25 April 2022

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Annex 2 - The risks of director liability to third parties in relation to climate change

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1. Introduction

The world is facing *"a code red for humanity"*.[1] While the carbon budget to prevent dangerous climate change is rapidly depleting, the most powerful corporations around the globe still refuse to rapidly reduce their emissions and continue to kick the proverbial can down the road, knowing full well that this decade is critical to keep warming to 1.5 °C.

Courts are stepping in to hold those in power accountable for their responsibility to help prevent a global catastrophe which will cause continued and widespread human rights violations. This started with a series of judgments against governments, but the judgment against Shell and many other developments show that the focus has expanded and continues to expand to multinational corporations, whose impacts on climate change are greater than the impact of most states.

In this contribution, we will examine what this could mean for directors that fail to adopt and execute Paris-aligned policies.

In particular, we submit that those directors may face future personal tortious liability to third parties for the loss and damage caused by their companies through their contribution to climate change.

While it is true that in all jurisdictions, directors are to a large extent shielded from personal liability, such protection is certainly not unlimited. We firmly believe that protection will not apply to directors of corporations of the world's biggest polluters and their facilitators if they fail to step up their efforts to phase-out fossil fuels despite the overwhelming scientific evidence and international consensus on what is needed to preserve a livable planet for current and future generations.

Directors cannot in good faith continue to hide behind other actors to justify their lack of action in this decisive decade. The world is looking for true leadership. A failure to live up to the task means that their corporations will remain a ball and chain to the critical global effort of almost halving emissions by 2030, with disastrous consequences.

Today, it is not too late to still prevent dangerous climate change. This contribution therefore serves as an urgent call on directors to change the current course of business conduct that will inevitably lead to climate disaster. This call applies to all captains of major industries, including the fossil fuel industry, transportation, heavy industry and agriculture as well as the financial and insurance industry and other large institutional investors that have the power to contribute to the much-needed acceleration of systemic change.

2. The implications of the judgment against Shell

Wednesday 26 May 2021 will go down in history as a day that *"sent shock waves through corporate boardrooms around the world"*[2] when a Dutch court ordered Shell to reduce its total global CO_2 emissions with 45% by 2030 in line with the Paris Agreement or risk civil liability for human rights violations.

The judgment confirms that corporations have an individual legal responsibility to immediately reduce their climate impact in the last decade that the world can still prevent dangerous climate change by limiting global average temperature increase to 1.5 °C.

[1] Statement of 9 August 2021 of the UN Secretary-General on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment

[2] Al Gore in his contribution of 15 September 2021 to the Time 100 list, available at https://time.com/collection/100-most-influential-people-2021/6095813/roger-cox/

Companies should realize they cannot claim to be Paris-aligned just because they have a plan – often not more than an ambition – to reach net-zero in 2050. Climate science unequivocally finds that the path to net-zero is crucial. Plans to reach net-zero in 2050 are wholly insufficient if those plans do not result in deep, immediate and sustained emission reductions towards 2030.[3]

After all, preventing dangerous climate change is about limiting cumulative emissions and staying within the remaining carbon budget to keep global warming to 1.5 °C. That carbon budget is rapidly shrinking at the current rate of emissions. Simply put: what we do or don't do in the coming years, will for a large part determine our future.

A crucial consequence of this is that corporations must reduce their absolute emissions towards 2030 as quickly as possible, with a linear pathway as the bare minimum, which would equally distribute the effort that must be delivered. Everything short of that is a delay of what must evidently be done and causes excess cumulative emissions and consequently, additional losses and damages. In order to limit cumulative emissions as much as possible, corporations should strive to pursue an accelerated reduction path. It is clear that corporations cannot wait until 2029 to take the necessary action but they must act now. Targets focused on reducing carbon intensity are clearly insufficient because they don't focus on reducing absolute emissions, which the Dutch court recognized.

The judgment further shows that corporations have to be proactive. Monitoring developments in society and letting states and other parties play a pioneering role does not suffice, as it disregards their own individual contribution to the problem and their power and control to help prevent global catastrophe.

The judgment has far-reaching implications for Shell and is relevant for other climate polluters. The court considered it requires a change of policy as well as an adjustment of the Shell group's energy package. In addition, the court found that drastic measures and financial sacrifice may be required, in light of the urgency of preventing dangerous climate change and considered Shell may have to forgo new investments in the extraction of fossil fuels and/or will have to limit its production of fossil resources.

The obligation to reduce absolute emissions means that Shell must become a smaller oil and gas company, regardless of whether Shell decides to expand its renewable energy business. Ultimately, fossil fuels must be phased-out to stay within the carbon budget. Shell knows this, the world knows this and the judgment confirms this.

These are several crucial takeaways of the judgment that are not only relevant to Shell. Other climate polluters, the companies that finance these actors as well as other entities that are in a position to use their power and control in a way that matters to achieve the universal goal of the Paris Agreement will have to consider the implications of the judgment for their own climate policies and actions.

In the next chapter, we will provide insight into the rapidly increasing liability risks for these systemic players. This shows that the judgment does not stand on its own but is part of a broader legal movement that recognizes the accountability of systemic players that fail to take up their proportional share of the burden by using their power, control and influence to help prevent dangerous climate change. We will also highlight some of the major developments that occurred after the Dutch court's ruling that further strengthened this movement.

[3] See Glasgow Climate Pact, par. 5 and 22 and IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("**AR6 WGI**").

3. The rapidly increasing liability risks for systemic players

The judgment against Shell cannot be viewed as one isolated judgment, but it is part of a wider legal trend that recognizes the responsibility of systemic players in the face of extraordinary facts and circumstances.

Corporations – and their directors – must realize that it is not just unlikely, but unthinkable that there will be less scrutiny towards their conduct and obligations in the years to come, while the window of action to still limit global warming to 1.5 °C is quickly closing. This means the pressure on directors to do what is necessary is increasing and if they fail to take adequate action or move too slow, this creates growing liability risks, in addition to the many commercial risks of moving too slow in the transition towards a net-zero economy.

