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Research Article

Specifics of resolving disputes in the field of climate protection by state courts and arbitration

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Abstract. The article is devoted to the study of climate claims, including new types of such claims, recorded in a number of countries in 2020—2021. They involve claims for the protection of human rights and claims against private companies. In addition, the author analyzes the most common grounds for argumentation of the plaintiffs' positions in climate claims based on international, constitutional, administrative, and tort law. The most common legal doctrines that were used by courts as the ground for decisions on climate claims have been studied. The purpose of the study is to form an idea of a new type of claims (claims in the field of climate protection or climate claims) based on the analysis of regulations, judicial practice of foreign countries and scientific sources. The methodology includes empirical methods of comparison, description, and interpretation, theoretical methods of formal and dialectical logic, special methods such as legal-dogmatic and legal norms interpretation. The study showed that judicial and arbitration proceedings on climate issues have become an effective tool used by citizens and non-governmental organizations to ensure compliance with or strengthening of the climate commitments made by governments in accordance with the 2015 Paris Agreement.

Key words: European Union law, Paris Agreement 2015, climate claims, Milieudefensie case 2021

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Особенности разрешения споров в сфере защиты климата государственными судами и арбитражем

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Аннотация. Исследование посвящено климатическим искам, в том числе новым видам таких исков, зафиксированных в ряде стран в 2020—2021 гг.: 1) исков о защите прав человека, 2) исков против частных компаний. Кроме того, автор анализирует наиболее распространенные основания аргументации позиций истцов по климатическим искам, основанных на международном, конституционном, административном и деликтном праве. Изучены наиболее распространенные правовые доктрины, которые были положены судами в основание решений по климатическим искам. Цель: сформировать представление о новой разновидности исков — исках в сфере защиты климата, или климатических исков, — на основе анализа нормативных актов, судебной практики зарубежных стран и научных источников. Методы: эмпирические методы сравнения, описания, интерпретации; теоретические методы формальной и диалектической логики. Применялись частнонаучные методы: юридико-догматический и метод толкования правовых норм. Результаты: Проведенное исследование показало, что судебные и арбитражные разбирательства по вопросам климата стали действенным инструментом, используемым гражданами и неправительственными организациями для обеспечения соблюдения или усиления обязательств по климату, взятых правительствами в соответствии с Парижским соглашением 2015 г.

Ключевые слова: право Европейского Союза, Парижское соглашение 2015 года, иски в сфере защиты климата, климатические иски, дело “Milieudefensie” 2021

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Introduction

According to the database of the Climate Change Laws of the World (based on research by the Grantham Institute of the London School of Economics and the Sabin Center on Climate Change Law at Columbia University Law School), **as of November 2021**, the total number of climate change lawsuits filed in state courts

reached 1931¹. A report published in July 2021 by British scientists D. Setzer and K. Nyam emphasized that, globally, the cumulative number of climate change-related lawsuits in state courts has more than doubled since 2015. In the period from 1986 to 2014, a little more than 800 cases were initiated, while over the past six years more than 1,000 cases have been brought (Setzer & Higham, 2021).

We would like to emphasize that the above statistics reflect the climate disputes settled only by state courts and administrative bodies, as well as by international or regional courts and tribunals (including the courts of the European Union). Data on the number of disputes between individuals in the field of climate protection against changes before arbitration institutions remain closed due to the arbitration principle of confidentiality. We can learn this information only from reports of individual arbitration institutions, for example, from the Report of the Arbitration and ADR Commission of the International Chamber of Commerce (ICC) on the role of arbitration and ADR in resolving international disputes related to climate change (ICC Report 2019)².

Cases in the field of climate protection are still being initiated in many jurisdictions in both judicial and non-judicial forums, experts from Norton Rose Fulbright E. De Wit and E. McCoach noted in August 2021 (De Wit & McCoach, 2021). Other foreign authors have also repeatedly stressed that, given the recent successful decisions based on human rights (we are talking about the decision of the Hague Court in *Milieudefensie et al. v Royal Dutch Shell plc*)³, similar lawsuits will be brought against governments and corporations (Macchi & Van Zeven, 2021). The fossil fuel sector will remain the main target of the lawsuits, but it is possible that the list of defendants could become more diversified over time, especially if other high-emission sectors are not seen as taking significant measures to reduce emissions or moving towards net zero (Schiermeier, 2021). Experts also predicted a significant risk of starting greenwashing claims as companies and other organizations face closer scrutiny of the actions they take to achieve their publicly announced goals (Peel & Lin, 2019).

