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The Role of Climate Litigation in the Development of a Mandatory Climate Due Diligence for energy companies.

Milieudefensie v. Shell judgment influence in the EU Corporate Sustainability Due Diligence.

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FOREWORD

With great satisfaction, I present this master's thesis as the culmination of my NOMPEL studies. This research journey has provided me with a unique and invaluable opportunity to explore the passionate world of corporate climate accountability.

First and foremost, I would like to express my gratitude to my mother for her unconditional support and belief in my dreams. Her encouragement has been an important motivation throughout the last two years.

I am also deeply grateful all the professors at Uppsala University, University of Eastern Finland, and UiT Arctic University of Norway for their wisdom, knowledge, and guidance. Their expertise has significantly enriched my understanding of energy and environmental law. Moreover, I would like to acknowledge my classmates for the incredible experiences.

Lastly, I would like to extend my heartfelt thanks to my supervisor, whose patience, kindness, and guidance have been vital in finishing this thesis.

ABSTRACT

Climate change is a global phenomenon that affects every individual on our planet. Achieving the targets outlined in the Paris Agreement and mitigating the adverse effects within the planetary boundaries requires collective efforts. However, despite the urgent calls from the scientific community, many governments' NDCs are falling short. Consequently, a new approach is necessary. Energy companies, as significant GHG contributors, must take responsibility and reduce their carbon footprints consistently. Voluntary corporate standards have proven ineffective in driving meaningful shifts away from business-as-usual practices. As a result, the absence of robust regulatory obligations has led society to seek enforcement mechanisms through the judicial power. This thesis examines the influence of jurisprudence in shaping and interpreting sustainability due diligence regulations within the EU context. It specifically focuses on the case study of the transposition of the Milieudefensie v. Shell ruling into the proposed EU Due Diligence Directive. The interaction between climate litigation and mandatory due diligence laws is an ongoing area of study in academia, serving as a mechanism to strengthen climate governance. This thesis aims to contribute to the discussion and shed light on the emergence of climate due diligence for energy carbon majors.

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ABBREVIATIONS

Abbreviation	Meaning
UN	United Nations.
OECD	Organization for Economic Co-operation and Development.
ECHR	European Convention of Human Rights.
GHG	Greenhouse Gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and nitrogen trifluoride)
ICJ	International Court of Justice.
ITLOS	International Tribunal for the Law of the Sea.
ILA	International Law Association.
IEA	International Energy Agency
IPCC	Intergovernmental Panel on Climate Change
TFEU	Treaty on the Functioning of the European Union.
Due Diligence Directive	Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	UN Guiding Principles on Business and Human Rights
OECD Guidelines	OECD Guidelines for Multinational Enterprises
UNGC	United Nations Global Compact
EU ETS	EU Emissions Trading System
ICCPR	International Convenant on Civil and Political Rights
Shell	Royal Dutch Shell pls.
NGOs	Non-governmental organizations

1 Introduction

Climate change is "the defining issue of our age" as recognized by the former UN Secretary-General Ban Ki-moon[1]. The energy sector (electricity, heat and transport) plays a major role by releasing three-quarters of the global GHG emissions[2] into the atmosphere[3]. According to the IPCC 2023 report, the current CO2 emissions resulting from fossil fuel infrastructure will exceed the carbon budget required to restrict global temperature rise to 1.5C[4]. Therefore, urgent public and private collective efforts are needed to avoid transposing the Paris target.

The home countries of major energy corporations are obligated by the Paris Agreement[5] to reduce GHG. Naturally, the energy sector is included in all NDCs as a part of the mitigation measures established by countries to achieve their climate goals focusing on renewable energy generation and energy efficiency technologies[6]. Therefore, regulations must be implemented to ensure that corporate business strategies are in line with these targets, allowing them to fulfill their international commitments. Private and public sector shall work together.

Even though, the climate regime bound only states, the responsibility of the industrial sector has been brought into the discussion[7]. In the Preamble 15th of the Paris Agreement is underscored the significance of engaging non-state actors in the fight against climate change, which requires a coordinate and collective efforts to tackle it[8]. This represents a classic case of a "social dilemma," where uncoordinated actions driven by self-interest can lead to suboptimal outcomes for both individuals and the community over time[9]. Otherwise, the lack of cooperation from important actors and the presence of free riders can deter participation[10]. Climate change is a global issue that cannot be effectively solved by a single actor. To address this, Ostrom suggested a polycentric approach, which entails efforts at multiple levels involving diverse stakeholders who can customize solutions to meet the

[1] UN 2014.
[2] Energy sector is responsible of 90% of the CO2 emissions worldwide.
[3] UN n.d.
[4] IPCC 2023, p. 4.
[5] Paris Agreement (adopted 12 December 2015, in force 4 November 2016) (2015) UNTC, vol. 3156.
[6] UNFCCC 2021, p. 7-8.
[7] Frumhoff et al 2015, p. 157.
[8] Banet 2017, p. 80.
[9] Ostrom 2009, p. 6.
[10] Ibid, p. 8.

specific ecological requirements[11]. Hence, to achieve our climate target, it is necessary for all energy companies to participate jointly towards an energy transition, specially carbon majors.

Back in 2014, Heede published a quantitative analysis spanning from 1751 to 2010 to track the emissions of CO2 and methane from fossil fuel and cement companies. He identified 90 companies that were classified as "Carbon Majors", a term coined by the academy to describe significant GHG contributors[12]. Because of this, the author proposes an alternative approach to the state-centered strategy by identifying major hydrocarbon companies that benefit greatly from their fossil fuel business and holding them responsible for contributing to climate change. This approach is gaining legal force within the climate change and human rights regime.

Three major European energy companies were identified as carbon majors in such study: Shell, BP, and Total[13]. These companies reported record profits in 2022, with Shell getting its highest profit in its history at $39 billion, BP at $27.7 billion, and TotalEnergies at $36.2 billion[14]. With such economic benefits, these companies have the financial and human resources to address the climate emergency through various mitigation measures, such as investing in low-carbon fuels, renewable sources for power generation, and carbon capture and storage technology. Also, they shall be subject to strong reporting mechanisms and the risks its activities pose over the environment[15].

However, companies are reluctant to alter their business-as-usual approach due to the significant economic benefits associated with exploiting their oil and gas reserves. Furthermore, governments persist in providing subsidies, and political measures remain insufficient in addressing the issue[16]. As a consequence of this lack of action, global activism is on the rise, utilizing strategic litigation as a means to influence the conduct of these companies and redirect investment from extractive projects towards low-carbon energy

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[11] Ibid, p. 32.
[12] Heede 2014, p. 229.
[13] Ibid, p.237.
[14] Energy Monitor 2023.
[15] Heede 2014, p. 236.
[16] van Asselt 2023, p. 1.

sources. This idea is embodied in the well-known slogan "keep fossil fuels in the ground" [17].

Back in 2012, the IEA report emphasized that to achieve the 2°C climate goal, only a maximum of one-third of proven fossil fuel reserves could be developed before 2050, unless carbon capture technologies are implemented to reduce CO2 emission[18]. The agency reaffirmed this conclusion in its 2021 Net Zero by 2050 report, which recommended no further approval of new oil and gas projects for development after 2021, as well as phasing out coal and achieving net-zero emissions in the global power sector by 2040[19].

All this shows a need to strengthen the participation of energy carbon majors in combating climate change through mandatory obligations to reduce their scope 1, 2, and 3 emissions. Although nearly all such corporations have committed to climate change pledges and net-zero transitions in recent years, they persist investing in new oil, gas, and coal reserves. As previously mentioned, scientists urge a stop of new extractive projects and a reduction of existing ones to reach the climate goal. However, a review of eight[20] climate plans from significant oil and gas corporations revealed that all were grossly inadequate in satisfying the basic criteria for limiting global warming to 1.5C[21]. Despite being well aware of the adverse effects for decades, neither company is willing to halt current extractive projects nor reject new ones[22].

The energy industry has been aware of the connection between global warming and CO2 emissions from fossil fuels for almost 50 years. Major companies such as Exxon and Shell conducted extensive scientific studies in the 1970s that accurately predicted the rise in global temperature and its impact on the planet's ecosystem caused by their activities[23]. In fact, Exxon is considered to have made the first climate projection among oil and gas companies with outstanding accuracy since 1981[24]. Shell's report "The Greenhouse Effect" went even further by quantifying their products' contribution to global CO2 emissions by segment,

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[17] van Asselt 2022.
[18] IEA 2012, p. 25.
[19] IEA 2021, p. 20-21.
[20] BP, Chevron, ENI, Equinor, ExxonMobil, Repsol, Shell and TotalEnergies.
[21] Oilchange International 2022, p. 1
[22] Ibid, p. 3.
[23] The Guardian 2018.
[24] The Harvard Gazette 2023.

including Scope 3[25]. Despite having scientific evidence of the link between their activities and the negative effects on the climate system, they did not alter their core business. It has been confirmed that they engaged in lobbying activities to oppose emission reduction regulation, as demonstrated by the formation of the Global Climate Coalition by Shell, ExxonMobil, and BP. Most important, their business plans foresee the continuation of exploration and extraction of fossil fuels beyond 2030 which would surpass the carbon budget established by the scientists[26].

It is clear that major oil and gas companies are reluctant to modify their business-as-usual approaches without external pressure from society and regulations. Private governance initiatives have been established to assist companies in integrating climate-related risks into their management systems, both as the source and as those affected. The Financial Stability Board's Task Force on Climate-related Financial Disclosure is an example of such an initiative, issuing recommendations on climate change risks that investors and companies should consider when making decisions regarding capital allocation[27]. BP[28], Total,[29] Shell[30] and Equinor[31] are among the carbon majors that have applied these recommendations to disclose climate risk challenges. A relevant risk addressed by the 2017 recommendations is the litigation risks resulting from corporate inaction to mitigate their impacts as a significant risk, given the growing trend observed in recent years[32]. Even though, every company has a unique corporate perspective when it comes to confronting the challenges of climate change, whether they view it as a business risk, opportunity, or social responsibility, none prioritize reducing their GHG emissions at the rate recommended by scientists over profits[33].

As a result, two legal instruments are currently emerging to address this: 1) corporate climate change litigation and 2) mandatory due diligence laws [34]. Currently, scholars are investigating the interaction among both aiming to strengthen the corporate climate governance through due diligence obligations [35]. Climate change lawyers are seeking

[25] Climate files 2018.
[26] Frumhoff et al 2015, p. 162.
[27] IPCC 2022, p. 159.
[28] BP 2022.
[29] TotalEnergies n.d.
[30] Shell 2022.
[31] Equinor ASA 2022.
[32] Task Force on Climate-related financial disclosure 2017, p. 5.
[33] Dahl and Fløttum 2019, p. 500.
[34] Rajavuori et al 2023, p. 2.
[35] Ibid.

alternative and innovative litigation strategies to hold carbon majors accountable, turning to civil and human rights law for remedies. This includes expanding the interpretation of due diligence to encompass climate change issues, particularly in the context of human rights, which is being referred to as "climate change due diligence"[36].

Juridical and quasi-judicial entities are advocating for the integration of climate-related considerations through their jurisprudence and recommendations. Also, the European Commission has taken measures to codify climate-related concerns into corporate sustainability due diligence. This framework aims to offer legal certainty to companies and remedies for victims.

For a better understanding of the term codification, I will briefly explain it. Codification refers to the process of translating legal principles established through court rulings into laws[37]. Throughout this process, the Commission possesses the "right of initiative" which allows it to incorporate judicial interpretations. The influence of courts as agents that motivate changes in policy has been a topic of discussion for an extended period[38]. The dynamism of legal precedents enables a more rapid evolution and adjustment of the legal framework in a changing world. In the unified European system, the development of case law affecting the entire value chain of a transnational company results in uncertainty regarding its potential consequences within the market[39]. Therefore, it is essential for the legislative branch to approach these issues in a comprehensive manner to ensure a level playing field and provide legal certainty.

The objective of this research is to investigate the *ex-post* influence of legal precedents, taking the Shell judgement as case study, on the formulation and interpretation of climate change obligations incorporated in the proposal of the EU Due Diligence Directive. Influence, in this context, refers to the capacity of an actor to shape a decision in accordance with their preferences[40]. The aim of this study is to contribute to the ongoing discourse about the consolidation of climate change due diligence through strategic litigation. Connection between case law and due diligence legislation is still in its primary stage due to its newness.

[36] Macchi 2021, p. 109.
[37] Schmidt 2018, p. 94.
[38] Ibid.
[39] Article 17(2) Treaty of the European Union.
[40] Dür 2008, p. 561.

Current judicial interpretation seems to be narrowing the gap in climate legislation by strengthening the responsibilities of carbon majors regarding their reduction of GHG at a rapid pace, which could lead to a significant transformation of energy companies' entire value chain. This is a significant evolution in the climate change regime with the judiciary system at the forefront.