3.1 Trends in climate litigation

In 2015, the District Court of the Hague was the first court that recognized that a state has an individual legal responsibility to help prevent dangerous climate change by reducing their emissions. The *Urgenda*-judgment was upheld by the Court of Appeal in 2018 and the Dutch Supreme Court in 2019.[4]

In the meantime, courts around the world have heard cases that target government inaction on climate change.[5] This has led to decisions in favor of environmental organizations and citizens in multiple countries, including judgments from the highest courts of France, Germany, Ireland and Pakistan.

These decisions recognize that states have a duty of care to protect citizens from the worst effects of climate change. The following five points illustrate that the position of corporations does not differ significantly from the position of states in relation to climate change:

(i) court orders against states have recognized that the serious and irreversible consequences of dangerous climate change present a significant risk to human rights.[6] While human rights may only be invoked directly in litigation against states, it is widely recognized that businesses can also have legally enforceable human rights obligations, either through indirect or horizontal effect and/or through widely accepted soft law instruments in the assessment of a civil law claim;

(ii) large corporate climate polluters often contribute more to climate change than individual states. A 2014 study by Richard Heede quantified the cumulative emissions of the 90 largest carbon companies from 1854 to 2010 and found that those companies are responsible for two-thirds of all global man-made emissions.[7]

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[4] District Court of The Hague 24 June 2015, Court of Appeal of The Hague 9 October 2018 and Dutch Supreme Court 20 December 2019, see http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/

[5] In May 2021, there were 68 cases pending, including 37 'Urgenda-style' cases, see Setzer, J. and Higham, C. (2021) Global trends in climate change litigation: 2021 snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 6.

[6] Based on robust scientific findings as analyzed by the IPCC. The impacts of climate change on human rights are also widely recognized by the global political community as well as international bodies, including the UN Human Rights Council which has adopted a total of 13 resolutions on climate change and human rights. Reference can also be made to the Climate Change and Human Rights Inquiry that took place before the Philippines Commission of Human Rights and yielded in thousands of pages of documentary and testimonial evidence, see https://www.greenpeace.org/philippines/the-climate-change-human-rights-inquiry-archive/

[7] Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229.

(iii) corporations also exercise more direct control over emissions than the power states exercise over emissions of citizens and companies within their jurisdiction. In other words: corporations are in a position to use their power and control in a way that matters to achieve the universal goal of preventing dangerous climate change;

(iv) all states and international bodies agree that climate action by corporations is indispensable to reach the goal of the Paris Agreement, which has long been recognized in the UN climate regime. Non-state climate action is one of the four pillars essential to closing the substantial emissions gap between collective state reduction promises and the collective emission reduction required to prevent dangerous climate change;

(v) it is irrelevant that states are a party to the Paris Agreement and corporations are not. What matters is that the Paris Agreement – combined with subsequent developments – reflects the universal political consensus, based on the best available science, that global society should limit global warming to 1.5°C if we want to avert an existential crisis. In order to do so, global CO_2 emissions must have declined with 45% by 2030. These universally accepted facts are obviously relevant to anyone who materially contributes to the problem or otherwise influences the systemic change required to achieve the 1.5°C goal.

Since 2015, climate change litigation has been on the rise and the number of cases has increased exponentially. A report of global trends in climate litigation identified over 1.800 ongoing cases as of May 2021 and found that an unprecedented number of key judgments with potentially far-reaching impacts were issued in the past 12 months prior.[8]

The same report explicitly refers to the litigation risk for businesses, finding that cases are increasingly targeting the private sector including financial actors. Plaintiffs continue to develop new legal strategies and incorporate a more diverse set of arguments, such as greenwashing and fiduciary duties. Plaintiffs also look at each other and learn from each other, which further exacerbates litigation risks.

The rise in climate litigation against private actors can also be explained by the increased scientific evidence of the urgency of the problem, the increased visibility of impacts of climate change, developments in attribution research linking the contribution of large corporate polluters to climate change (also see Chapter 3.2) and the overall lack of action on the part of corporations.

In addition, the risks and damages of climate change occur everywhere in the world. Private international law often provides alternatives grounds for jurisdiction other than the home state of the defendant, for example based on the place where the damage occurred or may occur. This means that multinational corporations should take into account that they may be sued in numerous jurisdictions around the world for damages or preventive action, not just in the country where they are based. This significantly increases litigation risks.

Furthermore, the award of a demand for climate action anywhere, increases the risks for systemic players everywhere. This is because the awarding of a claim in one country will have an exemplary effect for courts in other countries. Courts look at each other when deciding on these global issues.[9]

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[8] Setzer, J. and Higham, C. (2021) Global trends in climate change litigation: 2021 snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 5.

[9] See The Impact of the Paris Agreement on Climate Litigation and Law, by The Hon. Justice Brian J Preston FRSN SC, Chief Judge of the Land and Environment Court of New South Wales, Australia.

For example, the judgment of the Dutch Supreme Court in the *Urgenda*-case and the preceding opinion of the Procurator General and the Advocate-General in that case both took account of the groundbreaking judgment of the US Supreme Court in Massachusetts v. EPA. The *Urgenda*-case itself has been cited in other climate litigation decisions across the globe as well, including in the judgment against Shell. Consequently, judgments recognizing the legal obligation of systemic players, including the judgment against Shell, will have an exemplary effect in litigation against other corporations.

All of these developments show that corporations are under intense and increasing legal scrutiny. The judgment against Shell may have been the first to confirm the legal obligation of a corporation to reduce emissions, but it will not be the last. Since the hearing in the case against Shell took place in December 2020, scientific, political, regulatory, societal and legal developments have succeeded each other rapidly, as will be described below. Those developments confirm the extreme urgency of deep emission reductions by 2030 and the role that corporations must play in achieving that goal.

3.2 Notable developments as of 2021

The pressure to change business conduct has never been greater than in 2021 and early 2022 and comes from all corners of society: citizens, NGO's, scientists, investors, politicians, regulators, lawyers, international bodies, banks and insurance companies. This has an impact on how corporate behavior will be assessed, including in litigation, and indicates that liability risks are increasing. Due to the sheer number of developments, it is impossible to mention all of them. The following overview is merely a selection of important events.

