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ESG TORT LIABILITY: BELGIUM AND THE NETHERLANDS

Hans De Wulf –Ghent University -Leuphana Conference "sustainability in Corporate law"- 18.11.2022

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ESG AND TORT IN GENERAL

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7 TYPES OF LIABILITY

- 1. **Company/Parent** liability for **torts committed by itself** through/at the level of a subsidiary (Vedanta, UK and Dutch Shell Nigeria cases)
- 2. **Parent** liability for tort committed **by subsidiary**
  - No examples known to me in ESG context
- 3. **Company** liability for **knowingly doing business** with partner (sub or not) that creates **unacceptable risks** (Maran)

7 TYPES OF LIABILITY

- 4. Statutory creation of “**Duty to know”** about “adverse impacts” and to intervene to mitigate them throughout value chain=> tort liability **of company**, again for own negligence
  - Here CSDDD or (older) national laws create this duty
    - Loi de vigilance, Lieferkettengesetz, Dutch bill on “zorgplicht” (‘duty of care’)
    - Within group, this can amount to a *Konzernleitungspflicht*

7 TYPES OF LIABILITY

- ***5. Director*** liability towards “third parties”, through tort or derivative action (outsider buys shares), for ‘allowing’ company to commit a tort of type 1
- **6. True oversight failure liability of directors**, because company failed in its due diligence obligations
  - In 5, company directly caused damage, director liable for lack of intervention/oversight; in 6 “only mistake” of company may have been to perform negligent due diligence; director liable for lack of oversight of due diligence

7 TYPES OF LIABILITY

- 7. **merger of tort and human rights** in climate litigation against private firms
  - Paradigmatic: Shell Milieudefensie case= **Shell climate case**, district court The Hague May 2021
- **Negligence, which is a *standard* to judge behaviour, is transformed into a *duty* to behave carefully at all times**
- The content of this duty is fleshed out by human rights such as the right to life
- By misleadingly using the rhetoric of fundamental ***rights*****,** the judge pretends plaintiff can invoke a right= **trump** (as Dworkin called it) while in reality the judge engages in **a *political* balancing of interests to *create* a rule** which did not exist prior to court proceedings
  - Such balancing of interests should be left to parliament and perhaps constitutional courts (which are political courts), not to ordinary courts,
    - "**gouvernement des juges**"

BELGIAN DEVELOPMENTS

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2021 MP BILL

- Bill along lines of CSDD Directive was introduced on April 2 2021
  - Not by government, but by MPs of government parties
- But when draft of CSDD Directive was published, this was put on hold, and insiders tell me it will not be revived before/unless CSDDD is adopted

STRIKING ELEMENTS OF NOW DEFUNCT BILL

- As soon as “link” was shown between corporate behaviour and adverse impact, it would be presumed that company had acted negligently and caused the harm; but company could reverse this presumption= reversal of burden of proof
- Belgian courts would have had jurisdiction over human rights and climate torts worldwide, if a large company with *activities* in Belgium was involved

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CLIMATE LITIGATION

- Not really related to CSDD issues
- Belgian Climate Case: brought by NGO ClientEarth in 2015 against federal and regional goverments
- 2021: court of first instance Brussels rules NGO and Belgian citizens, but not trees, have standing to sue government for lack of action on climate
- Laclustre Belgian climate plan is a violation of right to life and private life of plaintiffs
- But court rules that it may not impose a specific climate plan, with specific emission redictuion targets, onthe governement: constitutional separation of powers

CLIMATE LITIGATION CONT'D

- April 2021: Client Earth sues National Bank of Belgium, because as part of quantitative easing, it also buys bonds of polluting fossil fuel firms= illegal subsidy
- Brussels court of first instance dismisses claims, but NGO appeals and demands Brussels court as for preliminary ruling of CJEU

BELGIAN TORT LAW

- Modeled on French law as it was in 1804
- Violation of statute is negligence
  - Eg statutory due diligence requirement
- Damage concept is broad: includes pure economic loss,
  - Not limited to physical harm or certain “legal goods”;
- Causation: in theory equivalence theory
- No concept of proximity, or relativity, no requirement of pre-existing duty, no idea that you can only rely on statute for tort damages if you belong to group of people it intended to protect

LIABILITY OF COMPANY

- *Okpabi v. Shell* type of liability very feasible under Belgian law
  - As far as substantive law is concerned; conflicts of law approch is another matter
  - Because, I remind you, this is *not* liability of parent for tort of subsidiary, but for own tort (intervention in daily management of pipelines owned by sub)

