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New trends in climate litigation – how do they work in practice?

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Table of contents

- Climate and environmental litigation - introduction
- Breakthrough – The Netherlands vs. Urgenda
- Climate litigation in Poland – ClientEarth vs. Enea
- Can climate litigation be the back-up force for the energy transformation? Millieudefensie, Client Earth vs. Shell and Polish cases
- Global update – World Youth 4 Climate Justice & Vanuatu ICJ Initiative
- Climate litigation in Polish activism – more information on the ongoing actions can be obtained from the author



Climate litigation – categories and development

Climate litigation is an aspect of environmental law that has gained prominence particularly in the last two decades. **Plaintiffs use litigation to set precedents** and thus to **create pressure** and **trigger specific actions by governments or private actors**.

Climate lawsuits can be divided into:

By the defendant - governments, public companies, private companies

On the basis of the plaintiff - private individuals or organisations

By legal basis - based on international/EU law or national law

By the subject to be protected - human rights or rights of nature

Climate litigation typically uses legal claims from: constitutional law (focusing on the violation of constitutional rights by the state), administrative law (challenging the legitimacy of administrative decision-making), private law (e.g. concerning actions in a company), consumer rights and human rights. **Investor-owned coal, oil and gas corporations may be legally and morally responsible for climate-related human rights violations, even though policy decisions may prevent them from engaging in such violations.** Lawsuits are often **pursued through the collective pooling of efforts and resources.**

Urgenda vs. The Netherlands

Background - where do the commitments come from?

Emission reduction commitments established by the European Union (40% reduction from 1991 levels), as well as under the Paris Agreement of 2015

Who is Urgenda?

Urgenda Foundation is a Dutch association of climate activists that represented 886 citizens in the case.

Chronology of the proceedings

The lawsuit was filed by Urgenda Foundation at the District Court in The Hague. It demanded that the courts oblige the state to reduce greenhouse gas emissions in the country by at least 25 per cent by the end of 2020 compared to 1990 levels. International law - the European Charter of Human Rights - was cited as the legal basis. In addition, the case also invoked provisions of the Dutch constitution, principles of international law (e.g. the principle of non-harm), obligations under European climate policy and the United Nations Framework Convention on Climate Change).





The court of first instance ordered the Dutch state to reduce its greenhouse gas emissions to 25% below 1990 levels by 2020, finding the government's commitment insufficient to meet the state's fair contribution to the UN goal of keeping the global temperature increase within two degrees Celsius of pre-industrial conditions. The court said that **the state had an obligation to take mitigation measures** because of the "severity of the consequences of climate change and the high risk of its occurrence". The **Dutch government appealed the rulings**, in cassation arguing in the first instance that the European Charter of Human Rights could not be used as a basis for imposing climate obligations on governments, and that the courts could not do so. However, the Supreme Court ruled as follows:

Under Article 13 of the ECHR, domestic law must offer an effective remedy against infringements or direct violations of rights that are protected by the ECHR. This means that national courts must be able to provide effective legal protection.

Why is Urgenda case a breakthrough?

The Urgenda vs. The Netherlands case also demonstrates that, **through a bottom-up climate lawsuit, it is possible to trigger an obligation on a country to issue appropriate legislation** - the court in proceeding imposed an obligation on the state of the Netherlands to create an appropriate legal framework to adequately reduce emissions. Under Dutch legal principles, the courts can issue a declaratory judgment declaring that a public entity is acting unlawfully by failing to enact legislation of a certain content. **So, could this be the impetus for the enactment of a law supporting investment in renewable energy sources?**

Climate litigation in Poland – ClientEarth vs. Enea

Background

ClientEarth, being a shareholder of the Polish energy company Enea, has filed a lawsuit to the court to declare invalid the resolution of the AGM about the expansion of the Ostrołęka coal-fired power plant.

Art. 425. Polish Code of Commercial Companies

Powództwo o stwierdzenie nieważności uchwały walnego zgromadzenia

§ 1. The persons or company governing bodies listed in Article 422 § 2 may bring an action against the company for a declaration of the invalidity of a resolution of the general assembly which is contrary to the law.

ClientEarth accused Enea of passing a resolution that is not profitable for the company as it did not properly consider climate change. The complaint was based on two main allegations, i.e. unjustified financial risk for shareholders and breach of due diligence in fulfilling the information obligation towards shareholders. The District Court in Poznań declared the resolution of Enea's general meeting authorising the construction of the Ostrołęka C power unit invalid.