Scientific developments

Since August 2021, the IPCC completed all three Working Group Reports of its Sixth Assessment Report ("**AR6**"), providing a comprehensive and alarming overview of the most up-to-date physical understanding of the climate system and climate change, the current and expected impacts of climate change and the possibilities to mitigate climate change.[10] AR6 confirms that climate change is hitting the world even harder than previously expected and that limiting warming to close to 1.5°C or even 2°C will be beyond reach unless there are immediate, rapid and large-scale reductions in greenhouse gas emissions.[11] AR6 also confirms human-induced climate change is already causing dangerous and widespread disruption in nature and affecting the lives of billions of people around the world, that even temporarily exceeding 1.5°C will result in additional severe impacts, some of which will be irreversible.[12] However, there are options to at least halve global emissions by 2030 across all sectors.[13]

The IPCC reports provide strengthened evidence of observed changes in weather extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence.[14]

[10] Note that the IPCC analyzes all relevant scientific, technical and social-economic information. First and foremost, this includes peer-reviewed literature, but also as selected non-peer reviewed publications, including reports from industry and governments. This means that IPCC findings provide a solid basis as evidence in climate litigation which should be considered irrefutable in court.

[11] IPCC Press Release 9 August 2021: Climate change widespread, rapid, and intensifying.

[12] IPCC Press Release 28 February 2022: Climate change: a threat to human wellbeing and health of the planet. Taking action now can secure our future

[13] IPCC Press Release 4 April 2022: The evidence is clear: the time for action is now. We can halve emissions by 2030.

[14] IPCC AR6 WGI, Summary for Policymakers, p. 8, par. A.3.

Attribution science, including science linking the contribution of corporations to the climate crisis continues to advance. Together with increased climate-related disclosure obligations on corporations, these developments considerably strengthen the chances of success of climate litigation.[15] More importantly, these findings are compelling and undeniable facts that should implore any systemic player to accelerate climate action.

As mentioned above, the risks to multinational corporations are exacerbated by the fact that they may be sued in numerous jurisdictions worldwide for climate damages and preventive action regardless where they are based.

Strengthened political consensus

Political consensus that the world must prevent dangerous human interference with the climate system dates back 30 years ago when the United Nations Framework Convention on Climate Change was signed. The 2015 Paris Agreement crucially held that this means keeping the increase in average global temperatures well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. Developments after 2015, including the IPCC Special Report: Global Warming of 1.5°C, made clear that the differences between the two temperatures are substantial and that the global community must strive to limit global warming to 1.5°C.

In November 2021, all political leaders in the world – based on IPCC findings – confirmed this 1.5°C goal and confirmed that this requires deep, immediate and sustained reductions of CO_2 emissions of about 45 % by 2030, because we are in the critical decade to prevent dangerous climate change.[16] This universal consensus on what must be done is obviously relevant to large emitters and other systemic players.

At COP26, more than 20 countries also pledged to end their foreign investments in fossil fuel projects.[17]

Authoritative findings by international organizations

In 2021, virtually every international organization that specializes in climate and energy-related topics called for accelerated action.

In May 2021, the International Energy Agency ("**IEA**") published its landmark report Net Zero by 2050 which included its assessment of a pathway for the energy sector to reach net-zero by 2050. In this report, the IEA concluded that global commitments and actions fall well short of what is needed to limit the rise in global temperatures to 1.5°C. In the IEA's pathway, annual clean energy investment worldwide would need to more than triple by 2030 to around USD 4 trillion and there is no more room for approval of new oil and gas fields, new coal mines or mine extensions beyond projects already committed as of 2021.[18]

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[15] Stuart-Smith, R.F., *Filling the evidentiary gap in climate litigation*, Nature Climate Change, Volume 11, 651-655. See also the news article *Climate science is supporting lawsuits that could help save the world* on Nature.com available at https://www.nature.com/articles/d41586-021-02424-7.

[16] Glasgow Climate Pact

[17] https://ukcop26.org/statement-on-international-public-support-for-the-clean-energy-transition/

[18] IEA (2021), Net Zero by 2050, IEA, Paris https://www.iea.org/reports/net-zero-by-2050

In October 2021, the 12th edition of the Emissions Gap Report of the United Nations Environment Programme ("**UNEP**") found that the world was still moving towards global temperature rise of around 2.7°C by the end of the century, even if all existing pledges for 2030 would be fully implemented.[19] These are just two examples of international organizations that are calling on all actors of society to do everything possible to reduce absolute emissions by 2030.

Increased scrutiny from shareholders and other investors and financiers

A growing group of investors and other stakeholders is increasing pressure on fossil fuel companies to align their emission reduction targets in the short, medium and long term with the goal of the Paris Agreement, acknowledging the foreseeable material financial and systemic risks associated with climate change, including the legal risks of failing to align with the Paris Agreement.

In May 2021, oil and gas companies faced unprecedented scrutiny from shareholders, resulting in replacement of three directors at ExxonMobil, majority support for Scope 3 absolute emission reduction targets at Chevron and 30% support from Shell's shareholders for the Follow This resolution requesting absolute emission reduction targets, including in the short term.

In October 2021, ABP, one of the largest pension funds in the world, announced its intention to divest all of its fossil fuel investments in the coming years, claiming it had been unable to engage with these companies to accelerate efforts to transition more quickly and citing the recently published reports of the IPCC and the IEA as reasons.[20] The announcement was made amidst growing pressure on ABP including an announced lawsuit by participants for failing to step up its own efforts and reduce the carbon footprint of investments.[21]

In February 2022, the global financial institution ING announced it would not finance any new oil and gas projects in response to the call from the IEA. ING also said it would phase down financing of their existing oil and gas clients.[22]

Corporations and their directors should expect further pressure this coming month of annual general meetings. Shareholder groups like Follow This have filed multiple resolutions to compel oil and gas companies to change course and set Paris-aligned reduction targets for all emissions.[23] In March 2022, Chevron shareholders also announced their resolution to displace the chairman and another director for their failure to cut carbon emissions.[24]

Note that shareholders that vote against resolutions calling for Paris-aligned action run risks as well, as they essentially approve inadequate – and dangerous – corporate climate policies to secure their own short-term financial gain. This is unacceptable given the state of the climate crisis. In addition,

[19] United Nations Environment Programme (2021). Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered – Executive Summary. Nairobi.