VIOLATION OF STATUTORY (E.G. DD) DUTY

- Statutory due diligence duty: non-respect is tort of negligence for which any victim can claim damanges
  - Problem: causation (next slide)
- If you did not have statute, there would be no company liability:
  - No general duty to supervise subsidiaries and intervene
  - No general duty (or right) to know what's happening at level of sub
    - **Group wide compliance efforst are a reality and a duty; but not reflected in *civil liability for damages* (but in injunctions, fines, …*)***
  - No vicarious liability for business partners, because one does not control them

CAUSATION IN DD CASES

- Cases where company does not itself cause damage, but ”allows” subsidiary or business partner to cause harm
- Is there sufficient causal connection between damage suffered by eg farmers and this *lack of oversight?*
- 1950s case: “algemene zeepziederij der Vlaanderen” (“Flanders laundry soap services”)

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‘FLANDERS LAUNDRY SOAP” CASE

- Before “serious loss rule” and before wrongful trading were introduced into legislation
- directors held liable towards creditors
- Court of cassation: factfinding court may use presumption that if directors had exercised due oversight and called a general meeting, creditors would not have been left unpaid= presumption of causal link between lack of oversight and damage of outsiders

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- Flanders laundry soap case can be applied to company in relation to subsidiary or business partner if there is statutory DD diligence requirement
- But can also be applied to directors who do not perform sufficient oversight of their own company

“UCO” CASE

- chair and CFO of parent held criminally liable because of pollution at level of sub
- Chair/CFO argued:
  - Two of us had no power to intervene, only board
  - Board never discussed problem
- Court:
  - You knew about problem at level of sub
  - Problem could have been solved by allocating budget
  - You, chair, should have put it on agenda of board, so that board could take decision on budget
  - By failing to do so, you have *aided and abetted* the company in its violations of environmental rules
- = oversight liability for willful blindness
- Could also be applied to parent in relation to sub that causes harm

DIRECTOR LIABILITY TOWARDS THIRD PARTIES

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TWO POSSIBLE ROUTES

- A. derivative action: ngo buys some shares, turning what is an outsider into a shareholder with standing to bring derivative claim; cf ClientEarth letter to Shell directors
  - But some EU jurisdictions have threshold requirements eg Belgium: 1%=> not realistic
  - Requires damage to company=> not obvious in most “ESG liability” cases
- B. based on tort law

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TORT ROUTE

- Never forget: duty of company ≠ duty of director; violation of corporate duty ≠proof that directors are to blame
- Tort requires at least fault, damage, causation
  - Plaintiff must prove all three <-> injunctive relief cases
- In tort, “fault” is only violation of duty/rule incumbent on *everybody*, not duty of director towards company only

TORT ROUTE

- Mainly realistic in “French” tort systems, that have eg. no proximity/duty requirements, do not limit damage to certain “Rechtsgüter”-violations, etc.
- Eg. Belgium
  - France itself: directors only liable in tort towards outsiders for “fault which can be distinguished from their duties (towards the company) as directors” (“f. détachable”)
  - Many legal systems (but not Benelux) seem to make tort claims against directors very difficult, except fraud

2 REALISTIC TORT SCENARIOS

- 1. Company has clear “bright line rule” obligation towards (/also towards) outsider and directors have either prevented company from meeting this obligation or manifestly not done enough to enable company to meet this obligation
  - Since we have a clear obligation, business judgement- like rules will not apply
  - Eg company subject to very clear CO2 emissions reduction scheme and directors do not enable company to stick to this schedule, eg do not budget efforts
  - Cf. UCO case

“GEVAARZETTING”, RISK CREATION

- 2. Directors are aware or should be aware that corporation causes manifest risk for outsiders and have not done enough to mitigate this risk
  - Or are negligently unaware of it because of manifestly insufficent compliance framework organised by company under their leadership
  - Here “soap case” is relevant

NETHERLANDS

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CASE LAW

- Okpabi (UK) mirrored in Dutch Shell Nigeria cases (Oguru et al.)
- Shell climate case: duty of top holding to make sure whole group (hundreds of subs) reduces its emissions
  - “obligation of result”
  - For scope 3 (client) emissions: best effort required, no guarantuee of result

DUTCH BILL (NOT ADOPTED YET)

