

PELS RIJCKEN

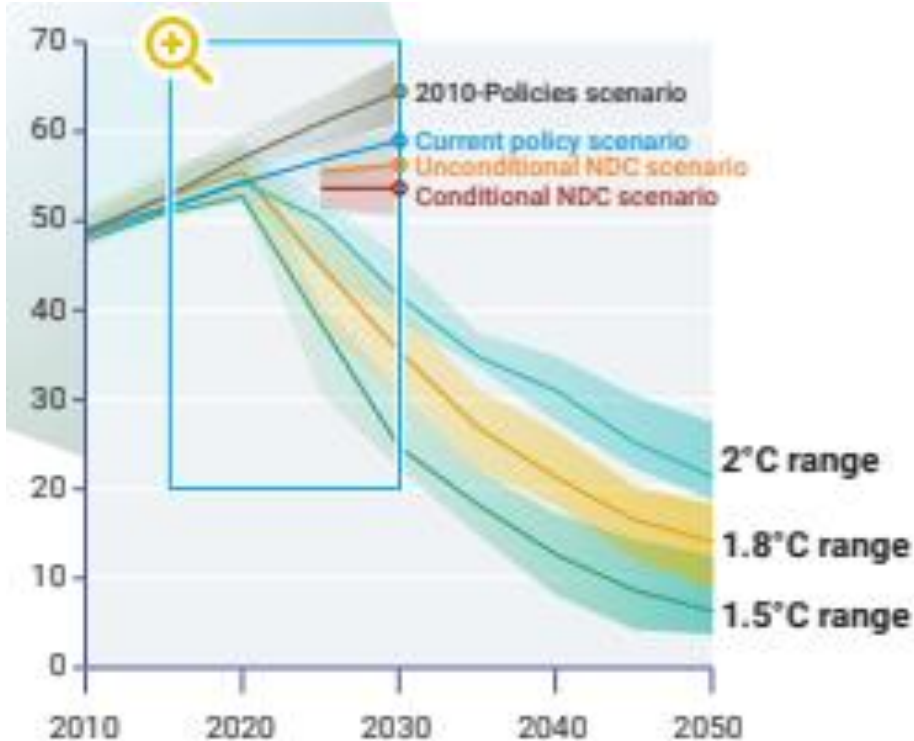


The Impact of Climate-Related Court Rulings in Light of UNGPs

Martijn Scheltema

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UNEP Emission Gap Report, Nov. 2020



- **Current NDCs remain seriously inadequate to meet temperature goals Paris Agreement**
- Unconditional NDCs consistent with limiting warming to 3.2°C
- Failure to significantly reduce global emissions by 2030 make it impossible to keep global warming below 1.5°C
- Dramatic strengthening of ambition is needed to achieve Paris goals.



Shell ruling

1. Climate change not exclusively Shell's problem but shared responsibility to act, even if governments implement no or insufficient measures (not sole responsibility of States)
2. 1.800 climate related cases (predominantly US) but so far no global order to reduce greenhouse gas emissions including in value chains
3. Importance beyond climate change for human rights issues at large



Shell ruling

1. District court starts with analysis of climate change issue and consequences building on scientific data (i.a. UNEP Emission Gap report 2020, 3.2° C in 2100 with current NDC's)
2. Shell has relatively large contribution (1.7% of global emissions compared to Netherlands (0.4%) or EU (8.7%))
3. Claim directed at parent, who controls operations of 1,100 subsidiaries and operating companies