[20] https://www.theguardian.com/environment/2021/oct/26/abp-pension-fund-to-stop-investing-in-fossil-fuels-amid-climate-fears

[21] IPE 13 September 2021, ABP brought to court over fossil fuel investments, https://www.ipe.com/news/abp-brought-to-court-over-fossil-fuel-investments/10054961.article

[22] https://www.reuters.com/business/sustainable-business/exclusive-dutch-bank-ing-ends-financing-new-oil-gas-projects-2022-03-23/

[23] https://www.follow-this.org/resolutions-2022/

[24] Washington Post 8 March 2022, Shareholders asked oil giant Chevron to cut emissions. Now some want the chairman ousted, available at https://www.washingtonpost.com/business/2022/03/08/chevron-shareholders-climate/

large institutional investors may have their own legal responsibility to reduce the carbon footprint of their financial investments.

This is also evident from the increased regulatory pressure on the financial industry to reduce its environmental impact and enhance transparency on risks. In March 2022, the European Central Bank concluded that none of the 109 lenders it oversees meet its climate risk disclosure expectations but produce *"a lot of white noise and no real substance"*.[25] Many other major central banks and regulators have also announced further action to address the climate crisis.[26]

Increased pressure from other stakeholders

In the midst of this changing landscape, numerous actors in the financial and insurance industry have announced new climate pledges or policies. Notably, the world's second largest reinsurer Swiss Re announced an enhanced oil and gas policy which excludes insurance for most new oil and gas projects and expresses an ambition that by 2025 half, and by 2030 all, of its oil and gas premiums will come from companies with credible net zero plans.[27]

These developments show that more and more stakeholders are aware of their own responsibilities, are shifting away from fossil fuels and are increasing pressure on business partners to change.

Another noteworthy movement is the increased workplace activism and recognition that Paris-alignment is in the best interest of internal company stakeholders such as employees. For example, the largest Dutch labor organization FNV announced its support for the call by Friends of the Earth Netherlands on 29 large climate polluters to align their 2030 policies and actions with the Paris Agreement.[28]

Major legal developments

The rapid increase in climate litigation in the past couple of years has already been addressed in the previous chapter. This trend has continued in 2021. Notable ongoing cases include the pending litigation against TotalEnergies in France for accelerated emission reductions[29] and the litigation against Italian oil giant Eni alleging insufficient emission cuts, lack of climate impact assessment and lack of transparency.[30]

The majority of climate litigation is pending in the United States. In February 2022, appeals courts in two landmark cases allowed climate litigation against big oil and gas companies to proceed in state court, rejecting legal arguments of the defendants that the Clean Air Act or federal common law

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[25] Financial Times 15 March 2022, ECB accuses eurozone banks of 'white noise' on climate risks.

[26] See for examples the Annual Public Statement of the European Securities and Markets Authority of 29 October 2021, listing as a key enforcement priority for 2021 annual reporting: *"consistency between the information disclosed within the IFRS financial statements and the non-financial information concerning climate-related matters, consideration of climate risks, disclosure of any significant judgements and estimation of uncertainty regarding climate risks while clearly assessing materiality"*

[27] Press Release Insure Our Future 17 March 2022, Swiss Re leads insurance industry's exodus from oil and gas, available at https://global.insure-our-future.com/swiss-re-leads-insurance-exodus-from-oil-and-gas/

[28] https://industrie.fnv-magazine.nl/012022/energietransitie/

[29] http://climatecasechart.com/climate-change-litigation/non-us-case/friends-of-the-earth-et-al-v-total/

[30] https://www.greens-efa.eu/en/article/press/greens-efa-ngos-and-associations-file-a-legal-appeal-against-italian-oil-company-enis-harmful-business-plan

preempts such actions.[31] Both cases claim redress for climate harms, including adaptation costs. In fact, many cases in the US focus on climate damages or adaptation costs based on the historic cumulative contribution of defendants to the climate crisis. In addition, there is at least one European case pending in a German court against energy company RWE, in which the plaintiff has also passed a major legal hurdle when a court found that his claim for adaptation costs can in principle give rise to corporate liability under German law and referred the case for taking of further evidence.[32]

Developments in attribution science as well as these legal developments show that there is a real risk of future liability of climate polluters for costs related to climate change. The award of such a claim would have significant financial consequences for the corporation and its stakeholders.

Lawsuits challenging new fossil fuel exploration are also increasingly common and have been successful, such as the preliminary injunction against Shell's seismic testing for oil and gas along the South Africa's eastern coastline. In view of the findings of the IEA, such challenges can be expected for most new fossil fuel projects.

Increased public scrutiny

New fossil fuel projects are also subject of intense public scrutiny. Shell's plans for seismic testing for oil and gas in South Africa mobilized communities around the world in protest, as did the planned development of the Cambo oil field off the Shetland islands. Shell backed out after heavy protests, stating that the economic case was not strong enough,[33] although the company may be reviewing its position now that oil prices have surged in response to the war in Ukraine.[34]

In September 2021, US Congress launched an investigation into fossil fuel industry disinformation on the climate crisis, including Shell, ExxonMobil, Chevron, BP and the American Petroleum Institute. The investigation focuses not only on historic behavior of the fossil fuel industry since their awareness on scientific evidence about the dangers of climate change since at least 1977, but also on the credibility of current net-zero pledges and on current actions to block reforms, invest overwhelmingly in fossil fuel extraction, and support efforts to extend the life of fossil fuel investments.[35] As part of this investigation, executives have been called to testify about their companies' actions and plans.