Thus, climate litigation has become a powerful tool used by citizens and non-governmental organizations to enforce or strengthen the climate commitments made by governments under the 2015 Paris Agreement (Gershinkova, 2021). Most cases were brought against national governments, usually by non-governmental organizations (NGOs) and individuals. Earlier we wrote about this in sufficient detail (Ermakova, 2020:606).

¹ Climate litigation cases. Climate Change Laws of the World. 2021. Available at: https://climate-laws.org/litigation_cases [Accessed 21th November 2021].

² Resolving Climate Change Related Disputes through Arbitration and ADR (ICC COMMISSION REPORT) (2019). International Chamber of Commerce (ICC). November 2019. Available at: <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [Accessed 21th November 2021].

³ *Milieudefensie et al. v Royal Dutch Shell plc*. ECLI:NL:RBDHA:2021:5339. Uitspraken. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> [Accessed 21th November 2021].

In this article, we will consider the types of climate claims, including new types of claims, recorded in a number of countries in 2020—2021: 1) claims for the protection of human rights and 2) claims against private companies. In addition, we will list the most common grounds for arguing the position of plaintiffs in climate claims, based on international, constitutional, administrative, and tort law. We will also study the most common legal doctrines that were used by the courts as the basis for decisions on climate claims.

Concept and classification of climate claims

The adoption of the Paris Agreement in December 2015 allowed to use legal instruments to protect against climate change — climate claims. To achieve the strategic goal of limiting global warming to 1.5 °C, the Paris Agreement created obligations for states with additional obligations for various actors. We join the opinion of most authors that in the modern sense, **climate disputes are any disputes arising in connection with the consequences of climate change and climate change policies provided for by the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement of 2015** (Stuart-Smith, 2021). However, the question of the first climate claims, and what specific disputes are included in this concept remains controversial to this day (Robinson & D'Arcy, 2021).

Some authors focus their attention mainly on disputes considered by state courts. For example, American researchers Jacqueline Peel and Jolene Lin wrote that lawsuits raising issues of climate change first appeared as a phenomenon in the United States in the early 1990s (Peel & Lin, 2019). Among the earliest precedents is the decision in *City of Los Angeles and City of New York v. National Highway Transportation Safety Administration, et al*⁴, adopted by the Court of Appeals of the District of Columbia in 1990. The case involved issues related to the application of the 1970 National Environmental Policy Act. The decision in the case became the prototype for the vast majority of subsequent climate change cases in the United States.

Other researchers also refer to climate claims interstate disputes and disputes in the field of international commercial arbitration. For example, in 2021, Patrick Tieffry, a French arbitrator and professor at the Sorbonne Law School, noted that arbitration was used as a forum for resolving international disputes long before climate change became an issue, and even before the environment in its modern sense became the subject of disputes (Thieffry, 2021). The scientist emphasized that environmental damage was the subject of well-known groundbreaking arbitrations in

⁴ *City of Los Angeles and City of New York v. National Highway Transportation Safety Administration, et al.* Casetext. Available at: <https://casetext.com/case/city-of-los-angeles-v-national-highway-traffic-safety-admin> [Accessed 21th November 2021].

Trail Smelter (1941)⁵ and “Lake Lanoux” (1957)⁶. In the Trail Smelter case, the United States filed a lawsuit against Canada in the International Arbitration Court; it sued Canada for damages, as well as an injunction against the activities of the Canadian Trail Smelter Corporation for air pollution in Washington State. The Lake Lanoux case concerned the use of the waters of Lake Lanoux in the Pyrenees: the French Government intended to carry out certain works to use the waters of the lake, but the Spanish Government feared that those works would negatively affect the rights and interests of Spain in violation of the Bayonne Treaty between France and Spain of May 26, 1866.

In our opinion, both authors are right. The reality is that most researchers now give equal attention to claims filed in national state courts, and claims filed in international courts and arbitration institutions (Arbitration Court at the International Chamber of Commerce, London International Arbitration Court, etc.) (Setzer & Higham, 2021).

It should be noted that the adoption of the Paris Agreement in 2015 caused a flurry of judicial and arbitration proceedings in search of eliminating climate change effects and putting pressure on state and non-state actors to take more ambitious actions to address the climate change challenge (Savaresi & Auz, 2019). Therefore, many foreign experts and research groups have come up with various theories concerning the classification of claims in the field of climate change, or the so-called climate claims (Ermakova, 2021:56).

