

Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company

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In a groundbreaking judgment delivered on May 26, 2021, The Hague District Court ordered Royal Dutch Shell plc (“Shell”) to reduce its worldwide CO₂ emissions by 45% by 2030 (compared to 2019 levels).

Based on an unwritten duty of care in Dutch tort law, the Court recognized that Shell has an “obligation of result” to reduce CO₂ emissions resulting from the Shell group’s activities, and a “best-efforts obligation” to reduce emissions generated by its business relations, including suppliers and end-users. While Shell was not yet found to be in violation of its reduction obligation, the Court held there was danger of “imminent breach” because it considered Shell’s climate policies insufficient.

In the wake of recent rulings requiring governments to lower emissions, this decision marks the first time any court in the world has imposed a duty on a company to do its share to prevent dangerous climate change. Although Shell has announced it will appeal the decision,¹ it must start complying with the judgment immediately. Similarly situated companies should expect to be bound by the same rules.

This alert memorandum presents a summary of the case, setting out the parties’ arguments and the main elements of the court’s holding. We also explore the decision’s wider implications within the broader momentum for climate change litigation and increasing judicial scrutiny over corporate behavior. Stay tuned for alerts covering this rapidly changing landscape, and [click here](#) for recent developments in business and human rights frameworks in Europe.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS & LONDON

Maurits Dolmans
mdolmans@cgsh.com

BRUSSELS

Géraldine Bourguignon
gbourguignon@cgsh.com

Quinten De Keersmaecker
qdekeersmaecker@cgsh.com

LONDON

Michael J. Preston
mpreston@cgsh.com

Emma O’Brien
eobrien@cgsh.com

¹ See ‘Shell Response to climate case verdict’ (26 May 2021), available [here](#).
clearygottlieb.com



Parties, claims & admissibility

In 2019, a class action lawsuit was filed against Shell by Milieudefensie (Friends of the Earth Netherlands) and six other Dutch nongovernmental organizations (“NGOs”),² alongside c. 17,000 individual co-claimants (the “Claimants”).

The Claimants argued that RD Shell S failed to take sufficient measures to reduce emissions generated by its entire group, in breach of its duty of care to prevent dangerous climate change through its policies. This duty, the Claimants alleged, results from the “tortious act” provision in Article 6:162 of the Dutch Civil Code, as further informed by the right to life and the right to respect for private and family life, respectively enshrined in Articles 2 and 8 of the European Convention on Human Rights (“ECHR”). Shell acknowledged that emissions should generally be reduced, but disputed that it was under an individual, enforceable obligation to reduce emissions through its group-wide policies.

Although the claims were initially brought on behalf of “current and future generations of the world’s population,” the court declared them admissible only with respect to Dutch residents and the inhabitants of the Wadden Sea region, because it deemed the global population’s interest in curbing climate change too diffuse to be bundled in a class action.³ Accordingly, the court allowed standing to six of the NGOs.⁴ The individual co-claimants did not have standing because they lacked a sufficiently concrete individual interest that was not already served by the class action, as required by Dutch law.

Holding: Shell has a duty to reduce emissions by 45% by 2030

The court presented its substantive findings in three steps. First, it recognized that Shell has an obligation to reduce its emissions (see 1). Second, the court specified that Shell must lower emissions by 45% by 2030 (compared to 2019 levels) (see 2).

² The other NGOs are Stichting Greenpeace Nederland, Stichting ter Bevordering Fossielvrij-Beweging, Landelijke Vereniging tot Behoud van de Waddenzee, Stichting Both Ends, Jongeren Milieu Actief, and ActionAid.

Finally, the court concluded that Shell may imminently breach its obligation (see 3). We discuss each of these elements in turn below, and explore why the court was unconvinced by the counterarguments raised by Shell (see 4).

The decision does not impose any fine or periodic penalty on Shell, nor civil damages, though these may follow if Shell fails to comply with its reduction obligation. Shell intends to appeal the ruling to The Hague Court of Appeal, whose rulings are in turn reviewable by the Dutch Supreme Court. However, the present decision is provisionally enforceable, meaning Shell must immediately start reducing emissions pending a final decision on appeal.

