

Climate Change Litigation

International & National Approaches

Professor Megan Bowman

King's College London & UNSW Australia

Climate-related Litigation: The Beginnings

Public Law litigation

- Civil society v. Govts
 - *The Netherlands v. Stichting Urgenda* (2021) 193 *International Law Reports* 478: Dutch Supreme Court – on appeal (2015) - Dutch government must reduce emissions by 25% reduction from 1990 levels by 2020 in line w/ its human rights obligations under Dutch constitution & consistent w/ PA goals.
- Civil society, NGOs and/or Local govts v. Fossil fuel firms
 - Initially, not successful: *why?*
 - Sept 2023: State of California suing 5 Carbon Majors for deceit & contribution to climate crisis

Evolution

(1) Private Law / Public Law litigation

- Shareholders, beneficiaries, civil society vs.
pension trustees, company directors.

Egs:

- McVeigh (2018): Australia: breach of company law (directors' duties) & Trustee fiduciary duty
- Milieudefensie (2021), (2024): The Netherlands: Dutch civil code
- ClientEarth v Shell (2023): UK: breach of company law (directors' duties ss172, 174)

(2) *'Strategic' climate change litigation*

- Also known as 'systemic climate cases'
- **The aim?** Trigger broader policy or behavioural change vs. directly addressing or redressing pollution/harm between the parties.
- *How is this different to aims of 'typical' litigation?*
- Setzer: 'taking a long view beyond the immediate success or failure of individual cases' to influence ambitious climate action more broadly.

Milieudefensie et al. v. Royal Dutch Shell Plc

C/09/571932 / HA ZA 19-379

(The Hague District Court 2021)

Legal arguments

- Shell ‘has an obligation, ensuing from the unwritten standard of care pursuant to Book 6 Section 162 Dutch Civil Code to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group.’ (Par 3.2 of decision)
- Shell Board has a duty to create a credible plan to reduce GHG emissions aligned with science/PA
- Did not focus on damages or past losses
- No need for proof of ‘causation’; argued instead on ‘contribution’:
‘the Shell group is responsible for significant CO2 emissions all over the world...including the Netherlands. It is not in dispute that these global CO2 emissions of the Shell group (Scope 1 through to 3) contribute to global warming and climate change in the Netherlands & Wadden Region.’ (Par 4.45 of decision)

Hague District Court held:

- Shell responsible for its own carbon emissions (Scope 1 and 2 emissions) as well as the emissions of those in its supply chain (Scope 3 emissions)
- Ordered Shell to reduce by 45% its global carbon emissions by end-2030 (compared with 2019 levels).
- *Why?* Rights-based reasoning (international law)!

Milieudefensie, cont.

- **Human rights (in the Netherlands) affected by climate change?**
 - Health risks and right to life (Par 4.46)
- **Responsibility of business to respect human rights?**
 - International soft law: *UN Guiding Principles (UNGPs)* as ‘authoritative and internationally endorsed’ (Par 4.4.11) re state and business responsibilities to respect human rights.
 - Soft law codes are ‘a guideline in the interpretation of the unwritten standard of care’ (4.4.11) because the EC ‘has expected’ EU businesses to meet UNGP responsibilities.
- **Responsibility ‘encompasses the company’s entire value chain’. *Meaning?***
 - All companies in the Shell group
 - Suppliers ‘from which the Shell group purchases raw materials, electricity and heat’
 - ‘End-users of the products produced and traded by the Shell group’

→ Shell responsibility therefore also extends to its Scope 2 and Scope 3 emissions (Par 4.4.18).

Responses:

- Hailed by some commentators as a victory for the rule of law due to the court's emphasis on accountability: obligation of Shell to act responsibly exists even despite ambivalent or unambitious government policy.
- BUT Shell appealed

Appeal Decision

Hague Ct of App

- Agreed with lower court: there is a legal obligation to reduce climate pollution in line with the Paris Agreement, and firms like Shell have obligations under human rights and soft law.
 - Human rights treaties like European Convention on Human Rights (arts 2 and 8) ‘can have an impact on private law relationships by giving substance to open standards, such as the social standard of care’ (para. 7.24).
 - Companies like Shell have ‘have their own responsibility in achieving the targets of the Paris Agreement’ (para. 7.27) because, in the words of Van Asselt & Sanavesi (2024) they ‘contributed significantly to the climate problem and clearly have it within their power to contribute to combating it’.
- But the Ct App overturned the requested remedy, being a 45% reduction in Scope 3 emissions by 2030.
- Reasoning?