3.3 The lack of adequate action

These are just examples of significant developments that increase the legal risks of systemic players,. In the face of all this, it is unfathomable that directors can deny that their companies have an active role to play in order to help prevent dangerous climate change. However, adequate action is still lacking.

While it is true that more and more corporations – in particular large multinationals – operate under net-zero pledges, that does not mean that adequate climate action is taken, let alone in the short and medium term. Seemingly impressive net-zero pledges are often empty or conditional promises that

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[31] https://www.reuters.com/legal/litigation/10th-circuit-hands-boulders-climate-lawsuit-home-court-advantage-2022-02-08/ and http://blogs.law.columbia.edu/climatechange/2022/02/23/in-a-first-for-climate-nuisance-claims-a-hawaii-state-court-allowed-honolulu-to-proceed-with-its-case-against-fossil-fuel-companies/
[32] https://www.germanwatch.org/en/huaraz
[33] https://www.nytimes.com/2021/12/10/business/economy/cambo-oilfield-project.html
[34] https://www.theguardian.com/business/2022/mar/22/shell-cambo-oilfield-green-targets-north-sea-oil-price
[35] https://oversight.house.gov/legislation/hearings/fueling-the-climate-crisis-exposing-big-oil-s-disinformation-campaign-to and https://docs.house.gov/meetings/GO/GO00/20220208/114392/HHRG-117-GO00-20220208-SD002.pdf.

are indicative of greenwashing rather than climate leadership. In the 2022 Corporate Climate Responsibility Monitor, NewClimate Institute analyzed the net-zero targets of 25 major multinational companies and found that these targets aim to reduce those companies' aggregate emissions by only 40% at most, not 100% as suggested by the term "net-zero".[36]

The recently published Climate Action 100+ Net Zero Company Benchmark assessments also confirm the lack of adequate action by the largest global polluters, finding that corporations operating under net-zero pledges often lack a robust strategy to deliver on those pledges, nor have they aligned their investment strategies with the goals of the Paris Agreement. This investor-led initiative also concludes that corporations fail to disclose plans for emission reductions in the short and medium term.[37]

4. The potential exposure of directors to future personal liability for climate damages

The previous chapter describes the rapidly increasing liability risks for corporations which will only continue to increase if they fail to bring their policies and actions in line with the Paris Agreement. This chapter discusses the possible implications for directors. To that end, we will first focus in a general sense on the obligation of directors to take into account broader societal interests in their decision-making processes.

When determining the corporate strategy, directors are obliged to take into account the interests of the company and its different stakeholders and weigh those interests in their decision-making process. In doing so, the management board assesses and discloses the risks that could threaten the company's strategy, communicates transparently what measures have been or will be taken to mitigate these strategic risks and justifies the corporate strategy to its internal stakeholders, such as shareholders.

A special aspect of this task is that directors must have regard for the interests of *external stakeholders* as well as the risks associated with a failure to sufficiently account for those external interests. This is not limited to the interests of creditors or customers of the company. National and international governance principles unmistakably recognize that directors must also take account of the company's impact on broader societal interests, including in particular the environment, climate and human rights.[38]

After all, the business operations – in particular those of large corporations – can have a negative impact on those external interests. Some degree of protection is therefore considered universally justified and necessary. Secondly, by sufficiently taking external interests into account, the company mitigates its liability risks, including its exposure to claims for damages from third parties harmed by the company.

Despite this balancing act by directors, the company may at some point still infringe external interests and the associated rights of third parties. This is merely a consequence of the company's participation in legal transactions as an independent legal entity. In such cases, the company is liable for the resulting damages.

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[36] https://newclimate.org/wp-content/uploads/2022/02/CorporateClimateResponsibilityMonitor2022.pdf

[37] https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-an-increase-in-company-net-zero-commitments-but-much-more-urgent-action-is-needed-to-align-with-a-1-5c-future/

[38] Global Governance Principles from the International Corporate Governance Network (ICGN), available at: https://www.icgn.org/icgn-global-governance-principles; Governance principles overview from the European Corporate Governance Institute (ECGI), available at: https://ecgi.global/content/codes.

In the absence of special circumstances, there will be no possibility for injured third parties to hold a director personally liable. The director is a representative of the company and usually does not create personal legal obligations by acting on behalf of the company. There will generally also be no reason to hold a director personally liable if the company is financially capable of fully compensating the damage suffered by third parties. After all, in that case the legal relationship between the infringer and the injured parties can be restored, at least financially.

However, special circumstances can open the door to personal liability. In general, legal systems, including those of the Netherlands,[39] the United Kingdom[40] and the United States[41], recognize grounds for personal liability of directors. In many cases, these standards follow from general tort law, which by nature focuses on the question whether due care was exercised in relation to third parties.

Whether a director can be held personally liable depends in general on the extent to which the director took account of legitimate interests of third parties when representing the company. A director that knowingly causes the company to cause damage to third parties must take into account that his actions or omissions can be considered so careless that he commits a personal wrongful act towards those third parties. Indeed, because of his role as representative of the company, the director is evidently in a position to prevent the company's unlawful conduct. By not using his managerial powers to prevent the infringement or to avert or limit the consequences thereof, the director is involved in the company's wrongful act to such an extent that he can be held liable for the third party's damages alongside that company. In other words, a director that procures or directs a wrongful act is not shielded from civil liability.

Aggrieved third parties may have reason to seek compensation from the director personally if the company is unable to fully compensate the damage caused. Of course, a relevant factor in this respect is whether the company is insured for the damage caused. Nevertheless, the injured third party will also seek other means of redress. Under these special circumstances, recourse may be found with the director, who often has Directors & Officers liability insurance.

As will be explained below, personal liability risks may loom for directors of in particular large polluting companies and other systemic players if they procure that the company fails to deliver on its obligation to help prevent dangerous climate change.

