Unofficial translation

The Hague Court of Appeal

Case number: 200.302.332

Filing date: 18 October 2022

STATEMENT OF DEFENCE ON APPEAL

in the matter of:

1. **Vereniging Milieudefensie**
   having its registered office in Amsterdam, the Netherlands;
2. **Stichting Greenpeace Nederland**
   having its registered office in Amsterdam, the Netherlands;
3. **Landelijke Vereniging tot Behoud van de Waddenzee**
   having its registered office in Harlingen, the Netherlands;
4. **Stichting ter bevordering van de Fossielvrij-beweging**
   having its registered office in Amsterdam, the Netherlands;
5. **Stichting Both ENDS**
   having its registered office in Amsterdam, the Netherlands;
6. **Jongeren Milieu Actief**
   having its registered office in Amsterdam, the Netherlands;

Respondents, originally the claimants

Collectively called: "**Milieudefensie et al.**"

Counsel:
R.H.J Cox, M.J. Reij, A.J.M. van Diem

versus:

Shell plc
having its registered office in London, United Kingdom

Appellant, originally the defendant

Counsel:
D.F. Lunsingh Scheurleer, T. Drenth

Table of Contents

1. Introduction

1. This Statement of Defence on Appeal ("**Defence on Appeal**") sets out the response of Milieudefensie et al. to Shell plc's Statement of Appeal ("**Appeal**") in the appeal against the judgement of 26 May 2021 of the District Court of The Hague (the "**Judgement**"). In this Defence on Appeal the abbreviation "**Shell**" is used to refer to appellant Shell plc, the parent company of the international Shell Group. The international Shell Group will be referred to by the abbreviation "**Shell Group**".

2. Milieudefensie et al. maintains everything it presented at first instance. In this context it notes that in the Appeal, Shell did not or only barely discussed, or did not present appeal grounds against, the facts established by the District Court. Nor did Shell pay attention to the great number of crucial facts and circumstances presented by Milieudefensie et al. at first instance and which, in view of the (positive side of the) devolutive effect of the appeal, form part of the legal dispute in appeal.

3. Milieudefensie et al. notes that in its Appeal, Shell acknowledges and emphasises that urgent action is necessary to solve the climate problem and that it is a necessity to lower global carbon emissions by 45% by 2030.[1] Shell also acknowledges that the matter requires an emissions reduction in an absolute sense because there is only a limited and shrinking global carbon budget to be able to achieve the temperature goals of the Paris Agreement.[2] According to Shell, emissions reductions will therefore have to take place in the economic sectors responsible for the global emission of greenhouse gases, that are in accordance with the carbon budget.[3] Shell states that consequently these sectors require a fast and drastic decarbonisation and that this requires action on the part of both state and non-state actors, including business enterprises.[4] Shell acknowledges that toward this end the existing energy sources and infrastructure will have to be replaced at an unprecedented pace and on an unprecedented scale and that this requires massive investments this decade.[5] Shell also acknowledges that there is a societal consensus regarding the fact that individual companies must take measures to reduce their emissions and that doing nothing is not acceptable.[6] Shell furthermore states that climate change threatens to have consequences for people's lives, including people living in the Netherlands.[7] With regard to its obligations in relation to human rights, Shell also confirmed in appeal that it embraces the United Nations Guiding Principles on Business and Human Rights and that its policy is based on said Guiding Principles.[8] Lastly, Shell acknowledges that the Shell Group can become a smaller oil and gas company and that this in any event will result in a reduction of its own carbon emissions.[9]

4. In connection with this latter acknowledgement of Shell, i.e. that the Shell Group can become a smaller oil and gas company and as a result its carbon emissions will fall, it is striking that Shell does not argue in the Appeal that this would be de facto too onerous for it. It only asserts that making the company smaller would not be effective, but that it is possible is a certainty.

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[1] Appeal, paras. 1.1.1, 1.1.2, 1.2.2, 1.4.1, 2.8.1, 3.2.10.b and 3.2.16.

[2] Appeal, paras. 2.2.3, 2.2.6 and 2.3.11.

[3] Appeal, para. 2.3.7; Shell asserts in 2.3.6 that the same applies to countries.

[4] Appeal, paras. 1.3.1 and 2.2.9.

[5] Appeal, paras. 1.1.4, 1.3.3, 2.5.1, 2.5.7 and 2.5.11.

[6] Appeal, para. 7.2.3.a.(iii); see also 2.2.9, 2.3.10, 3.2.17 and 5.2.3.(b).

[7] Appeal, para. 4.2.5.

[8] Appeal, paras. 4.1.2, 4.3.8 and 1.5.1.b.(ii).

[9] Appeal, paras. 1.6.2.a and 8.4.5.

5. Bearing in mind the possibility for Shell to reduce the emissions of the Shell Group by reducing its oil and gas activities, in its essence this case revolves around the question whether Shell, as one of the biggest carbon emitters in the world, has a legal duty to make a proportional contribution to preventing dangerous climate change.[10]

6. The District Court answered that question in the affirmative and held that Shell is under an obligation to reduce the emissions of the Shell Group by 2030 by at least 45% net. Within the boundaries of the legal dispute limited by Shell's grounds of appeal, this legal question regarding Shell's reduction obligation is before us again and is now more important than ever.

7. Despite the Judgement, Shell's current corporate policy for the Shell Group still provides for very large-scale investments in oil and gas and will consequently lead to no or hardly any emissions reductions on the part of the Shell Group by 2030.[11] This means that Shell's policy is still at odds with the global task of limiting the warming of the earth to 1.5˚C in the last few years when this is still possible.

8. At the same time, the urgency of the climate problem since the ending of the debate at first instance has only continued to increase. Because countries and important non-state actors like Shell have not taken sufficient action in the past few years to reduce their emissions, in its last report of 2022 the IPCC calculated that a global reduction in carbon emissions of 48% by 2030 is now necessary.[12] Every year that too little is done, will only increase this percentage further and will make the global climate task more difficult and consequently less likely to succeed. This confirms that the reduction obligation which the District Court imposed on Shell of at least 45% net by 2030 must be deemed an absolutely necessary lower limit.

9. There will therefore be no other or better time to call Shell to account. In a few years it will be too late and it will no longer be possible to prevent a warming up of 1.5˚C.

10. In view of the extreme urgency and need for emissions reductions to be realised by Shell as well as in view of the positive effects for climate action which arise worldwide from the reduction order with regard to parties other than Shell (more on this further on in the Defence on Appeal),[13] Milieudefensie et al. is merely seeking affirmation of the Judgement. If the urgency were not so great, Milieudefensie et al. would have wanted to address parts of the operative part of the Judgement by means of a cross-appeal. However, because of the urgency it has decided not to do so and it will only focus on maintaining the reduction obligation that was challenged in appeal. What is also relevant in this respect is that Shell has chosen to largely ignore a judgement which was declared to be immediately enforceable. In this appeal Milieudefensie et al. therefore requests the Court of Appeal to reject Shell's grounds of appeal as unfounded and to affirm the Judgement, where necessary providing supplementation (*ex officio*) of legal grounds or improving the grounds of the decisions of the District Court.

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[10] With regard to use of the term 'dangerous climate change', Milieudefensie et al. refers to the danger limit of 1.5°C defined by the global community. The term finds its origin in the UN Climate Convention of 1992, in which Article 2 speaks of preventing "*dangerous anthropogenic interference with the climate system*". It is evident that right now, with an average warming of between 1.1°C and 1.2°C, there is already anthropogenic interference with the climate system, with significant consequences that can already be seen. See in this respect also Chapter 5.5 Defence on Appeal.

[11] See Chapter 6 Defence on Appeal.

[12] See Chapter 5 Defence on Appeal.

[13] See Chapter 8 Defence on Appeal.

11. One of Shell's central arguments in the Appeal is that only political decision makers can take responsibility for urgent climate action. Important reasons presented in this respect are that the energy transition is very complex and that this transition requires a weighing of interests between climate change, energy access and economic development, which are interests that should be weighed by political decision makers. Consequently, only political decision makers should be dealing with this case, not the courts. In addition, judicial intervention would allegedly be an unacceptable encroachment on political processes. According to Shell, the Court of Appeal would thus not be able to give an opinion on the claims of Milieudefensie et al., or in any event should set aside the Judgement and dismiss these claims now.

12. This Defence on Appeal will go into the relationship between courts and political decision makers in this case (and in climate cases in general) and reasons will be presented that the Judgement is not an unacceptable encroachment on state policy. It will become clear that the courts in fact have democratic legitimacy and are equipped to answer the legal questions that have been presented, which touch upon the foundation of a state ruled by law. Naturally the other assertions which Shell presented in its Appeal will be dealt with in detail. Nevertheless, Milieudefensie et al. wishes to make it clear in this introduction that Shell is failing to understand two important points in this case. By briefly referring to these two points, some background is provided for the argument that recurs in this Defence on Appeal, that the Court of Appeal is not being asked to make political choices. It also clarifies up front that, contrary to what Shell suggests, the Court of Appeal is also not being asked to shape the global energy transition. Therefore, as an explanation of these two points the following.