Appeal, cont.

- Agreed with Shell that 45% reduction lacked legal or scientific foundation:
 - Existing EU and Dutch climate laws/regs do not establish a specific legal requirement for a 45% reduction. *So need: govt mandate or parliament legislation: 'sectoral pathways'?*
 - The Ct was “unable to establish that the social standard of care entails an obligation for Shell to reduce its CO2 emissions by 45%, **or some other percentage.**”
- Also agreed with Shell re ‘market substitution’ argument: if Shell reduces its sales of fossil fuels, other companies will step in to fill the demand. So the remedy (Scope 3 reductions) may be ineffective for mitigating global climate change.
 - Critics call this the ‘classic drug dealer's defense’: “If I don't do it, someone else will.” *Will this stand the test of time?*

Next steps?

Milieudefensie has retaliated:

(1) Appealed to Dutch Supreme Court (May 2026):

Grounds?

- To protect & enforce human rights, Ct must set a specific reduction percentage AND have regard to science and international legal principles when doing so.
- This case is against Shell. So how other companies behave is irrelevant to this case.

(2) Launched a new case against Shell based on *obiter dictum in Milieudefensie*: new oil and gas expansion may be illegal (para. 7.61) . *Implications? Future claims will focus on investment / expansion in new oil & gas fields.*

Other jurisdictions:

Mixed Results!

- *Notre Affaire à Tous v. Total* (France, Company law, strategic, June 2026): Breach of Corporate Duty of Vigilance Law; must create a transition plan that includes Scope 3 BUT no forced reductions
- *Greenpeace Italy v. ENI* (Italy, Tort law, strategic, 2025): leave by Supreme Ct to proceed to trial in Rome. Italian JJs can hear climate-related lawsuits to protect human rights.
- *Smith v Fonterra* (New Zealand, Tort law, individual, 2026): leave by Supreme Ct to proceed BUT then NZ government passed anti-tort law legislation to block.
- Meaning of success = ??

Next wave...

- Financial institutions and individual board members ‘who make these emissions and fossil fuel projects possible’ will be increasingly targeted in climate litigation (per Roger Cox, lawyer for *Milieudefensie*)
- → Elderson speech 2023: ‘..key message of my remarks today: litigants are coming after the banks, “come hell or high water”. And the banks need to be prepared’

Litigation against Banks for 'financed emissions'

After the Appeal loss against Shell, Milieudefensie announced on 15 Nov 2024 that it would proceed with another case - against a bank - ING, the largest bank in the Netherlands:

"There can be no doubt about it: ING, as the most polluting bank in the Netherlands, is exacerbating dangerous climate change. We have looked closely at the court ruling [decided for Shell on appeal] and we see in it a solid basis to demand better climate policies from ING. Therefore, together with our tens of thousands of co-plaintiffs, we will continue our case to hold the banker of the climate crisis accountable." per Donald Pols, Milieudefensie director

- Source:

https://www.banktrack.org/article/milieudefensie_climate_case_against_bank_of_the_climate_crisis_ing_continues

Bank Litigation, cont.

- ***Milieudefensie v. ING Bank*** (Filed in March 2025; pending in Amsterdam District Court)

Claim: Currently - similar arguments per *Milieudefensie v Shell* (2021) - but might change pre-filing:

- Dutch bank ING has breached the legal societal duty of care under Article 6 of the Dutch Civil Code
- Has obligations under UN Guiding Principles and OECD Guidelines re human rights and emissions reductions & robust transition plan
 - Must report on and reduce 'scope 3' financed emissions
 - Must stop financing new fossil fuels
 - Must institute enhanced due diligence measures that require its large corporate clients to have a transition plan, or walk away.

Bank Litigation cont.

- *Notre Affaire à Tous Les Amis de la Terre & Ors v. BNP Paribas* (Filed in 2023; pending in Judicial Court of Paris)

Claim: BNP Paribas is breaching the French Vigilance Law 2017, French Civil Code, French Commercial Code

- Insufficient transition plan
- Insufficient reporting or reduction of Scope 3 financed emissions
- Must immediately terminate any financing to companies which develop new fossil projects
- Must use voting rights to influence investee companies to transition or divest from them

Class Discussion

- What is the aim of ‘strategic’ climate litigation? What are the opportunities and perils of such litigation?
- How are litigants using international law in national courts? Is it working?
- Why does the jurisdiction of litigation influence the outcome? What are the implications?
- What are some different ways to define ‘success’ in climate-related litigation? Which definition do you prefer?