- October 2022 Bill on “responsible and sustainable international entrepreneurship”
  - Intention is to adopt this and not wait for final CSDDD (“Europe too slow”)
  - If adopted, Dutch law on DD for child labour will be revoked
- Same goal as CSDD Directive
- Introduces duty of care concerning environment and human rights for every “large” legal person and regulated financial firm

DUTCH BILL

- Will also be applicable to foreign firms that are active in the Netherlands or sell a product on the Dutch market
- Many unclarities, eg definition of “firms” that would be subject to the law:
  - Definition distinguishes 3 types of firms and then adds “*including subsidiaries*”
    - So this looks like an indirect, “hidden” way of imposing duties of parent on subsidiaries *and* make parent responsible for subsidiaries
  - Sometimes duty to end “own activities”
    - But what is “own activity” for a parent company? Does it include activities of subsidiaries ?
- Due care duty may be met “together with other firms”: does this allow subs to delegate duties to parent (and its board?)

DUTCH BILL: SANCTIONS

- Firm that creates adverse impacts, has to remedy those
  - One possibility among several is: paying damages
- Administrative sanctions by supervisory authority: injunctions; admin. fines; publication of sanctions
- Criminal sanction
- bill wants to facilitate civil claims

DUTCH BILL: CIVIL CLAIMS

- Netherlands have legislation on collective public interest litigation –eg to protect the environment- by Dutch foundations or associations
- Bill: if such a public interest claim brought, it will be deemed to have sufficient links with Netherlands for Dutch courts to be competent
- If (any) plaintiff claims damages for adverse impacts and alleges facts justifying a presumption that there is a connection with a firm, then the firm has the burden of proof that it did not act contrary to the rules (duty of care) of the Act (Bill)
  - This (the Bill says) is a directly applicable mandatory rule in the sense of art. 16 Rome II Regulation

“RESERVE SLIDES” NOT TO BE SHOWN, PERSONAL BACKGROUND MATERIAL

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THESIS I

- cases like *Maran, Vedanta, Shell Nigeria*, where parents are held liable for torts at level of sub/business partner, are normal application of regular tort law
  - Are not cases in which parent is held liable for tort committed by subsidiary or business partner
  - Do not deviate from rules on limited shareholder liability
  - Do not deviate from *Trennungsprinzip/*asset partitioning
- But European (at least UK and Dutch) courts construe rules on jurisdiction in sometimes unorthodox way in order to accept jurisdiction

THESIS II

- Climate change/Co2 reduction litigation: transformation of tort law:
  - From an instrument to award damages
  - To the basis of precautionary injunctive relief
  - In general interest litigation by ngos
  - That turns courts into quasi-regulators
  - In a way that is incompatible with both traditional tort law and, more importantly, the *trias politica* (separation of powers, Montesquieu)
  - Enabled by insertion of human rights-content into the negligence standard
    - Which is itself transformed from a *standard* to judge behaviour into an enforceable *duty* to at all times behave “carefully”, irrespective of whether damage and causation have occurred/been proven

GROUP AND VALUE CHAIN LIABILITY

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MARAN, EWCA 10 MARCH 2021

- Maran is one of 3 subs in UK shipping group
- Sells, as broker, oil tanker owned by other sub to B (not part of group), in order to have it dismantled
- B delivers ship to Zuma, Bangladeshi company
- Zuma dismantles ship, employee of Zuma dies
- Maran successfully sued in UK for negligence by widow of deceased Zuma employee

MARAN CONTINUED

- Decisive for UK judge: Maran knew that B would deliver ship to Zuma and knew that Zuma had notoriously bad health&safety record, so that death of employee was foreseeable

- Maran-type liability also possible- even easier for lack of proximity requirements- under French –system tort law
  - In France itelf: DD legislation=> cases against eg Total
- Is not vicarious liability
- Is liability for own negligence: *culpa in eligendo*: knowingly doing business with notorious-risk creator is fault (negligence) if risk is likely to materialize as a result of business assignment
  - Damage calculation: take into account own causal role of Zuma (employer)

VEDANTA, UKSC

- Sub of UK parent exploits copper mine in Zambia
- Pollutes water used for drinking and irrigation=Damage to human health, cattle and crops
- 1800 Zambian farmers successfully sue UK parent in UK based on tort of negligence
- “Vedanta” would then be applied in “Opkabi v. Shell” (Shell Nigeria cases in UK and Netherlands)

