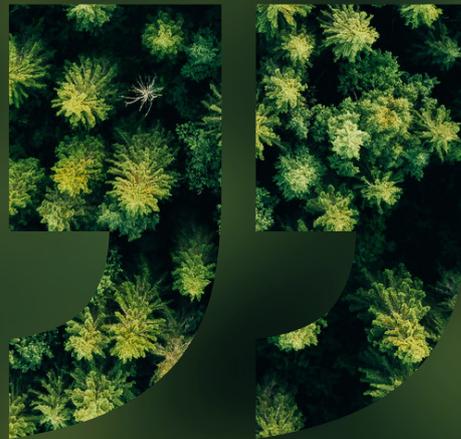


C L I F F O R D

C H A N C E



**ESG: DUTCH
COURT'S
LANDMARK
DECISION ON
CLIMATE CHANGE,
HUMAN RIGHTS AND
CORPORATE DUTIES**



— THOUGHT LEADERSHIP

MAY 2021



ESG: DUTCH COURT'S LANDMARK DECISION ON CLIMATE CHANGE, HUMAN RIGHTS AND CORPORATE DUTIES

In a landmark judgement, Royal Dutch Shell (RDS) has been ordered by the District Court of The Hague to reduce its CO₂ emissions by 45% by 2030, as compared with 2019 levels. The case was brought by the Dutch branch of Friends of the Earth (Milieudefensie), a number of other NGO's, and over 17,000 individual claimants. The ruling sets a precedent for other companies that could face similar lawsuits.

This is the first time that any court has ordered a company to reduce CO₂ emissions and the judgment may have significant consequences for other companies with a link to the Netherlands who have significant CO₂-emissions, especially if they are headquartered there.

The judgment was rendered on 26 May, 2021 – a big day for climate change activists. On the same day significant climate change-related votes took place at the general meetings of ExxonMobil and Chevron. At ExxonMobil, a majority of shareholders selected at least two of the four directors nominated by the activist hedge fund Engine No 1. Meanwhile, Chevron's shareholders voted for a resolution calling on the company to substantially reduce its Scope 3 emissions.

Key takeaways

Standard of care

The court decided that under Dutch law, (which the court in effect applied because RDS is headquartered in the Netherlands), there is an obligation on companies such as RDS to reduce CO₂ emissions. This follows from the standard of care as laid down in the general tort statute of Dutch law (Article 6:162 of the Dutch Civil Code), which includes protection against acts or omissions which breach a duty imposed by a rule of unwritten law relating to proper social conduct.

Role of human rights within the standard of care

In reaching its decision, the court said that there is "widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights" and ruled that climate change science must be taken into account in deciding what the duty requires of a corporate. Significantly, the court considered that the existence of this duty of care can be deduced from the UN Guiding Principles on Business and Human Rights (UNGPR) and other so-called "soft law" instruments, in which corporate responsibility to respect human rights is universally endorsed. The court considers that the UNGPR therefore provide an appropriate guideline for the interpretation of the standard of care. Importantly, it is not relevant whether RDS has committed itself to the UNGPR. This is the first time that a national court has referred to and relied on the UNGPR in this manner.

Specifically, while the court concedes that the NGO claimants in this case (Milieudefensie et al.) cannot directly invoke articles 2 and 8 ECHR (the right to life and the right to respect for private and family life) and Articles 6 and 17 of the ICCPR against RDS, it said that these rights will be factored in when interpreting the unwritten standard of care. The court also refers to the recent Urgenda case (which was an action against the state), noting that the Supreme Court held that articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to CO₂ emissions induced global warming.

Reduction pathways; relevance of a company's size

The court specifically refers to the IPCC reports and notes that the reduction pathways aiming for a net 45% reduction of CO2 emissions in 2030, relative to 2010 levels, offer the best possible chance worldwide to prevent the most serious consequences of dangerous climate change. The court includes this broad consensus in its interpretation of the unwritten standard of care referred to above.

Although the court holds that the responsibility of companies to respect human rights applies to all companies regardless of their size, sector, operational context, ownership and structure, it emphasizes that the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the company's adverse human rights impacts. In this respect, the court factors in that the Shell group is a major player on the worldwide market of fossil fuels and that, if Scope 1, 2 and 3 are included, it is responsible for significant CO2 emissions all over the world. The court mentions that 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.

Specific reduction obligation on RDS

Weighing these circumstances, the court concludes that RDS is obliged to reduce the Scope 1, 2 and 3 CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019 (which is in line with the claim by Milieudéfense et al. and ties in with the year the claim was filed), through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3). It is up to RDS to design the reduction obligation, taking account of its current obligations.

The court notes that this is an obligation of result for the activities of the Shell group itself. It is a "significant best-efforts obligation" with respect to the business relations of the Shell group, including the end-users. In this context, the court rules that RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible.

Imminent breach of reduction obligation

The court then deals with the question whether the current policy, policy intentions and ambitions of RDS for the Shell group are consistent with RDS' reduction obligation.

The court finds that although RDS has set more stringent climate ambitions for the Shell group in 2019 and 2020, business plans in the Shell group still need to be updated in accordance with these climate ambitions, and a further explanation of its future portfolio and plans is still forthcoming. The court notes that, in its view:

"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). These plans ('ambitions' and 'intentions') are furthermore not unconditional but – as can be read in the disclaimer and cautionary notes to the Shell documents – dependent on the pace at which global society moves towards the climate goals of the Paris Agreement ('in step with society and its customers'). Emissions reduction targets for 2030 are lacking completely; the [Net Carbon Footprint Ambition] identifies the year 2035 as an intermediate step (see under 2.5.19)."

The court deduces from this that "RDS retains the right to let the Shell group undergo a less rapid energy transition if society were to move slower", whilst finding that RDS has insufficiently contested the NGO's argument that RDS' planned investments in new explorations



are not compatible with the reduction target to be met. The court holds that this shows that the Shell group monitors developments in society and lets states and other parties play a pioneering role, ruling that in doing so, "RDS disregards its individual responsibility, which requires RDS to actively effectuate its reduction obligation through the Shell group's corporate policy."

The court rules, therefore, that because the policy, policy intentions and ambitions are incompatible with RDS' reduction obligation, this "implies" an imminent violation of RDS' reduction obligation. This means that the court must allow Milieudefensie's claim, noting that "there is no room for weighing interests". The court finds that it must therefore reject RDS' arguments that the imposition of this duty of care in effect invites everyone in global society to lodge claims against each other on a similar basis.

What now?

The court order was declared provisionally enforceable. This means that it will remain enforceable even if RDS appeals, unless the court of appeal suspends the enforceability of the order.

Given the outcome, RDS will likely appeal to the Hague Court of Appeal. Any judgment from the Court of Appeal could then be finally appealed to the Dutch Supreme Court. It is therefore likely that this case will be litigated for several more years.

This case concerns is a class action governed by Article 3:305a of the Dutch Civil Code. Pursuant to this article, a foundation or association with full legal capacity may institute legal proceedings for the protection of similar interests of other persons. The court rules that the common interest of preventing dangerous climate change by reducing CO2 emissions can be protected in such a class action.

The success of Milieudefensie et al. will likely encourage it and others to initiate similar proceedings against other large emitters of CO2, especially if they are headquartered in the Netherlands. It cannot be ruled out that they could seek to make the same argument for non-Dutch headquartered companies, arguing that Dutch law should apply to their claims based on other connections of the company or case to the jurisdiction.

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