For example, American lawyers E. De Wit and E. McCouch identified the following five categories of climate protection claims:

- 1) claims for the protection of human rights and constitutional claims;
- 2) claims against governments;
- 3) claims in the field of private law;
- 4) claims in the field of planning and permitting;
- 5) claims in the field of administrative law and torts (De Wit & McCoach, 2021).

English authors D. Setzer and K. Higham focused on three types of climate litigations: 1) constitutional and human rights disputes; 2) claims against individuals — disputes in the field of corporate law and financial markets; 3) claims related to adaptation to climate change (Setzer & Higham, 2021).

In our opinion, the authors often confuse criteria for classifying climate claims, combining different frames of reference: **industry claims** (constitutional, corporate, financial, administrative), **claim purpose** (claims related to adaptation to climate change; claims in planning and issuance of permits) and **composition of the disputing parties** (claims against governments, claims

⁵ Trail Smelter Arbitration (United States of America v Canada) (1941) 3 RIAA 1905. Office of Legal Affairs. UNITED NATIONS. Available at: https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf [Accessed 21th November 2021].

⁶ Lake Lanoux Arbitration (France v Spain) (1957) 12 riaa 281; 24 ilr 101 // ECOLEX. URL: <https://www.ecolex.org/details/court-decision/lake-lanoux-arbitration-france-v-spain-b09cb956-2cb5-479e-ba3a-bbfd4f7b68fc/> [Accessed 21th November 2021].

against individuals). The confusion of criteria is a serious weak point and a reason for criticism. It is obvious that various sectoral claims can be filed against both governments and individuals: constitutional (protection of human rights), financial, administrative, etc. Further, we will illustrate this thesis with specific examples.

This article is focused on certain types of climate claims, depending on industry: 1) constitutional claims (including claims for the protection of human rights), 2) administrative claims (including planning and permitting), and 3) corporate claims.

Constitutional climate laws

The scope of human rights arguments in climate cases continues to grow, according to the Climate Change Laws of the World database. There are currently more than 100 (112 to be exact) cases of human rights violations identified worldwide, including in the United States, with 29 of these cases filed in 2020 and five more by May 2021. Most (93) of these cases were brought against governments, and a minority (16) sued private companies. Positive decisions were reached in 25 of these cases, and negative decisions were made in 32 cases (Setzer & Higham, 2021). As a reminder, the “Climate Change Laws of the World” database mainly includes cases brought by state national courts.

Urgenda case. One of the most notable climate change court decisions is the landmark decision of **the District Court in The Hague on June 24, 2015**. The Dutch environmental group Urgenda Foundation and 900 Dutch citizens have sued the Dutch government urging it acted more actively to prevent global climate change (Ermakova, 2020:612; Ermakova & Frolova, 2021:1798). The court found that the state had violated the “standard of due diligence” for its citizens, which, according to Art. Article 21 of the Dutch Constitution and Dutch tort law is a wrongful act. The court ruled that the Netherlands should take additional measures to reduce greenhouse gas emissions⁷. That was the first judicial decision to pin the state down to limit greenhouse gas emissions. The District Court’s ruling was upheld by a ruling by the Supreme Court of the Netherlands on 20 December 2019.

It should be noted that although the decision of the Dutch Supreme Court is not binding on courts in other countries, the principles contained in this case have significantly strengthened the position of citizens in terms of global legal and political pressure on their governments to take urgent action on climate change. The decision has had and will continue to have particular weight in the European Union as it is based in part on the provisions of the European Convention on Human Rights (ECHR).

⁷ District Court of the Hague 24 June 2015, ECLI: NL: RBDHA: 2015:7145. Rechtspraak. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7145> [Accessed 21th November 2021].

Neubauer and Others v. Germany. In February 2020, nine German youths filed a constitutional complaint with the German Federal Constitutional Court. The plaintiffs' complaint argued that the target of reducing greenhouse gas emissions established in the German Federal Climate Protection Act of December 2019 (55% of the 1990 level by 2030) is insufficient to meet Germany's obligations under the 2015 Paris Agreement. It was further argued that "insufficient aim" violates the rights of individuals (the plaintiffs) to human dignity, life and physical integrity protected by Articles 1 and 2 of the German Constitution in conjunction with article 20a of the Constitution, which provides that Germany must protect the natural foundations of life, bearing in mind its responsibility to future generations.

In the judgment published on April 29, 2021, Germany's Federal Constitutional Court joined other courts around the world in criticizing governments for failing to take effective actions against climate change. The court ruled that the German Climate Protection Act of December 2019 was insufficient to fulfill Germany's obligations.