1.1 Purpose and research question

The purpose of this thesis is to analyze the influence of climate change litigation cases on the establishment of climate due diligence obligations in the EU Due Diligence Directive.

The central research question for this thesis is: *How does strategic climate change litigation (Shell case) influence the corporate sustainability due diligence obligations for energy companies to align their activities with the Paris Agreement`s goal?*

1. How has climate due diligence of energy companies been interpreted in the Shell jurisprudence?
2. How do that court decisions influence the development of a climate due diligence regulation in the proposal of EU Due Diligence Directive?
3. What are the key components of the legal content of corporate climate due diligence in the directive?

Currently, national courts are filling legislative gaps aimed to strengthen the companies' corporate liability for their GHG through broadening the interpretation of concepts as "duty of care" as due diligence standard of conduct aiming to include clear climate mitigation plans into the corporate human rights due diligence. As an example, the Milieudefensie et al. v. Royal Dutch Shell PLC[41] (hereinafter referred as "Shell Case") will be analyzed.

In the case, the plaintiffs argued the oil company must implement a detail action plan to reduce their GHG emission through the entire supply chain grounded under the duty of care. Climate change action plans do not fall clearly under the scope of a human right due

[41] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021.

diligence, so the NGOs are looking for courts to cover up the legal void by interpreting those legal concepts as integral part of due diligence as standard of conduct.

1.2 Methodology

In general, my thesis follows a legal doctrinal research methodology, aiming to provide a systematic approach to the principles, concepts, and regulations that govern the corporate climate-change due diligence regime within the EU context[42]. Consequently, an internal perspective of the climate legal system will be undertaken from the view of a legislator[43]. The hypothesis centers that national jurisprudence of a member state can be *ex-post* codified into EU secondary law for strengthening the obligations of energy carbon majors to incorporate a climate change impact assessment as part of their due diligence obligations. To address this, a case study is conducted to examine the influence of the Shell jurisprudence on the drafting of the proposal for the EU Due Diligence Directive.

In the legal-dogmatic approach, this thesis centralized on the ongoing legislative process of developing a comprehensive EU mandatory human rights due diligence framework that encompasses all companies 'activities. To achieve this, descriptive research of relevant jurisprudence, preparatory legislative documents, and legal doctrine is conducted.

It is primarily focused on the following official sources: the judgment of the District Court of The Hague in the Shell case; the preliminary documents and proposal of the EU Due Diligence Directive[44]; two international soft law instruments, namely the UNGPs and OECD Guidelines; and COP and UNGA resolutions derived from the Paris Agreement. In addition, the theoretical framework is based on relevant academic literature that examines the interaction between strategic litigation and mandatory due diligence laws, specifically in relation to the consolidation of climate due diligence within the corporate human rights regime, particularly as it applies to energy carbon majors. Furthermore, the studied literature explores the influence of judicial interpretation in the understanding of due diligence obligations in the context of EU climate legislation.

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[42] Smits 2015, p. 5.
[43] Ibid, p. 6.
[44] It is important to note that, at the time of writing, the final decision in the Shell case and the definitive text of the EU directive are still pending.

To respond the central and sub-questions, first is important to understand the corporate human rights due diligence regime. For this, the first chapter describes its meaning under the UNGPs and OECD Guidelines within the EU climate regime. Therefore, a descriptive analysis of both instruments is provided.

For responding the first sub-question a case study with a more prescriptive approach[45] will be conducted for the Shell ruling due to its groundbreaking nature as the first case in which an energy carbon major is required, under civil law and human rights due diligence, to reduce its GHG emissions in alignment with the Paris Agreement. This decision highlights the company's duty of care obligation and sets a significant precedent in climate change litigation. Lawyers are driving the judiciary to re-interpret corporate climate responsibilities and bridge the regulatory gaps with the objective to influence the behavior of energy companies towards adopting more sustainable business plans[46]. Ideally, such broader interpretation of corporate due diligence obligation helps the development of an effective long-term normativity. It is critical about the gap in the current regulation as only states are bound by the legislation, leaving non-state actors conduct un-regulated. Hence, the need to enforce legal remedies through mandatory due diligence legislation along the entire supply chain of carbon majors.

In relation to the final two research questions, this study draws upon the preparatory documents of the Due Diligence Directive initiative, including the impact assessment, explanatory memorandum, results of public consultation, and other official documents. By examining such sources, the study aims to shed light on how the Commission has incorporated the insights gained from the Shell case and considered potential litigation risks in shaping the directive.

Lastly, according to various scholars, the influence of litigation on the creation of a mandatory due diligence legislation is still a subject of ongoing debate. It cannot be stated that it is the sole factor driving the establishment of secondary EU legislation, such as the Due Diligence Directive[47]. Other social, environmental, and economic factors also play a

[45] Smits 2015, p. 9.
[46] Webley 2016, p. 2-3.
[47] Peel and Osofsky 2020, p. 12.

significant role. Therefore, I will center my attention in express references made to the case in preparatory documents.

In an international and European context, my theoretical framework is based on concepts from the EU Due Diligence Directive, UNGPs and OECD guidelines and international climate regime and from auxiliary disciplines such as climate change science.

1.3 Scope and Limitations

This thesis explores the intersection of corporate human rights and climate due diligence within the framework of EU climate legislation. While both legal disciplines are subject to international regulation, the analysis focuses specifically on EU legislation regarding sustainable due diligence. This approach is constrained due to the unique contextual factors, including EU`s commitment to the Paris Agreement, which shape the judicial and legislative sources.

In relation to the study case, it is conducted within the framework of the Dutch judicial system. As such, it does not aim to provide a comprehensive review of climate change litigation cases across all EU member states. Instead, the research seeks to illustrate the impact of a landmark ruling on the content of secondary legislation. Consequently, concepts derived from Dutch tort law will be examined solely as legal mechanisms for holding energy carbon majors accountable for their obligations to reduce GHG emissions.

The development of a climate due diligence for companies is a new legal field where recent case law and legislative efforts converge to address the responsibilities of non-state actors in reducing GHG emissions. Hence, the research focuses on the scenario where case law influences the formulation of legislation or its interpretation, aiming to bridge regulatory gaps and establish binding obligations for the implementation of mitigation measures with defined objectives, action plans, and timelines for major GHG emitters.

The scope of this research does not extend to other environmental and human rights, as they are governed by separate regulatory frameworks with distinct objectives. Furthermore, the study does not delve extensively into the complexities surrounding the interplay between human rights and climate change regimes.

For the purpose of this study, climate change litigation will be defined as "(c)ases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change[48]". Moreover, the study will focus on strategic litigation, which involves cases where the plaintiffs seek to achieve a significant societal benefit rather than just for themselves. Specifically, the objective is to prompt corporations to adopt more ambitious and rigorous policies to decrease their GHG emissions[49]. This litigation strategy is referred to as the "corporate framework," which relies on human rights and environmental due diligence standards to foster a change in the corporate policies of carbon majors to implement stringent mitigation measures[50].

Litigation targeting States is not within the scope of this study as they are governed by mandatory international and national laws that clearly outline their responsibility in addressing the detrimental effects of GHG emissions on the global climate system. Additionally, litigation specifically targeting a particular project or indirectly addressing climate issues is excluded from this research, as the focus is not on influencing corporate policies in such cases.

The definition of "energy carbon majors" used in this thesis pertains to energy companies that meet the criteria of being covered under Article 15 of the EU Due Diligence Directive and being classified as significant CO2 emitters according to Heede's study[51] and within the 100 fossil fuel companies identified in the 2017 Carbon Majors Database[52]. This includes European companies with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million, and non-EU companies that generated a net turnover of more than EUR 150 million in the Union. This is because they will be subject to mandatory climate change due diligence obligations and are the primary target of strategic litigation. Under the concept of “corporate climate accountably” which is also used in this thesis shall be understood the integrity and effectiveness of companies’ climate pledges[53].

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[48] This definition is used by the Sabin Center for Climate Change in categorizing its database. UNEP 2020, p. 6-7.
[49] Setzer and Higham 2022, p. 11.
[50] Ibid, p.18-19
[51] *See* Heede 2014.
[52] Griffin 2017, p. 6.
[53] Carbon Market Watch 2023.

1.4 Structure

The thesis is set out as follows. Following the introduction, in Chapter 2, it provides an overview of the concept of corporate human rights due diligence to better understand its interpretation in case law and maps the increasing trends of strategic climate litigation against energy carbon majors. It also provides an overview of the recent due diligence legislation emerging in EU Member States focusing on the French Law Duty of Vigilance and the EU directive.

Chapter 3 examines the theoretical framework for the interaction among corporate climate strategic litigation and mandatory EU due diligence laws focusing on the hypothesis in which the judicial interpretation fill in the gaps of the regulation to fight against climate change. Then, the Shell ruling was selected as study case, given the significance of this dispute for the development of a mandatory climate due diligence. The main objective is to study the legal reasoning brought by the Dutch district court in interpreting the obligation of the company to reduce its CO_2 emissions by 45% from 2019 levels by 2030 based on the duty of care. This case serves as an exemplary instance of how the courts are addressing regulatory gaps by using a combination of right-based litigation and tort law to hold energy companies accountable.

Chapter 4 discusses the proposed EU Due Diligence Directive and how the Shell case primarily influenced the mandatory requirements outlined in it. It also examines the impact of climate change litigation on the integration of climate due diligence into the corporate human rights framework, and how this concept is being incorporated into legislation. Finally, the chapter outlines the key components of this new approach.

The thesis concludes that strategic cases are coloring the obligational content of long-term regulatory instruments and acting as auxiliary mechanisms for reinforcing climate governance across the entire supply chain benefiting third countries with less stringent environmental regulation. Even though, the methodological limitations in analyzing its impact of the strategic cases in other jurisdictions, the litigation trend is optimistic about the role of courts in decentralizing climate obligations among non-state actors which currently are indirectly bound by human rights and climate regime.

The thesis presents a conclusion that strategic cases play a significant role in shaping the substantive provisions of secondary legislation within the EU, thereby functioning as supplementary mechanisms to strengthen climate governance. This influence in the interpretation of the standard of care expected from companies can be seen in the following areas. Firstly, *Interpretation of the standard of care under tort law encompass climate change adverse impacts in their entire supply chain. Secondly, companies have a legal responsibility to mitigate harmful impacts in line with the Paris Agreement. Third,* the integration of climate science into legal practice enables lawyers to trace greenhouse gas emissions back to specific companies, facilitating the attribution of individual responsibility. Fourth, parent companies can be held accountable for the actions of their subsidiaries, challenging the long-standing principle of separate corporate personality enshrined in corporate law, which traditionally governs their independent policies. Lastly, strategic cases are paving the way for the inclusion of scope 3 emissions within mandatory reporting frameworks.

Despite the methodological limitations encountered in analyzing the impact of strategic cases due to its scarcity, the experts in litigation trends inspires optimism regarding the courts' role in decentralizing climate obligations among non-state actors.

2 Mapping the strategic litigation and regulatory landscape within the EU.

This chapter provides an overview of the concept of corporate human rights due diligence established in the UNGPs and OECD Guidelines to better understand its interpretation as the base documents for the ruling and the directive. It also maps the increasing trend of strategic climate litigation against energy carbon majors within the EU. Finally, it explains the recent due diligence legislation emerging around Europe with a special mention to the French Duty of Vigilance law and the aims of the proposal for a unified EU framework.

2.1 Corporate human rights due diligence

This chapter aims to present a brief review of the corporate human rights due diligence concept. Additionally, the chapter highlights the need to integrate climate due diligence with

human rights considerations to achieve a comprehensive approach, given their interrelated nature.
The term "diligence" is derived from the Latin word "*diligentia*," which is traduce as a standard of care that any reasonable person would take in certain circumstances as opposed to negligence[54]. Nowadays, the concept of due diligence is widely recognized across various disciplines of public and private law with completely different meanings[55]. Therefore, it is key to narrow down its definition for the purposes of this study.

Academia continues to deliberate on its scope, substance, and legal character within the international law. Certain scholars contend that it constitutes a principle of international law[56], other contend that due diligence cannot be regarded as a principle of international law due to its divergent meanings in different legal disciplines and its dependence on a substantive rule[57]. Kulesza state due diligence obligation sets a benchmark or standard for assessing if a state has breached international obligations by omission, rather than action and opposed to objective responsibility [58] . Same logic as in the civil regime. Despite the varying perspectives, there is a consensus among scholars that it is a compulsory standard of conduct for states. In the private sector, the concept is understood differently. For this reason, this thesis excludes the due diligence obligations of states, mainly for two reasons[59].

