

BHR & the Environment New Dimensions and Challenges

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Contents of the lecture

- ✓ The UNGPs and the environment: a missing link?
- ✓ Climate Due Diligence
- ✓ Emerging due diligence legislation & the environment
- ✓ Climate Change litigation against companies



BHR & the environment: A missing link?



BHR & the environment: increasing relevance

- Emerging stream of litigation against companies and states in relation to climate change and its human rights and environmental impacts
- Regulatory developments making some form of human rights & environmental due diligence mandatory
- Companies under pressure to start integrating HRs, environmental and Climate Change considerations into their policies and processes

The Human Rights – Environment nexus: increasing recognition

2012 UN Human Rights Council establishes a mandate on human rights and the environment

1st Special Rapporteur: John Knox (2012-15; 2015-18)

2nd Special Rapporteur: David. R. Boyd (2018-)

2021 Human Rights Council:

- Appointment of a Special Rapporteur on the promotion and protection of human rights in the context of climate change (Res. 48/14)
- Recognition of the **right to a safe, clean, healthy and sustainable environment as a human right** (Res. 48/13)

The UNGPs, the environment & climate change

No explicit mention in the text of the UN Guiding Principles on Business and Human Rights (or in the Interpretive Guide).

- Does this mean the UNGPs are not concerned with environmental and climate change impacts of businesses?

Climate Due Diligence as a dimension of Human Rights Due Diligence

- My opinion:

- To ensure consistency, Human Rights Due Diligence under the UNGPs must be interpreted in the light of mutually reinforcing principles of environmental law, climate law and human rights law.
- Companies should also perform 'Climate Due Diligence'

MACCHI, C. (2021). The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'. *Business and Human Rights Journal*.

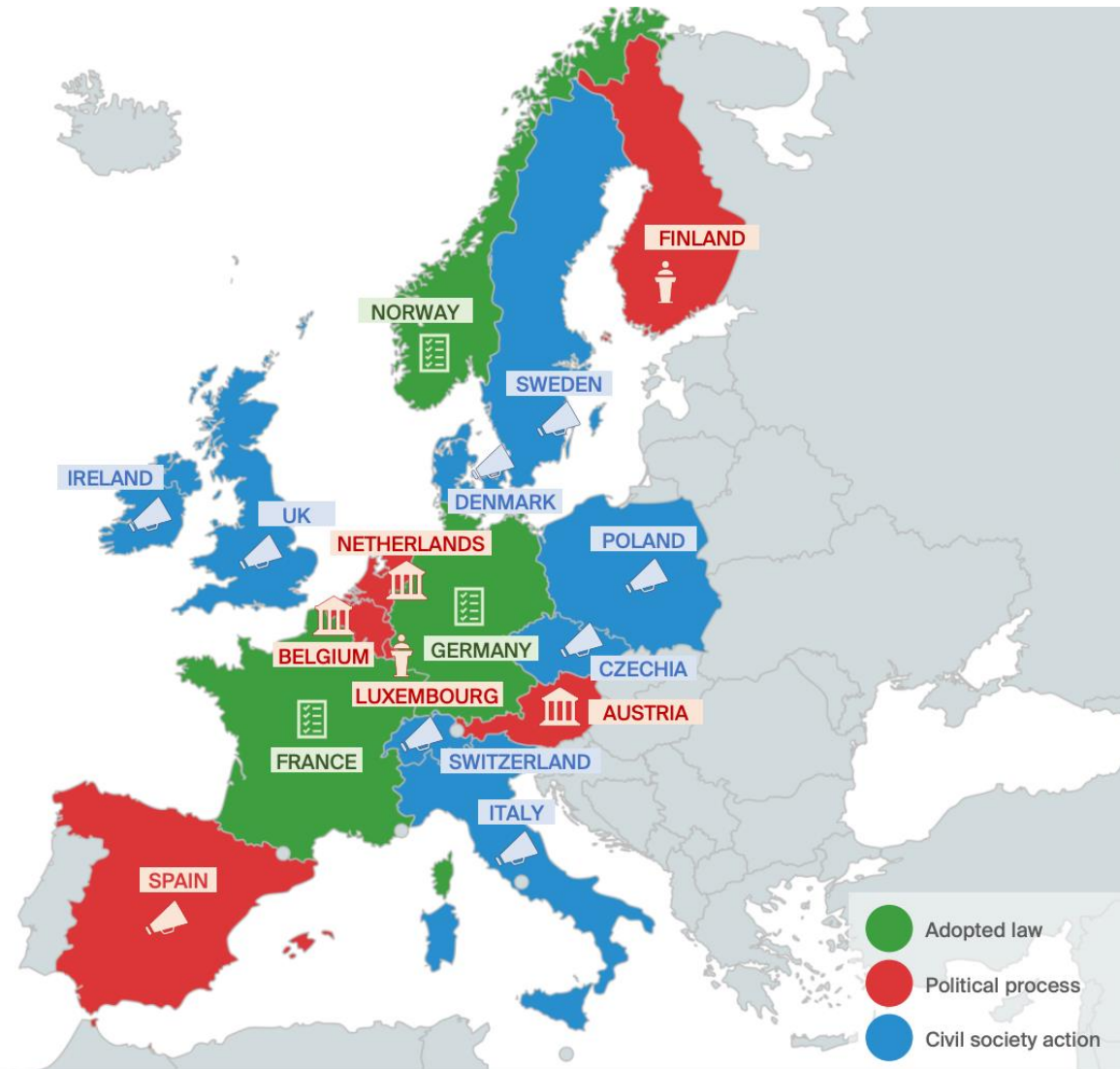
Putting the 'E' in
Human Rights Due
Diligence:
Emerging legislation