The principle of sustainable development underlies reasoning that requires political action, considering the consequences for present and future generations (Bäumler, 2021). The court ruled that the government must amend the Federal Law on Climate Protection with updated reduction targets by December 31, 2022.

Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy. In November 2016, Greenpeace Nordic Association, and the environmental group Nature and Youth filed a lawsuit with the Oslo District Court against the Norwegian government, arguing that the government violated Article 112 of the Norwegian Constitution by their decision to grant licenses for deep-sea oil production⁸. Article 112 of the Constitution provides that "everyone has the right to an environment conducive to health and to a natural environment whose productivity and diversity are preserved". It has been argued that Article 112 gives the Court jurisdiction to invalidate the issuance of deep-sea licenses because the decision violates the rights that this Article is intended to protect. The plaintiffs requested the relevant orders.

In January 2018, the Oslo District Court ruled in the government's favor. The plaintiffs appealed this decision to the Borgarting Court of Appeal in Oslo, arguing that the District Court erred in its interpretation of section 112 of the Norwegian Constitution. In January 2020, the Borgarting Court of Appeal upheld the District Court's decision. The plaintiffs appealed against this second ruling in February 2020. In December 2020, the Norwegian Supreme Court ruled in favor of the government. The Supreme Court ruled that Article 112 of the Norwegian Constitution protects individuals from the risks of climate change but upheld the deep-sea oil licenses and ruled that the Norwegian government did not violate Article 112 of the Constitution.

⁸ Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy. Creative Commons Attribution-ShareAlike 4.0 International. 4 May 2021. Available at: https://climatelitigation.miraheze.org/wiki/Greenpeace_Nordic_Ass%E2%80%99n_v._Ministry_of_Petroleum_and_Energy [Accessed 21th November 2021].

The court clarified that the uncertainty surrounding future emissions from exported oil is insufficient to prevent granting licenses.

After failing in national courts, in June 2021, a group of Norwegian climate activists, Greenpeace and Young Friends of the Earth, applied to the European Court of Human Rights (ECHR). The petition claims that Norway's plans for additional exploration and drilling for oil in the Arctic deprive young people of their basic human rights (De Wit & McCoach, 2021).

The victories of climate activists in human rights lawsuits led to an interesting phenomenon: lawyers began to study the issue of the possibility of considering human rights claims by international commercial arbitration. Traditionally, such claims have not been the subject of commercial arbitration. But in 2011, the Human Rights Council of the UN General Assembly published Guiding Principles on Business and Human Rights⁹. Various jurisdictions have implemented the UN Guiding Principles in their national legislation or are in the process of doing so. For example, under the 2017 French Vigilance Law (*Loi de Vigilance*)¹⁰, multinational corporations domiciled in France are liable to stakeholders for damages resulting from violation of legal obligations related to human rights. Similar bills are being developed in the European Union and Germany. However, these projects did not pay much attention to arbitration.

In fact, some of the unique advantages of international arbitration, such as the right of parties to appoint a tribunal, procedural flexibility, efficiency in obtaining evidence and ability to maintain confidentiality, ideally fit the special needs of disputing parties in cases related to “protecting human rights in business” (Business Human Rights (BHR)). It is even more striking that arbitration has not yet played a prominent role in discussions connected to ensuring the observance of human rights in business, German lawyer N.J. Saugg noted in 2021 (Zaugg, 2021).

Administrative climate claims

Notre Affaire à Tous and others v France. On December 17, 2018, four non-profit organizations Notre Affaire à Tous, Fondation pour la Nature et l'Homme, Greenpeace France and Oxfam France provided legal notice (*Lettre préalable indemnitaire*) to the French government, arguing that its failure to take appropriate actions to effectively tackle climate change violates its statutory duty to act. This “letter” initiated the first round of legal proceedings against the French government for inadequate actions in the fight against climate change¹¹.

⁹ United Nations Guiding Principles on Business and Human Rights. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [Accessed 21th November 2021].

¹⁰ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1). Legifrance. Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> [Accessed 21th November 2021].

¹¹ Notre Affaire à Tous and Others v. Total. Climate Change Laws of the World. January 28, 2020. Available at: https://climate-laws.org/geographies/france/litigation_cases/notre-affaire-a-tous-and-others-v-total [Accessed 21th November 2021].

This letter is part of a lawsuit known as “recours en carence fautive”. The plaintiffs argued that the French government’s failure to take appropriate measures to effectively tackle climate change violated its statutory duty to act. On February 15, 2019, the French government rejected the plaintiffs’ letter (Ermakova, 2020:617—619).