First, the mandatory nature of human rights obligations for non-state actors is still under debate[60]. Furthermore, these obligations are established in soft law instruments, such as the UNGPs and OECD Guidelines. Corporations are indirectly bound by these legal regimes, and their adoption is mainly driven by reputational incentives rather than legal ones, unlike states. Such non-binding instruments acknowledge that corporations have a responsibility to respect human rights[61]. Scholars have noted a growing trend in the use of soft law for global governance, which provides flexible and adaptable instruments that can be modified more quickly than legally binding treaties [62] . The upside down is their lack of effective

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[54] Peter et al 2020, p. 122.
[55] First Report 2014, p. 6.
[56] *See* Kulesza 2016, p. 2; ILA Second Report 2016, p.6; Barnidge 2006, p. 81.
[57] Peter et al 2020, p. 121
[58] Kulesza 2016, p. 2.
[59] Ollino 2022, p. 13-14.
[60] Ibid.
[61] Macchi and Zeben 2021, p. 412.
[62] Guruparan and Zerk 2021.

enforcement. As a consequence, lawyers have to rely in other legal remedies as tort law coloured by the content of such international standards.
Second, non-actors apply it as a process for risk management tool to identify, assess and manage risks, not a as an international obligation[63]. This definition will be used in this study in the realm of corporate human rights due diligence built on the UNGPs and the OECD Guidelines.

Both soft law instruments are the base of the EU Directive and widely cited in the Shell case as authoritative guidelines for enterprises regarding human rights due diligence. The OECD Guidelines were adopted earlier, in 1976, than the UNGPs. They are considered the most comprehensive and authoritative set of recommendations for implementing a responsible business conduct[64]. Until now, the OECD Guidelines have undergone four updates, with the most recent occurring in 2011. That update highlights the importance of addressing climate change in the private sector to foster responsible business practices[65]. It also includes a new introduction that incorporates the guiding principles derived from the UN Framework for Business and Human Rights, known as "Protect, Respect, and Remedy," which were endorsed in June 2011. This document consolidated the integration of human rights due diligence within the international community[66].

John Ruggie's report "Protect, respect and remedy: a framework on the issue of human rights and transnational corporations and other business enterprises" issued in 2008, formed the basis for the 2011 UN Guiding Principles on Business and Human Rights[67]. The UN Commission on Human Rights mandated a special report with the objective of researching and identifying nonbinding human rights standards. Subsequently, an extensive consultation involving relevant stakeholders, including companies, was conducted to draft a set of "guiding principles"[68].

Those 31 principles are organized into three pillars: protect, respect, and remedy. They emphasize that states have a responsibility to fulfill all three. Unlike states, the UNGPs

[63] Ibid.
[64] Achtouk and Garden 2022, p. 608.
[65] OECD 2011.
[66] Debevoise & Plimpton 2021, p. 5.
[67] UN Digital Library 2011.
[68] Debevoise & Plimpton 2021, p. 5.

impose a specific *respect* obligation on corporations, in accordance with domestic law and international soft law instruments such as the OECD Guidelines. As seen, the synergies among both documents are expressly recognized and aim for the construction of a global standard of expected conduct applicable to all businesses in any given situation[69] and limiting the obligations of companies only to one pillar.

Also, they emphasized the necessity of reinforcing corporate responsibility to respect human rights via a well-established due diligence process, as a single component of a larger judicial and governance system[70].

It should be highlighted that the meaning of due diligence is not as explicit in the UNGPSs, as will be elaborated. It is crucial to address this discrepancy in meanings as both documents serve as the foundation for the EU Due Diligence Directive, and excluding other interpretations is essential for the study's objectives.

In this regard, Bonnitcha and McCorquodale[71] emphasized that the due diligence concept utilized in the UNGPs encompasses two connotations: one as a business process and other as a standard of conduct. The former pertains to the procedure a company undertakes, primarily during a merger and acquisition process to recognize commercial risks, while the latter applies in the context of human rights as a criterion for the behavior expected from a company in cases of human rights violations. The first definition should be discarded.

In addition, Ruggie and Sherman argued that the concept of due diligence in the UNGPs is not connected to the due diligence doctrine commonly recognized by international human rights attorneys[72]. They explain that corporate due diligence is instead based on a "transactional social norm[73]," which is separate from an international legal norm. Essentially, companies are aware that they must comply with all relevant laws to acquire and maintain their legal license to operate. However, legal compliance alone may not be sufficient to sustain their social license to operate, especially in situations where the law is insufficient. The social license to operate is grounded in prevalent social norms that can be

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[69] UNHRC 2012, p. 14.
[70] Ruggie and Sherman 2017, p. 923
[71] Bonnitcha and McCorquodale 2017, p. 899.
[72] Ruggie and Sherman 2017, p. 923.
[73] Ibid.

just as crucial to the success of a business as legal norms[74]. The projects can be suspended by the civil society because they represent a threat to human rights and environment.

For major clarification, Section II of the Guiding Principles, specifically Principle 15(b), pertains to the corporate responsibility of companies to respect human rights. This principle explicitly states that companies should establish policies and procedures that are proportionate to their size and circumstances. This includes implementing a "due diligence process" aimed at identifying, preventing, mitigating, and being accountable for their impact on human rights. This process serves as a risk-management approach to ensure that human rights are not violated[75].

On this regard, the OECD Guidelines defined due diligence as: "the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems"[76]. Both instruments understand the concept in the same terms.

Hence, I propose the following definition build upon both documents: a risk-management process through which energy carbon majors can identify, prevent, mitigate, and be accountable for both existing and potential adverse impacts on the environment and human rights. In addition, it is an essential component of business decision-making and risk management systems to keep their social license. This definition encompasses the prevention of potential adverse impacts and the necessary remediation of actual impacts on human rights and the environment.

Once a definition of human rights due diligence is established, the relevant details and substantial content regarding climate change obligations need to be explained in further detail. The UNGPs did not include environmental rights as human rights that could be affected by corporations. But in an extended interpretation of Principle 12 which mandates that companies must respect human rights outlined in international agreements, such as the International Bill of Human Rights and other labor treaties, while also allowing for the integration of additional standards, if necessary, it could be interpreted that carbon majors

[74] UNGA 2009, para. 46.
[75] UNHR 2011, p. 16.
[76] OECD 2011, p. 23.

are obligated to include the climate change obligations due to its large contribution to GHG emissions globally [77].

Acknowledging this gap, the OECD Guidelines encourage companies to improve their environmental performance by decreasing their GHG emissions throughout their entire supply chain, suppliers and business partners, as well as by disclosing their risk reporting[78]. To ensure compliance with the precautionary approach stated in the guidelines, the incorporation of climate change matters is essential. Despite the attention given to reducing GHG emissions in the OECD Guidelines, the development of a methodological framework for conducting climate due diligence is still in its early stages.

These guidelines are endorsed and promoted by states as a comprehensive code of conduct to ensure companies duty of corporate social responsibility. The implementation of these guidelines is rooted in political agreements forged by governments. As a result, enterprises are indirectly obligated to abide by these guidelines[79]. Unlike other soft law instruments, the guidelines include provisions for a non-judicial mechanism, including a voluntary dispute settlement process. Adhering states[80] are bound to implement the Guidelines through NCPs, and the Guidelines offer a non-adversarial dispute resolution mechanism in the event of a breach[81]. Each participating government is responsible for establishing an NCP office with dual objectives: 1) promoting the implementation of the guidelines and addressing inquiries through good offices, mediation and conciliation processes, and 2) serving as a grievance mechanism to resolve cases related to violations of the guidelines. NCPs also issue recommendations[82].

This mechanism serves as an exemplification of a non-judicial framework that contributes to enhancing human rights due diligence practices in diverse jurisdictions with extraterritorial implications. It provides a convenient remedy for individuals, unions and business adversely affected by irresponsible business conduct, offering remedies such as economic compensation or amendments to company policies[83].

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[77] Macchi 2021, p. 109.
[78] OECD 2011, p. 43.
[79] Ward 2004, p. 1-2.
[80] All the OECD members had adopted the Guidelines.
[81] Achtouk-Spivak and Garden 2022, p. 609.
[82] OECD 2021, p. 3.
[83] Achtouk-Spivak and Garden 2022, p. 609.

The number of cases handled by NCPs pertaining to violations of responsible business conduct has been experiencing exponential growth. Victims are now more determined than ever to seek effective legal remedies in order to hold major carbon-emitting companies accountable for their contributions to climate change. NCPs provide a non-judicial platform for addressing issues such as environmental damage. This mechanism was established in 2000. Subsequently, when the UNGPs were endorsed in 2011, they reinforced in the third pillar the obligation for states and companies to implement effective remedies for human rights violations. A significant distinction between the two documents is that the UNGPs are non-binding in all circumstances. Additionally, the UNGPs do not prescribe any specific grievance mechanism[84].

Despite the existence of NCPs in 49 adhering states and the resolution of over 500 cases, this mechanism still faces significant challenges, including issues of accessibility, case handling efficiency, consistency, and procedural fairness[85].

Regarding climate change issues, the NCPs have exhibited inconsistent and contradictory resolutions, which have diminished their overall effectiveness. Depending on the jurisdiction, NCPs have made varying decisions regarding whether or not due diligence climate-related matters fall within their scope. For instance, in the case of the Netherlands, such issues have been deemed within their scope and climate impacts shall be included in the due diligence process, whereas in the cases of Germany and Australia, they have been considered outside their mandate[86].

Nonetheless, there is a growing trend towards the judicialization of climate due diligence through civil or human rights remedies, informed by both soft law instruments. This development has the potential to generate significant synergies between the interpretations of national courts and the resolutions issued by NCPs[87].

In summary, the OECD Guidelines and UN Guiding Principles (UNGPs) constitute a global standard for human rights due diligence in the corporate sector. Both documents emphasize the obligation of companies to uphold human rights throughout their entire value chain, encompassing their own operations, subsidiaries, and business partners. Although the Paris

[84] Ibid, p. 610-611
[85] OECD 2020, p. 1.
[86] Achtouk-Spivak and Garden 2022, p. 628.
[87] Ibid, p. 641.

Agreement is not explicitly mentioned as a treaty to be respected by companies within these documents, it is generally understood that major emitters, such as energy companies, are expected to adhere to its principles.

The judicialization of corporate social responsibility policies through the OECD's adversarial mechanism serves as an example of climate change litigation, enabling individuals and communities to hold energy companies accountable for their inaction. The recommendations put forth by this mechanism could be utilized by national courts when interpreting corporate obligations pertaining to climate change within the context of human rights due diligence. This, in turn, would indirectly strengthen the structure and significance of these guidelines.

2.2 Mapping the climate change strategic litigation landscape

The trend of corporate framework litigation is on the rise, and energy companies cannot ignore the urgent need for change if they wish to avoid reputational and litigation risks associated with inefficient climate pledges. While the corporate human rights due diligence framework started as soft law and guidelines for companies, lawyers are finding legal mechanisms to enforce it in line with climate change legislation. Also, the society has created private platforms for companies to track, report and reduce their GHG.

As stated by Setzer and Vanhala[88], climate litigation arose as a means to address institutional shortcomings at both the international and national levels, and as a tool to discuss, implement, strengthen, or contest climate-related laws. Similarly, it has been observed that despite the implementation of multilateral environmental agreements like the UNFCCC, Kyoto Protocol, and Paris Agreement, the anticipated outcomes have not been achieved. This has resulted in the public turning towards the courts as a replacement for legislative inadequacy[89].

On this context, the judicial power function is twofold: by enforcing both national and international climate regulations and encouraging non-state actors to take corrective

[88] Setzer and Vanhala 2019, p. 18.
[89] Bodansky 2019, p. 265.

actions[90]. In addition, if utilized strategically, it has been acknowledged that it has the potential to encourage the implementation of regulatory actions[91].

Up to now, around 70% of cases related to climate change policies target governments as their primary focus. Nonetheless, there has been a notable increase in the number of strategic cases filed against major energy carbon majors, constituting a significant majority of such cases. Specifically, in 2021, out of the 38 cases brought against private actors, 16 cases were directed towards oil and gas companies[92].

Litigation of this nature against major carbon-emitting companies is still in its early stages of development, and the outcomes can vary significantly across jurisdictions. The level of commitment by governments to fulfill their obligations under the Paris Agreement is heavily influenced by energy security, economic and social factors, leading to differing approaches. For instance, countries like the Netherlands have displayed greater willingness to hold accountable carbon majors, as demonstrated by the ruling against Shell. Countries heavily reliant on oil or with concerns regarding energy security may be less prone to enforce obligations on oil companies to curtail their exploration and extraction activities.

As early mention, climate strategic litigation aims for a change in the corporate policies of companies to align them with the Paris Agreement target. Even though, the outcome of such cases in the past was not very favorable due to legal and scientific constrains, a new litigation wave is arising with potentially better results. The following two reasons had been identified[93]:

First, as scientific advancements continue to shed light on the impacts of GHG emissions on planetary boundaries and litigation strategies are adapting and evolving accordingly. The availability of new evidence and methodologies for tracing GHG emissions from major carbon majors help lawyers to elaborate stronger cases against them.