Milieudefensie et al. v. Royal Dutch Shell

Case background:

In 2021, a group of Dutch NGOs filed a lawsuit against the oil giant Shell, alleging that Shell's contribution to climate change violates its duty of care under Dutch law and human rights obligations. The acts that came up in the case were the **IPCC report**, as well as the **European Convention on Human Rights** which guarantees **the right to life** (Article 2) and **the right to private life, family life, home and correspondence** (Article 8) (as a legal basis, linking the case to the Urgenda judgment discussed earlier). The plaintiffs' argumentation outlines how **Shell's knowledge of climate change, misleading statements** about climate change and inadequate actions to reduce climate change are unlawful exposure of Dutch citizens by Shell. In a pre-litigation letter, Milieudefensie therefore demanded that Shell cease its unlawful conduct by aligning its actions with the Paris Agreement's 2015 objective of preventing dangerous climate change. As a response, the Board of Directors indicated that they did not consider the claims to be on the merits. They also indicated that the **courts are not the appropriate forum to promote the global energy transition**.

In its decision, the District Court in the Hague upheld the class action by Milieudefensie, Greenpeace NL, Fossilvrij NL, Waddenvereniging, Both ENDS and Young Friends of the Earth NL, as the interests served by the class action were in line with the objectives set out in their statutes. Due to the legal grounds invoked, **the court ordered Shell to reduce its emissions by 45% by 2045. Shell's sustainability policy was pronounced not sufficiently concrete**. Thus, it can be considered that there is a judgment extending the solutions known from the Urgenda case also to private parties.



Client Earth vs. Shell

Case background:

ClientEarth has also brought a lawsuit as a shareholder of the oil giant Shell in this case. This time the lawsuit, filed in a UK court, is against the corporation's board of directors. According to ClientEarth, they have engaged in **"ineffective management of the significant and foreseeable risk that climate change poses to the company"**.

Why is this case groundbreaking?

The lawsuit filed by ClientEarth earlier this year received unprecedented support from Shell's institutional investors. Their combined assets under management amount to more than half a trillion dollars.

It is also the **first minority shareholder lawsuit against the Board of Directors**. The Board of Directors, present in common law is the body that exercises supervision and control in a given company and also manages it. The plaintiff informed the Board of its intention to file a lawsuit challenging the legitimacy of its management actions as early as March 2022. The main allegation is that the company's energy transition was not adequately prepared. The Board argues that the company's energy transition strategy, as presented by the Board, is in line with the requirements of the Paris Agreement and will allow Shell to become a significant player in the post-transformation energy market. However, shareholders take a different view, **accusing the directors of breaching their fiduciary duty**.

fiduciary duty means inter alia **that a director must demonstrate strong loyalty to the company's shareholders, which translates into acting in their best interests to maximise the value of the company**

This means that if a lawsuit is found to be valid, **the sanction against directors may be removal from office**.