Developments in Europe



- FRANCE** Law on the duty of vigilance of parent and outsourcing companies
- GERMANY** Law on the corporate duty of care in supply chains
- NETHERLANDS** Law on child labour due diligence
- NORWAY** Law on business transparency and human rights and decent working conditions
- AUSTRIA** Parliamentary proposal for a supply chain law
- BELGIUM** Parliamentary proposal on the corporate duty of vigilance and care in value chains
- FINLAND** Government commitment to due diligence legislation
- LUXEMBOURG** Government commitment to due diligence legislation
- NETHERLANDS** Government commitment to due diligence legislation
Parliamentary proposal on responsible and sustainable international business conduct
- SPAIN** Government's Annual Regulatory Plan includes a legislative initiative on due diligence



Emerging legislation on mandatory due diligence

- France: Law on the 'duty of vigilance' (2017)
- Germany: Supply Chain Due Diligence Act (2021, in force: 2023)
- Norway: Transparency Act (2021, in force: 2022)

European Commission Directive proposal



The release was delayed by
two rejections by the
Regulatory Scrutiny Board

Brussels, 23.2.2022
COM(2022) 71 final

2022/0051 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

(Text with EEA relevance)

{SEC(2022) 95 final} - {SWD(2022) 38 final} - {SWD(2022) 39 final} -
{SWD(2022) 42 final} - {SWD(2022) 43 final}

Draft EU Directive on Corporate Sustainability Due Diligence

- Art. 3: “Adverse environmental impacts” and “adverse human rights impacts” are defined in the Annex
- However, the Annex’s list of environmental law instruments leaves out key legislation such as the Aarhus Convention or the Paris Agreement
- Climate Due Diligence is not an integral dimension of the mandatory due diligence provisions. Climate Change is treated separately > Art. 15

Combating Climate Change

Art. 15

- MSs shall require companies to 'adopt a **plan** to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement.'
- Identify the extent to which climate change is a risk for, or an impact of, the company's operations
- **If it is a principal risk**, then the company must include **emission reduction objectives** in its plan
- Compliance with these obligations shall be considered in setting directors' variable remuneration linked to long-term sustainability

Emerging Climate Change litigation against corporations



Climate litigation against corporations

Two prevalent themes:

- **Risk mitigation**
- **Integration**



Integrating climate change into the company's policies and processes

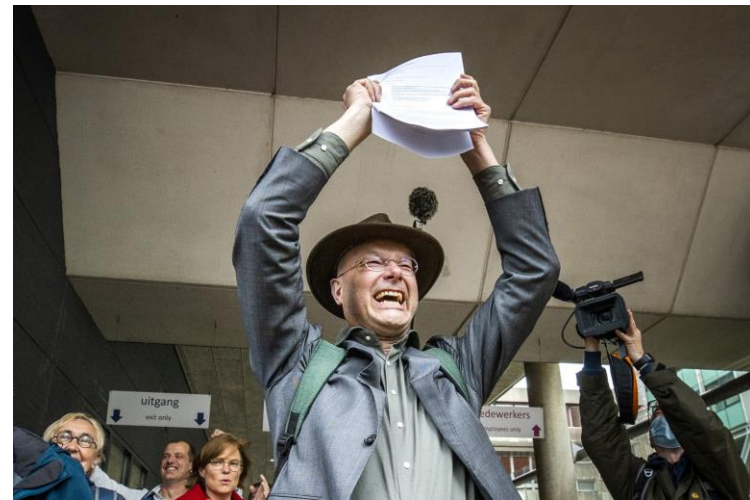
- Assessment and communication of direct and indirect emissions
 - Dutch NCP, *Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie v ING*
 - NCP Japan, *Market Forces v. SMBC, MUFG and Mizuho*
 - *Saonu and Morobe Provincial Government v. Minister for Environment and Conservation and Climate Change et al* (PNG, 2021)
- Refraining from misleading the public about climate impacts
 - *Carbon Majors* petition (Phillippines Commission of Human Rights)
 - UK NCP, *ClientEarth v BP*
- Alignment of actions with the Paris Agreement's goals
 - *Notre Affaire à Tous v Total* (France – pending)
 - *Milieudefensie v RDS*

Historical contribution to global GHG emissions by company

Entity	2010 emissions MtCO ₂ e	Cumulative MtCO ₂ e	% cumulative global, 1751-2010
1. Chevron, USA	423	51,096	3.52%
2. ExxonMobil, USA	655	46,672	3.22%
3. BP, UK	554	35,837	2.47%
4. Royal Dutch Shell, Netherlands	478	30,751	2.12%
5. ConocoPhillips, USA	359	16,866	1.16%
6. Peabody Energy, USA	519	12,432	0.86%
7. Total, France	398	11,911	0.82%
8. Consol Energy, Inc., USA	160	9,096	0.63%
9. BHP Billiton, Australia	320	7,606	0.52%
10. Anglo American, UK	242	7,242	0.50%
11. RWE, Germany	148	6,843	0.47%
12. ENI, Italy	258	5,973	0.41%
13. Rio Tinto, UK	161	5,961	0.41%
14. Arch Coal, USA	341	5,888	0.41%
15. Anadarko, USA	96	5,195	0.36%
16. Occidental, USA	109	5,063	0.35%
17. Lukoil, Russian Federation	322	3,873	0.27%
18. Sasol, South Africa	113	3,515	0.24%
19. Repsol, Spain	126	3,381	0.23%
20. Marathon, USA	59	2,985	0.21%
21. Yukos, Russian Federation *	-	2,858	0.20%
22. Hess, USA	61	2,364	0.16%
23. Xstrata, Switzerland	214	2,223	0.15%
24. Massey Energy, USA	91	2,199	0.15%
25. Alpha Natural Resources, USA	182	2,149	0.15%
26. Cyprus Amax, USA *	-	1,748	0.12%
27. EnCana, Canada	84	1,695	0.12%
28. Devon Energy, USA	93	1,690	0.12%
29. BG Group, UK	97	1,543	0.11%
30. Westmoreland Mining, USA	46	1,530	0.11%
31. Suncor, Canada	89	1,407	0.10%
32. Kiewit Mining, USA	59	1,295	0.09%
33. North American Coal, USA	40	1,181	0.08%
34. Ruhrkohle AG, Germany	-	1,138	0.08%
35. Luminant, USA	33	1,049	0.07%
36. Lafarge, France	61	1,044	0.07%
37. Holcim, Switzerland	62	1,008	0.07%
38. Canadian Natural Resources	93	958	0.07%
39. Apache, USA	97	951	0.07%
40. Talisman, Canada	62	925	0.06%
41. Murray Coal, USA	59	796	0.05%
42. UK Coal, UK	19	794	0.05%
43. Husky Energy, Canada	42	665	0.05%
44. Nexen, Canada	36	651	0.04%
45. HeidelbergCement, Germany	31	587	0.04%
46. Cemex, Mexico	27	551	0.04%
47. Italcementi, Italy	24	463	0.03%
48. Murphy Oil, USA	27	418	0.03%
49. Taiheiyo, Japan	10	402	0.03%
50. OMV Group, Austria	45	346	0.02%
Total:	7,628	314,811	21.71%