FINDINGS IN VEDANTA AND SHELL NIGERIA

- "control" in the accounting directive sense is not relevant for liability
- Possibility to control operations of sub does not give rise to duty to intervene at level of sub
- But when fact-finding shows: parent took over operational management: liability for (own) negligence
- 4 "Vedanta routes" for parent liability

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VEDANTA ROUTES

- 1. parent company takes over the management or joint management of the relevant activity of its subsidiary.
- 2. parent provides defective advice and/or promulgates defective group-wide safety/environmental policies
- 3. parent promulgates group-wide policies and takes active steps to ensure the implementation of those policies by its subsidiary.
- 4. parent company holds out that it exercises a particular degree of supervision and control of its subsidiary.

CONCLUSIONS

- Maran and Vedanta would be possible in many jurisdictions
- Are about liability for own negligence
- Maran: *culpa in eligendo*: knowingly doing business with a partner that will very likely cause serious damage (= assuming risk-creation) is own negligence
- Vedanta: committing a tort using the assets and staff of a subsidiary
  - *Not* a case of vicarious liability or liability for sub's tort
  - Not relevant that physically the tort was "implemented" at the level of a separate legal person

GROUP COMLIANCE DUTY?

- Vedanta and Shell were about active intervention by parent at level of subsidiary
- What if sub itself creates adverse impacts, without parent intervention, but parent did not know
- Then potential liability in two cases:
  - Wilfull blindness, cf. Belgian UCO case: CFO and chair know about pollution issue at sub but refuse to discuss it at parent board level and thus do not enable board to tackle problem=>criminally liable
  - Group compliance duty = duty to know (and then act)

IS THERE A GROUP COMPLIANCE DUTY?

- Not generally speaking; no *Konzernleitungspflicht*
- But: common law duty of parent board to have system to warn about risks that could be detrimental to shareholders of parent
- But: sectoral regulation creates it (eg banking)
- Draft EU CSDD Directive will create such a duty (for company) even including business partners outside group

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INFLUENCE OF CSDD STATUTES

- Violation of DD duties is of course own negligence for holding company
- Even so two approaches possible:
  - French approach: *stimulating* private enforcement
    - Also draft EU directive, but less aggressive
  - German approach: trying to *exclude* tort liability and exclusive focus on public enforcement
    - German scholars think this wil not prevent § 823 suits

HUMAN RIGHTS AND TORT: BROTHERS IN ARMS? OR ENEMIES OF THE STATE ?

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SHELL CLIMATE CASE (MAY 2021)

- Injunctive relief sought by ngo representing the population of the Netherlands, based on collective interest litigation possibility in Code of civil procedure
- “district court” orders Shell to reduce CO2 emissions (scope 1 through 3) by 45% compared to 2019 by 2030
- Legal basis: Dutch statutory provision on tort of negligence

SHELL CLIMATE CASE

- Standard of care fleshed out by:
  - International *soft* law, some of it directed also at companies and even subscribed to by Shell
  - Right to (private) life as protected by arts 2 and 8 of European Convention on Human Rights (ECHR)
    - Earlier case law (Dutch and EctHR): this also entails protection against climate change that affects health/makes life unbearable

WHAT'S WRONG WITH THE SHELL CLIMATE JUDGMENT ?

- Too much for 20 minutes
- Note: case based on tort of negligence, but "only" injunctive relief demanded => plaintiffs and court can avoid difficult questions about damages and causation
- Relief granted because Shell's policies *threatened* (= potentially, not yet actually) to lead to violation of CO2 emission reduction norm *invented* by court based on duty of care entailed in negligence concept

WHAT'S WRONG WITH THE SHELL CLIMATE JUDGMENT ?

- Court acts as creator and enforcer of regulation
  - Is fundamentally *different* from regulation-like *effect* of private enforcement through tort *damages* claims
    - Eg in asbestos, tobacco, opioids litigation
- 'Milieudefensie' and other ngos have launched/threaten to launch dozens of similar claims worldwide
  - Eg against German carmakers in order to stop production and sale of combustion engines by 2030

MY MAIN OBJECTION (POLICY)

- Judgement plays rhetorical trick by framing case as if judge applies human *right* (=trump, as we know since at least Dworkin) in order to operationalize the *standard* of care, which is turned into an enforceable *duty to at all times behave carefully*
- Whereas in reality judgment performs a balancing of interests to create (invent!) regulatory norm
  - Namely reducing (even scope 3= of Shell customers) emissions with certain % by certain date
  - This norm could not be deduced from international or Dutch environmental law, nor is it even a deductive specification of binding commitments of the Dutch State
- In a constitutional democracy, only parliament can create such norms (rules) after balancing competing interests

