, we would be mistaken to overlook two of the problematic limitations for climate activism posed by the courts judgment.[82] First, the court's refusal to include interests beyond the residents of the Netherlands illustrates the challenges of extraterritorial rights applications in tort-based climate litigation.[83] This limitation risks prioritizing the interests of the Netherlands, the low-laying nation best situated—financially and technologically—to cope with the stresses of adapting to rising oceans, while blocking consideration of those communities—predominantly in the Global South—who face immediate, rather than future, risks

[79] Setzer and Higham 2021, p. 28.

[80] Wittgenstein 1958, p. 33.

[81] See Petersmann's critique of legal modernism in the context of the climate crisis and the Anthropocene. Petersmann 2021.

[82] Auz's characterization of the Inter-American Court of Human Rights as a 'liminal space' for climate litigation is helpful for thinking through the simultaneous opportunities for transformative change offered by courts of all types, coupled with the structural obstacles they simultaneously pose to that change. Auz 2021, pp. 204–208.

[83] *Milieudefensie and others v Royal Dutch Shell Plc,* n. 15, §4.2.3–4.2.5.

of flooding, erosion, salination of drinking water, etc., and have less access to the financial and technological means to adapt to them. Notably, there was no explicit consideration of the interests of the communities in the Caribbean Dutch islands, as a community with more immediate and deep-reaching exposure to the threat of rising oceans than the rest of the Netherlands, a failure that further entrenches the marginalization of these post-colonies.[84] As Mayer acknowledges, the argument for ordering RDS to reduce its emissions would be stronger if the human rights impacts outside of just those experienced by Dutch residents in the European territory of the Netherlands were considered.[85] Second, the court's willingness to entertain reduction pathways that rely heavily on negative emissions (or carbon removal) technologies which do not yet exists, further legitimizes a 'political economy of delay' that is fundamentally at odds with the urgent reductions sought in this case and others.[86] This latter observation illustrates that, despite the increasingly robust scientific evidence of the consequences of climate change that have supported the second-wave of private climate litigation, courts still struggle to make meaningful evaluations of this complex body of scientific data and models.

11.5 Conclusion

When read in the context of the second wave of private climate litigation, the *Milieudefensie and others v RDS* judgment illustrates the evolving narrative of energy corporations and their simultaneous accountability for, and vulnerability to, the changing climate. The arguments successfully postulated by the plaintiffs are situated in the same worldview of the narratives found in other legal mobilizations against Carbon Majors, including shareholder activism during AGMs and ClientEarth's fiduciary duty lawsuit against Shell in the UK. They collectively aim to re-define how energy corporations' perceptions of profitability and accountability are impacted by a changing climate. While these cases creatively reimagine legal frameworks to transition towards non-extractive economic order, the case also illustrates the structural obstacles that the courts pose to radical transformations, as the court limits the representation of communities outside of the Netherlands and legitimizes reduction pathways premised on carbon removal technologies that do not yet exist.

[84] See, for instance, the work of Ferdinand on climate justice in the French overseas territories. Ferdinand 2018. This relates to a broader concern, raised by Gonzalez, at the intersections of racism, (post)colonialism and climate change. Gonzalez 2021.

[85] Mayer 2022, pp. 409–410.

[86] Carton 2019, p. 765.

References

Andersson J (2020) Ghost in a Shell: The Scenario Tool and the World Making of Royal Dutch Shell. Business History Review 94:729-751.

Auz J (2021) "So, This is Permanence": The Inter-American Human Rights System as a Liminal Space for Climate Justice. Melbourne Journal of International Law 22:187-220.

Bergkamp L (2015) Het Haagse Klimaatvonnis: Rechterlijke Onbevoegdheid en de Negatie van Het Causaliteitsvereiste [The Hague's Climate Judgment: Judicial Incompetence and the Negation of the Causality Requirement]. Nederlands Juristenblad 2015/1676:2278-2288.

Burgers L (2022) An Apology Leading to Dystopia: Or, Why Fuelling Climate Change Is Tortious. Transnational Environmental Law 11:419-431.

Carton W (2019) "Fixing" Climate Change by Mortgaging the Future: Negative Emissions, Spatiotemporal Fixes, and the Political Economy of Delay. Antipode 51:750-769.

Centraal Bureau voor de Statistiek (CBS) [Statistics Netherlands] (2022) Uitstoot broeikasgassen 2,1 procent hoger in 2021. https://www.cbs.nl/nl-nl/nieuws/2022/11/uitstoot-broeikasgassen-2-1-procent-hoger-in-2021. Accessed 17 August 2022.

Commission on Human Rights of the Philippines (2022) National Inquiry on Climate Change Report. https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf. Accessed 17 August 2022.

Dehm J (2020) Coal Mines, Carbon Budgets and Human Rights in Australian Climate Litigation: Reflections on *Gloucester Resources Limited v Minister for Planning and the Environment*. Australian Journal of Human Rights 26:244-273.

Ekwurzel B, Boneham J, Dalton M, Heede R, Mera R, Allen M, Frumhoff P (2017) The Rise in Global Atmospheric CO2, Surface Temperature, and Sea Level from Emissions Traced to Carbon Producers. Climate Change 144:579-590.

Faure M, Nollkaemper A (2007) International Liability as an Instrument to Prevent and Compensate for Climate Change: Climate Change Liability and the Allocation of Risk. Stanford Environmental Law Journal 26:123-179.

Ferdinand M (2018) Subnational climate justice for the French Outre-mer: postcolonial politics and geography of an epistemic shift. Island Studies Journal 13:119-134.