13. Firstly, Shell fails to note in its Appeal that the political choice it cites regarding climate approach, energy security and economic development was already made in 2015. September 2015 is when the 2030 Agenda for Sustainable Development was adopted by UN Resolution. This was followed by the Paris Agreement in December 2015. The Paris Agreement and the Sustainable Development Goals refer to each other and must be seen in conjunction with each other, as was also determined by the District Court (no ground of appeal was lodged regarding this determination).[14]

14. Compliance with the Paris Agreement also serves other significant social interests, both nationally and internationally, such as affordable energy access, energy security, economic development and combating poverty. The temperature goal of the Paris Agreement is therefore not only crucial to prevent dangerous climate change, but also to secure sustainable economic and social development in general. This applies in both the developed countries and in the developing countries. The Sustainable Development Goals apply to all countries and are relevant for all countries.[15]

15. Preventing dangerous climate change is therefore a prerequisite for a fair and just development for every individual country and in order to secure a joint future for humans on a habitable earth.[16] Preventing dangerous climate change also serves to protect the socio-economic progress which has been made in many developing countries in the past few decades. If the temperature goal of the Paris Agreement is not achieved, the UN believes this socio-economic progress will be nullified, with serious consequences for billions of people.[17]

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[14] Judgement, para. 4.4.42; Milieudefensie et al.'s Notes on oral arguments 5, paras. 7-19.

[15] Milieudefensie et al.'s Notes on oral arguments 5, paras. 7-27.

[16] Milieudefensie et al.'s Notes on oral arguments 5, paras. 1-96.

[17] Milieudefensie et al.'s Notes on oral arguments 5, paras. 20-27.

16. With an eye on the above the District Court determined that Goal 7 of the UN Sustainable Development Goals ("*Ensure access to affordable, reliable, sustainable and modern energy for all."*) does not detract from the goals of the Paris Agreement, nor does it encroach on these goals. The District Court made it clear in this respect that this also ensues from Goal 13 of the Sustainable Development Goals (*"Take urgent action to combat climate change and its impacts.")* and in the preamble under 8 of the Paris Agreement in which the intrinsic connection is emphasised between the approach to dangerous climate change and the fair access to sustainable development and ending poverty. The District Court noted that Shell's arguments relating to the political choice to be made by states in relation to climate action, energy security and economic development cannot succeed.[18] Shell has not presented a ground of appeal against the aforementioned specific considerations of the District Court.

17. States have thus already jointly made the political choice relating concerning climate action and energy security and access to affordable energy (and the other Development Goals of the 2030 Agenda) and recorded them in international agreements. They are very aware of the mutual connection and integrated nature of the climate and energy goals and see these goals (together with the other goals) as an integral and indivisible whole that must be realised in conjunction "*to realize human rights for all*".[19]

18. Political decision makers and policymakers in all countries are therefore expected to come up with a holistic approach. This also appears from the citation quoted by Shell in the Appeal in para. 2.5.12 from the *Theme Report on Energy Transition; Towards the Achievement of SDG 7 and Net-Zero Emissions* published by the UN in September 2021, from which Shell quotes the following citation:

    "*The challenges of balancing energy security, economic development, and climate concerns must be accepted and the paths must be sought that promote each of these simultaneously. Such paths exist and it is the task of policymakers to find them.*"[20]

19. This citation, quoted by Shell, underscores that energy security, economic development and climate action must be shaped synergistically so that all goals are achieved in conjunction. That is the task which the international community of countries has set for itself, a task which is achievable and "*must be accepted*", according to the UN in the aforementioned citation.

20. Contrary to what Shell might be suggesting, the temperature goal of the Paris Agreement is not a point of discussion in the above citation, in relation to the goals of energy security and sustainable socio-economic development. What the UN clarifies here is that the synergy between the Paris Agreement and the Development Goals does not arise by itself by reaching global consensus. This synergy must be intentionally sought by political decision makers and policymakers in the effort toward implementing this in practice. This is also what the World Economic Forum refers to in the report cited by Shell in the Appeal under 2.2.7.

21. The IPCC, UNEP and other institutions support states and their policymakers in this holistic task by mapping out the synergistic possibilities and wise choices, as well as by showing the consequences of unwise choices. By providing insight into these policy 'do's and don'ts' it is assured as much as possible that the urgently necessary energy transition that must be shaped

[18] Judgement, paras. 4.4.41 and 4.4.42.

[19] Milieudefensie et al.'s Notes on oral arguments 5, paras. 28-38. See also the Preamble with the 2030 Agenda.

[20] Appeal, para. 2.5.12.

within the temperature goal of the Paris Agreement, can be achieved in a good and synergistic manner with the other Sustainable Development Goals.[21]

22. With regard to the realisation of Sustainable Goal 7 regarding access to energy, the states themselves have already explicitly made it clear how the synergy between climate action, energy security and economic development must be found, namely by investing in sustainable energy and improving energy efficiency.[22] States are maintaining that necessary synergy in case of crisis situations. In that case too, achieving the 1.5°C goal and the 2030 Agenda for Sustainable Development is the focal point. This appears, inter alia, from the communiqué of 28 June 2022 of the G7 countries[23] in which, partly in connection with the Ukraine crisis and other geopolitical tensions, the following is explained (emphasis added by counsel):

"*We, the Leaders of the Group of Seven (G7) […] We were joined in Elmau by the Leaders of Argentina, India, Indonesia, Senegal and South Africa […] The commitments we make today will shape our path towards a sustainable development and inclusive economic recovery, and a prosperous and peaceful future, in line with the Agenda 2030. […] We reaffirm our unwavering commitment to the Paris Agreement, and its strengthened implementation. […] We highlight the increased urgency to act to reduce global greenhouse gas emissions by around 43 per cent by 2030[24], relative to the 2019 level, in light of the latest findings of the IPCC, in order to limit global warming to 1.5 °C. […] We also commit to keep a limit of 1.5 °C temperature rise within reach, to enhance resilience and adaptive capacity to the impacts of climate change, and to align financial flows with the goals of the Paris Agreement. We will fully play our part in urgently implementing the Glasgow Climate Pact.*"[25]

23. What is made clear here, is that states realise that working on preventing dangerous climate change must remain the greatest possible priority, including in times of crisis, and that this is also necessary to achieve the Sustainable Development Goals. This is emphasised once again in a report of the University of Essex that makes it clear that the Sustainable Development Goals cannot be achieved if the production and burning of fossil fuels is not decreased in line with the Paris Agreement:[26]

"Fossil fuels undermine all 17 SDGs. As the primary driver of climate change and air pollution, and a major contributor to biodiversity loss, fossil fuels have a detrimental impact on all the SDGs."[27]

24. In short: the Sustainable Development Goals do not stand in the way of the global task of reducing CO2 emissions by at least 45% by 2030. On the contrary, achieving this reduction task and the phasing out of fossil fuels is necessary to achieve the Sustainable Development Goals. This also makes it clear that the order to reduce emissions imposed on Shell is not an

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[21] Milieudefensie et al.'s Notes on oral arguments 5, paras. 74-79.

[22] Milieudefensie et al.'s Notes on oral arguments 5, paras. 28-38.

[23] The G7 consists of Canada, the United States, the United Kingdom, France, Italy, Japan, and Germany. The European Union also participates in the G7 but is not a member because it is not a state.

[24] The reference to a reduction of 43% relates to all greenhouse gas emissions, and thus not only CO2 emissions. For CO2 alone the percentage is 48%, as is explained in Chapter 5.

[25] **Exhibit MD-374**, G7 Leaders' Communiqué of 28 June 2022, pp. 1-2.

[26] **Exhibit MD-375**, Fueling Failure, How coal, oil and gas sabotage all seventeen Sustainable Development Goals, pp. 2-4. See also **Exhibit MD-376**, United Nations, The Sustainable Developments Goals Report 2021, p. 51, where the UN makes it clear that phasing out fossil subsidies too slowly forms a threat in relation both to achieving the Paris Agreement and achieving the 2030 Agenda for Sustainable Development Goals.

[27] Exhibit MD-375, p. 18.

encroachment on Development Goal 7 relating to access to energy. Nor does the reduction order constitute encroachment of do's and don'ts of synergistic climate policy. That the reduction order cannot be seen as encroaching on government policy for many other reasons, nor as encroachment on the principle of Common But Differentiated Responsibilities, will be discussed in detail further on in the Defence on Appeal.[28]

25. Secondly, Shell fails to note (by repeatedly emphasising the complexity of the energy transition and the technical and economic knowledge which is required for this) that the Court of Appeal is not being asked to shape the global energy transition or to create a regulatory framework in this respect. Milieudefensie et al. is merely seeking on appeal, pursuant to the applicable law and Article 3:296(1) of the Dutch Civil Code (DCC), legal protection against the socially careless actions of Shell, because Shell has a corporate policy that is at odds with the global climate goals. Shell continues to pursue this disastrous corporate policy, despite the fact that it knows that all countries which have signed up to the UN Climate Convention have indicated since 2012 that they cannot handle climate action on their own and that this requires proactive action of non-state actors (including companies). This has also been established by the District Court (a determination against which Shell did not file a ground of appeal):

"*4.4.26 […] The issue is that combating carbon emissions and the warming of the earth according to the contracting parties cannot be realised exclusively by states. There is thus also a role to be played by others. Since 2012 there has been broad international consensus on the need for non-state action, because states cannot handle the climate task alone. In the current situation it is necessary that others contribute to reducing carbon emissions: the IPCC has noted that the national reduction commitments of the contracting states for 2030 when added up together will be far from sufficient to be able to achieve the goals of the Paris Agreement.*"

26. The necessity that non-state actors make their contribution to the climate task naturally applies first and foremost to the biggest carbon emitters. In this context it is good to know that only four countries have greater carbon emissions than Shell, being the four major powers: the United States, China, Russia and India. In terms of CO2 emissions Shell is thus not only comparable to a country, but it is comparable to a major state actor.[29] That Milieudefensie et al. seeks legal protection against this big impact of Shell on the climate problem should therefore speak for itself.