On March 14, 2019, the plaintiffs filed a claim with the Paris Administrative Court (Tribunal administratif de Paris). The petition accompanying their initiative, *L’Affaire du siècle*, or Matter of the Century, has received a record 2.1 million signatures. The plaintiffs asked the court to order the government to pay compensation for the damage caused and to take measures to address the problem of climate change.

On February 3, 2021, the Paris Administrative Court issued a judgment. The court found that the government caused environmental damage; however, the government was not ordered to pay compensation. The court also recognized the existence of non-pecuniary damage and ordered the government to compensate each claimant for damage caused by the government’s failure to act. The court also recognized the non-pecuniary damage and ordered the government to compensate each claimant for damage caused by the government’s failure to act. The court indicated that, within 2 months of notifying the parties of the judgment, additional information should be provided on how the government plans to achieve its change goals before deciding on measures to be taken by the government to tackle climate change (De Wit & McCoach, 2021).

Sharma v Minister for the Environment¹². In May 2021, a judge in the Australian Federal Court handed down a landmark decision in the *Sharma v Minister for the Environment* climate change case, which received a lot of backlash both in Australia and internationally (Rock, 2021). This was a negligence suit by the Australian Minister of the Environment (hereinafter the Minister), initiated in connection with an application to expand a coal mine in the NSW region. Vickery Coal Pty Ltd planned to expand the scope of its existing coal mining permit. The environmental impact of this application meant it was a “controlled action” under Australia’s Environment and Biodiversity Act 1999, which stated that a permit could not be issued without the approval of the Minister. The case was brought by a group of eight children, led by A. Sharma, against the federal minister to protect young people from future harm that could be caused by the proposed New South Wales Coal Expansion Project (Vickery Project).

On 8 July 2021, the Court ruled that the Minister must take care to avoid bodily harm or death to Australian children from CO₂ emissions when deciding whether to approve the Vickery Project. On July 16, 2021, the minister appealed this decision (De Wit & McCoach, 2021).

¹² *Sharma v Minister for the Environment*/Environmental Law Australia. Available at: <http://envlaw.com.au/sharma/> [Accessed 21th November 2021].

The Sharma decision is fundamentally changing understanding of government liability and its individual members in the context of climate change. The potential recognition of the duty of “caring for future generations”, if supported by courts in other countries, may become a prerequisite for decision-making not only for governments, but also for private actors to pursue new developments and projects.

However, two weeks after the Court’s ruling in *Sharma v Minister for the Environment*, the Minister granted permission to expand another major coal mine, the Mangula mine in New South Wales. Australian human rights activists have called it Groundhog Day. They argued that “the near-word-for-word repetition of formulaic reasoning in approving the expansion of two mines is not accidental, but deliberate strategy (developed by agency officials and lawyers advising the minister) to minimize the possibility of a successful judicial review of a climate change court decision”.

Corporate climate claims

The Milieudefensie et al. v Royal Dutch Shell plc. On May 26, 2021, the District Court of The Hague ruled for the first time in class actions brought by several non-governmental organizations (NGOs) (including Friends of the Earth (Milieudefensie)) against a private company, Royal Dutch Shell plc (Shell)¹³. The NGOs argued that Shell should have reduced its total CO₂ emissions by at least 45% from 2019 levels by the end of 2030 (the “target reduction”). The court ruled in favor of non-governmental organizations and ordered Shell to achieve the target reduction. **This is the first time when a court has ordered a private company** to cut CO₂ emissions in line with the climate targets included in the Paris Agreement.

As the Dutch scholars Chiara Mackey and Josephine Van Zeben (Wageningen University, Netherlands) have emphasized, nation-states are still the only full-fledged subjects of international law, except for corporations, which are not considered to have direct obligations under international law in the field of human rights. Accordingly, all existing international human rights treaties are stipulated by states for states, and corporations cannot be defendants in any international human rights body or court. At the same time, the actions of transnational corporations have significant social and environmental impacts. In addition, these corporations enjoy broad rights under international investment law (Macchi & Van Zeben, 2021).

A number of regional and international initiatives have sought to bridge the resulting governance gaps with regard to the transnational activities of complex business conglomerates and corporate networks. However, attempts to impose direct

¹³ Milieudefensie et al. v Royal Dutch Shell plc. ECLI:NL:RBDHA:2021:5339. Uitspraken. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> [Accessed 21th November 2021].

international human rights obligations on corporations, including those under the auspices of the UN, have proved politically controversial and ultimately failed. Even the United Nations Guiding Principles on Business and Human Rights are formulated as a traditional international instrument that is binding on states and not on private actors.