As this contribution has set out, it is foreseeable to everyone - including corporate executives - that global warming of more than 1.5°C will pose a serious threat to human life and well-being and will cause perpetual damages and suffering to an extent never seen before. There is international political consensus based on the best available climate science that global emissions must be reduced by 45% by 2030 in order to maintain a 50% chance of still limiting global warming to 1.5°C. In this contribution,

[39] Dutch Supreme Court 5 September 2014, ECLI:NL:HR:2014:2628 (Hezemans Air); Dutch Supreme Court 5 September 2014, ECLI:NL:HR:2014:2627 (RCI v. Kastrop); Dutch Supreme Court 8 December 2006, ECLI:NL:HR:2006:AZ0758 (Ontvanger v. Roelofsen).

[40] England and Wales Court of Appeal (Civil Division) 7 May 2021, [2021] EWCA Civ 675 (Lifestyle Equities C.V. & Anor v Ahmed & Anor); Scottish Court of Session 3 February 2015, [2015] CSIH 11 (William Campbell v. (First) Peter Gordon Joiners Limited and Derek Forsyth, the liquidator thereof; and (Second) Peter Gordon) England and Wales Court of Appeal (Civil Division) 5 October 2001, [2001] EWCA Civ 1441 (MCA Records Inc & Anor v Charly Records Ltd & Ors); House of Lords.

[41] Delaware Superior Court August 31, 2015, C.A. No. S14L-12-035 MJB (Yavar Rzayev, LLC v. Marvin B. Roffman); Supreme Court of California, September 4, 1986, 42 Cal.3d (Frances T. v. Village Green Owners Assn.)

we have explained that there is a clear trend that large polluting companies have an individual legal responsibility to help prevent dangerous climate change by drastically reducing their emissions by at least 45% by 2030. The judgment against Shell is not an isolated case in this regard. Companies that continue to postpone the task therefore face enormous liability risks, and so do their executives.

Companies will therefore have to design their policies in line with the objectives of the Paris Agreement. This means that directors will be required to give much more weight to the external interests of society, in particular the environment, climate change and human rights, in carrying out risk assessments and risk management. This is necessary on the one hand to protect society and its citizens, and on the other hand to protect the company itself, as will be discussed below in Chapter 5.

If directors of a large polluting company do not bring the company policy in line with the Paris Agreement, this leads to two findings. First, it is then foreseeable to the directors that the company will at some point infringe on legitimate interests of society, more specifically on the human rights and other legitimate interests of anyone facing harm and suffering as a result of dangerous climate change. Secondly, the failure to bring policy in line with the Paris Agreement means that the director is *de facto* failing to take action to avert or mitigate that breach or its impact on society.

It must be kept in mind that dangerous climate change can only be prevented by keeping total global greenhouse gas emissions within the still very limited carbon budget. In other words, there is an immediate need to drastically reduce cumulative emissions. Delaying the reduction effort results in more cumulative emissions and thus causes more damage. That is why the global community at the last climate conference in Glasgow also recognized that we are in the critical decade for climate action and that a global emission reduction of about 45% by 2030 is absolutely necessary to keep the Paris goal alive.[42]

Any director of a large CO_2 emitting company (especially one with high scope 3 emissions) should be aware of this critical and urgent task for 2030 and also of the damage to society that will be caused if this task is not achieved. The necessity of reducing the emissions linked to the company and its products with immediate effect should therefore be evident to each of these directors. Moreover, directors must realize that any further postponement of the reduction effort towards 2030 will mean that the measures to be taken by the company will become increasingly expensive and far-reaching. The risk that the task will not be achieved will therefore also increase.

Failure or delay in implementing the Paris objectives in the company's policy can result in the director causing the company to act unlawfully towards third parties who suffer damage or distress (in the long run this is everyone), resulting in liability for the company.[43] This liability leads to the company's obligation to compensate the damage suffered by everyone due to the consequences of dangerous climate change in proportion to the company's contribution to that damage.

[42] See Glasgow Climate Pact, par 5 and 22

[43] C. Williams & E. Mulholland, What the Shell Judgment Means for US Directors, Harvard Law School Forum on Corporate Governance, July 2021, available at: https://corpgov.law.harvard.edu/2021/07/22/what-the-shell-judgment-means-for-us-directors/.

It is therefore not an option for a director to wait for government regulation or to merely follow general societal developments; this only increases the company's risk of failing to meet its emission reduction obligations, potentially resulting in an explosion of third-party tort claims.[44]

If, despite this knowledge and despite the foreseeability of damage to third parties, the board knowingly adopts and pursues a company policy that is contrary to the Paris temperature goal, there is a considerable chance that the company will be held liable for the damage caused to society. In that case directors should take into account that they are acting so carelessly that in time they will also commit a personal tort against everyone who suffers damage as a result of dangerous climate change.[45] After all, it is eminently in the power of the director to adjust the corporate policy in such a way that the company's contribution to the damage caused by climate change is limited.

There is also a clear task for shareholders here. Shareholders, like banks, pension funds, insurance companies and other asset managers owe a duty of care to their clients and other stakeholders to refrain from investments in sectors where stranded assets or liability exposure create significant risks for long-term return on investment, such as those in polluting industries. In addition, these financial actors may have their own legal obligations to use their power and control to help achieve the Paris climate goal. Thus, there is a joint interest of directors and shareholders to implement Paris-compliant corporate policies. In any event, shareholders will have to use their rights, including their right to vote on the dismissal and appointment of directors, advisory votes on corporate strategy and votes on resolutions from green shareholders in a way that promotes Paris-compliant action.

The exposure of companies that do not adopt policies in line with the Paris Agreement can potentially be so extensive that no company will ever be able to bear the damage it will have to compensate in such a case. Even if it is assumed that the damage must be compensated in proportion to the quantity of CO_2 emissions of the company in question, the financial burden will be so great (and will recur and increase year after year) that it must be assumed that no company will be able to bear it. The continuity of the company will therefore almost certainly be at risk. This has implications for directors. Because, as described above, this may be a basis for injured parties worldwide to successfully sue the directors in compensation claims against the company.

The consequences of the above for liability insurers of polluting companies and their directors are obvious. In view of the increasing exposure of companies and directors, it cannot be ruled out that premiums will rise in the coming years. Moreover, it is likely that exclusions from insurance coverage will be extended to liabilities that are a result of circumstances described above. This, of course, also has consequences for the recoverability of claims by injured parties from companies and their directors, with the point of attention for directors that in that case their personal assets may be more exposed to recovery by injured parties.