27. Contrary to what Shell suggests, in order to be able to offer Milieudefensie et al. legal protection, the court does not have to shape the global energy transition and the policy therefore. In this case, against the background of all relevant facts and circumstances, a weighing of interests need only be made between the general interest of humans and the environment on the one part (the interest which Milieudefensie et al. is seeking to protect) and the commercial interest of Shell on the other.

28. The legal question which has been presented to the District Court and the Court of Appeal thus has a far more limited scope than Shell makes it appear. The District Court rightly answered that question and determined in that respect on good and convincing grounds that Shell is under an obligation to reduce the emissions of the Shell Group by 2030 by at least 45% net.

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[28] Defence on Appeal, Chapter 3.9, Chapters 5.2 and 5.3 and Chapter 9.

[29] The footprint of the other 193 countries that signed the UN Climate Convention is only a fraction of that of Shell. For example, the CO2 footprint of another industrial major power like the United Kingdom is not even 1/3 of Shell's footprint and the footprint of the Netherlands is only 1/9 that of Shell). As will appear from Chapter 6, the scope of the CO2 emissions connected with the Shell Group is even bigger than was assumed by Milieudefensie et al. at first instance.

29. Against the background of this introduction, Milieudefensie et al. will explain in this Defence on Appeal that Shell's grounds of appeal cannot succeed. Milieudefensie et al. will therefore first present a recap of the bases of the claims of Milieudefensie et al. After that the further structure of this Defence on Appeal and the division into chapters (as also known from the table of contents) will be explained in further detail.

2. Background of claims of Milieudefensie et al.

30. At first instance, Milieudefensie et al. presented as the basis for its claims that Shell is violating the unwritten standard of care of Article 6:162(2) DCC, or that such violation is imminent. Pursuant to Article 3:296 DCC, Milieudefensie et al. asked the District Court to order Shell to implement an adequate climate policy.

2.1 Article 6:162(2) of the Dutch Civil Code: the objective reference points

31. Milieudefensie et al. made it clear at first instance that the social standard of care is an open standard which, in addition to the relevant facts and circumstances of this case, is coloured and made specific by, inter alia, the following objective reference points that are cited by Milieudefensie et al.:

(1) the limit for dangerous climate warming laid down in the UN Climate Convention and the Paris Agreement;
(2) the 'Kelderluik' criteria developed in case law with regard to hazardous negligence;
(3) the horizontal effect of the European Convention on Human Rights (ECHR),
(4) the case law of the Netherlands Supreme Court and other domestic courts;
(5) the case law of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and other foreign courts;
(6) the findings and resolutions of the UN Human Rights Council;
(7) the findings of the UN Special Rapporteur on Human Rights and the Environment;
(8) the findings of the UN Committee on Economic, Social and Cultural Rights;
(9) the UN Sustainable Development Goals;
(10) general international legal principles;
(11) the United Nations Guiding Principles on Business and Human Rights (UNGP);
(12) the UN Global Compact;
(13) the OECD Guidelines for Multinational Enterprises;
(14) the corporate governance code;
(15) international emissions reduction protocols for business enterprises;
(16) specific users in the oil and gas sector;
(17) the reports, summaries and (annual) reports of Shell;
(18) scientific findings and expert reports of, among others: the IPCC (Intergovernmental Panel on Climate Change); UNEP (United Nations Environmental Programme); WHO (World Health Organization); IEA (International Energy Agency); IRENA (International Renewable Energy Agency); the Global Commission on the Economy and Climate; the International Council for Science; the European Commission; De Nederlandsche Bank; KNMI (Koninklijk Nederlands Meteorologisch Instituut); PBL (Planbureau voor de Leefomgeving); and the (scientific) reports, studies and publications of many other authors, universities and institutions.

32. Milieudefensie et al. already discussed these objective reference points which are relevant for the duty of care at first instance and showed that they all point in the same direction, i.e. that there is an obligation for Shell to respect human rights and to refrain from acts of hazardous negligence behaviour that can reasonably be prevented, and that on the basis thereof Shell has an obligation to make a proportional contribution to preventing dangerous climate change. In this Defence on Appeal we will naturally come back to the perspectives which arise from the aforementioned 18 reference points.

2.2 Article 6:162(2) of the Dutch Civil Code: the facts and circumstances

33. With regard to the relevant facts and circumstances of this case which are important with regard to giving shape and substance to Shell's duty of care, these were discussed in detail at first instance. However, Shell hardly pays any attention to this in the Defence on Appeal. Milieudefensie et al. naturally will not repeat the facts and circumstances that were presented at first instance in full, but does set store by discussing them (partly) hereinafter point by point in summary form, as this is of crucial importance for the full (factual and legal) context in which Shell's grounds of appeal must be assessed. Where necessary Milieudefensie et al. will give an update in the following chapters of this Defence on Appeal of the facts and circumstances presented at first instance.

34. For the sake of reading convenience, no references will be included in the following summary of points 1 through 172. **Exhibit MD-340** therefore contains exactly the same summary which does provide the sources of the aforementioned facts and circumstances in the documents which Milieudefensie et al. submitted into the proceedings at first instance.

35. Following are important facts and circumstances cited at first instance:

With regard to dangerous climate change

(1) since the 1990s it is general knowledge that in order to prevent dangerous climate change, the warming of the earth must be kept below 2°C;

(2) since 2009 under the UN climate regime account must be taken of a necessary limiting of the warming to 1.5°C ;

(3) since the Paris Agreement of 2015 there is a great deal of agreement in climate science and within the international community regarding the basic principle that the warming of the earth must be limited to 1.5°C ;

(4) warming of the earth greater than 1.5°C will have very harmful consequences, such as extreme heat, extreme dryness, extreme precipitation, disruption of eco systems so that, inter alia, food and water supplies will be in jeopardy, and rising of the sea level due to the expansion of warming sea water and the melting of glaciers and polar ice caps;

(5) with a greater warming than 1.5°C the risk of climate changes increases, whereby the climate on earth or areas on earth is abruptly and drastically changing ('tipping points');

(6) because of all of this the lives, the well-being and the living environment of many people is in jeopardy, worldwide, including the Netherlands, as determined by the Supreme Court of the Netherlands in the Urgenda case;

(7) consequently human rights worldwide and also in the Netherlands are being affected, possibly irreversibly;

With regard to the need for emissions reduction

(8) to limit the harm to fundamental human rights connected with climate change, the human emission of greenhouse gases must be reduced to (net) zero as soon as possible;

(9) in climate science and within the international community there is agreement that towards this end CO2 emissions must have been reduced worldwide in 2030 by at least 45% (i.e. must have been almost halved in 2030) relative to 2010 and that in 2050 on balance humans may not add any CO2 emissions at all to the atmosphere (and net zero must therefore have been reached by that time);

(10) this task for 2030 and 2050 is technically and economically possible, achievable and affordable, but this requires an immediate and significant start;

With regard to climate action and other general interests/development goals

(11) achieving the climate task is a prerequisite for sustainable economic development worldwide and this ensues, inter alia, from the definition of dangerous climate change in Article 2 of the UN Climate Convention (UNFCCC), which article indicates that dangerous climate change is a threat on a global level to the food supply, the ecosystems and sustainable economic development;

(12) the need to achieve the climate task for sustainable economic development also ensues from Article 2 of the Paris Agreement, which explicitly refers to the need to prevent dangerous climate change in the context of sustainable development and ending poverty;

(13) the international community in 2015 in the UN Resolution for Sustainable Development Goals confirmed that tackling climate change is a prerequisite for being able to realise the other Sustainable Development Goals;

(14) the Sustainable Development Goals apply to all countries and all countries are expected to give substance to this global sustainable agenda in their own territory and in cooperation with each other, in the awareness that this agenda is not only necessary for the life and well-being of their own populations, but of all people in the world;

(15) the key idea of the Sustainable Development Goals is that the life and well-being of people (wherever they were born) depends on vital natural ecosystems, maintaining biodiversity and a stable climate and that consequently making the economy sustainable is necessary in order to be able to (continue to) realise and guarantee access to the basic needs of every human, such as food, water, housing, safety, energy, work and education.