Additionally, this enables the judicial power to approach lawsuits with fresh perspectives and reinterpret flexible concepts such as due diligence as a crucial element of the corporate

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[90] Setzer and Nachmany 2018, p. 56.
[91] Ibid.
[92] Ibid, p. 14.
[93] Ganguly et al 2018, p. 844-845.

duty of care. Furthermore, jurisdictional processes are evolving to overcome legal impediments in support of broader standing rights, proof of harm, and causation between a climate damage and a carbon major, aligning with advancements in scientific knowledge and legal precedents[94].

Second, experts suggest that it is more effective to concentrate financial and human resources for lawsuits against carbon majors for a real reduction in GHG emissions worldwide[95].

Case law impacts have not gone unnoticed. Its significance in reinforcing policies to achieve the climate target was recognized by the Working Group III to the Sixth Assessment Report of the IPCC issued in 2022, which viewed it as a means of compelling companies to act in accordance with the Paris Agreement[96].

In the private sector, projects like the Carbon Disclosure Project, Greenhouse Gas Protocol and Carbon Tracker have taken steps to address this gap by prompting energy companies to reveal carbon footprints and commit voluntarily pledges to a low-carbon transition.[97]

As an example, Shell and Total have voluntarily implemented net-zero policies such as Shell's Net Carbon Footprint for 2030 and Total's Climate and Sustainable Energy.[98] Unfortunately, these objectives may still fall short in terms of ambition and alignment with societal expectations and environmental imperatives. BP, Shell, Total, Chevron and Exxon are usually associated with greenwashing and disregard of climate impacts in the name of profits[99]. Although they have made commitments to develop clean energy portfolios and reduce investments in fossil fuel projects, these pledges often lack specific timelines and actionable steps. As a result, they may continue to operate according to their usual business model[100].

[94] Ganguly et al 2018, p. 842-849.
[95] Setzer and Vanhala 2019, p. 18.
[96] IPCC 2022, p. 46.
[97] van Asselt et al 2014, p. 26.
[98] Total Energies n.d.
[99] Li et al 2022, p. 1.
[100] Ibid.

Despite the international and private social efforts to engage carbon majors in curtaining their GHG emissions and in conducting human rights due diligence, evidence shows it has been insufficient. The latest Corporate Human Rights Benchmark discovered that nearly half (46.2%) of the world's largest companies investigated failed to provide any proof of recognizing or reducing human rights concerns in their supply chains. Similarly, KnowTheChain's evaluations indicate that companies, on average, only score 29% for their human right’s due diligence endeavors. This is precisely what climate due diligence legislation aim to tackle[101].

In summary, both the public and private sectors are actively promoting creative approaches to enhance corporate climate accountability. A greater access to scientific knowledge and reducing legal hurdles, had led to a new litigation wave utilizing remedies from human rights and tort law. While many strategic cases are still in progress, their impacts are already becoming evident. Furthermore, private platforms can serve as valuable mechanisms for raising awareness in society regarding the risks associated with hydrocarbon activities.

2.3 Overview of EU mandatory human rights due diligence legislation. A consolidated framework for the EU.

By January 2023, there have been 15 proposals for national mandatory human rights and environmental due diligence initiatives, which include the EU Due Diligence Directive. Among these proposals, five have been authorized in France, Germany, Norway, Switzerland, and the UK, with 11 of them arising from civil society efforts[102].

Likewise, companies are showing support for the adoption of due diligence laws in the sake of legal certainty. For instance, during the Due Diligence Directive's public consultation, almost 60% of the business associations that responded agreed on the necessity of developing a coherent EU legal framework. The reasons behind this agreement included the need for harmonization, awareness of the negative effects of current practices, enhancing corporate contribution to sustainable development goals, leveling the playing field for all European players, and providing legal certainty[103]. Unsurprisingly, only 14% of companies

[101] Business & Human Rights Resource Center 2023.
[102] Ibid.
[103] European Commission. Dictorate-General Justice and Consumers 2022, p. 4.

and business associations support a judicial enforcement mechanism[104]. I will presume that the national decision-making process also received private backing mirroring the EU process, as analyzing the legislative processes of each country is beyond the scope of this thesis.

Despite the general agreement on the necessity of legislation regarding this issue, the scope of its responsibilities and the measures for implementing it differ across jurisdictions, mainly with respect to enforcement measures[105]. Large companies that operate in multiple jurisdictions and generate significant revenues typically are covered for their operations, including those conducted by their suppliers across the entire value chain. The type of human rights included in the due diligence also varies across countries. France and Germany expressly include adverse environmental impacts, whilst Norway exclude them. The Dutch and EU proposals clearly include climate change issues[106].

As an exemplification of a legal framework praised for its effective enforcement mechanisms and which had a major influence in the development of the EU directive, the French law shall be described upon, accompanied by an illustration of a relevant case law that could potentially impact the interpretation of the duty of vigilance imposed upon oil companies.

2.3.1 French Duty of Vigilance Law.

It is generally agreed that the French Duty of Vigilance Law[107] has the most robust compliance mechanism, as it allows for civil liability in cases of noncompliance. Under this law, victims can file lawsuits against companies for damages resulting from a breach of their vigilance obligations. Other laws provide for administrative sanctions instead[108].

Currently, it the only law which enforces a human rights and environmental due diligence obligation across the EU[109].

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[104] Ibid, p. 7.
[105] Quijano and Lopez 2021, p. 244.
[106] Rajavuori et al 2023, p. 3.
[107] Law No. 2017-399 of 27 March 2017 on the Duty of Vigilance of Parent and Ordering Companies.
[108] Ibid, p. 245.
[109] European Commission. Directorate-General for Justice and Consumers 2020, p. 19.

It applies to large French companies that employ either 5000 individuals in France or 10,000 globally, and its requirements are based solely on employee count, unlike the Due Diligence Directive, which also includes annual turnover. It also means it applies to all sectors. The primary duty of companies under this law is to exercise a duty of care and accountability for the activities of their subsidiaries and business partners with established commercial relationship within their supply chain. It is the first legislation that imposes on the parent company the obligation to adopt a sustainable policy for its whole group, and it allows such control to be exercised through contractual clauses[110].

To meet their legal obligation, companies must draft, implement and publish a "vigilance plan" that includes reasonable measures to identify potential risks and prevent major violations of human rights and environmental standards[111]. As the law is built on the UNGPs[112], it is natural to use them as interpretative guidelines for the development of the vigilance plan and the interpretation of its concepts, such as "severity" or "risks[113].

The implementation feature distinguishes the law from others because it goes beyond the mere reporting obligation[114]. It sets a duty of care which is understood as a "legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment[115]". The law imposes an obligation of process, not result to achieve the objectives outlined in the vigilance plans.[116]Therefore in case the company do not meet the standard it may be considered as a violation of the law.[117] Climate change is not expressly mentioned in the law, but it can be understood to cover the reduction of GHG emissions[118].

As a means of enforcing this law, a judicial notice may be issued to mandate an injunction that could lead to financial penalties in case the obligations regarding the draft, implementation or publishing of the vigilance plan are not complied. If harm is inflicted within the French territory, those affected can initiate a tort action against the parent

[110] SWD(2022) 42 final, p. 27
[111] Ibid, p. 170.
[112] Debevoise & Plimpton 2021, p. 76.
[113] Ibid, p. 145.
[114] Savourey and Brabant 2021, p. 146.
[115] Cossart et al 2017, p. 319
[116] Ibid.
[117] Ibid p. 321.
[118] Macchi 2021, p. 97.

company[119]. But in practice, the victims had found problematic to understand which court has jurisdiction to resolve the disputes[120].

Until now, four cases had been filed on the grounds of the law, but only one of them was brought against an oil and gas company.

The ongoing litigation against Total is a case on point. Its CO2 emissions account for 1% of the world[121]. *Notre Affaire à Tous et al. v. Total*[122] is the first case against an energy carbon major filed based on the human right's due diligence legislation due to "climate inaction[123]".

During January 2020, 14 French local authorities and five NGOs filed a lawsuit against Total before the Nanterre court requiring Total to revise its vigilance plan[124]. The formal notice accused the company of neglecting to recognize and address potential climate risks linked to its operations based on their duty of environmental vigilance enshrined in the French Environmental Charter[125]. Specifically, the applicants claimed that Total's vigilance plan did not guarantee that the company is aligned with the Paris Agreement's objectives and lack of specific climate-related measures[126]. Its core reasoning is the substantive obligation of the company to avoid investing in hydrocarbon projects that cause environmental damage[127].

The plaintiffs argue that Total's vigilance plan lacks adequate information regarding emissions reduction and assert that the company is not in compliance with international climate agreements. In this particular case, the plaintiffs are also relying on an open code of conduct influenced by international climate standards, as well as principles related to human and environmental rights[128].

This case provides a compelling example of what may be possible in the future when the EU Due Diligence Directive becomes enforceable.

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[119] Ibid, p. 151.
[120] Shiwakoty 2023.
[121] Ibid.
[122] As of the time of writing, the case is still pending.
[123] Euractiv 2020.
[124] Debevoise & Plimpton 2021, p. 84.
[125] Sabin Center for Climate Change Law 2023.
[126] Macchi 2021, p. 97.
[127] Savaresi and Setzer 2022, p. 27.
[128] Macchi 2021, p. 97.

The EU directive is inspired by provisions of the cited law. Also, it incorporated lessons learned since its entry into force to avoid legal uncertainty and future confusions. With this being said, lets describe the objectives of the EU proposal.

2.3.2 Aims and objectives of the Due Diligence Directive. A consolidated framework for the EU.

On February 23, 2022, the European Commission adopted the proposal for a Directive on Corporate Sustainability due diligence[129], on the grounds of articles 50(1) and (2)(g) and 114 of the TFEU. Both provisions aim to ensure the freedom of establishment and the effective functioning of the internal market by removing bureaucratic obstacles through the standardization of requirements[130].

Its objective is to assure that companies operating in the EU internal market, regardless of their origin, contribute to the achievement of the European Green Deal and the UN Sustainable Development Goals by the implementation of a risk-assessment to minimize any possible or actual negative impacts on human rights and the environment resulting from the companies' operations, its subsidiaries, and their business partners through their chain of activities[131]. In other words, a mandatory due diligence in human rights and environmental matters[132].

The proposal has arisen from a sustained demand by significant stakeholders, such as NGOs, citizens, governments, and some companies, urging the Commission to enact a regulation stipulating precise guidelines on how corporations must perform mandatory due diligence regarding human rights and the environment throughout their chain of activities[133]. These claims were reflected in the European Parliament's recommendations to the Commission. Such document expressly acknowledges the necessity of incorporating climate change considerations into the corporate due diligence[134]. Moreover, governments are facing

[129] European Commission n.d. Proposal for a Directive on corporate sustainability due diligence and annex
[130] COM(2022) 71 Final, p. 11.
[131] Council of the European Union 2022, p. 18.
[132] Ibid, p. 1.
[133] The proposal replaces the term "value chain" for "chain of activities" to limit its scope towards upstream and downstream supply activities, excluding the disposal of products by consumers and distribution, transport, storage and disposal of the products being subject to export control. Council of the European Union 2022, p. 6-7.
[134] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) [2021] OJ C 474, p.16.

unprecedent pressure from society to put in place stringent action plans to phase-out fossil fuels on the grounds of constitutional or human rights laws.

As a reminder, during the COP26 the parties recognized the need to reduce fossil fuel subsidies and phase-down coal power. On this regard, litigation against states supporting fossil fuels through permits or subsidies are increasingly scaling up and influencing the governmental polices. As an example, the Dutch Cabinet restricted up to 35% the capacity of a coal power plant until 2024 influenced by the Urgenda case[135]. Another example is the case Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy[136] in which the plaintiffs argued the issuance of licenses for upstream projects in the Barent deep-sea violates the right to a healthy environment enshrined in article 112 of the Norwegian Constitution[137]. On the contrary to the Dutch judges, the Norwegians had a more conservative approach and dismissed the allegation.

In this context, the EU adopted the directive as a complement of the EU Climate Legislation[138], mainly to work together with the proposal for an amendment of several directives[139], including Directive 2013/34/EU, incorporated in the Corporate Sustainability Reporting Directive (CSRD) which includes the disclosure of companies` plans to align their business model and strategy with the transition to a sustainable economy and the goal of limiting global warming to 1.5°C in accordance with the Paris Agreement (Article 19b) [140].