The 2021 Milieudefensie ruling by the Hague Court reflects a general trend towards increased scrutiny by national governments over the environmental impacts of multinational corporations. This decision obliges Royal Dutch Shell (RDS) to strengthen its corporate environmental due diligence policy and the responsibilities set out in the United Nations Guiding Principles on Business and Human Rights, however none of these responsibilities are formally enforceable (Macchi & Van Zeven, 2021).

Case merits: In 2019, Milieudefensie, on behalf of itself, six other non-governmental organizations and over 17,000 Dutch nationals, filed a class action lawsuit in the District Court of The Hague against RDS, the parent company of a global network of subsidiaries engaged in oil and gas production and distribution. The plaintiffs argued that RDS is obligated, based on an unwritten standard of care, under section 162 of the Dutch Civil Code, to help prevent dangerous climate change. In light of this commitment, the plaintiffs requested the Court to order RDS to reduce CO₂ emissions by 45 per cent by 2030 compared to 2019, including emissions based on its own business operations as well as those generated through the sale of its energy products. The lawsuit was directed, inter alia, against Royal Dutch Shell as the parent company of the Shell group and the entity that sets the overall policy for the entire group. RDS's corporate policy has been identified by the plaintiffs as "dangerous and disastrous ... in line with the global climate target to prevent dangerous climate change to protect humanity, the human environment and nature".

With regard to the choice of applicable law, the main discussion point was the interpretation of "event causing damage" within the meaning of Article 7 of the EU Rome II Regulation¹⁴. The court found that RDS corporate policy in the Netherlands constituted the event allowing to apply Dutch tort law. However, the Court recognized that due to the nature of "environmental liability", situations may arise where multiple events lead to damage in several countries. This means that more than one national law may be enforced, which could have implications for other cases against corporations acting internationally.

The judgment of the Court is based on the tort law of the Netherlands (Article 6: 162 of the Dutch Civil Code). In its assessment of whether Shell acted in defiance of the unwritten "duty of care" within the meaning of this Civil Code provision, the Court referred to so-called "soft provisions" of international law, such as the United

¹⁴ 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). EUR-lex. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864> [Accessed 21th November 2021].

Nations Guiding Principles on Business and Human Rights, and took into account all the circumstances of the case, including: (a) the consequences of Shell's CO₂ emissions; b) the impact of Shell on CO₂ emissions; c) provisions for the protection of human rights.

Considering this, the Court noted that if Shell did not achieve the “reduction target” then the company would act contrary to its unwritten “duty of care” and therefore ordered Shell to achieve the “reduction target”. The Court ruled that Shell 1) must satisfy an “obligation of result” in terms of the activities of the Shell group; this means that Shell must ensure that the companies in its group achieve the “reduction target”, 2) must undertake a “significant best-efforts obligation” in relation to Shell's business partners, including end users, which entails taking the necessary steps to eliminate or prevent a significant risk arising from CO₂ emissions from business partners of Shell, and use their influence to limit as much as possible any long-term consequences of such emissions.

Shell announced in a July 20, 2021 press statement that Shell would appeal the court ruling (De Wit & McCoach, 2021).

However, Shell chose to act differently. In November 2021, reports emerged that “the oil and gas company Royal Dutch Shell decided to change its shareholding structure, become a UK tax resident instead of the Netherlands and shorten the name simply to “Shell”. These are the most significant changes in the company since its formation in 2005. The Dutch government said it was “unpleasantly surprised” by the company's statement”¹⁵. Therefore, we fully agree with the opinion of K. McKee and J. Van Zeben that the *Milieudefensie v RDS* decision, similar to the *Urgenda* decision, can be regarded as a means of accelerating and ensuring fulfillment of obligations agreed within the framework of the UNFCCC process. At the same time, as it was especially clear in the *Urgenda* case, these decisions can have complex links to national and regional climate policies that reflect hard-won agreements on political goals.

Okpabi and others v Royal Dutch Shell Plc. On 12 February 2021, the UK Supreme Court ruled on the case of *Okpabi and others v Royal Dutch Shell Plc*¹⁶. The case concerned two negligence claims brought by Nigerian citizens against Royal Dutch Shell (based in the UK) and its Nigerian operating subsidiary that operated the pipeline. The plaintiffs argued that they suffered damage as a result of the allegedly negligent operation of the pipeline and that Shell was under an obligation to take care of the alleged environmental damage and human rights violations due to its alleged control of its subsidiary.