(16) the Sustainable Development Goals are closely connected with the protection of universal human rights, including the right to life, the right to well-being and health, the right to food security, the right to water and the right to an adequate and safe home and living environment;

(17) the Sustainable Development Goals show that universal energy security and energy access and affordable energy for all, can only be realised due to a quick, sustainable energy transition;

(18) in the international community and in science there is full awareness that climate change is the biggest threat to all other development goals worldwide;

(19) all of this shows that all 197 countries and regions that are a party to the UN Climate Convention, including the Netherlands and the EU, have each for themselves made a general weighing of interests since the concluding of the UN Climate Convention in 1992 and have come to the consensus that dangerous climate change must be prevented in order to be able to (continue to) serve other general interests;

With regard to the need to achieve the goal before 2030

(20) to prevent dangerous climate change, it is necessary that in 2030 global CO2 emissions have fallen by at least 45%;

(21) if the international community manages to successfully satisfy this first task before 2030 and then achieve the second task of achieving net zero emissions by 2050, there is a 50% chance that the earth's warming will actually be limited to 1.5°C and there is an 85% chance that the warming will remain limited to well under 2°C;

(22) even if this huge global reduction task for 2030 and 2050 succeeds, there is thus still a 50% chance that the 1.5°C warming will be permanently exceeded and that when it comes to tipping points, the earth will even see an accelerated and irreversible further warming;

With regard to failing climate policy and the role of the fossil industry

(23) the fact that even with the successful implementation of the global reduction task, it can no longer be guaranteed that the earth's warming will remain limited to the temperature goal of the Paris Agreement, is the result of the lack of climate action in the last 30 years since the concluding of the UN Climate Convention in 1992;

(24) the UN Climate Convention over the last 30 years placed the greatest burden of the global reduction task with the developed (Western) countries on the basis of the international legal principle of Common But Differentiated Responsibilities (the CBDR principle for short);

(25) the CBDR principle entails that all countries must contribute to the climate goal, but the rich Western countries must take the lead, as due to their abundant use of fossil fuels since the industrial revolution, they have caused the climate problem to a great extent and as group of Western countries, they also have the most resources, knowledge, (institutional) infrastructure and the international (power) position to shape the necessary transformation to a sustainable global society;

(26) the UN Climate Convention of 1992 makes it clear in Article 4.1.c that a transition to zero-emissions sustainable energy in the energy sector is essential;

(27) previously, at the UN Conference of 1988 the countries present had explicitly called upon the industry to shift business investments on a massive scale to renewable alternatives;

(28) these developments since the 1980s regarding the need for a renewable energy transition, were seen as a threat to the fossil business model by the fossil industry virtually from the outset;

(29) these developments were the starting shot for intensive political and social influence by the fossil industry via lobbying and PR campaigns and the use of industry associations, which started to support the fossil companies in maintaining the fossil business model;

(30) since the UN Climate Convention the political arrows of the fossil industry have focused on the most important Western regions (i.e. North America, Europe and Australia), where year after year billions have been spent on lobbying and PR campaigns to prevent the Western countries from actually taking control of global climate action and preventing and undermining social support for the sustainable energy transition in these Western regions;

(31) the fossil industry was extremely successful in this respect and the developed countries as a group are far from realising the emissions reductions that they themselves acknowledged as necessary for 2020 (the 25-40% emissions reduction as of 2020 which

was also the guideline in the Urgenda case in terms of the reduction to be achieved by a Western country like the Netherlands);

(32) consequently the Western countries did not take control of global climate action from the very start since 1992, there has been no adequate climate action for decades and the climate problem has become significantly greater since then;

(33) this blockade, obstruction and delaying of the climate approach by the fossil industry, based on financial interests, and the related (in part) failure of the countries in their climate action, have now brought human civilisation to the point that the critical and all-determining decade has arrived;

(34) due to these actions of the fossil industry (including Shell) the path of gradual change is no longer possible, and a radical turnaround with almost a halving of the global emissions in the coming 8 years is now the only remaining alternative to avoid dangerous climate change;

With regard to the power vacuum and the need for self-regulation

(35) this blockade of the sustainable energy transition by the fossil industry is all the more reproachable because of another important development since the 1990s;

(36) in the 1990s it became clear that due to the ever increasing scale increases of multinational enterprises (of which the fossil companies are among the biggest), these companies have a greater impact on human rights and the environment than far and away most states in the world;

(37) at the same time it became clear that due to the increasing global influence of multinational enterprises, a power vacuum (governance gap) was created because of, on the one hand, the difficulty in regulating multinational enterprises nationally (multinational companies are flexible and threaten to leave for other countries if they are not happy with intended new regulations) and, on the other, a lack of international regulation and international supervision of multinational enterprises;

(38) this power vacuum (the governance gap) was the background and reason for drawing up, inter alia, the United Nations Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprises;

(39) because of the power vacuum these guidelines are based on self-regulation and place the responsibility with business enterprises to respect human rights and the environment independently and proactively and to observe the precautionary principle in this respect;

(40) bodies behind human rights treaties, because of the existing power vacuum and the universal character of human rights, recommend that home states regulate the extraterritorial activities of the head offices of multinational enterprises based in their territory if human rights are at risk;

With regard to the need for proactive climate action of business enterprises

(41) in line with the aforementioned UN Guidelines, it was made explicitly clear under the climate regime of the UN Climate Convention since 2012 that states cannot take climate action alone and that climate action can only succeed if business enterprises also take responsibility for reducing emissions;

(42) therefore, since 2012 climate action taken by business enterprises under their own responsibility has become an important pillar under the UN climate regime in order to achieve successful climate action;

(43) according to the UN the potential of independent emissions reductions by business enterprises is very great and great steps can be taken to close the emissions gap (the difference between what is globally necessary in emissions reductions and what is actually reduced);

(44) according to the UN, the importance of independent and proactive climate action of business enterprises is greater than only the emissions reductions they achieve, because action of business enterprises makes it easier to increase their own national climate ambitions;

(45) the UN believes that independent and proactive action of business enterprises can lead to a flywheel effect; an effect that is necessary to be able to achieve the climate goals;

(46) the greater a company's CO2 footprint, the greater the importance that the company itself take action to reduce that footprint;

With regard to Shell's CO2 footprint

(47) Shell is a vertically integrated company and is primarily engaged in the exploration, production, refining, distribution, marketing and sale of fossil fuels and as such has one of the biggest CO2 footprints of all companies in the world;

(48) since 1988, the year the IPCC was founded and the year the UN Conference called upon industry to en masse shift investments into renewable alternatives, the global emissions have (cumulatively) more or less doubled;

(49) half of all greenhouse gas emissions since 1988 are connected to only 25 companies, including Shell;

With regard to Shell's knowledge on the dangers of a large CO2 footprint

(50) since the 1980s Shell has had special knowledge of the seriousness of the dangers of the greenhouse gases connected with its products and the destructive consequences thereof for the planet, as well as that it knew even then that the climate consequences would be partly irreversible;

(51) because of the knowledge that Shell itself has possessed since the 1980s, Shell is taking measures to protect its property against the foreseeable consequences of climate change and rising sea levels, such as by raising its drilling platforms;

(52) since the 1990s Shell has known that a warming of the earth by approx. 2°C is very dangerous for humans and the ecosystems humans are dependent on;

(53) Shell has also known since the 1990s that this danger can only be prevented by phasing out oil and gas and the transformation to renewable energy sources;

(54) Shell already indicated in the 1990s that it realised that it would have to take responsibility for the CO2 emissions caused by Shell customers by the use of Shell fuels (Scope 3 emissions) and that Shell would therefore have to actively reduce the emissions of its customers;

(55) since the 1990s Shell has been measuring and publishing the annual greenhouse gases which are connected with its business activities (Scope 1 and 2 emissions) and those which are connected with the use of its products by its customers (Scope 3 emissions);

(56) on the basis of those measures of the Scope 1, 2 and 3 emissions connected with its company, Shell has known since the 1990s that its annual share in the global emissions is very substantial and indeed constitutes several percent (in 2002 Shell represented 3.6% of global CO2 emissions);

(57) Shell also realised in the 1990s that it could face lawsuits in the future if, despite the warnings of scientists, it did not take action against climate change and that the company, by its own estimation could in time face the same fate as the tobacco companies;

With regard to Shell's conduct

(58) Shell made a start in the 1990s with the transformation to renewable energy, but in 2007 made a policy choice to cease the investments in renewable energy activities and to focus the investment flows on new oil and gas fields;

(59) part of that policy choice was to expand Shell's fossil activities with the most CO2-polluting oil and gas types like oil sands, shale oil and shale gas;

(60) since 2007 Shell has also been making use of public deception and greenwashing to camouflage this (renewed) non-renewable fossil course, such as appears, inter alia, from the findings of the Reclame Code Commissie (Dutch Advertising Code Committee) and comparable foreign committees;

With regard to the political and social influence of Shell

(61) Shell has been using its power, (financial) resources and position for decades to combat, delay or water down the energy transition and regulatory initiatives of governments or otherwise turn them to its advantage, inter alia through lobby activities, PR policy, the creation of economic and social lock-in effects and by (threatening to be) leaving countries that will not shape their regulations in accordance with Shell's wishes;

(62) Shell annually spends tens of millions on political lobby activities alone to protect its fossil business model, and also has these lobby activities carried out via the many branch organisations of the fossil industry of which Shell is a member and which are partly financed by Shell;

(63) Shell is in the top five of the 25 biggest oil and gas companies which exert the most negative influence on climate policy by means of lobbying;

(64) Shell, in order to keep its "social license to operate", by means of PR campaigns, is manipulating political decision makers and society to present the image that Shell is a socially responsible company that can be trusted;

(65) those PR campaigns are specifically deployed if there is a lot of media attention for the climate problem and at times when regulatory initiatives have been presented;

(66) for these purposes Shell annually spends a global PR budget of approx. 50 million US dollars;