Both proposals aim to create synergies and ensure that companies comply with their corporate climate accountability. Evidently, energy carbon majors are within its scope. On this regard, Article 15 of the Due Diligence Directive explicitly references Directive 2013/34/EU in response to requests from member states to prevent potential legal conflicts arising from double or contradictory reporting obligations. In addition, the objective is to expand the scope of the Non-Financial Reporting Directive and its amendment, the CSRD,

[135]Setzer and Higham 2022, p.4 and 30
[136] Supreme Court of Norway, *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*, 20-051052SIV-HRET, judgement held on 22 December 2020 (English version).
[137] Sabin Center for Climate Change Law 2016.
[138] European Commission n.d., European Green Deal.
[139] Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting.
[140] COM(2021) 189 final.

to incorporate climate due diligence obligations. This extension would encompass the disclosure of companies' climate pledges, ensuring that their business models and strategies are aligned with the transition to a sustainable economy and contribute to the goal of limiting global warming to 1.5°C as outlined in the Paris Agreement[141].

Besides, the Due Diligence Directive aims to prevent the growing fragmentation of regulations on human rights and environmental due diligence across member states. Currently, certain Member states, such as France[142] and Germany[143], have implemented legislation mandating sustainable due diligence for their companies. This has raised a range of concerns within the private sector due to inconsistent requirements and a lack of standardization. Therefore, the regulation seeks to harmonization, to level the playfield for companies and remove the barriers that could impact free movement and distort competition[144].

In summary, strategic litigation with novel legal strategies rooted in rights-based and/or tort law remedies, is increasingly targeting energy carbon majors on a global scale. This litigation trend plays a crucial role in shaping due diligence obligations as a central mechanism for companies to fulfill their duty of care.

Member states' legislatures are also addressing this issue by enacting diverse forms of due diligence laws, some tailored to specific sectors and others with cross-sectoral applicability, varying in their inclusion or exclusion of judicial remedies and explicit coverage of climate-related matters. This heterogeneity may result in fragmentation and potentially impact the European Union's market dynamics. In response, the European Commission has taken a significant step by proposing a unified and coherent regulatory framework that applies uniformly to all member states. Although the definitive text of the proposal is pending, it has already attracted attention from NGOs advocating for revisions in line with international standards and urging for stronger enforcement mechanisms to ensure companies demonstrate a serious commitment to their climate obligations throughout the entire supply chain.

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[141] Ibid, p. 4.
[142] Corporate Duty of Vigilance (Loi de Vigilance) enacted 27 March 2017 entered into force 28 March 2017.
[143] Act on Corporate Due Diligence in Supply Chains enacted 22 July 2022 and enter into force 1 January 2023.
[144] COM(2022) 71 final, p. 11.

As mentioned earlier, the emergence of a corporate climate due diligence framework within the legal system has captured the interest of academia, particularly in understanding the role of the judiciary in fighting climate change in the face of regulatory shortcomings.

In the subsequent section, the theoretical framework is explained, drawing on the study conducted by Rajavuori et al.[145], to gain a comprehensive understanding of the potential short-term and long-term interactions within this context. Having provided a broad overview of corporate strategic climate litigations and mandatory due diligence laws, the subsequent discussion will delve further into the subject.

3 The Role of Climate Litigation in the Development of Corporate Due Diligence.

This section provides the theoretical framework for the interaction between climate change litigation and legislation. It builds on Rajavuori et al.'s classification of the three possible interactions between them, along with examples of how they have worked together in practice. While this study focuses only on the last scenario with the example of the Shell ruling, where strategic litigation influences the *ex-post* proposal of legislation and/or its interpretation, it is important to discuss the other scenarios for a broader understanding of the increasing interconnection between due diligence human rights laws and climate change litigation.

Subsequently, the Shell ruling is described upon, focusing on the judicial interpretation of the obligations imposed on the oil company regarding the reduction of GHG emissions.

3.1 Theoretical framework of the interaction among climate jurisprudence and EU human rights due diligence laws.

In democratic states, the judicial power possesses the authority to interpret the regulation in a specific case. In the context of our research, judges play a key role by ensuring compliance and holding companies accountable for their efforts or lack thereof in addressing climate change in accordance with their legal obligations. Consequently, the judicial power assumes

[145] *See* Rajavuori et al 2023.

a legitimate function in shaping and advancing policy within the legal framework[146]. About such judicial faculties scholars have pros and const about "judicial activism" understood as "judges pushing the boundaries of existing law for political purposes"[147]. This study, however, does not delve into the examination of the merits or drawbacks of judicial activism.

Historically, judges have played a pivotal role in the evolution of environmental and human rights laws through landmark decisions, which subsequently inform and influence legislative processes[148]. Due to the separation of powers, courts are unable to directly amend or alter legislation[149]. Nevertheless, through their interpretations, judges can contribute to the progression of climate policies and the overall advancement of environmental and human rights law. As mentioned by Bodansky, social perception may suggest courts are more receptive towards advancing environmental objectives compared with politicians. However, it is important to acknowledge judges not always align with the progressive expectations of society[150].

In light of this understanding, the research will explore the various approaches employed to assess the effects of case law on regulation within the EU context. It is noteworthy that the European Commission possesses the power to codify case law into secondary legislation exercising their "right of initiative".

This field faces methodological challenges. In academia, two approaches are evolving for the purpose of accurately assessing the influence of case law: 1) a sequential, cause-and-effect analysis aimed at establishing a link that evidence the impact of a court decision on legislation, and 2) a constitutive analysis that considers the societal context in order to comprehend the complexities of legal claim formulations. Scholarship acknowledges the necessity of integrating additional disciplines such as politics, economics, and sociology to provide a precise assessment[151].
For the first one, establishing a definitive causal connection between case law and the draft of legislation poses significant challenges, as various factors influence this process. In such

[146] Colby et al 2020, p. 169.
[147] Van Geel 2017, p. 58.
[148] Ibid., p. 171.
[149] Ibid, p. 181.
[150] Bodansky 2019, p. 266.
[151] Peel and Osofsky 2020, p. 12.

a complex scenario, valuable insights can be found from preparatory legislative documents, which illuminate the underlying rationale shaping the obligatory provisions of the directive under scrutiny, as discussed in the subsequent chapter.

In the second, high-profile cases such as the Shell ruling are a response to the societal demands, among other factors, for greater involvement from major carbon-emitting entities, and the Commission may consider the rationale behind such cases to align policies and strive towards achieving the EU's ambitious climate objectives. As part of the decision-making process, the Commission engages in public consultations to gather input from relevant stakeholders, taking into consideration their concerns to conduct a comprehensive impact assessment of forthcoming regulations. During such consultations, NGOs actively participate highlighting gaps or inconsistencies between the initiative and climate science, environmental principles, and international corporate standards, among others. Governments should consider the input provided by these organizations, as it can also offer insights into the potential arguments that may be raised in future lawsuit.

Other considerations on regard the influence of case law in the legal framework concerning climate risk matters, can be classified as direct or indirect. The former refers to the codification process. In contrast, indirect effects prompt a change in corporate conduct regarding climate risk[152]. An important challenge to assess such impacts is the lack of solid evidence to affirm climate litigation is traduce into long-term national mitigation policies because governmental policies changes. Therefore, jurisprudence acts as a supplementary mechanism in the enforcement of climate laws[153].

Scholars[154] are currently examining the impact of climate litigation on climate governance, encountering notable methodological obstacles in discerning the specific role played by litigation in driving these transformations vis-à-vis the influence of other political, economic, and market-related factors[155]. Moreover, identifying the apparent influence of high-profile cases on decision-making processes across different jurisdictions proves challenging[156]. For instance, the success of the Shell case was achieved due to the

[152] Ibid, p. 23.
[153] Setzer and Vanhala 2019, p. 7.
[154] *See* Peel and Osofsky 2020; Setzer and Vanhala 2019; Rajavuori et al 2023; Macchi 2021.
[155] Peel and Osofsky 2020, p. 13.
[156] Setzer and Vanhala 2019, p. 11.

characteristics of the Dutch legal system, implying that comparable outcomes may not necessarily be replicated in other member states with a more conservative judicial approach.

In the specific case of litigation and mandatory due diligence laws the literature has identified three main scenarios[157]:

3.1.1 Lawsuits based on Due Diligence Laws.

At present, climate litigation based on national laws is relatively uncommon due to two primary factors: (1) the limited number of laws in effect, and (2) the lack of adequate legal remedies[158].

Notre Affaire à Tous et al. v. Total[159] serves as an illustrative example of how legal sources are utilized as foundations for litigation aimed at strengthening climate governance. Courts will play a crucial role in providing consistent interpretations of the expected due diligence obligations for energy companies. Anticipatedly, once all member states transpose the EU directive and it becomes enforceable, there is expected to be an increase in litigation activity by NGOs or citizens seeking clarity and precision in the due diligence requirements pertaining to the climate commitments of major carbon-emitting companies.

3.1.2 Private climate litigation fostering legal framework.

As previously mention, a significant methodological challenge in studying its effects is distinguishing the individual contribution of litigation in bringing about these changes in contrast to other factors[160]. Nevertheless, it has been identified three main situations[161]:

(1) when the judicial power directly orders the development of legislation, as in the Massachussets v. EPA case; (2) when corporate responsibilities are strengthened by active involvement in decision-making processes, such as when Friends of the Earth Netherlands advocated for mandatory due diligence for financial institutions through the Corporate Sustainability Reporting Directive to prevent deforestation[162]; and (3) when companies are

[157] *See* Rajavuori et al 2023.
[158] Ibid, p. 4.
[159] The case was explained in section 2.3.1
[160] Peel and Osofsky 2020, p. 13.
[161] Rajavuori et al 2023, p. 6.
[162] Milieudefensie. Friends of the Earth Netherlands 2022.

affected by climate-related legal proceedings, as is the case in the current development of the Due Diligence Directive, where companies see it as a positive move to level the playing field for all businesses, including their competitors, in the interests of legal certainty.

3.1.3 Private climate litigation as gap-filler of the legislation.

Lawsuits may vary in their legal grounds across jurisdictions for correcting the gaps in the legislation, but there are identifiable trends. The primary sources of legal claims discussed are human rights and tort law[163]. The following cases are an example on the function of human rights quasi-judicial bodies to provide legal solutions to the victims affected by environmental disasters. Judicial and quasi-judicial interpretation of the current legislation is vital for the decentralization of the climate regime across all relevant actors as oil and gas companies.

The initial focus is on the role of human rights in enhancing climate litigation success. This study does not study the merits or drawbacks of using rights-based climate litigation as a means of achieving climate justice, as its focus is on how such litigation addresses the absence of effective enforcement mechanisms in national and international frameworks for holding companies accountable for their insufficient efforts to decrease their GHG emissions[164].

Scholars have called the period following the adoption of the Paris Agreement as the "third wave[165]" of climate litigation, which is marked by a focus on human rights and constitutional law as legal foundations. This trend is commonly referred to as the "rights turn[166]". Two notable cases that exemplify this approach are Urgenda and Leghari[167], which are likely to have a ripple effect on other rights-based litigations worldwide. Both resolved by judicial bodies.

As one might anticipate, the majority of climate-related lawsuits target governments. However, there is a rising trend in rights-based climate litigation against corporations, which

[163] Rajavuori et al 2023, p. 3.
[164] Savaresi and Hartmann 2018, p. 2.
[165] Setzer et al 2022, p. 9.
[166] Peel and Osofsky 2017, p. 49.
[167] Lahore High Court Green Bench, *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015, Orders held 4 and 14 September 2015.

appeals to non-judicial entities and invoke soft law instruments like the UNGPs and OECD Guidelines.

Now, as example two instances resolved by quasi-judicial bodies that entail the interpretation of due diligence obligations encompassing climate change mitigation measures.

As companies are not bound by human rights law, private climate litigation has found in non-judicial bodies an alternative option for holding responsible carbon majors.

To illustrate this, the Philippines Commission on Human Rights' National Inquiry on Climate Change[168] is a pertinent example. Unlike other cases, this was settled by a quasi-legislative[169] human rights entity, highlighting the diverse array of organizations that can participate in climate-related discussions. This case is significant because it acknowledges the inextricable link between human rights and climate change, addresses the accountability of oil and gas Carbon majors in the current environmental crisis, and advocates for the inclusion of climate change concerns in human rights due diligence, guided by the UNGPs.

The plaintiffs core petition asserts that major carbon companies such as Shell, Total, Chevron, ExxonMobil, and Repsol have violated and endangered human rights by contributing to the damages through climate change in the region[170]. The petitioners, as in the Shell case, relied on the UNGPs[171] principles as authoritative standard of corporate conduct. They argue that companies are failing to meet their due diligence obligations by investing in projects that conflict with climate goals[172] and demand that climate change concerns be incorporated into human rights due diligence[173]. In 2022, the commission released its final report with recommendations for carbon majors, including conducting climate change and human rights impact assessments across their value chain as part of their due diligence in accordance with the UNGPs[174].