Source: text of the 'Carbon Majors Petition', p. 4

Milieudefensie v Shell NL, 2021



Milieudefensie et al. v Shell (District Court at The Hague, May 2021)

- Class action in defense of (current and future generations of) Netherlands residents
- Allegations: Shell's insufficient action to reduce GHG emissions and active attempt to mislead the public about the sustainability of its operations
- Legal basis: the **unwritten duty of proper social conduct** (or duty of care) contained in the Dutch Civil Code, interpreted in the light of several sources of international law and climate science

Milieudefensie v Shell NL, 2021



The Court interprets Shell's duty of care in the light of:

- ✓ Right to life and right to respect for private and family life (European Convention of Human Rights; ICCPR)
- ✓ UN Guiding Principles on Business and Human Rights – it also mentions the OECD Guidelines and the UN Global Compact
- ✓ Paris Agreement and IPCC studies

Milieudefensie v Shell NL, 2021

- “In its interpretation of the unwritten standard of care, the court follows the **UN Guiding Principles** (UNGPs)”
- While the UNGPs “do not create any new right, nor establish legally binding obligations”, they “are suitable as a guideline in the interpretation of the unwritten standard of care”
- “Due to the universally endorsed content of the UNGPs, it is irrelevant whether or not RDS has committed itself to the UNGPs, although RDS states on its website to support the UNGPs”
- “RDS’ value chain includes the closely affiliated companies of the Shell group, on which it has a policy-setting influence”, and its end-users

Milieudefensie v Shell

NL, 2021

Decision: Shell must reduce its group's emissions by **45%** by 2030 (compared to 2019)

- 45% cut to the **aggregate Scope 1, 2, 3** CO2 emissions of the Shell group.
- The Court gives some guidance:
 - Obligation of results to cut Scope 1 emissions
 - Obligation of 'best efforts' to reduce Scope 2 and 3 emissions (emissions produced by the company's suppliers and end-users)
- The Court suggests that
 - The energy package sold to **consumers** might have to be adjusted
 - Shell might want to stop investing in fossil fuels

Milieudefensie v Shell NL, 2021

The **compelling common interest** that is served by complying with the reduction obligation **outweighs the negative consequences RDS might face** (...) and the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO₂-generating activities.
(para 4.4.54)

The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its **individual partial responsibility** to do its part regarding the emissions of the Shell group, which it can control and influence
(para 4.4.9)



The parent company's duty of care

- *Vedanta Resources plc and another v Lungowe et al*, Supreme Court (UK, 2019)
- *Okpabi et al v Royal Dutch Shell plc and another*, Supreme Court (UK, 2021)
- *Four Nigerian Farmers and Milieudefensie v Royal Dutch Shell plc and another*, Court of Appeals (NL, 2021)



Thank You



C. Macchi. 2022.

Business, Human Rights and the Environment: The Evolving Agenda.

Asser-Springer.