(67) as part of its PR strategy, Shell has been publicly indicating for several years that it supports climate regulations, but when not in the public eye continues using its position of power to combat, delay and water down regulations or otherwise turn them to its advantage;

(68) as the late John Ruggie (the UN-appointed architect of the UN Guiding Principles on Business and Human Rights) wrote in one of his published studies, that stakeholders of the big (fossil) industry sit down on a weekly basis in the most important political centres of the world with the highest-ranking government officials to secure the interests of their business model, thereby continuing to exert pressure on the regulatory initiatives of states;

(69) civilians do not have a role of any significance in this forcefield and the trade unions and NGOs in the political centres are outnumbered 30-fold by the lobbyists of the business community;

(70) according to Ruggie it is difficult to deal with the noted power vacuum by means of a universal treaty in order to regulate behaviour of multinational companies internationally, inter alia because this would result in global harmonisation of national legal systems in important areas of law, such as commercial law, business law, financial law, tax law, consumer law and competition law;

(71) Shell exerts significant influence worldwide (including in the Netherlands) on politics in general and on legislative processes in particular, so that political climate action is seriously impeded worldwide and the supporting base for change in society is undermined;

With regard to Shell's policy

(72) the fact that Shell claims to embrace the UN Guidelines as well as a letter from 2014 addressed to investors show that Shell is well aware of the power vacuum and realises quite well how big the inhibitory effect is of its actions (and that of its industry) on climate regulations and the energy transition;

(73) Shell indicated in the letter in question to have good reasons to assume that in the foreseeable future there will be no effective climate legislation and there will therefore not be a rapid energy transition;

(74) Shell therefore asserted in the letter in question to have confidence that the global climate goals will not be achieved and its fossil business model will not be affected;

(75) to this day Shell asserts in its annual reports that accelerated climate regulations will have a material impact on its fossil business model, but that it is and remains willing to accept those risks (risk appetite), in view of the high returns made on fossil energy;

(76) Shell is trying to mitigate the risks of accelerated climate regulations for its fossil business model and keep these risks manageable by means of, inter alia, the aforementioned lobby and PR practices;

(77) as part of its lobby and PR offensive, Shell (together with other fossil companies and the trade associations) has been busy for years in promoting gas worldwide as a transition fuel, in order to retain political support for the future of fossil fuels and stimulate the market demand for fossil fuels;

(78) from a business perspective Shell will therefore remain responsible for continuing to invest in new oil and gas production, which shows that it is relying on the belief that there will not be a rapid energy transition;

With regard to Shell's investments

(79) for all these reasons Shell intends up to 2030 (and thereafter) to continue making large-scale investments in new oil and gas fields;

(80) Article 2 of the Paris Agreement of 2015, the key article, sets out that dangerous climate change can only be prevented by shifting investments to sustainable alternatives (a determination that dates from the aforementioned UN Conference of 1988 and can also be found in the UN Climate Convention of 1992);

(81) the limited carbon budget that is available to the world to prevent dangerous climate change does not allow for any more investments in new oil and gas fields;

(82) despite this knowledge Shell belongs to the biggest investors in the world in terms of intended investments in new oil and gas fields;

With regard to Shell's Scope 3 emissions

(83) Shell has complete control over the quantity of carbon emissions which are connected with the fossil fuels that Shell sells to its customers (Scope 3 emissions);

(84) after all, Shell's Scope 3 emissions will increase if it sells more fossil fuels, while its Scope 3 emissions will fall if it sells fewer fossil fuels;

(85) the majority of all Shell carbon emissions are connected with the products it sells;

(86) the control that Shell has over the emissions connected with the Shell products is greater and more direct than the control those states have over the national emissions of citizens and companies;

(87) because of that greater and more direct control over emissions, companies can act more quickly than many national states and consequently are best able to take rapid action to generate a flywheel effect in relation to climate action, such as provided for under the UN climate regime and is deemed necessary;

(88) in addition, Shell has control over a much larger scope of carbon emissions than the state of the Netherlands and than almost all other states have;

(89) a comparative study of Oxford University shows that there is general consensus between the climate protocols and guidelines for business enterprises, that business enterprises with a lot of Scope 3 emissions (such as the business enterprises in the fossil energy sector and the automobile sector) are responsible for these emissions and therefore must reduce their Scope 3 emissions (just like their Scope 1 and 2 emissions);

(90) there is a logical explanation for this because, if the biggest energy companies in the world continue to offer consumers virtually only fossil energy, consumers cannot reduce their own emissions or can only do so to a limited degree;

(91) this is so evident, that Shell understood this back in the 1990s and therefore at the time focused its policy on reducing the sale of oil and gas and increasing the sale of renewable alternatives, so that the Scope 3 emissions of the Shell Group could be reduced;

(92) the fact that Shell and other fossil companies have the option of reducing the Scope 3 emissions that are connected to their products, also appears from the goals they have included in this respect in their policy;

(93) the need to take responsibility for Scope 3 emissions also ensues from the UNGP and must therefore be part of the respecting of human rights by companies, according to the UN Special Rapporteur on Human Rights and the Environment;

(94) this responsibility for Scope 3 emissions is also broadly supported in the need for proactive climate action by companies set out under the UN Climate Regime, as discussed above;

(95) the Oxford analysis also shows that the climate protocols and guidelines for business enterprises are in consensus that the biggest CO2-emitting companies bear the greatest responsibility, in particular if they are based in Western jurisdictions, because they have the biggest capacity for emissions reduction in Scope 1, 2 and 3, they have the greatest capacity to bear the financial burdens thereof, they also have the biggest historical responsibility for the climate problem and consequently also have the greatest responsibility for solving the problem;

(96) because of the limited carbon budget that is left, there is a need to reduce the emissions of companies as of 2030 in an absolute sense and this (insofar as it is not evident) is also underlined in the Oxford analysis;

(97) Shell refuses to set a goal to reduce the totality of its Scope 1, 2 and 3 emissions as of 2030 in absolute terms;

With regard to Shell's annual rejection of the integration of policy in conformity with the Paris Agreement

(98) the general meeting of shareholders of Shell, on the advice of the board of directors, since 2016 has fully rejected all annual shareholders' resolutions calling on Shell for absolute emissions reductions (in Scope 1, 2 and 3) in line with the Paris goals;

(99) Shell will thus not voluntarily commit to have the total CO2 emissions connected with the company fall by 45% by 2030, or by any other reduction percentage whatsoever before 2030;

(100) it cannot be expected, without a court order, that Shell will implement an adequate policy that is in conformity with the Paris Agreement that is geared to reducing the Scope 1, 2 and 3 emissions connected with the group in an absolute sense;

With regard to Shell's independent responsibility and legal duty

(101) Milieudefensie et al. has argued that, in view of the size of Shell's emissions, in view of the seriousness of the climate problem and Shell's knowledge in this respect, in view of related harm to human rights, in view of the existence of the power vacuum, in view of the blocking global influence of Shell on climate action and on regulatory initiatives, in view of countries calling on companies to independently and proactively reduce their emissions because the public sector cannot realise climate action on its own, as well as in view of Shell's options to heed that call and change the business model, Shell has its own legal duty to change course and make a proportional contribution to solving the most catastrophic development which humanity has ever been confronted with;

(102) nowhere in the scientific literature, treaties or other sources is it argued that the Paris Goals will be achieved if the big fossil companies continue their activities in the current manner;

With regard to the need and obligation to realise a reduction of 45% by 2030

(103) in connection with the aforementioned court-issued reduction order, it is necessary to know that the vast majority of all global CO2 emissions is caused by the use of oil, gas and coal (the energy sector);

(104) achieving the temperature goal of the Paris Agreement therefore stands or falls with the contribution of the energy sector and the (fossil) companies which form part thereof;

(105) the basic principle that individual companies too must at least follow the global average is confirmed by, inter alia, the Science Based Target Initiative, which indicates that this is best practice;

(106) maintaining this global average for Shell is particularly apposite because with its net zero in 2050 strategy, Shell must itself seek alignment with the global scenario;

(107) Shell has also sought alignment with the international legal principle of Common But Differentiated Responsibilities (the CBDR principle) and on the basis thereof it believes that it should in fact do more than the global average because, so it says itself, Shell, just like the developed countries, belongs to that part of global society that can move faster than the global average and therefore must in fact move faster than the global average;

(108) this translation from global (45%) to Shell (45%) is also self-evident for other reasons, because there are no agreements regarding which energy company or which part of the

energy sector (coal, oil and gas) will make what contribution to achieving the 45% reduction goal, and in this respect there is no global coordination, nor is such expected;

(109) the oil and gas sector thus cannot (continue to) look at the coal sector while awaiting what will happen in that sector;

(110) therefore the precautionary principle calls for the approach that Shell must at least adhere to the global average of 45% reduction by 2030, because if it does not do so, it is taking on more risk than is socially responsible;

(111) the precautionary principle forms part of the UNGP Guidelines embraced by Shell, is part of human rights law and furthermore, via the doctrine of hazardous negligence, is part of Dutch law;

(112) the order, moreover, only relates to what Shell must have achieved by 2030 and the sectoral balance can then be reviewed again after that;

<u>With regard to the onerousness of the reduction order of 45% as of 2030</u>

(113) Shell does not dispute that it can actually realise the 45% reduction in 2030 with regard to Scope 1, 2 and 3 emissions;