1. Shell has a reduction obligation

The court held that Shell owes:

- an “obligation of result” to reduce CO₂ emissions generated worldwide by its group’s operations (*i.e.*, an obligation to ensure that the emission reduction is achieved to the level specified by the court);
- a “significant best-efforts obligation” to reduce CO₂ emissions generated worldwide by its business partners, including suppliers and end-users (*i.e.*, an obligation to take necessary steps to remove serious risks and limit any lasting consequences to the best of its abilities).

The court derived this twin obligation from Dutch tort law, which imposes a duty not to act in conflict with “what according to unwritten law has to be regarded as proper social conduct.”⁵ This so-called “unwritten standard of care” is an open norm that courts may interpret in light of prevailing social norms and conventions, and as a result inherently evolves with time.

To determine the “proper social conduct” for Shell in this case, the court proceeded to interpret this open norm on the basis of fourteen elements. These included international “soft law” instruments such as

³ The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (26 May 2021) (the “Court Decision”), para. 4.2.3, available [here](#).

⁴ The seventh NGO, ActionAid, was not allowed standing because its operations were geared towards developing countries rather than the Netherlands.

⁵ [Article 6:162](#) of the Dutch Civil Code.

the [OECD Guidelines for Multinational Enterprises](#) and the [UN Guiding Principles on Business and Human Rights](#), which place a (non-binding) responsibility on companies to respect human rights and set policy accordingly. Even though the claimants could not invoke human rights against Shell directly, the court also took account of Articles 2 and 8 ECHR in its interpretation of Shell's standard of care. Indeed, the court recognized that these provisions offer protection to Dutch residents against the consequences of dangerous climate change due to CO₂ emissions,⁶ which pose potentially serious and irreversible risks for the human rights of Dutch residents and the inhabitants of the Wadden Sea region.

From these considerations, the court inferred that Shell bears an individual responsibility to reduce emissions, in its capacity as policy-setting holding of a group responsible for a significant share of global CO₂ emissions (exceeding that of most countries, including the Netherlands). The court clarified that Shell's responsibility exists independently of states' abilities and/or willingness to fulfil their own human rights obligations. Therefore, state action – or indeed lack thereof – does not detract from Shell's standalone obligations.

2. Shell must reduce emissions by 45% by 2030

Having established that Shell is required to reduce emissions, the court had to determine by how much. Referring to [IPCC reports](#) and the [Paris Agreement](#), the court observed a “widely endorsed consensus” that emissions must be reduced by net 45% by 2030 and to net zero by 2050.⁷ According to the court, this consensus applies globally and also to non-state actors.⁸ Therefore, Shell – while not solely

responsible – may be expected to do its part to achieve these so-called “reduction pathways”.

The court emphasized that every emission of CO₂ and other greenhouse gases, anywhere in the world and caused in whatever manner, increases the risk to Dutch residents and the inhabitants of the Wadden Sea region. Therefore, the court found that in formulating its group policy, Shell should take as a guideline that the Shell group's global Scope 1-3 emissions in 2030 must be 45% lower compared to 2019 levels.⁹ The court held that Shell has the knowledge and means to implement these necessary reductions, but stopped short of specifying or imposing any method according to which Shell must achieve this target.

3. Shell may imminently breach its obligation

Once it established that Shell is subject to a reduction obligation, the court proceeded to assess Shell's policy, policy intentions and ambitions against that obligation. While not finding Shell to be currently in violation of its responsibilities, the court nonetheless considered that Shell's policies amount to “intangible, undefined and non-binding plans for the long-term,” and are contingent on the pace at which global society moves towards climate goals.¹⁰ The court also criticized Shell for not having any emissions reduction target for 2030. In conclusion, Shell's policies, though not currently unlawful, were deemed incompatible with the reduction obligation, implying an “imminent violation.”¹¹

4. Shell's counterarguments dismissed

— **Causal link.** While Shell acknowledged that its emissions *contribute* to global warming and climate change in the Netherlands, it disputed

⁶ See Dutch Supreme Court, *State of the Netherlands v Urgenda Foundation*, NL:HR:2019:2007 (20 December 2019), available [here](#).