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[168] Commission on Human Rights of the Philippines 2022.
[169] Savaresi and Hartmann 2018, p. 3.
[170] Greenpeace Southeast Asia 2015, p. 7.
[171] Peel and Osofsky 2017, p. 58.
[172] Greenpeace Southeast Asia 2015, p. 11.
[173] CHR-NI-2016- 0001 2019, p. 66-130.
[174] Commission on Human Rights of the Philippines 2022, p. 119.

While not legally binding, this report is the first of its kind and could establish a precedent for future cases and regulatory policies[175]. Also, it can inform future jurisdictional processes in other countries.

Another example is the NCP provided in the OECD Guidelines as previously explained, they offer another enforcement instrument for resolving disputes related with responsible business conduct with extra-territorial effects across its value chain, including climate change matters. Yet, the NCP had shown inconsistency in their approach towards corporate responsibility to climate change. In the Oxfam Novib case[176], it was resolved that the Dutch bank had to conduct a climate due diligence across its chain value and its obligation to disclosure concrete climate goals in its financial services[177].

NCPs are viewed as crucial in addressing human rights violations against corporations, as they have a history of handling transnational violations and have paved the way for the emerging practice of holding parent companies accountable for their subsidiaries' actions[178]. However, it's important to note that these mechanisms lack legal enforceability for businesses[179].

Quasi-judicial bodies are assuming a crucial role in expanding the implementation and interpretation of international corporate standards.

Regarding jurisdictional processes, attorneys are utilizing tort remedies in conjunction with non-binding human rights frameworks, particularly the UNGPs, as exemplified in the Shell case which will be elaborated upon. In essence, the Dutch court ordered Shell to lower its GHG based on the duty of care outlined in the Dutch Civil Code. This legal action served as a way to address the legislative gap to obligate energy companies to reduce their emissions[180]. What sets it apart from other cases is that the climate action wasn't targeting a specific project, but rather the corporation's overall contribution to GHG[181].

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175 Savaresi and Hartmann 2018, p. 3.
176 Dutch NCP, *Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie v ING*, final Statement after examination of Complain held on 19 April 2019.
177 OECD 2019.
178 Ibid, p. 612.
179 Ibid, p. 614.
180 Rajavuori et al 2023, p. 5.
181 Weller and Tran 2022, p. 2.

In summary, doctrinal research is examining the interaction between jurisprudence and due diligence laws, with the objective of advancing the implementation of the Paris Agreement. This framework seeks to ensure that major GHG emitters fulfill their responsibilities in a responsible manner. Ideally, lawmakers should consider environmentally protective interpretations put forth by judicial and quasi-judicial bodies, aiming for broad legal effectiveness and clear remedies.

Now, due to its significance as a landmark case, the next chapter will provide a detailed explanation of the Shell case ruling.

3.2 Shell jurisprudence and the duty of care.

The Shell case represents pathbreaking for future legal actions aimed at holding private firms accountable for their role in climate change.

It marks an important turning point in bringing to the table non-state actors to aid in achieving the goals of the Paris Agreement by bridging the gap among the corporate sector and the climate change regime. Also, it is the perfect example of how judicial procedures shapes the content of a mandatory due diligence, enhance the applicability of legal obligations and hardening soft corporate law.

3.2.1 Overview of the case

On 26 May 2021, the Hague District Court ruled the Shell group[182] shall:

> (…) limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to its business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels[183].

[182] Shell group is understood as: companies and legal entities included in the consolidated annual accounts. District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 5.3.
[183] Idem.

It is the first time where a private company has been ordered to decrease its carbon dioxide emissions beyond the limits established by governmental policies such as the EU emission trading system[184].

The case was brought to justice by Milieudefensie[185] representing itself and six Dutch NGOs and 17.000 citizens (hereinafter refereed as the "Claimants") filed a class action against Royal Dutch Shell PLC alleging the company`s role in climate change breaches its duty of care enshrined in the Civil Code, as well as its human rights obligations[186].

The Claimants based their lawsuit stating Shell has an obligation "to contribute to the prevention of dangerous climate change through the corporate policy (….)[187]" in compliance with the unwritten standard of care.

According to the Claimants, Shell's GHG account for 1% of global emissions, which is twice the amount generated by the Netherlands causing great harm into the climate system and human rights[188]. They alleged that Shell was fully aware of the relation between the use of fossil fuels and its consequences to the environment since 1986, which was corroborated by internal reports presented as evidence in their case[189]. Nevertheless, the company`s business plans continue focusing on production and trading of fossil fuels[190], instead of switching to renewable sources. Its operations resulted in significant levels of CO2 released into the atmosphere.

Therefore, it is necessary for parent companies to implement a change in corporate vision that extends to their subsidiaries and business partners. The argument suggests that all companies should make a proportional contribution to reducing carbon emissions using the best available technology as determined by the international community. Failure to do so may result in accusations of unlawful endangerment constituting a tortious act under Section 162 of the Dutch civil code[191].

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[184] Macchi and van Zeben 2021, p. 409.
[185] The branch of Friends of the Earth Netherlands.
[186] Sabin Center for Climate Change Law n.d.
[187] District Court of the Hague, *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 3.2
[188] Íbid, para. 22.
[189] Íbid, para. 24.
[190] Ibid, para. 28.
[191] Ibid, para. 39.

In procedural matters, the Claimants were required to primarily substantiate two issues, the jurisdiction of the Hague District Court and the applicability of Dutch law. As for the first issue, the Claimants argued that Shell, as the parent company, is responsible for implementing the inadequate environmentally and socially responsible corporate agenda across all its subsidiaries[192]. As Shell's headquarters and management board are situated in the Netherlands and considering that the NGOs associated with the claimants are also based there, it was the obvious jurisdiction to pursue the case[193].

With respect to the applicability of Dutch legislation, the plaintiffs substantiate their determination based on article 4 of the Rome II Regulation[194]. It allows the Claimants to choose the legal regime of the jurisdiction where the harm occurred. On this regard, the Netherlands is identified as the head office where Shell's policies are formulated, and the adverse consequences of climate change are likewise evident[195]. The court agreed that the corporate policy constituted the "event giving rise to the damage" under Article 7 of the Rome II Regulation[196].

The Claimants strategically chose a jurisdiction that has established a precedent of endorsing rigorous climate policies, capitalizing on the Dutch legal system's inclination towards embracing innovative interpretations. By doing so, they aimed to exert influence over the entire companies' portfolio.

After establishing the jurisdiction and applicable law, the focus will now shift to the core of the conflict. The Claimants requested the District Court to rule (1) that the aggregate annual volume of CO2 emissions released into the atmosphere as a result of its business operations and sale of energy products constitute an illegal act towards the Claimants, and (2) that Shell

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[192] Ibid, para. 91.
[193] This criterion is in accordance with the Brussels I Bis (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.) and the Dutch Civil legislation. Ibid, para. 66-74.
[194] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.
[195] District Court of the Hague, *Milieudefensie v Royal Dutch Shell*, summon filed on 5 April 2019, para. 103.
[196] Ibid, para. 4.3.

must lower its Scope1,2 and 3 emissions level in line with the Paris Agreement and the best available climate science[197].

In rendering its decision, the court informed the duty of care with scientific principles and international standards, which will be further elucidated.

3.2.2 Interpretation of the duty of care.

The legal basis for the judgement lies in Book 6, Section 162 of the Civil Code, which defines "tortious acts[198]" as a non-contractual liability arose for causing harm to a third party[199]. In contrast to contractual liability, the perpetrator of a tortious act is bound by a legal norm regardless of whether they agree with it or not, as the source of the norm is the law itself[200]. If an individual infringes the subjective rights of another person, breaks a law, or violates commonly accepted unwritten law as a "proper social conduct[201]", they are engaging in wrongful behavior[202].

This study aims to analyze the legal obligation associated with unwritten laws regarding "proper social conduct" as a duty of care. The argument presented by claimants is that the social duty of care within the Dutch legal system is an open and adaptable legal standard that can be applied to specific circumstances and guided by contextual legal and scientific considerations[203]. Furthermore, this standard should be interpreted in accordance with the Kelderluik criteria[204], human rights such as the right to life and privacy and the UNGPs, UN Global Compact, and OECD Guidelines[205]. Due to the source of the legal obligation,

[197] Ibid, para 3.1.
[198] Dutch Civil Law n.d.
[199] von Bar 2009, p. 229.
[200] Keirse 2019, p. 331.
[201] Dutch Civil Law n.d., article 6:162(2).
[202] Giesen et al 2018, p. 169.
[203] District Court of the Hague, *Milieudefensie v Royal Dutch Shell*, summon filed on 5 April 2019, para. 505.
[204] The Kelderluik criteria refer to a set of factors established by the Dutch Supreme Court for determining whether a behavior constitutes unlawful endangerment and violates the duty of care. These criteria were also applied in the Urgenda case and include the following considerations: (i) The nature and extent of the damage caused by climate change. (ii) The knowledge and foreseeability of this damage. (iii) The likelihood of dangerous climate change occurring. (iv) The nature of the state's behavior or omissions. (v) The inconvenience associated with the precautionary measures that need to be taken. District Court of the Hague, *Milieudefensie v Royal Dutch Shell*, summon filed on 5 April 2019, paras. 511-512.
[205] Íbid, para. 22.

plaintiffs were required to demonstrate that the defendant acted negligently with regard to the aforementioned norms and generally accepted principles[206].

The expectation for Shell`s policy was to steadily reduce its carbon dioxide emissions across its chain of activities, in a manner comparable to how a government would approach this issue. This approach takes into consideration the reasoning behind the Urgenda case[207]. The Court's ruling indicates that Shell's responsibilities to reduce emissions stem from an unwritten standard of care that should be reflected in its corporate policies, aligning with the level of care expected by society. The Court analyzed fourteen elements in order to interpret the standard of care in this context[208].

Gaining a comprehensive understanding of these elements is of highest importance as they elucidate the factors that the court takes into account when evaluating the expected behavior of a company. Other carbon majors should duly consider these factors if they wish to mitigate the risks associated with litigation within the Netherlands.

Macchi and Zeben's[209] classified the fourteen factors into five main categories:

- **Shell's control over its subsidiaries to reduce their CO2 emissions.**

The assessment centers on the effective control exerted by the parent company over its subsidiaries and the extent of leverage it holds over business partners to reduce its Scope 1-3 emissions. As a reminder, the French law was the first legislation that imposes on the parent company the obligation to adopt a wide-group sustainable policy.

This was incorporated in the Due Diligence Directive considerations of a company's ability to leverage its influence over third parties to effectuate more rigorous environmental standards through contractual clauses and heightened monitoring practices.

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[206] Institute of Advanced Legal Studies 2021.
[207]The Hague Court of Appeal, *The State of The Netherlands v. Urgenda Foundation*, C/09/456689/ HA ZA 13–1396, judgement held on 24 June 2015.
[208] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021 2021, para. 4.4.2.
[209] Macchi and Zeben 2021, p. 411.

- **Impact on the Wadden region and in the Netherlands.**

Regarding this issue, the Court observed that Shell's emissions surpass those of certain states, thereby impacting the environment and health of Dutch citizens. Despite the uncertainty associated with the precise consequences of these emissions, this does not invalidate the scientific forecasts highlighting their severe consequences[210].

The court's reasoning was evidently influenced by climate science, a factor that can be anticipated in other courts as well, given its widespread dissemination.

- **Applicable regulatory framework: Human rights, soft law and EU ETS.**

The case contended as legal grounds Articles 2 and 8 of the ECHR, along with soft law instruments such as the UNGPs, OECD Guidelines, administrative permits, and the EU ETS.

Human rights

Similar to the Urgenda case, the Claimants are invoking the right to life (as stipulated in Article 2 of the ECHR and Article 6 of the ICCPR[211]) and the right to respect for private and family life (as outlined in Article 8 of the ECHR and Article 17 of the ICCPR). They acknowledge that human rights treaties are binding on States rather than corporations and that positive actions towards the population are mandatory only for governments. In contrast, Shell argued that mentioning human rights in the context of climate change were not relevant. However, this argument was dismissed based on reports from the UN Human Rights Committee[212] and the UN Special Rapporteur on Human Rights[213], which recognized that environmental degradation caused by climate change poses a threat to the enjoyment of human rights, such as those related to food, health, and life.

Unlike the Urgenda case, Shell is not bound directly by international human rights law, nor the Paris Agreement, so the Claimants could not invoke them directly. Its function is as interpretative aids in the understanding of the duty of care[214].

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[210] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26 May 2021, para. 4.4.7.
[211] International Covenant on Civil and Political Rights (adopted 16 December 1966, in force 23 March 1976) Treaty Series.
[212] CCPR/C/127/D/2728/2016 2020, para. 9.4.
[213] A/74/161 2019, p.6.
[214] Van Harro 2021.

Soft law: UNGPs and OECD Guidelines.