Shell ruling

1. Claim and decision address Scope 1, 2 and 3 emissions (based on World Resources Institute Greenhouse Gas Protocol)

1. Scope 1: emissions from own or controlled facilities

2. Scope 2: emissions from third parties who provide energy to Shell

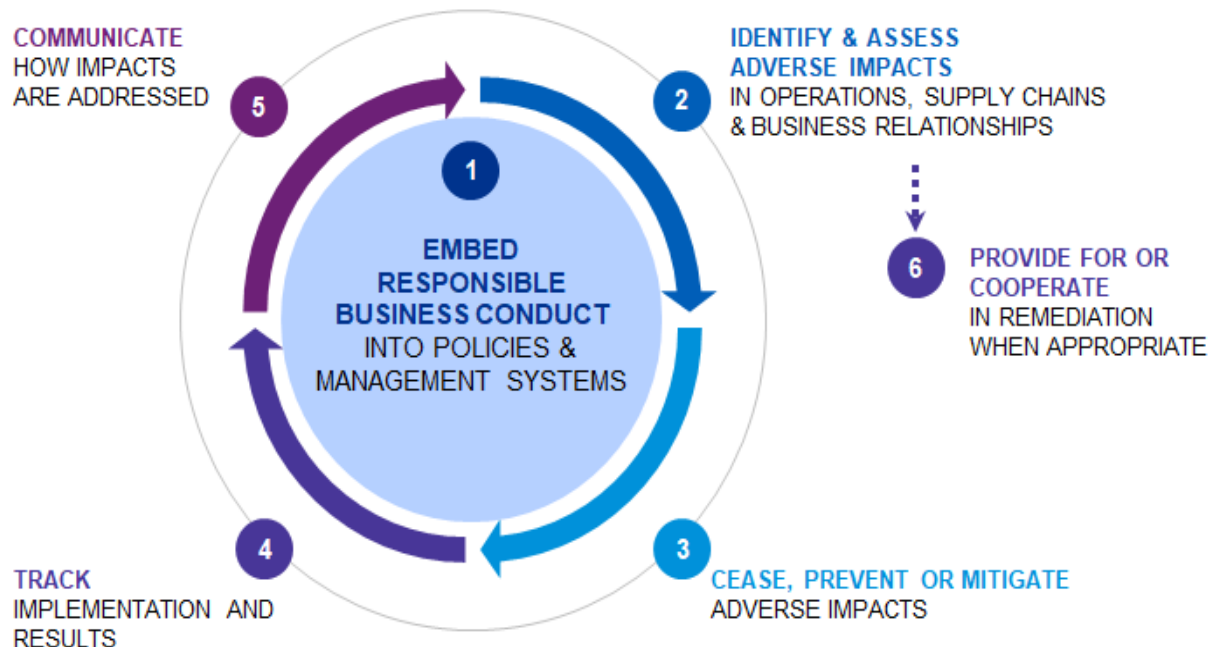
3. Scope 3: other emissions caused by operations Shell by parties not under control of Shell (such as end users)(85% of emissions of Shell is Scope 3)

2. District court underpins order based on art. 6:162 DCC with 14 observations

1. Such as policy setting position of Shell in the group, scale of the emissions, consequences of emissions for Netherlands, leverage over suppliers and end users, the onus and proportionality of a reduction measure and the UNGPs (and OECD Guidelines)



Six steps of Human Rights Due Diligence





UNGPs as hard law

1. Court rules human rights such as art. 2 and 8 ECHR are relevant also in relation between Shell and claimant (cf. Urgenda)
2. What is expected in connection with business and human rights is reflected by global consensus in UNGPs and OECD Guidelines, here focus on step 3 (and a little on 4)
 1. Shell complied with steps 1, 2 and 5
 2. UNGPs not designed as legal norm
3. Relates to Scope 1, 2 and 3 emissions, but regarding Scope 3 a significant obligation of means and not of result



UNGPs as hard law

1. Starting point is Shell has to adapt policy and implement new policy as Dutch company based on Dutch law in all its operations
2. Solves three issues:
 1. Jurisdiction (Dutch court creates de facto global jurisdiction)
 2. Applicable law (also very relevant for other non-environmental types of impact)
 3. Corporate separateness



Recommendations

1. Lawyers should be brought up to speed regarding legal consequences of UNGPs (not only regarding climate change)
 1. Financial institutions may be next
 2. Less than 20% of companies meets due diligence requirements (Maastricht Research)
2. Develop best practices (in line with EU Green (and later Social) Taxonomy) before judiciary or legislator take over
3. Get better grip on human rights situation (i.a. by improving data collection and monitoring through measuring human rights impact on stakeholders instead of company activities and developing KPIs based on this)



Prof. Martijn Scheltema

PARTNER

T: +31 70 515 3908/6 209 55 990

E: MARTIJN.SCHELTEMA@PELSRIJCKEN.NL