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[44] A parallel can be made with the worldwide asbestos cases from decades ago. The risks which accompanied the use of asbestos were known in the early 1960s. In the end, many asbestos producers and employers all over the world were found liable with retroactive effect, because they knew or should have known the dangers of asbestos since the 1960s. Courts established that at that point in time there was sufficient certainty in the international scientific community that exposure to asbestos could cause mesothelioma. This should have led asbestos producers and companies working with asbestos products to take precautionary measures and phase-out asbestos use as quickly as possible and use or develop safe alternatives. See for an example from the United States, the United States Court of Appeals, 5th Circuit September 10, 1973, 493 F.2d 1076 (Clarence Borel v. Fibreboard Products Corporation). And an example from the Netherlands: Dutch Supreme Court 17 February 2006, ECLI:NL:HR:2006:AU6927 (Heesbeen v. Van Buuren).

[45] In such cases, the damage to be compensated by the director may also be calculated in proportion to the contribution made by the director through the company to that damage, based on the share of the company concerned in global CO_2 emissions.

5. The potential exposure of directors to claims for mismanagement

In this contribution, we focus on the possible liability of directors towards third parties. In addition to the potential exposure to liability for third party damages, directors may also be at risk for personal liability to the company and/or to shareholders of the company for mismanaging climate-related risks. In this chapter, Milieudefensie will provide a brief overview of those liability risks and the importance of Paris-aligned climate policies for the long-term success of the company. This is another reason for directors to prioritize Paris-aligned action, although the decisions of directors on their corporate policies to mitigate climate-related risks for the company are as such irrelevant in assessing liability towards third parties.

It is widely accepted that climate change leads to *foreseeable* material, financial and systemic risks for companies in the short, medium and long term.[46] There is abundant material available from the international legal community that confirms that an inadequate response to those risks is detrimental to the company and its stakeholders, and can therefore lead to personal liability of directors towards the company and shareholders.[47]

The risk of personal consequences for directors is demonstrated by the announced legal action of shareholder ClientEarth against Shell's Board of Directors, which is aimed at changing corporate strategy. ClientEarth describes Shell's strategy as one that prioritizes near-term profit at the expense of enduring commercial viability for all of the company's stakeholders, including its shareholders and employees.[48]

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[46] Among others: S. Barker, C. Williams, A. Cooper, *Fiduciary Duties and Climate Change in the United States*, CCLI October 2021, available at: https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf; CCLI & Climate Governance Initiative (World Economic Forum), *Primer on Climate Change: Directors' Duties and Disclosure Obligations. In Support of the Principles for Effective Climate Governance*, June 2021, available at: https://ccli.ubc.ca/wp-content/uploads/2021/06/Primer-on-Climate-Change-1.pdf; N. Hutley & S. Hartford Davis, Climate Change and Directors' Duties, Further Supplementary Memorandum of Opinion on the 2019 and 2016 Opinions, April 2021, available at: https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf and https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf.

[47] Among others: S. Barker, C. Williams, A. Cooper, *Fiduciary Duties and Climate Change in the United States*, CCLI October 2021, available at: https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf; C. Williams & E. Mulholland, *What the Shell Judgment Means for US Directors*, Harvard Law School Forum on Corporate Governance, July 2021, available at: https://corpgov.law.harvard.edu/2021/07/22/what-the-shell-judgment-means-for-us-directors/; CCLI & Climate Governance Initiative (World Economic Forum), *Primer on Climate Change: Directors' Duties and Disclosure Obligations. In Support of the Principles for Effective Climate Governance*, June 2021, available at: https://ccli.ubc.ca/wp-content/uploads/2021/06/Primer-on-Climate-Change-1.pdf; S. Barker & E. Mulholland, *Directors' Liability and Climate Risk: Comparative Paper - Australia, Canada, South Africa, and the United Kingdom*, CCLI October 2019, available at: https://ccli.ouce.ox.ac.uk/wp-content/uploads/2019/10/CCLI-Directors%E2%80%99-Liability-and-Climate-Risk-Comparative-Paper-October-2019-vFINAL.pdf; Hon. Justice B.J. Preston, *The Impact of the Paris Agreement on Climate Change Litigation and Law*, Dundee Climate Conference ('Elements of a 'European', 'International', 'Global' Climate Consensus after Paris?') September 2019, University of Dundee UK, available at: https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_The_Impact_of_the_Paris_Agreement_on_Climate_Change_Litigation_and_Law.pdf; A. Staker & A. Garton, *Directors' Liability and Climate Risk: United Kingdom - Country Paper*, CCLI April 2018 available at: https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-UK-Paper-Final.pdf; N. Hutley & S. Hartford Davis, *Climate Change and Directors' Duties*, Further Supplementary Memorandum of Opinion on the 2019 and 2016 Opinions, April 2021, available at: https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf and https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf.

[48] See https://www.clientearth.org/redirecting-shell/

It is internationally accepted that directors are obliged towards the company - and therefore also towards all stakeholders - to act with full knowledge of the facts, in good faith, carefully and loyally, in order to promote the best interests of that company.[49] It also follows from national and international governance principles that, when acting in the interest of the company, directors should focus on creating, maintaining and promoting the lasting success of the company in the long term.[50]

In order to do so, directors must have regard for the foreseeable risks that can threaten this success. Only then can directors assess how they should act: after all, in the interest of the company they will have to take measures and develop a policy to responsibly manage the identified risks. Next, directors should disclose the identified risks and its risk management policy to all stakeholders of the company. The importance of transparency in relation to climate change risks is demonstrated by the increasing legal disclosure requirements.[51]

The risks associated with climate change are commonly referred to under three categories: (i) legal risks, (ii) physical risks and (iii) transition risks.

First, the company runs many legal risks . The serious and rapidly increasing civil liability risks resulting from corporate policies that are not in line with the Paris Agreement have already been discussed extensively above.