⁷ Court Decision, para. 4.4.29, available [here](#). Note that this is a lower reduction target than articulated in the recent provisional agreement on a European Climate Law, which set an intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels (see our alert memorandum of April 27, 2021, available [here](#)).

⁸ The Court noted a “broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own.” See *id.*

⁹ Greenhouse gas emissions are broken down into three categories: “scope 1” emissions are those caused directly by an organization's activities; “scope 2” emissions are indirect emissions resulting from an organization's energy consumption; and “scope 3” emissions are defined as all other indirect emissions caused along an organization's value chain, which includes end-users (see [here](#)).

¹⁰ Court Decision, para. 4.5.2, available [here](#).

¹¹ *Id.*, para. 4.5.8.

the existence of a *sufficient* causal link between its actions and climate change, arguing that global climate change is caused by aggregate emissions worldwide and that Shell cannot incur liability for merely contributing to them.

The court disagreed, affirming that Shell is of course not solely responsible for preventing dangerous climate change, but nevertheless holds an individual partial responsibility to take preventative action according to its ability.

- **Other offenders.** Further, Shell argued that there are other actors who need to reduce emissions, and that a reduction obligation would have no effect because any reduced emissions would be offset by other suppliers increasing emissions.

The court rejected these arguments, clarifying that the existence of other “offenders” does not absolve Shell of its responsibility to do its part. The court noted further that, while it remains to be seen whether other companies will replace any reduced fossil fuel production by Shell, they would in any case be subject to similar responsibilities.

- **ETS framework.** Shell also argued that the framework of the EU Emissions Trading System (“ETS”) pre-empts further emissions cuts ordered by the court.

The court was unconvinced by this argument because the ETS only applies to some of the emissions in the EU for which Shell is responsible and because the ETS does not cover emissions outside the EU. By contrast, the standard of care requires Shell to reduce all emissions (globally) that will harm Dutch residents and the inhabitants of the Wadden Sea region.

- **Financial burden.** Finally, the court recognized that the reduction obligation would affect Shell’s profits and growth, but found that the interest served by imposing such an obligation outweighs Shell’s commercial interests.

“Climate reckoning” for Big Oil?

In response to the judgment, Shell has pledged to accelerate its plans to reduce emissions, maintaining, however, that it will continue to produce fossil fuels.¹²

The calendar year so far has been pivotal for Shell. The present decision follows a judgment of The Hague Court of Appeal in January 2021, in a case between the same parties related to oil spills in the Niger Delta.¹³ In that case, the court found that Shell owed a duty of care as parent company to a group of Nigerian claimants. Accordingly, Shell was held liable for failing to ensure that its Nigerian subsidiary install an early-warning system to identify leaks in a pipeline. An appeal before the Dutch Supreme Court is pending.¹⁴ Two weeks later, in a case concerning the same facts, the UK Supreme Court similarly held that the claimants had an arguable case that Shell owed them a duty of care as parent company.¹⁵

Furthermore, the decision against Shell coincided with a series of related sustainability developments, leading some to herald a “climate reckoning” for the oil industry.¹⁶

- **IEA roadmap.** On May 17, the International Energy Agency (IEA) released its ‘[Net Zero by 2050](#)’ roadmap, affirming that oil, gas and coal companies must stop all new extractive projects from 2021 onwards if the goals of the Paris Agreement and IPCC reports are to be met, sending a clear message that urgent and effective action by fossil-fuel companies is required to address climate change.

¹² See ‘Shell Response to climate case verdict’ (26 May 2021), available [here](#).

¹³ The Hague District Court, *Milieudéfensie et al. v Royal Dutch Shell plc*, NL:GHDHA:2021:132-134 (29 January 2021), available [here](#).

¹⁴ See J. Brady, M. Zarubin, Q. De Keersmaecker, C. Cibrario Assereto, *ESG liability: risks increasing for multinational companies*, PLC Magazine (2021).

¹⁵ UK Supreme Court, *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (21 February 2021), available [here](#).

¹⁶ See, e.g., ‘Defeats for Big Oil mark ‘sea change’ in climate battle’, *Financial Times* (26 May 2021), available [here](#); ‘A turning point for Big Oil’, *Financial Times* (28 May 2021), available [here](#).