MY MAIN OBJECTION (LAW)

- Human rights profs and the EctHR will tell you: HR protection of private life is ***not* a 'subjective right'** (continental parlance) enforceable in horizontal rrelationships, i.e. between private parties
- Human rights certainly need to have impact on private law:
  - State needs to fashion private law in accordance with human rights
  - Private law needs to be interpreted in conformity with human rights
- But even constitutional court engaging in judicial review of legislation can only find legislation violates fundamental right; cannot replace it with legislation or rules that are in conformity with fundamental rights

IN OTHER WORDS

- => private party can sue state alleging:
  - Its own climate action, including legislation, is not in conformity with human right to life
  - Its enforcement policies against companies are so substandard that they violate right to life
- But no court can create rules or subjective rights or allocate the latter = deciding what the general interest specifically requires; and no court can itself design the state's climate action plan

SEPARATION OF POWERS

- In a constitutional democracy, the balancing of interests – leading some stakeholders in society to lose (eg the choice *could* be made that keeping temperatures down is more important than keeping gas and electricty affordable for the 99%)- to determine what the public interest requires, can only legitimately be done by parliament (and perhaps constitutional courts)
- Once parliament (and const.courts) have created rules and allocated rights, they can be privately enforced

- But he Shell court *created* the rules, thus engaging in politics ("gouvernement des juges"): it balanced interest to determine which type of action was required in the general interest
- And it enforced the rule against a private party, at the request of a private party
- So it demanded that a private party help realise a 2nd generation ("positive") human right before the Dutch state or international treaties had determined *how* this had to be done
- Rhetorically, this maneuver was misleadingly cloacked in human rights talk: human right to life determines the content of the standard of care required by the Dutch statutory provsion on the tort of negligence

- Sure, states have “positive obligations” under the ECHR/ fundamental rights provisions
- Sure, since WWII, we have “positive” human rights, that enjoin states to enable citizens to realise their capabilities as an expression of human dignity
- Sure, private law should be in conformity with fundamental rights and sate should create a legal system, including private enforement, allowing citizens to protect their fundamental rights

BUT THERE ARE RED LINES

- NO, the power of a multinational like Shell does not turn it into the equivalent of a state
- And more strictly legal arguments:
  - **NO, a private person has no direct claims (with few exceptions, eg bar on slavery) against other private person based on human rights provisions in the ECHR or Constitutions or Bills of Rights**
    - If you doubt this, read art. 1 ECHR: Treaty only creates obligations for states
  - NO, ordinary judges cannot balance societal interest to determine which specific actions the general interest requires, in other words cannot determine what specific actions the realisation of human rights requires

SO CETERUM CENSEO

- "Shell climate" is a wrong judgement
- That should be reformed on appeal and its example should not be followed by other judges in the dozens of similar cases that are now pending
- "Shell climate" constitutes an abuse of tort law, turning all Calabresian liability rules into property rules
  - (thanks to my tort law colleague Marc Kruithof for pointing this out to me)

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TWO POSSIBLE ROUTES

- A. derivative action: ngo buys some shares, turning what is an outsider into a shareholder with standing to bring derivative claim; cf again letter to Shell directors
  - But some EU jurisdictions have threshold requirements (eg Belgium: 1%)=> not realistic
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“GEVAARZETTING”, RISK CREATION

- Directors are aware or should be aware that corporation causes manifest risk for outsiders and have not done enough to mitigate this risk
  - Or are negligently unaware of it because of manifestly insufficent compliance framework organised by company under their leadership
  - Two predictions I hazard: a. in Europe “Caremark”-like deferrence to business judgement will play little role in such circumstances b. in France and Belgium, courts will easily accept causal link between damage and insufficient action by directors

CONCLUSION

- Tort law plays an increasing role in enforcing ESG norms incuding human rights against corporations
- This is a positive development
- CS due diligence legislation –which leads to *de facto* extraterritoriality of EU ESG standards- will create a “duty to know” and increase corporate tort law liability
- Many bridges too far however: climate litigation by ngos against corporations where vague negligence standard is transformed into instrument that judge uses to invent new rules and create new rights; this violates tort law but is also unconstitutional

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