The Guiding Principles expressly state that companies are obligated to respect human rights, regardless of domestic law, as the UNGPs constitute a universal standard of expected conduct applicable to all companies. Failure to adhere to human rights principles may result in consequences, such as difficulty in obtaining investment or permits, and a lack of social endorsement for new projects that could pose long-term risks[215].

The interpretation of the duty of care in the judgement places great emphasis on the influential role that soft law instruments play, owing to their wide acceptance. Mainly, in the UNGPs as a guideline for Shell's corporate governance to strengthen the company's compliance with human rights.

In accordance with these international standards, the judgement asserts that the UNGPs should form part of the interpretation of the duty of care because of their authoritativeness and international acceptance[216]. Also, due to the European Commission declaration expecting European businesses to respect human rights as set forth in the UNGPs[217]. Shell's endorsement of the UNGPs, UNGC[218], and OECD Guidelines as external voluntary codes[219], and their declaration that the UNGPs informed their human rights policy[220], further underscores the role of the UNGPs' in its operations.

EU ETS

Regarding the EU ETS, Shell maintained that it was complying to the emission obligations outlined by the regulation. However, the Court found that the ETS scheme only applies to

[215] Idem, p. 13-14.
[216] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 4.4.11.
[217] COM(2011) 681 final, para. 4.8.2.

[218] *United Nations Global Compact 2004.*

[219] Shell Global n.d.
[220] Shell Global, “Human Rights” (n.d.)

Scope 1 and Scope 2 emissions within Europe[221], and the company's reduction responsibility extends also for Scope 3 worldwide[222].

Addressing Scope 3 emissions by energy companies is vital for a successful climate policy. For example, in this case, they amount around 85% of Shell`s total emissions (based on a 2018 report) [223].

- **Utilizing Climate Science in Quantifying Shell's Emission Reduction Obligations**

The damage assessment is focus on the potential harm to the Netherlands, which has experienced a temperature increase twice as rapid as the global average[224] according to climate research. Based on findings from the IPCC, it has been mandated that Shell must achieve a 45% reduction by 2030 compared to 2010 levels to avert the negative consequences of climate change[225].

- **Fairness and effectiveness of implementing a reduction obligation.**

First, I will address the fairness point. Shell argued that a reduction obligation would negatively impact energy security[226]. They claimed that complying with the obligation would result in a reduction of their operations, ultimately affecting the 7th Sustainable Development Goal, which aims to provide affordable, reliable, sustainable, and modern energy for all[227]. However, the Court did not agree with this argument, instead recognizing the challenge of balancing energy security with environmental concerns called "the twin challenge[228]". Also, emphasized that reliable access to energy must be viewed in the context of climate targets, and cannot be considered independent of them.

To support their interpretation of the standard of care, the Court looked to the United Nations Sustainable Development Goals, which have international consensus. Specifically, they

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[221] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 4.4.46
[222] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 4.4.46
[223] Ibid, para. 2.5.5
[224] Ibid, para. 4.4.47.
[225] Ibid, para.
[226] Ibid, para. 4.4.40.
[227] UN n.d.
[228] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 4.4.40

noted that SDG 7 and SDG 13 work together to address the need for action against climate change[229]. The Court emphasized that these goals must be viewed in synergy, and that SDG 7 cannot be used as a justification to avoid taking stringent measures to reduce fossil fuel sources.

Secondly, Shell contended that another company would step in to fill the gap if they reduced their emissions in certain operations, which would make the emissions reduction ineffective[230]. The Court recognized that Shell is not solely responsible for the issue, it doesn't exclude its responsibility of shifting their corporate plan towards an energy transition[231], even other competitors substitute them. Nevertheless, the Court cited a Production Gap Report[232], which highlighted the connection between limiting production and reducing emissions, so Shell`s shift in business projects could reduce the availability of fossil fuels.

3.2.3 Decision.

As per the earlier interpretation, Shell has been instructed by the Court to reduce their CO2 emissions by at least 45% by the end of 2019 compared to 2019 levels[233]. It is important to note that the Court has not currently deemed Shell's emissions to be illegal[234]. However, if the board of directors fails to align their corporate objectives with the Paris Agreement goal, a violation is expected to occur in the future[235]. Throughout the judgement only CO2 emissions are addressed, other pollutants are methane fall out of the scope of the case[236].

Shell is bound by a performance obligation to decrease its Scope 1 and Scope 2 emissions (associated with the company). However, for reducing the rest of Scope 2 and Scope 3 emissions only requires making a "best effort." Shell is at liberty to choose its own business strategies to accomplish this goal[237].

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[229] Ibid, para. 4.4.42.
[230] Ibid, para. 4.4.49.
[231] Idem.
[232] The Production Gap 2021, p. 50.
[233] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 5.3.
[234] Ibid, para. 4.5.8.
[235] Ibid, para 4.5.3.
[236] Hösli 2021, p. 197
[237] Ibid, para. 4.4.39.

Several scholars have scrutinized the absence of a well-defined methodology and appropriate legal rationale to justify the reduction obligation. This difficulty is likely not only due to the court's execution but also to its methodological preferences since international agreements and climate science do not provide a satisfactory basis for determining the required mitigation measures for Shell[238]. Moreover, courts lack of expertise on these matters to properly conduct an accurate calculation[239].

The ruling is temporarily enforceable on the grounds that the interests represented by the Claimants are crucial and require immediate action.

Shell's Chief Executive stated that a comprehensive overhaul of the entire energy system is necessary to meet the climate goals, and the efforts of only one major energy company would be futile. This statement was made on July 20, 2021, when the company confirmed its plans to appeal the verdict[240]. By the time of writing the final ruling is still pending.

In summary, the Court's interpretation emphasized that the energy company has an obligation to respect human rights and align its business plan with the Paris Agreement, even if not directly mandated by legislation. This ruling also contributes to strengthening the soft law framework concerning corporate human rights due diligence by incorporating the obligation to reduce GHG emissions. In the next section, the proposal of the directive is analyzed in detail regarding the general due diligence obligations and specific climate change issues emphasizing the major areas of influence identified in the preparatory documents.

4 A study of the Shell ruling transposition into the EU Due Diligence Directive.

4.1 Analysis of the climate due diligence components evident in the Shell case.

It has contributed to shaping the components of a climate due diligence in a number of ways. As previously stated, several countries and the EU are adopting mandatory human rights

[238] Mayer 2022, p. 418
[239]Colby et al 2020, p. 169.
[240] Shell global 2021.

legislation covering environmental aspects, but very little regarding climate change[241]. Shell`s judgement offers a successful example on how civil liability helps imposing climate mitigation actions on energy companies[242]. The court overlooked the companies` argument regarding the lack of a causal link between the corporate activities of the parent company and the harm caused to the environment and the society due to climate change. It based in scientific climate data and Shell`s own declarations about their net zero plans[243].

Regarding the content of climate due diligence, the judgement gives us some guidance.

First, it divides CO2 emissions into two categories: those directly resulting from the operations of the companies` group, and those caused by end-users and business partners[244]. Different types of liability are assigned to each category. Scope 1 and 2 emissions, which are linked to the business activities are subject to an obligation of result[245], while Scope 3 emissions require only a "best effort" obligation aimed at preventing significant CO2-related risks from business partners[246]. The court employs the concept of "leverage," as outlined in the UNGPs and the French law which can be exercised through the inclusion of clauses in contracts. To address end-user emissions, the court suggested modifying its energy packages[247].

This approach is informed by Principle 13 of the UNGPs, which extends corporate responsibility for preventing adverse human rights impacts to business partners [248] throughout the entire value chain[249]. Despite the court's good intentions, Hösli doubt the strength of the argument and the legal documents, such as the Oxford Report, used to support it. The consensus on whether energy companies are obligated to address Scope 3 emissions is unclear, with even the Task Force on Climate-Related Finance Disclosure stating that companies are not required to do so[250]. He suggests that the court could have supported its argument based on the Oxfam Novib case in which the Dutch NCP states that the OECD

[241] Macchi and Zeben 2021, p. 413
[242] Mayer 2022, p. 410.
[243] Ibid, p. 411.
[244] District Court of the Hague, Milieudefensie v Royal Dutch Shell, ECLI:NL:RBDHA:2021:5339, judgment held on 26-05-2021, para. 4.4.22.
[245] Ibid, para. 4.4.23.
[246] Ibid, para 4.4.24.
[247] Ibid, para. 4.4.53.
[248] Hösli 2021, p. 201.
[249] The Due Diligence Directive changed the term for "chain of activities" as explain in section 4.3
[250] Hösli 2021, p. 201.

Guidelines anticipate companies performing climate due diligence throughout their entire value chain[251].

Ultimately, this established a standard for holding individual carbon majors liable for their contributions, despite the lack of a direct connection between their activities and the widespread damage, due to their duty of care.

Nevertheless, the inconsistencies of the argumentation in justifying the mitigation action[252], Macchi and Zeben[253] pointed out the merit of the judgement is to provide a first insightful and coherent view for the definition of a climate due diligence bringing together the Paris Agreement, UNGPs and the IPCC reports.

In summary, the Shell case has influenced two significant aspects. Firstly, it has been considered as an element in the drafting of the Due Diligence Directive by the European Commission, as shown in the impact assessment. This can be seen as an example of how strategic litigation can strengthen the climate change regime and hold carbon majors accountable. Secondly, it has incorporated climate change issues into the human rights risk assessment, coloring the concept of due diligence.

4.2 Major areas of influence.

Upon conducting an examination of the decision-making process, explicit references to the Shell case were identified in the impact assessment document. As indicated, my research focus in jurisprudence that interpret legal concepts such as due diligence and provide them with contextualized content that aligns with the specific circumstances to curtail GHG emissions. While it appears that the European Commission took the case into consideration during the formulation of the directive, it cannot be conclusively asserted that it served as the predominant driving force of article 15 titled “combating climate change”.

But, it is significant the evaluation conducted by the court and the identification of the factors taken into account during the assessment, which inform the understanding of due diligence

[251] Ministry of Foreign Affairs 2019, p.3
[252] Mayer 2022, p. 412.
[253] Macchi and Zeben 2021, p. 414.

and delineate the expected conduct from companies. Such elements are now part of a legal precedent which can be cited in future cases.

Taking these factors into consideration, it can be concluded that the interpretation of due diligence for energy companies has major areas of influence, namely:

- *Interpretation of the standard of care under tort law as including climate change adverse impacts in their entire supply chain[254]. Hardening of soft law*

The directive requires companies to adopt measures that are consistent with the European Green Deal and the UN Sustainable Development Goals, which aim to reduce their impact on the environment[255].

Legal remedies such as tort law necessitate that the party posing the risk exercises due diligence in their conduct and fulfills their duty of care. In this particular instance, the court explicitly stated that climate considerations must be taken into account, otherwise the conduct would be considered wrongful. Such standard of care is informed by UNGPs and OECD Guidelines as authoritative instruments accepted globally.

During the public consultation process, it was found that 47.1% of companies had adopted voluntary standards such as the UNGPs and the OECD Guidelines. However, these companies stated that such soft law frameworks do not offer clear regulatory requirements or standards for compliance, and thus fail to mitigate negative legal consequences. The shell case was mentioned as an example of litigation risk due to the ambiguity of the current legal framework[256].

- *Legal responsibility to mitigate harmful impacts in accordance with the provisions of the Paris Agreement[257].*

As stipulated by Article 15, companies are required to develop and implement a plan that outlines specific actions, financial and investment plans, and proof that their business model

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[254] SWD(2022) 42 final, p. 34.
[255] COM(2022) 71 final, p. 1.
[256] Ibid, p. 10.
[257] Ibid, p. 10

and strategy are compatible with limiting global warming to 1.5°C as provided in the Paris Agreement. It is consistent with the CSRD initiative, to maximize effectiveness through the mandate of disclosing and reporting climate plans[258].

A further obligation is placed upon energy companies as significant GHG emitters, requiring them to include a clear and achievable reduction objective in their plan. Despite transnational energy companies making pledges to become net-zero and implementing climate change plans, civil society and NGOs argue that these lack transparency and clear timelines. With the implementation of these mandates, companies will be expected to articulate their carbon neutral pathway with greater clarity.

The directive has been subject of critics by NGOs such as ClientEarth for the exclusion of the Paris Agreement from the list of environmental conventions in the definition of adverse environmental impacts. This narrows down the Directive's extent and creates a loophole that energy companies can exploit to minimize their mitigation actions[259].

- *Reliance on scientific knowledge and methodologies to accurately trace and assess GHG[260]. Higher sustainability risk.*

The notion that climate change is a complex problem that no single actor can solve is no longer a valid argument. The district court decision made sustainability risks more evident than ever before. By using scientific measurements, the plaintiffs were able to track the impact of Shell's activities across its value chain[261]. Jurisprudence is evolving to incorporate scientific evidence for individualizing the responsibility of each carbon major.