- **ExxonMobil.** On May 26, ExxonMobil shareholders voted to appoint three climate activist nominees as board members.
- **Chevron.** In similarly unprecedented investor action, on May 26, shareholders of the oil giant Chevron voted 61% in favor of a proposal to cut scope 3 emissions, although they have yet to set definitive targets.
- **Total.** On May 28, an overwhelming 90% of Total’s shareholders voted to approve a resolution supporting the company’s “ambitions” on sustainable development and energy transition towards carbon neutrality and its related targets by 2030. The resolution was largely driven by a small group of activist investors holding just over 1% of total shares, who wanted Total to take more proactive steps towards decarbonization.

Momentum for climate change litigation continues unabated

The Hague District Court’s decision against Shell effectively extends to a private entity the principles established by the same court in 2015 in *Urgenda* – the first ever ruling ordering a government to set more ambitious climate targets.¹⁷ The *Urgenda* judgment was upheld on appeal by the Dutch Supreme Court and reverberated in significant climate rulings around the world, including Ireland,¹⁸ France,¹⁹ Germany²⁰ and Belgium.²¹ Most recently, a constitutional claim was filed against the state of Guyana (in the first such case taken in the English-speaking Caribbean), followed by a lawsuit against the Italian government.

Further, on the same day as the decision against Shell, the Australian Federal Court recognized a governmental obligation to ensure children are not harmed by future coal projects.²² While the court stopped short of granting an injunction to stop approval of the coal mine in question, the decision was nevertheless the first in the world to impose a direct duty of care on a government official to protect young people from the future impact of climate change. This momentum has continued in Australia – historically resistant to taking action on climate change – with a recent victory for Greenpeace Australia in a trademark infringement claim against Australia’s largest electricity generator.²³

The decision against Shell is predicted to have a similar “domino effect” in relation to claims against companies, providing both “inspiration” and a “legal template.”²⁴ While much may depend on the outcome of Shell’s appeal(s), there is potential for the present decision to be followed elsewhere in jurisdictions with similar principles for assessment of tortious conduct. Indeed, the court emphasized that “all enterprises regardless of their size, sector, operational context, ownership and structure” have a responsibility to respect human rights, implying all companies must do their part to help prevent dangerous climate change.²⁵ A case is already underway in France in which claimants seek an order against another oil company, Total, to make more explicit efforts to curb emissions.²⁶ Other industries, including aviation, steel and pharmaceuticals, may yet be targeted with lawsuits increasingly recognized as an effective way to “[give] teeth” to climate

¹⁷ The Hague District Court, *Urgenda Foundation v State of the Netherlands*, NL:RBDHA:2015:7196 (24 June 2015), available [here](#).

¹⁸ Irish Supreme Court, *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] IESC 49 (21 July 2020), available [here](#).

¹⁹ Paris Administrative Court, *Notre Affaire à Tous and Others v France*, n°1904967, 1904968, 1904972, 1904976/4-1 (3 February 2021), available [here](#).

²⁰ German Constitutional Court, *Neubauer et al. v Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (29 April 2021), available [here](#).

²¹ Brussels Court of First Instance, *VZW Klimaatzaak v Kingdom of Belgium & Others*, 2015/4585/A (17 June 2021), available [here](#).

²² *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, available [here](#).

²³ See ‘AGL mostly fails in trademark court case against Greenpeace for using logo in campaign’ *ABC* (8 June 2021), available [here](#).

²⁴ See ‘Shell verdict sets scene for more corporate climate cases’, *Financial Times* (28 May 2021) available [here](#).

²⁵ Court Decision, para. 4.4.16, available [here](#).

²⁶ Nanterre District Court, *Notre Affaire à Tous and Others v Total* (pending, summons filed 28 January 2020).

commitments.²⁷ Yet while other companies in the oil and other high-risk sectors may potentially be impacted by similar reasoning, the judgments will in all cases be fact-specific and any outcome will, like the decision against Shell, account for how burdensome and proportionate it is for a company to reduce emissions.

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²⁷ See 'Shell verdict sets scene for more corporate climate cases', *Financial Times* (28 May 2021) available [here](#).