Fisher E (2013) Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*. Law & Policy 35:236-260.

Fleurke F, Smeehuizen L (2018) *Milieudefensie versus Shell*; Een Verkenning [*Milieudefensie v Shell*: An Exploration]. Nederlands Juristenblad 2018/1580:2232-2238.

Ganguly G, Setzer J, Heyvaert V (2018) If at First You Don't Succeed: Suing Corporations for Climate Change. Oxford Journal of Legal Studies 38:841-868.

Gonzalez CG (2021) Racial Capitalism, Climate Justice, and Climate Displacement. Oñati Socio-Legal Series 11:108-147.

Grossman DA (2003) Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation. Columbia Journal of Environmental Law 28:1-61.

Heede R (2013) Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010 Methods & Results Report. https://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf. Accessed 17 August 2022.

Hilson C (2002) New Social Movements: The Role of Legal Opportunity. Journal of European Public Policy 9:238-255.

Hilson C (2019) Law, Courts and Populism: Climate Change Litigation and the Narrative Turn. In: Sterett SM, Demetrius Walker L (eds) Research Handbook on Law and Courts. Edward Elgar, Cheltenham, pp 81-94.

Hösli A (2021) Milieudefensie et al. v. Shell: A tipping point in climate change litigation against corporations? Climate Law 11:195-209.

Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31.

Intergovernmental Panel on Climate Change (2022) Sixth Assessment Report: Mitigation of Climate Change. https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf. Accessed 17 August 2022.

Kysar DA (2011) What Climate Change Can Do about Tort Law. Environmental Law 41:1-71.

Marjanac S, Patton L (2018) Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain? Journal of Energy & Natural Resources Law 38:265-298.

Mayer B (2019) *The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of the Hague. Transnational Environmental Law 8:167-192.

Mayer B (2022) The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie v. Royal Dutch Shell*. Transnational Environmental Law 11:407-418.

Milieudefensie (2022) Deze brief verandert alles: grote vervuilers, kom met een klimaatplan. https://milieudefensie.nl/actueel/deze-brief-verandert-alles-grote-vervuilers-kom-met-een-klimaatplan. Accessed 17 August 2022.

Nosek G (2018) Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories. William & Mary Environmental Law & Policy Review 42:733-803.

Olszynski M, Mascher S, Doelle M (2017) From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability. The Georgetown Environmental Law Review 30:1-45.

Organisation for Economic Co-operation and Development (2011) Guidelines for multinational enterprises. http://mneguidelines.oecd.org/guidelines/. Accessed 17 August 2022.

Osofsky HM (2008) The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v EPA. Chicago Journal of International Law 8:573-620.

Oxford University Net Zero Network (2020) Mapping of current practices around net zero targets. https://netzeroclimate.org/wp-content/uploads/2020/12/Net-Zero-Target-Map.pdf. Accessed 17 August 2022.

Paiement P (2019) Urgent Agenda: How Climate Litigation Builds Transnational Narratives. Transnational Legal Theory 11:121-143.

Peel J, Osofsky HM (2015) Climate Change Litigation: Regulatory Pathways to Cleaner Energy. Cambridge University Press, Cambridge.

Peel J, Osofsky HM (2018) A Rights Turn in Climate Change Litigation? Transnational Environmental Law 7:37-67.

Petersmann M-C (2021) Response-Abilities of Care in More-than-Human Worlds. Journal of Human Rights and the Environment 12:102-124.

Rabin RJ (1992) A Sociolegal History of the Tobacco Tort Litigation. Stanford Law Review 44:853-878.

Rodrigue M, Michelon G (2021) Shareholder Activism and the Environment. In: Bebbington J et al. (eds) Routledge Handbook of Environmental Accounting. Routledge, Abingdon, pp 151-164.

Savaresi A, Auz J (2019) Climate Change Litigation and Human Rights: Pushing the Boundaries. Climate Law 9:244-262.

Savaresi A, Hartmann J (2020) Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry. In: Lin J and Kysar DA (eds) Climate Change Litigation in the Asia Pacific. Cambridge University Press, Cambridge, pp 73-93.

Schutgens R (2015) Urgenda En de Trias [Urgenda and the Separation of Powers]. Nederlands Juristenblad 2015/1676:2270-2277.

Setzer J, Higham C (2021) Global trends in climate change litigation: 2021 snapshot. https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/. Accessed 18 August 2022.

Setzer J, Vanhala L (2019) Climate change litigation: A review of research on courts and litigants in climate governance. WIREs Climate Change 10:e580.

Smeehuizen L (2022) De Veroordeling van Shell Tot 45% CO2-Reductie in 2030: Over Legitimiteit En Effectiviteit [The Order for Shell for a 45% Reduction in CO_2 in 2030: On legitimacy and effectiveness]. Nederlands Juristenblad 2022/458:540-548.

United Nations Global Compact (2015) The Ten Principles. https://www.unglobalcompact.org/what-is-gc/mission/principles. Accessed 17 August 2022.
van der Schyff G (2020) The Urgenda Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism. Constitutional Review 6:210-240.
Vanhala L (2012) Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK. Law & Society Review 46:523-556.
Wegener BW (2019) *Urgenda* – World Rescue by Court Order? The "Climate Justice"-Movement Tests the Limits of Legal Protection. Journal for European Environmental & Planning Law 16:125-147.
Wittgenstein L (1958) Philosophical Investigations. Blackwell, Oxford (Anscombe GEM tr.).