[258] COM(2022) 71 final, p. 4
[259] ClientEarth 2022, p. 4-5.
[260] Ibid, p. 11.
[261] Ibid, p. 11.

- *Recognition of the parent company's responsibility as the authority for implementing a comprehensive sustainability policy within its wider group*[262] *and utilizing contractual clauses to exert influence on suppliers to reduce GHG emissions*[263].

Energy companies' global supply chains are subject to diverse jurisdictions with varying perspectives on sustainability, and more importantly, varying levels of enforcement for human rights and environmental obligations. This is particularly evident in the hydrocarbon sector, where oil reserves are often a source of conflict. As an example, Total`s upstream activities are conducted in Africa and Middle East where environmental regulations are weaker than in France[264]. In contrast to other issues, climate change is a transboundary and diffuse problem, as GHG emissions cannot be constrained to a specific jurisdiction. To address this challenge, there is a growing trend to regulate the entire value chain under legislation and best environmental practices of the parent company, and to hold it responsible for any inadequate climate-related policies of its subsidiaries as seen in the Due Diligence Directive.

The European Commission recognizes the obligation of the parent company's board to implement a mandatory human rights due diligence policy for its subsidiaries in accordance with the Shell's ruling and the French Duty of Vigilance law[265]. The directive's Articles 1, 5, and 6 state the member states' obligation to ensure that due diligence is integrated into all corporate policies, covering subsidiaries and suppliers. In the widely cited ruling, the judges deemed that the parent company can exercise its control and influence over subsidiaries and suppliers, respectively through their purchase policy. It is relevant to acknowledge the judicial interpretation because the proposal is not clear enough about the integration of climate change issues which may lead to further lawsuits looking for clarification in the obligations of carbon majors. Article 15 is vaguely drafted and its connection with the core obligations enshrined in articles 5 to 11 remains unclear[266].

The European Commission seems to side with the interpretation of the court regarding that the headquarters shall exercise control over its subsidiaries and leverage over the suppliers

[262] Ibid, p. 29
[263] Ibid, p. 12-26.
[264] Dahn and Fløttum 2019, p. 501.
[265] SWD(2022) 42 final, p. 25-26.
[266] Higham et al 2023, p. 23.

to adapt a more sustainable corporate governance. It proposes cascading the obligation through contractual clauses[267].

Due diligence legislation is having a great impact in the principle of separate corporate personality that governs corporate law. Parent companies cannot hide behind the corporate veil for climate-related and human rights issues caused by their subsidiaries[268]. To enhance legal certainty, Article 12 requires the Commission to issue guidance containing model contractual clauses.

- *Determining the scope of emissions that are encompassed within the due diligence obligations.*

Article 15 is silent in respect of the emissions covered by the climate plan. ClientEarth pointed out it should be more prescriptive regarding the content of the plan and if scope 3 emissions are included[269]. These types of emissions are the highest in the hydrocarbon sector, representing almost 88%[270]. For this reason, NGOs recommend that the legislator clarifies that the plan should include scope 3 emissions and not just those from the company's own operations[271].

In this regard, the Shell ruling imposes a "best effort" obligation to reduce its scope 3 emissions. As mentioned by Hösli, this point is still disputed[272]. Although reporting these emissions is not currently mandatory, there is a growing trend of requiring oil and gas companies to address them. The preliminary documents do not mention their incorporation.

In summary, the emergence of climate due diligence is evident, with its development being shaped by rulings and recommendations from various jurisdictional and quasi-judicial bodies. The significance of this development is underscored by its incorporation in Article 15, highlighting its relevance within the legal framework. It is foreseeable that the establishment of climate due diligence as a legal requirement will serve as a solid foundation for future lawsuits and legal actions pertaining to climate change-related matters.

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[267] COM(2022) 71 final, p. 17.
[268] Bright 2018, p. 212.
[269] ClientEarth 2022, p. 4-5.
[270] S&P Global 2021.
[271] ClientEarth 2022, p. 5.
[272] Hösli 2021, p. 201.

The directive is ambiguous regarding its integration with human rights due diligence; however, clear indications can be found in UN reports, the Shell jurisprudence, and the human rights recommendations from the Philippines, emphasizing the importance of considering this aspect in the risk assessment process.

The subsequent section will provide a more doctrinal perspective on climate due diligence.

4.3 Implications of the emerging climate due diligence for energy companies.

Over the past decade, human rights due diligence has become more firmly established in both international and national law, leading to a shift in the way businesses operate on a global scale[273]. However, much work still needs to be done in the area of climate change. Private corporations, in particular, have a crucial role to play in tackling the adverse impacts of climate change, and indirectly safeguard other human rights such as the right to life and a quality standard of living closely interlinked with the enjoyment of such rights.

The 2015 UN report on human rights obligations related to a safe, clean, healthy, and sustainable environment blurred the division between human rights and climate change[274]. The report recognized that climate change poses a threat to the enjoyment of other human rights and declared that states have an obligation to establish legal and institutional frameworks to protect these rights, including from damage caused by private corporations[275].

This recognition of the interlinkage between human rights and climate change has become increasingly evident, driven in part by a rise in right-based litigation based on the right to life and a decent standard of living as enshrined in international treaties. Such litigation seeks to compel companies and states to reduce their GHG emissions[276]. Climate change litigation has pushed the limits of the corporate human rights due diligence, as seen in the cases discussed in the previous sections.

[273] Landau 2023, p. 222
[274] UN A/HRC/28/61 2015, para. 2.
[275] Macchi 2021, p. 93.
[276] Setzer and Nachmany 2018, p. 7.

Several authors support the consolidation of climate due diligence as part of the human rights framework to ensure a more comprehensive approach and prevent further legal fragmentation[277].

Climate change obligations are not explicitly included in the corporate human rights due diligence framework. However, some authors, such as Macchi, have proposed the inclusion of GHG reduction obligations in the context of human rights due diligence due to their close relation[278]. The increase in global temperature causing natural disasters affects the enjoyment of human rights such as the right to life, access to food, and quality of life.

Olawuyi argues a unified due diligence would legitimize the "social license", as understood by Ruggie, to conduct activities[279]. As previously mentioned, due diligence is an adaptable concept that can be applied to new circumstances, allowing for the integration of climate-related issues without compromising its integrity.

In the corporate context, climate due diligence has two definitions: 1) as a business process, and 2) as a standard of conduct[280]. For the former, the UNGPs promote the implementation of human rights due diligence across all companies, with Principle 17(b) specifying that the risk assessment for due diligence should vary based on factors such as the company's size, the level of risk causing severe human rights impacts, the nature and context of its operations, and should evolve according to new human rights risks. In its 2014 recommendations the IBA Task Force suggested to expand the scope of corporate policy addressing climate change risk can be guided by the UNGPs[281].

Hence, carbon majors must adopt mitigation measures that involve transitioning to a net-zero carbon policy. This transition necessitates the development of new technologies such as carbon capture, as well as increased investment in renewable energies and energy efficiency[282]. Essentially, they need to change their core business.

For its dimension as standard of conduct, recent case law suggests that two characteristics are emerging for climate due diligence: risk mitigation and integration. Risk mitigation

[277] See Macchi 2021; Savaresi and Hartmann 2018; Spier 2018.
[278] *See* Macchi 2021.
[279] Olawuyi 2016, p. 18.
[280] Macchi 2021, p. 93
[281] International Bar Association 2015, p. 16.
[282] Addison 2018, p. 460

requires companies to reduce their scope 1 and 2 emissions in all their projects, while integration focuses on the systematic inclusion of clear climate targets into their policies. The IPCC reports and other credible scientific sources serve as the benchmark in this regard[283].

Macchi propose the following elements to be consider by companies when conducting its risk assessment[284]:

1. **Severity**. The OECD Guidelines recommend using a risk-based approach to prioritize risks based on their level of severity[285]. The severity of risks posed by climate change to human life is indisputable. Oslo Principles[286] state that in such cases, a precautionary approach should be adopted, and companies must be obliged to reduce their GHG at a rate that is scientifically credible, to protect against these threats.

   Energy carbon majors, as the largest CO2 emitters, are under an obligation to conduct comprehensive climate due diligence and implement quality mitigation measures that are proportionate to their impact. Such assessments shall consider scientific information arose from the IPCC reports and in-house studies. As in the Exxon case, for instance, it accurately predicted the rise in temperatures since the late 1970s. caused by their products[287].

   The carbon majors would have to deeply cut their investment in future exploration and extraction projects as a mitigation measure in line with the scientific recommendations.

2. **Causality**. Establishing a causal link between a company's GHG emissions and the resulting adverse impact, such as droughts, is extremely difficult. It's almost impossible to attribute liability to a specific damage with concrete evidence.

Energy companies cannot continue to neglect their obligations if they want to avoid reputational and litigation risks. Once the directive comes into full force, it is expected to

[283] *See* Macchi 2021n. 23); Savaresi and Hartmann 2018; Spier 2018.
[284] Macchi 2021n. 23), p. 111.
[285] European Commission 2020, p.
[286] Oslo principles on global climate change obligations 2015, p. 3.
[287] Columbia Journalism School 2015.

become the basis for more strategic cases requiring courts to interpret the obligations of carbon majors due to the weak drafting of Article 15.

In summary, a climate risk assessment is emerging as an integral part of the human rights context, and its inclusion appears to be obligatory for energy carbon majors in order to fulfill their duty of care.

5 Conclusions.

Both the IPCC and the International Energy Agency emphasize the need to keep fossil fuels in the ground to achieve climate targets which can be done only with the incorporation of these companies. Despite this, governments and companies continue to invest in hydrocarbon projects without facing substantial consequences, primarily due to a weak legal framework and complex obstacles faced by victims seeking changes in companies' policies aligned with the Paris Agreement. As a result, society is turning to the judicial system to address the gaps in the legal system and hold these companies accountable.

Due to the division of powers theory, the judiciary operates within the confines of the existing legal framework and refrains from supplementing the legislative authority. Nonetheless, this does not preclude the courts from offering insightful and innovative interpretations that prioritize environmental protection, as they fulfill their role as custodians of the legal system.

For example, the Netherlands legal system, as demonstrated in the Shell case, has displayed a tendency towards a broader and innovative interpretation of legal principles, such as the unwritten duty of care, to compel companies to make significant modifications to their corporate policies towards sustainability. However, it cannot be assumed that judges in other member states will adopt the same approach, and it is premature to draw conclusions regarding the true impact of litigation on companies' behavior. If companies are willing to comply with their duty of care, it would be vital to conduct a human rights due diligence process together with climate matters.

Experts predict a rise in lawsuits against carbon majors, which is unlikely to decrease even after the EU directive on the due diligence obligation for companies comes into force. This

is due to the directive's vague language and unclear climate obligations. Nonetheless, the Shell case has resonated throughout Europe and beyond, and its influence will endure, regardless of whether it is eventually overturned by the appellate court or not. Other cases against oil and gas companies may draw inspiration from the Dutch court's interpretation, potentially creating a domino effect in line with the EU's ambitious climate targets. At the same time, the Shell case is explicitly referenced in the EU directive's impact assessment, which recognizes the litigation risks faced by companies that fail to integrate climate considerations seriously into their management systems and corporate policies along the value chain.

Ideally, the directive would codify the most ambitious court interpretations against major emitters, as the necessity for a clear and reliable legislative framework is evident. But the reality looks different. Nevertheless, the Shell case informed five key aspects in the development of the EU directive: standard of care in tort law includes climate change impacts, carbon majors are responsible to mitigate harmful impacts in line with the Paris Agreement, climate science can help to individualize the responsibility of each company, parent company responsibility for subsidiaries and business partners, and scope 3 emissions should be included.

Climate change litigation is shifting the principle of separate personalities which prevail in corporate law by holding responsible the parent company for extra-territorial human right and environmental violations. The evolution of this point would be interesting as a new legal paradigm.

The final point is particularly contentious due to the absence of a definitive standard or established business practice regarding whether reporting of scope 3 emissions should be obligatory. In this case, the court did not provide enough convincing evidence.

Such points address my central research question: *How does strategic climate change litigation (Shell case) influence the corporate sustainability due diligence obligations for energy companies to align their activities with the Paris Agreement`s goal?*

As a conclusion, the jurisprudence of the courts will acquire significance through shaping the substance of the due diligence concept, rather than directly impacting the exact wording of the directive.

Finally, strategic climate litigation and mandatory due diligence laws are still in their early stages but gaining momentum. As the impacts of climate change worsen and pose a threat to the enjoyment of human rights, there is no doubt that rights-based and tort cases will continue to increase, seeking justice for victims and exerting pressure on energy companies to reduce their greenhouse gas emissions. Energy carbon majors bear a significant responsibility for the rise in GHG, and it is evident that they possess the necessary human and financial resources to invest in green technology and low-carbon projects.

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