(114) nor does Shell dispute that after the execution of the reduction task, it can still be a profitable and flourishing energy company in 2030;

(115) nor will the reduction of Shell's fossil activities affect the level playing field, at least not in an onerous manner, because most other oil and gas companies in the world are not even half Shell's size and these companies have been profitable for decades in a much smaller size;

(116) in addition, the order must be seen as a 'no-regret' measure for Shell, because Shell must in any event be a net zero company by 2050, and that on the road to achieving this, at all times the intermediate point of a 45% reduction must be achieved;

(117) the reduction order will primarily entail that Shell can no longer invest in new fossil projects and the order will not have consequences, or such consequences will be much more limited, for the Shell fossil projects already in operation;

(118) oil and gas fields already in operation, after they have reached their peak production, will naturally produce less and less, so that the Shell emissions will decrease by themselves if no more new oil and gas projects are added to the Shell energy portfolio;

(119) Shell asserts that Shell is well prepared and positioned on the transition to renewable energy and renewable electricity generation;

(120) Shell asserts that wind energy and solar energy from a technical and commercial perspective are on an equal footing with oil and gas, are commercially profitable and it can also invest in them;

(121) regardless of the above concerning the onerousness of the order, the seriousness of the consequences of dangerous climate change and the magnitude of human rights violations that are the result thereof, also a (very) onerous order is justified with regard to Shell because this is the only way to offer effective legal protection;

(122) in this particular case a(n) (very) onerous order can be imposed, because according to its annual reports Shell has realised very well for quite some time already that it can be held to account via a court order for its fossil business model;

(123) in response Shell indicated in its annual reports to have calculated this risk of judicial intervention and made it part of its risk appetite when continuing with substantial investments in new oil and gas fields and the related fossil infrastructure;

(124) by means of the Shell annual reports, the shareholders, financiers and other stakeholders of Shell are also aware of this legal risk of a court order, and they have also made this risk part of their own risk appetite and have made provision for this risk;

(125) if these calculated risks arise as a result of the court order, this will de facto not constitute onerousness because management, shareholders, financiers and other stakeholders of Shell willingly and knowingly accepted these risks and the consequences thereof must therefore be borne by said parties themselves;

<u>With regard to the effectiveness of a court order</u>

(126) an order for a 45% emissions reduction is also effective, because it will lead to a reduction in Shell's emissions;

(127) the emissions of Shell are, in addition, considerably greater than those of the Netherlands;

(128) if, according to the Netherlands Supreme Court, the emissions reduction of the Netherlands is relevant on a global level, this applies all the more to the reductions of Shell, which will prevent much greater CO2 emissions than in the Urgenda case against the State;

(129) the automatic consequence of an emissions reduction order to be imposed on Shell is that the annual investments of Shell in (new) fossil energy projects will have to change and Shell's oil and gas business will have to shrink;

(130) this investment change will create more space for renewable alternatives, both inside Shell and on the energy market in general;

(131) the investment limitations for oil and gas based on an order, Shell's financial-economic interests in the fossil sector will decrease and consequently its inhibitory and restraining influence on political and policy-based decision making relating to climate initiatives and climate regulations;

(132) investment change is the ultimate instrument (designated by the international community in Article 2 of the Paris Agreement) for achieving the emission reductions which are necessary to achieve the temperature goal of the Paris Agreement;

(133) in Article 2 of the Paris Agreement, the international community has indicated that every climate-unfriendly investment is causally related to the climate problem, and every climate-friendly investment is causally related to the reduction of that problem;

(134) the need for limits on investments in the production of oil and gas is generally acknowledged, as is the need for an increase in investments in renewable energy and energy efficiency;

(135) the general economic rules of supply and demand dictate that there is always a relationship between the limiting of production (less supply), the upward price effect thereof (higher price) and the limiting of consumption that is the result thereof (less demand);

(136) studies show that on the basis of these economic rules of supply and demand, a reduction in the production of oil and gas leads to a reduction in the consumption of oil and gas, which reduction in consumption is equal to 20% to 60% of the reduction in production.

(137) science also indicates many indirect effects which will result from an emissions reduction at Shell and from the investment change and limiting of production that is the result of that;

(138) one of those indirect effects is that due to the restriction for Shell to invest in (new) oil and gas infrastructure, the lock-in effects of fossil infrastructure will be counter-acted;

(139) counter-acting the lock-in effect is crucial for a quick renewable energy transition and the reduction of the transition costs, so that it will be easier for renewable energy alternatives to compete with fossil energy sources, which are traditionally the most subsidised energy sources;

(140) measures on the production side are cheaper than those on the demand side, so that due to production-limiting measures (such as a reduction order) more emissions reductions can take place at lower cost, so that the energy transition will also be accelerated;

(141) another indirect effect of this consists of studies of political scientists and sociologists demonstrating that production-limiting measures for fossil fuels increase the public support base for climate action and lead to public standard modifications which are necessary to be able to achieve a climate-neutral society;

(142) said standard modifications and the awareness relating to the need for production-limiting measures will also persuade other fossil companies to do more and can lead to an accelerated change to sustainable production and consumption;

(143) an indirect effect of a court order is also that the risk profile of fossil projects increases, so that financing those projects becomes more costly and difficult (more risk leads to more stringent loan conditions and higher interest to cover the banking risk) and this has a dampening effect on the production options of fossil energy;

(144) the increasing risk profile of fossil projects not only reflects on Shell, but on all fossil companies and consequently the investment climate in the fossil industry is affected in a broad sense and this can lead to additional reduced production of fossil fuels;

(145) an increasing risk profile of fossil companies will also lead to reconsiderations among institutional shareholders (such as pension funds) so that they leave the fossil industry as shareholders (which happened after the judgement at first instance), and which makes raising new investment capital for fossil companies difficult;

(146) a court order to reduce emissions also has an indirect effect in a legal sense because of the 'ripple' effect with regard to other jurisdictions;

(147) this also happened with the judgement in the Urgenda case, which case has been cited by foreign courts when awarding similar climate claims against states and with respect to permits for new fossil projects;

<u>With regard to transition science and system dynamics</u>

(148) all these kinds of indirect effects which are connected with the court order, are precisely the kinds of effects which according to transition science are crucial to create a social tipping point that is necessary for a transition;

(149) transitions will be about system dynamics (the interaction between politics, market, climate policy, social pressure, consumer behaviour, standards and values, regulations, technological innovation, etc.) and not only about market dynamics;

(150) according to transition science, system dynamics are therefore leading with regard to transitions, and not market dynamics;

(151) a part of system dynamics is also that a small intervention in a part of the system can have a significant effect on other parts of the system because of feedback loops in the system;

(152) this is also the basic principle of the UN's international climate action, in which the starting point is that proactive contributions of business enterprises to the climate goals cause a flywheel effect so that countries, cities and consumers are enabled to be more ambitious in terms of climate action;

<u>With regard to the lack of perfect substitution</u>

(153) because transitions are about system dynamics and not only about market dynamics, Shell's assertion that nothing will change on the oil and gas market if Shell changes, says nothing about what the effect of a court order will be on the system dynamics due to the indirect effects arising from such an order;

(154) the argument that a court order will not change anything in the market dynamics (the argument of perfect substitution) will, moreover, not succeed because of the already cited basic rules regarding supply and demand and the relationship between reduction in production and reduction in consumption;

(155) foreign courts, on the basis of the basic and indisputable rules of supply and demand, had previously already concluded that there can never be a perfect substitution if the production of fossil fuels is limited, and that the UN drew the same conclusion as well;

(156) perfect substitution is not at issue, as the special place of Shell as vertically integrated system player in the oil and gas market, cannot just be taken over by most oil and gas companies;

(157) undisputed data on Shell will demonstrate, inter alia, that due to its enormous size Shell (one of the biggest business enterprises in the world) can operate at greater efficiency and lower cost than far and away most of its competitors;

(158) consequently projects which Shell can profitably develop and operate, will be infeasible or far more risky for most of its competitors, so that Shell has a special place in the oil and gas market;

(159) in addition, Shell is also a very large purchaser on the oil and gas market and consequently the demand for oil and gas on the market will decline as a result of the reduction order;

(160) insofar as any degree of substitution were to take place, it cannot take place automatically and immediately and there is thus by definition a delay in some form of substitution, which provides another reason why this can never be perfect;

(161) the delay that is inherent in any form of substitution, means that the tempo of global emissions is slowing down, resulting in both a global effect and more time being created to solve the climate problem;

(162) this was also the reasoning of the US Supreme Court in the case of Massachusetts v. EPA, in which the following was considered: *"A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."*;

(163) perfect substitution is again not relevant because: more and more companies want to operate in a more climate-friendly manner; countries cease issuing new licences for oil and gas extraction; there is increasing attention on the part of central banks for the stranded assets problem with continuing investments by the fossil industry; more and more institutional investors are getting out of the fossil industry; and because of more of these kinds of climate-related developments in society;

(164) these developments are far from sufficient, but do clarify that for some years now the fossil industry has been viewed differently than it had been previously, so that market situations of the past which Shell has cited in relation to the substitution argument cannot be a reference framework for the present or the near future, which is also underlined by the expert report of transition expert Rotmans;