In addition to these civil liability risks, the company faces many other legal and compliance risks as a result of the changing legal landscape, increased public and regulatory scrutiny and rapidly developing laws and regulations. To name a few examples: greenwashing, violation of mandatory disclosure obligations, securities fraud, violation of developing accounting and valuation principles, violation of environmental legislation or labor laws, violation of human rights due to the heavy impact of climate change on human life and well-being. A failure to comply with laws and regulations can result in fines, damages or criminal prosecution. This obviously also impacts the company's reputation and social license to operate.

Second, the company is at financial risk from physical hazards.[52] The effects of climate change, such as extreme weather, floods, landslides, drought, wildfires, and melting glaciers, can result in *direct* damage to the company's assets, including damage to its facilities, production sites, drilling rigs, pipelines, offices and research and development centers. In today's globalized economy, the impacts of extreme weather events will also have many effects beyond the place of occurrence. Extreme weather can disrupt the company's supply chains or impact the business as a result of other direct or indirect effects on suppliers and customers. In practice, extreme weather can impact the entire value

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[49] CCLI & Climate Governance Initiative (World Economic Forum), *Primer on Climate Change: Directors' Duties and Disclosure Obligations. In Support of the Principles for Effective Climate Governance*, June 2021, available at: https://ccli.ubc.ca/wp-content/uploads/2021/06/Primer-on-Climate-Change-1.pdf.

[50] International Corporate Governance Network (ICGN), Global Governance Principles, available at: https://www.icgn.org/icgn-global-governance-principles ; Governance principles overview of the European Corporate Governance Institute (ECGI) available at: https://ecgi.global/content/codes.

[51] EY, *Applying IFRS: Accounting for Climate Change*, December 2021, available at: https://www.ey.com/en_gl/ifrs-technical-resources/applying-ifrs-accounting-for-climate-change.

[52] Climate change is widely considered as one of the most important threats to the global economy. Damages and losses from extreme weather events alone are estimated at USD 1.75 trillion in the United States between 1980 and 2019 (https://www.climate.gov/news-features/blogs/beyond-data/2010-2019-landmark-decade-us-billion-dollar-weather-and-climate) and 500 billion in the EU in the same period (https://www.eea.europa.eu/highlights/economic-losses-from-weather-and). These are merely the financial effects of extreme weather in these two large economies. More importantly, hundreds of thousands of lives were lost during those events and many more people died all over the world in other weather disasters.

chain of the company. It is undeniable that these physical risks will increase dramatically as global warming continues, particularly if the universal danger line of 1.5°C is exceeded.

Thirdly, companies faces economic transition risks. Companies that do not sufficiently prepare for the energy transition will be affected financially, for example because capital markets do shift to renewable energy and other sustainable, non-fossil energy investments. This impacts access to capital markets and share prices. Some investors are divesting from or reducing fossil fuel investments. This will impact the company's ability to finance future projects. The same applies to the ability of companies to take out project insurance, or liability insurance. There is also a high risk of stranded assets, which is further increased in view of the IEA's finding that there is no more room for new oil and gas fields to be approved in its "narrow but achievable" pathway to limit global warming to 1.5°C. Furthermore, the competitive position and reputation of companies that fail to take Paris-aligned action will be under pressure as a result of changes in consumer demand. These economic transition risks may furthermore be exacerbated by rapidly changing legislation and regulations, as governments are also under international pressure to accelerate the fight against dangerous climate change.

Directors who do not take these risks sufficiently into account - and in fact that is what happens if their policies are inconsistent with the goal of the Paris Agreement - invoke major financial risks on the company. The potential exposure to damages as a result of legal risks, physical risks and economic transition risks goes beyond the financial capability of any business. The board is required to mitigate these risks that threaten the company's lasting success, better yet: its survival. This means that it is in the best interest of the company to pursue a policy that delivers a proportional contribution to prevent dangerous climate change. The depth of investment necessarily associated with a Paris-compliant policy may come at the expense of short-term distributable profits, but that is what is expected from directors to secure the long-term best interest of the company.

In view of the fact that these consequences are already foreseeable for directors, they should take into account the fact that, in the event of inadequate climate policy, they may at any moment be accused of having failed to fulfill their duties towards the company and its shareholders. This could lead to directors being held personally liable for the damage suffered by the company and/or the shareholders as a result.

6. The position of shareholders

The position of shareholders has been addressed throughout this contribution, but we devote a short closing chapter to their position in view of this upcoming proxy season.

Shareholders of large polluting companies must inform themselves about the implications of corporate climate policies and scrutinize claims of Paris-alignment. To assist those efforts, investor groups are closing an information gap and a lack of transparency on the part of corporations by conducting detailed assessments of corporate climate policies. However, absent such assessments, shareholders will also have the tools necessary to evaluate climate plans and they will have important decisions to make once they do. Shareholders are in a position to use their power to influence board appointments and in some cases vote on corporate climate policies and can be expected to use that power to promote Paris-aligned action.

A vote against resolutions calling for Paris-aligned action essentially signals that shareholders approve of inadequate – and dangerous – corporate climate policies to secure their own short-term financial

gain. It will be clear that such a decision may create risks for shareholders, but more importantly it creates risks for the achievement of the universal goal of preventing dangerous climate change.

Large institutional investors including banks, pension funds, insurance companies and private asset managers may also have their own legal responsibility to reduce the carbon footprint of their financial investments to promote the goals of the Paris Agreement. This in addition to the duty of care they owe to clients and other stakeholders in respect of prudent investment. This is something they will have to take into account in implementing their own corporate climate policies.

7. Conclusion

In this contribution, we have shown that corporate directors must recognize the importance and urgency of adopting Paris-aligned corporate climate policies and putting absolute emission reductions at the front and center of these policies. If the private sector can change the current course of business conduct, then we may still preserve a world in which companies and their customers can thrive for a long time to come. But the opposite is also true: if they fail, an existential crisis awaits in which neither the large multinational corporations nor the directors of those corporations will be immune from a flood of claims and loss of legitimacy. In all its complexity, the choice is then simple. The decisions to be made by directors and shareholders with it equally so.