Climate litigation in Polish perspective

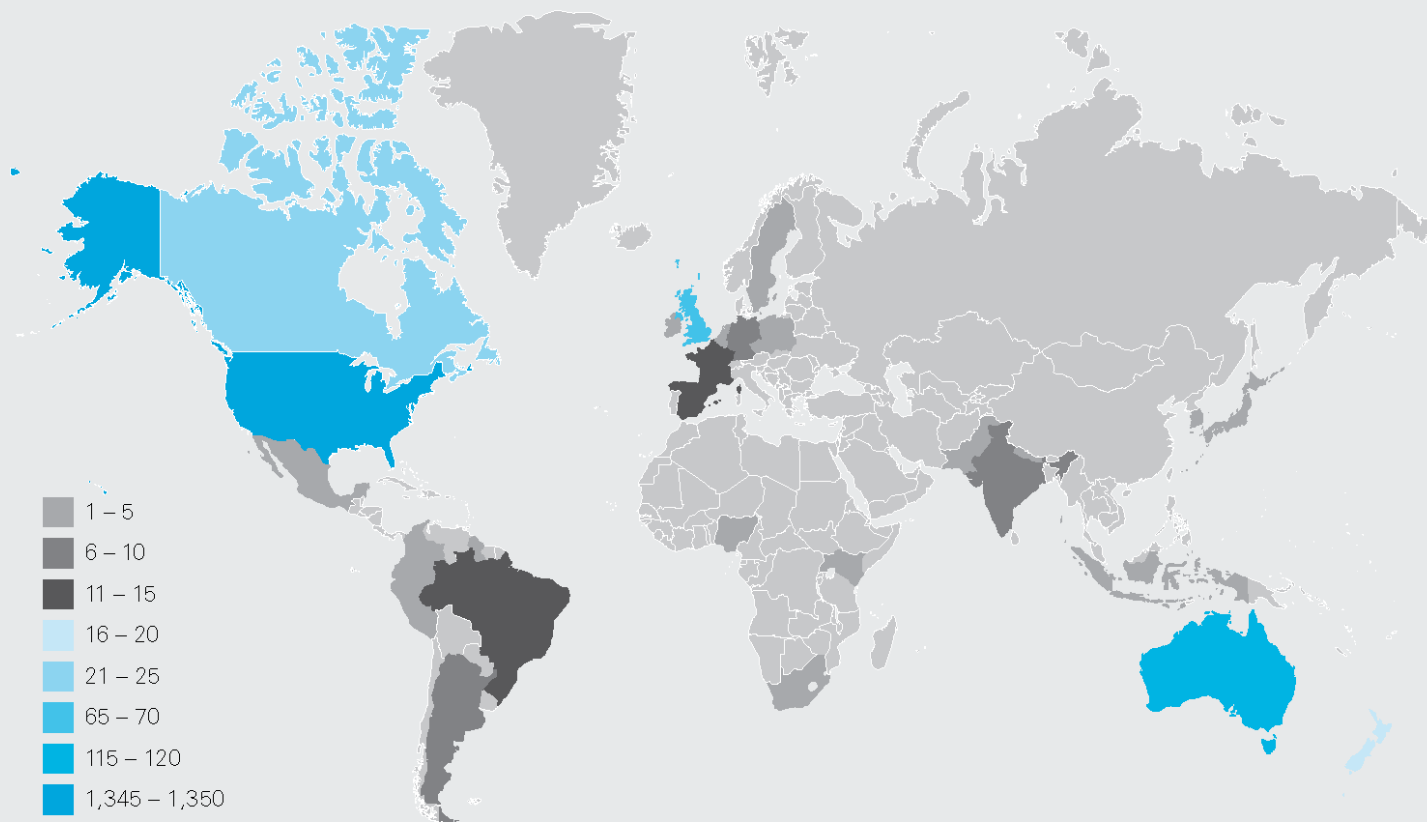
- Most of the cases based on the ECHR and Polish Constitution, which obliged the state to protect the environment and ensure ecological safety for contemporary and future generations
- Many cases are brought up, with varying results, before the administrative courts in relations to non-existent or insufficient public participation in environmental impact assessment procedures (which is now being taken away)
- There is a theoretical legal basis for compensation claims in the Law on Environmental Protection

art. 323 para 1. Any person **who is directly threatened or harmed** by an unlawful impact on the environment may require the entity responsible for the threat or infringement to restore the lawful situation and to take preventive measures, in particular by installing installations or equipment to prevent the threat or infringement; where this is impossible or excessively difficult, he may require the cessation of the activity causing the threat or infringement.

... maybe more potential in? Art. 417 Polish Civil Code Any person whose personal interests are threatened by another person's actions may demand that the actions be ceased unless they are not unlawful.

- Development YES – Open Pit-Mines NO vs. PZU S.A.

Figure 1: Number of cases around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net
Source: Authors based on Climate Change Laws of the World and Sabin Center data



World's Youth for Climate Justice and Vanuatu ICJ Initiative



In 2022, Vanuatu, along with 16 other UN countries, announced that it would lobby for a resolution on an advisory opinion to the International Court of Justice. The opinion is to **address the relationship between climate change and threats to human rights**. The Vanuatu representatives ask the following questions:

- (1) **What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;**
- (2) **What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:**
 - (a) **States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?**
 - (b) **peoples and individuals of the present and future generations affected by the adverse effects of climate change?**



On 29 March 2023, **UN General Assembly resolution on the advisory opinion was unanimously adopted**. This means that the ICJ will have to lean on the questions and give its opinion.

The ICJ's **advisory opinion is not binding**, but it can **set a trend** in the perception of climate commitments and **link environmental law with human rights**. The advisory opinion will help to **provide a framework** for international and national courts and **become a useful tool in climate proceedings** like the IPCC report). The opinion can also contribute to promoting a scientific approach to climate research, influence the fuller fulfilment of the goals of the Paris Agreement 2015 and, due to its emphasis on the human rights aspect, influence co-operation in counter-crisis action.



Sources:

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- Kahl W., *Climate Change Litigation: a Handbook*, Bloomsbury Publishing 2022



For discussion:

- 1) Can climate proceedings potentially create a direct claim for an energy transition, including the construction of renewable energy sources?
- 2) 2) Which legal basis would you consider to be the most effective in terms of lobbying for a rapid energy transition, including in particular the abandonment of fossil fuel investments? Does ESG seem like a good solution?