¹⁵ Tairov R. Shell zaplanirovala samye krupnye korporativnye izmeneniya s 2005 goda // Forbes. 15.11.2021. Available from: https://www.forbes.ru/biznes/446047-shell-zaplanirovala-samye-krupnye-korporativnye-izmeneniya-s-2005-goda?utm_source=facebook&utm_medium=social&utm_campaign=neftegazovaya-kompaniya-royal-dutch-shell [Accessed 21th November 2021]. (in Russian).

¹⁶ *Okpabi and others v Royal Dutch Shell Plc*. Case ID: UKSC 2018/0068. The Supreme Court. Available at: <https://www.supremecourt.uk/cases/uksc-2018-0068.html> [Accessed 21th November 2021].

Attorney Claire Connellan (White & Case firm) emphasized that the UK Supreme Court issued the latest in a series of landmark decisions on parent company liability under UK law in lawsuits addressing environmental and human rights violations (Connellan, 2021). Unanimously overturning the decision of the Court of Appeal, the Supreme Court concluded that, based on the degree of control and de facto management, it could be argued that the parent company has a duty of care for the alleged environmental damage and human rights violations by Shell's Nigerian subsidiary.

Case merits. More than 40,000 citizens of the two affected Niger Delta regions (the plaintiffs) have filed a class action lawsuit against Royal Dutch Shell (RDS) and one of its Nigerian subsidiaries, Shell Petroleum Development Company of Nigeria Ltd (SPDC). The plaintiffs argued that oil spills and pipelines pollution by SPDC caused significant environmental damage, as a result of which natural sources of water cannot be safely used for drinking, fishing, agricultural, washing or recreational purposes.

The plaintiffs attempted to sue the parent company, RDS, directly responsible for the actions of its subsidiary, alleging that RDS had a duty of care for environmental damage. RDS has breached this obligation by failing to remedy the significant harm caused to the plaintiffs' communities. The plaintiffs also argued that RDS exercised control over SPDC and its operations, and therefore RDS is responsible for the actions of SPDC, including through RDS's corporate policies, which, on their point of view, in their point of view, are related to the damage caused.

Both the High Court and the Court of Appeal ruled in favor of the defendants on the grounds that the plaintiffs failed to present a duly reasoned argument that Royal Dutch Shell had a duty of care for the alleged environmental damage.

Having considered the disputable issue of plaintiffs' arguments and applying the general principles of negligence, the UK Supreme Court concluded that RDS (the respondent) had failed to prove that the plaintiffs' arguments were "demonstrably untrue or unsupported". On the contrary, the Supreme Court is convinced that there is a "real issue to be tried". The court found the evidence particularly compelling that the Shell group was organized along business and functional lines rather than according to a corporate form (i.e., a separate corporate entity).

This ruling emphasizes that a parent company incorporated in England may be liable in English courts for claims brought by non-UK plaintiffs (where it can be argued that the parent company has a duty of care in relation to environmental damage incurred by the actions of its subsidiary). It also shows that the limit for plaintiffs to file such claims in English courts is lower than previously thought (De Wit & McCoach, 2021).

Multinational corporate groups need to have a clear understanding of how and to whom responsibility for management functions across the group is delegated. According to Claire Connellan, this issue will be in the focus of attention of companies operating not only in the UK, but also in the European Union, as the number of lawsuits where plaintiffs seek to hold companies accountable for damage

to human rights and the environment, as well as in connection with the Draft of new EU Corporate Sustainability Reporting Directive (CSRD)¹⁷ requiring mandatory due diligence on human rights, environment and good governance throughout the value chain is growing (Connellan, 2021).

Legal doctrines in climate claims

Due Diligence is a core standard of international law that encompasses a wide range of due diligence terminology, but there is no legally binding definition to be found anywhere (Monnheimer, 2021). Scientific writings use a variety of terms to denote due diligence, including “doctrine,” “requirement,” “duty,” “obligation,” or “standard,” noted Polish author D. Kulesza (Kulesza, 2016).

The doctrine of a state’s “due diligence” for its citizens has been used by many courts to reason their decisions on climate disputes. For example, the District Court of The Hague, in the *Urgenda* case, found that “the state had violated the ‘standard of due diligence’ for its citizens, which is illegal under Dutch tort law”. Similar arguments were used by the Federal Court of Australia in its decision in the case **Sharma v Minister for the Environment** in May 2021.