(165) on the basis of all aforementioned direct and indirect effects of a court order to reduce emissions, as well as taking account of the delay in any substitution process and in view of the changing market circumstances due to more climate awareness, it must be noted that the immediate and perfect (100%) substitution asserted by Shell which would supposedly take place as a result of a court order to reduce emissions, does not exist or the existence thereof is highly implausible;

(166) because a court order to reduce emissions in fact assures that in any event Shell's emissions will decrease, while it is unsure whether and in what degree, where and when there will be a form of substitution via others, there can be no other conclusion than that it must be assumed that due to the order, not only will Shell's emissions decrease, but this will also have an effect on global emissions;

(167) the precautionary principle also does not permit Shell to base a claim on the uncertain phenomenon of perfect substitution to not have to realise its own emissions reductions and to cast doubt on the effectiveness of the order to reduce emissions, because by doing so it is taking on more risk than is socially responsible;

(168) the precautionary principle forms part of the UNGP Guidelines embraced by Shell, is part of human rights law and furthermore, via the doctrine of hazardous negligence, is part of Dutch law;

(169) this substitution reasoning once again cannot be accepted because this would mean that no one can be held accountable for its emissions, however big, because no single country or multinational company is causing the climate problem on its own;

(170) these kinds of substitution defences were also presented in the Urgenda case and were dismissed in all instances (as they also were in comparable foreign judgements);

(171) in all cases the criterion must be that the argument of perfect substitution cannot be maintained and therefore cannot stand in the way of imposing a court order;

(172) according to Milieudefensie et al., all these facts and circumstances show that an order to reduce CO2 emissions is an effective remedy for the danger to human rights that climate change represents and to which Shell willingly and knowingly contributes and continues to contribute by following (and continuing to follow) a completely inadequate climate policy with regard to the Shell Group.

36. Against the background of (inter alia) the objective reference points and relevant facts and circumstances referred to in the preceding paragraphs, the District Court was rightly of the opinion that Shell is subject to a social duty of care to implement an adequate climate policy and to reduce the emissions of the Shell Group in 2030 by at least 45% net. In the Judgement, the District Court qualified a large part of these facts and circumstances as established facts and took them as the basic principle for its assessment and decision. Naturally the Judgement does not provide an exhaustive summary of the full party debate, nor is such necessary. The Judgement provides more than enough insight into the thought process and reasoning which form the basis of the Judgement and the facts and circumstances and objective reference points which were reviewed in conjunction by the District Court.

37. It is important to determine that Shell has not presented any grounds of appeal against the facts established by the District Court in the Judgement. According to the 'two statements rule' accepted by the Netherlands Supreme Court in its established case law, Shell can no longer dispute in appeal the accuracy of the established facts and details set out by the District Court and taken as the basis for its Judgement and make them a point of discussion. The conclusion must therefore be that with regard to Shell the facts established by the District Court are deemed established between the parties and serve as the basis for the further debate in appeal. Shell only made the following exception in this respect.

38. In Ground of Appeal IX Shell only objects to the fact that its modified policy – that was published after closing the debate at first instance – was not included in the consideration by the District Court. Milieudefensie et al. will discuss this modified policy of Shell in Chapter 6 of this Defence on Appeal and will demonstrate that this policy is still at odds with the temperature goal of the Paris Agreement and does not make a proportional and adequate contribution to preventing dangerous climate change. For the rest, Ground of Appeal IX is not an obvious objection to other facts established by the District Court. For the further handling of Ground of Appeal IX, reference is made to Chapter 10.

39. With regard to the other facts and circumstances which are mentioned in the list of facts and circumstances set out above by Milieudefensie et al. (1 through 172), but which do not recur in the Judgement, these are to a great extent not disputed by Shell. Not at first instance, nor now in the Appeal.

40. According to para. 1.2.3 of the Appeal, the boundaries of the legal battle in appeal as set by Shell (and what Shell does dispute in terms of the facts) is in essence limited to the following topics: (a) Shell believes that it would be pointless to force Shell to bring about an emissions reduction: other companies will fully take over that emissions space so that globally no effect will be realised by an order to reduce emissions; (b) Shell furthermore asserts that the acknowledged need to reduce global emissions in 2030 by 45% cannot apply to it as an individual company; (c) Shell furthermore argues that there is no legal obligation which forces it to effect necessary emissions reductions and that a legal obligation would encroach on EU law, in particular the free movement of goods in the EU; (d) lastly, Shell asserts that a reduction obligation cannot be seen separately from the wider social factual context in which the energy transition takes place and the weighing of interests which must be made by political decision makers (and not by the courts).

41. The Defence on Appeal has been structured in such a way that Milieudefensie et al. in Chapter 3 will first go into the relationship between courts and political decision makers in this matter (and similar matters) in greater detail. This is because, inter alia, Shell, with reference to, among other things, the Urgenda case, argues that it would only be up to political decision makers to make decisions regarding the energy transition, that an order against Shell would encroach on political policy and that the order would be a disruption of the relationship between legislature and judiciary. It will therefore be clarified in this chapter that the District Court, with the order issued pursuant to Article 3:296(1) DCC, did not infringe the constitutional relationships and/or the role of political decision makers in the energy transition, nor does the Court of Appeal have to show restraint in its review when assessing Shell's social duty of care and can affirm the Judgement.

42. In Chapter 4 Milieudefensie et al. will refute Shell's assertion that the social standard of care and the doctrine of hazardous negligence / the 'Kelderluik' factors as a case example thereof, are supposedly not appropriate for application in this case. Milieudefensie et al. will also explain

there that it has based its claim on more legal grounds and objective reference points than only the doctrine of hazardous negligence, and that all these grounds and reference points point in the same direction, i.e. that Shell has a legal obligation to make a proportional contribution to preventing dangerous climate change.

43. In Chapter 5 a more detailed explanation will be presented as to why the proportional contribution to be made by Shell must result in a 45% reduction be 2030 over the Scope 1, 2 and 3 emissions of the Shell Group. That chapter will also discuss Shell's assertions with regard to the different sectoral paths for oil, coal and gas and the other defences that Shell has presented to argue that the percentage of 45% cannot be imposed on it. It will appear that the reduction percentage of 45% by 2030 must be maintained and that Shell's grounds of appeal in this respect cannot succeed. In addition, in Chapter 5 an update will be given on the scientific findings since the concluding of the debate at first instance regarding the need for the imposed reduction order.

44. Chapter 6 will review Shell's most recently modified corporate policy (the Powering Progress policy), whereby it will be demonstrated that this policy is not adequate and is far removed from an adequate climate policy for the Shell Group.

45. In Chapter 7 Milieudefensie et al. will take a look at Shell's responsibility for Scope 3 emissions, partly in the light of Shell's objections regarding the measuring and reporting of these emissions. Milieudefensie et al. will also explain that Shell's legal duty relating to both Scope 2 and Scope 3 emissions of the Shell Group can become an obligation of result, as also applies for the Scope 1 emissions.

46. Chapter 8 will go into the need for and effectiveness of the reduction order issued by the District Court. The substitution argument will be refuted in further detail here and there will be a discussion of the market and system effects resulting from the reduction order which are favourable for global climate action.

47. It will then be explained in Chapter 9 that the reduction order does not encroach on EU law or the EU climate policy. This topic deserves special attention because Shell's defence that the obligation to reduce emissions encroaches on EU law in a general sense and would impede the free movement of goods in the EU in a manner which is prohibited, is a defence that was not presented at first instance. Milieudefensie et al. will therefore pay significant attention to this new defence of Shell and show that there is no such encroachment and prohibited impediment.

48. In Chapter 10 Milieudefensie et al. will discuss Shell's grounds of appeal against the background of the preceding chapters, with the conclusion that each of these grounds of appeal must be dismissed.

49. In Chapter 11 Milieudefensie et al. will make an offer to present evidence.

50. Lastly, Milieudefensie et al. will ask the Court of Appeal to affirm the Judgement, if necessary with supplementation and/or improvement of grounds.

3. The relationship between judiciary and political decision makers

3.1 Introduction

51. In this chapter there will be a discussion of the relationship between judiciary and political decision makers in this matter (and similar matters). This is because, inter alia, Shell, with reference to, inter alia, the Urgenda case, argues that it should only be up to political decision makers to make decisions regarding the energy transition, that an order against Shell would encroach on political policy and that the order would constitute a disruption of the relationship between legislature and judiciary. This chapter will therefore clarify that the District Court, with the order issued pursuant to Article 3:296(1) DCC, did not infringe constitutional relationships and/or the role of political decision makers in the energy transition, nor does the Court of Appeal have to show restraint in its review when assessing Shell's social duty of care.

3.2 Article 3:296 of the Dutch Civil Code and the court order

52. Article 3:296 DCC stipulates in the first paragraph that unless the contrary ensues from the law, the nature of the obligation or from a legal act, the individual who is obliged with regard to another person to give something, do something or refrain from doing something, shall be ordered to do so by the court on the claim of the entitled party. The second paragraph of this article adds to this that an individual who is bound to do something subject to a condition or subject to a time stipulation, can be ordered to comply with such condition or time stipulation.

53. The essence of Article 3:296 DCC is that a legal duty must be performed. It is the responsibility of Milieudefensie et al. to demonstrate the existence of said legal duty of Shell to "give something, do something or refrain from doing something". However, if that is demonstrated and the obligation is violated by Shell, or if such violation is imminent, Shell must be ordered to comply with the legal duty on the claim of Milieudefensie et al. This also happened at first instance.