The doctrine of “due diligence” is at the heart of the United Nations’ Guiding Principles on Business and Human Rights, which set international benchmarks for addressing corporate responsibility for human rights violations (Bonnitcha & McCorquodale, 2017). This was clearly demonstrated in the decision of the District Court of The Hague in the case *Milieudefensie et al. v Royal Dutch Shell plc* in May 2021. The due diligence standard was the basis for the UK Supreme Court decision in the case of *Okpabi and others v Royal Dutch Shell Plc*, delivered in February 2021.

The Public Trust Doctrine is a common law doctrine that stems from Roman law. It was based on the idea that certain common properties such as rivers, seashore, forests and air are under the tutelage of the government for free and unimpeded use by the general public. According to Roman law, these resources either belonged to no one (*Res Nullius*), or belonged to all (*Res Communis*). According to the doctrine of “public trust”, the state holds natural resources in trust and, as a trustee, is obliged to use these resources rationally and for the benefit of citizens (Sagarin, Turnipseed, 2012).

In climate protection cases, the “public trust doctrine” is best known for the landmark constitutional climate lawsuit *Juliana v. United States*¹⁸. In 2015, 21 young people, represented by Our Children’s Trust, filed a lawsuit against the United States in the Federal District Court for the District of Oregon. The plaintiffs argued that the

¹⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. COM/2021/189 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189> [Accessed 21th November 2021].

¹⁸ *Juliana v. United States*. Climate Change Litigation Databases. 2021. Available at: <http://climatecasechart.com/climate-change-litigation/case/juliana-v-united-states/> [Accessed 21th November 2021].

US government knowingly violated their constitutional rights to life, liberty and property, and violated the government's sovereign duty to protect public resources, that is, the doctrine of public trust, by encouraging and permitting the burning of fossil fuels. As of June 2021, the issue of an amicable settlement of the dispute is under discussion (Peel & Lin, 2019).

The doctrine of legitimate expectations. As such, “legitimate expectations” claims are based on the assumption that government agencies must act consistently and not override their own decisions. Individuals who reasonably rely on statements by a government agency should have the right to enforce them; if necessary through the court. For a “legitimate expectation” to arise, a government statement must be clear, unambiguous and unconditional. Interference with “legitimate expectations” may in some cases be justified by public policy considerations (Tomlinson, 2020).

A stable and predictable legal environment is one of the main factors in the investment process. This is especially important in the energy sector, with its characteristic long-term investments that require significant financial costs (Krzykowski, 2021). As an example of climate lawsuits based on the doctrine of “legitimate expectations”, one can cite the so-called “solar cases”, initiated over the past 10 years by investors against Spain, Italy and the Czech Republic. These disputes focus on the question of whether governments can adjust incentives such as subsidies and feed-in tariffs in the renewable energy sector to the detriment of investors, after those investors have relied on these subsidies to make their investments. Among the “solar cases” brought against the Czech Republic are the following: “Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.à r.l. v. Czech Republic” (2013); “Voltaic Network GmbH v. Czech Republic” (2013); “ICW Europe Investments Limited v. Czech Republic” (2013) and others. A number of “solar cases” were also initiated against Italy, including “Veolia Propreté SAS v. Italy” (ICSID Case No. ARB / 18/20); “VC Holding II S.à r.l. and others v. Italy” (ICSID Case No. ARB / 16/39); “Eskosol S.p.A. in Liquidazione v. Italy” (ICSID Case No. ARB / 15/50) and others.

Conclusion

The study showed that judicial and arbitration proceedings on climate issues have become an effective tool used by citizens and non-governmental organizations to ensure compliance with or strengthen the climate commitments made by governments in accordance with the 2015 Paris Agreement.

The author came to the following conclusions:

1) climate disputes are any disputes arising in connection with the consequences of climate change and climate change policies provided for by the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement;

2) claims in the field of climate change protection include claims filed with national state courts and other claims filed with international courts and international arbitration institutions (international arbitrations);

3) it is possible to distinguish certain types of climate claims depending on their industry affiliation (substantive classification of claims): a) constitutional claims (including claims for the protection of human rights); b) administrative claims (including planning and permitting); c) corporate claims.

4) in most cases in the field of climate protection, the arguments of the plaintiffs and the conclusions of courts and arbitrations are based (except for international and national regulations) on various doctrines: the doctrine of “due diligence”; the doctrine of “public trust”; the doctrine of “legitimate expectations”.

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