54. A court order requested pursuant to Article 3:296 DCC can only be left out if this ensues from the law, the nature of the obligation or from a legal action. For example, natural obligations are not legally enforceable (Art. 6:3(1) DCC), and Dutch constitutional law stand in the way of a court ordering the State to establish legislation in a formal sense (prohibition on order to create legislation), even if the State is acting unlawfully by its acts or omissions.[30]

55. There are thus exceptions to the primary rule of Article 3:296(1) DCC that someone who is obliged to give something, do something or refrain from doing something, may be ordered to do so by the court.

56. Except for invoking (in vain) the general requirement of interest of Article 3:303 DCC and the relativity requirement[31] at first instance, however, Shell (rightly) did not base a claim on one of the exceptions set out in this Article 3:296 DCC. Nor has Shell made such claim in this appeal. This establishes that if it can be concluded that Shell is under a legal obligation to give, do or refrain from doing something, a court order can also be imposed on Shell.

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[30] HR 21 March 2003, ECLI:NL:HR:2003:AE8462, NJ 2003/691 (Stichting Waterpakt v. Staat).

[31] Milieudefensie et al. will come back to the components 'interest' and 'relativity' further on in this Defence on Appeal.

3.3 Article 3:296 of the Dutch Civil Code and the relationship between legislature and judiciary

57. Shell disputes the existence of a legal duty.

58. In this respect Shell takes the position that the reduction obligation imposed by the District Court pursuant to Article 3:296 DCC, finds no support in Dutch law with regard to an unwritten standard of care. In this respect Shell appears to be arguing in essence that the Court of Appeal, when reviewing the social duty of care, supposedly may only involve a limited number of objective reference points, or that the existing statutory framework is supposedly of decisive importance in this review. When interpreting the open standard of the duty of care, according to Shell there should primarily be a review of the system of law, the cases for which provision is made therein and the legislative history. According to Shell this ensues from, inter alia, the judgement in Quint v. Te Poel, a case from 1959.

59. In addition, Shell appears to want to see the considerations of the Netherlands Supreme Court in the Urgenda case relating to the order to create legislation and the political domain with regard to the power relationships between legislature and judiciary, translated into the way the Court of Appeal reviews and assesses Shell's duty of care. According to Shell it ensues from the Urgenda case that only the Dutch government and parliament may make statements regarding the way in which greenhouse gas emissions are to be reduced. Shell argues on this basis that a court order against Shell encroaches on the policymaking discretion of the State of the Netherlands.

60. With this argument Shell fails to note that Shell has its own, independent responsibility to make a proportional contribution to preventing dangerous climate change and that the opinion of the court does not entail an encroachment on political policy. If the reference framework of Article 6:162(2) DCC is applied in conformity with the relevant jurisprudence, the objective reference points and the relevant facts and circumstances in this case undeniably point to such an individual, independent legal duty.

61. Shell's assertions justify that Milieudefensie et al. have a look at the assessment framework of Article 6:162(2) DCC and the role that the court plays in finding a legal duty on the basis of this article. This will also address the Urgenda case and the considerations of the Netherlands Supreme Court in the framework of the discussion on the reduction order imposed on the State and the political discretion of the State. This is necessary to show that the relevant considerations do not have the consequences that Shell attributes to them in this case. This will also show that at first instance the District Court did nothing differently or more than is prescribed by Articles 11 and 13 of the General Provisions Act (Wet AB): making determinations 'in accordance with the law'.

3.4 No restriction of use of perspectives based on objective reference points when assessing the social duty of care

62. Shell argues that the District Court, when assessing the existence of an unwritten standard of care, may not elevate its own views to rules of unwritten law.[32] The District Court did not do so. Pursuant to the provisions laid down in the law of Article 3:296 DCC and Article 6:162 DCC, the court must establish the standards applicable between the parties which ensue from unwritten law. The court has the right to do so and is indeed obliged to do so on the basis of Articles 11

[32] Appeal, para. 3.2.3.

and 13 General Provisions Act. As Shell itself acknowledges, when interpreting the standard of care, the court tends to make use of objective reference points. This alone shows that Shell itself understands that the court does not make determinations on the basis of its own views.

63. Shell then refers to the judgement in Quint v. Te Poel of 1959[33] and argues that the court, when interpreting the standard of care, must seek alignment with the system of the law and the matters for which provision is made therein. With this Shell apparently means to say that the Court of Appeal may only observe these objective reference points, excluding all other objective reference points. According to Shell this is necessary in the framework of legal certainty and foreseeability. Shell's argument is incorrect and finds no basis in the case law it cites.

64. The judgement in Quint v. Te Poel does not apply to this case; in this case there is no limitation ensuing from the system of law when making a finding of a legal duty as referred to in Article 6:162(2) DCC.

65. The judgement in Quint v. Te Poel does not relate to the way in which the assessment must be carried out in the framework of Article 6:162(2) DCC. This case merely explains that Article 1269 of the old Dutch Civil Code – which stipulated that all obligations arose either from contract or 'from the law' – was to be interpreted broadly, in such sense that according to the Netherlands Supreme Court this article "*does not in any way entail that every obligation must be based directly on a statute, but it may only be deduced that in cases which are not specifically arranged by law the solution must be accepted, that fits in the system of law and aligns with cases for which provision has been made in the law*". This legal rule has also been codified in the current Article 6:1 DCC, by including that obligations can only arise if such 'ensues' from the law.

66. The judgement thus relates to the arising of obligations which are not based directly on a statute. It ensues from this that this case law does not apply to this case. The ground invoked by Milieudefensie et al. is in fact regulated in the law. In Article 3:296 DCC and Article 6:162(2) DCC the legislature did give the judiciary both the power and the instruction to assess per case 'in accordance with the law' what in a specific case the unwritten social standard of care, under the given facts and circumstances, encompasses and to attach an order to a legal duty that has been determined to exist.

67. In addition, although the law – as decided in Quint v. Te Poel and codified in Article 6:1 DCC – has a moderately closed system with regard to sources of obligations, legal duties as referred to in Article 6:162(2) DCC in fact ensue freely from unwritten law.[34] When finding a legal duty in unwritten law on the basis of objective reference points and the specific facts and circumstances of the case at hand, there is no limitation because of the case of Quint v. Te Poel, cited by Shell.[35] In addition, the term legal duty is broader than the term obligation. For example, the duty to refrain from an unlawful act under Article 3:296 DCC can form the basis for imposing an injunction or order, even if it cannot (yet) be deemed an obligation.[36]

68. Shell is well aware of the above and is very selective in its citation of the case law in question. Shell often cites from the Opinion of Advocate-General Valk in the judgement relating to the repatriation of ISIS wives that *"the court does not operate in a void or elevate its subjective*

[33] HR 30 January 1959, ECLI:NL:HR:1959:AI1600, NJ 1959, 548 (Quint v. Te Poel).

[34] The same conclusion is drawn in: Asser/Sieburgh 6-I 2016/11, with reference to Article 6:162(2) DCC.

[35] It is therefore not surprising that in the case law relating to Article 6:162(2) DCC, there is little or no reference to the Quint v. Te Poel case.

[36] T.E. Deurvorst, Groene Serie Onrechtmatige Daad II.2.1.1.3.

opinion as to what 'is right' to law".[37] Shell nevertheless fails to state that A-G Valk, immediately after the passage cited by Shell, discussed the reference framework of Article 6:162(2) DCC in great detail. According to A-G Valk, the court should *"seek alignment as much as possible with objective references,*[38] *with which the case to be decided can be compared."* A-G Valk then mentions the following as objective references (emphasis added by counsel):[39]

- "***legal provisions** (…) which do not apply directly to the case to be decided (…) Dutch lawyers are more than familiar with the 'Langemeijer correction' as accepted by the Netherlands Supreme Court in 1951 in the 'Tandartsen' case: the violation of a statutory standard which is not intended to protect the injured party against the loss suffered by him (and therefore, on the basis of the relativity requirement, cannot itself lead to liability), can serve as a perspective when answering the question whether the injured party has acted contrary to what according to unwritten law is deemed acceptable in society.*";
- *"**Convention provisions** can have an effect, in a comparable manner, on the duty of care review, including insofar as they have no direct effect within the meaning of Arts. 93 and 94 of the Dutch Constitution. A known example of this is the 'indirect horizontal effect' which can emanate from rights enshrined in the ECHR (written for the 'vertical relationship' between government and citizen) in legal relationships between private parties.";*
- *"Decisions of judicial bodies (**jurisprudence**) function as an important reference point, in part against the background of the principle of uniformity of law.***"** Advocate-General Valk states in this respect that "*the case law of foreign judicial bodies can be a perspective of potential significance" "in particular with regard to the countries around us, with a comparable social order and legal tradition";*
- "***Private regulations and other forms of soft law**, in all kinds of forms and gradations, are eligible. The Urgenda case, in which the State was ordered to reduce emissions of greenhouse gases from the territory of the Netherlands as at the end of 2020 by a minimum of 25% relative to 1990. This order to reduce emissions, which was based on Arts. 2 and 8 ECHR was, taking account of the parties' assertions in the dispute, in part based on widely shared insights of climate science and the international community.";*
- *"If and insofar as objective reference points for the (further) elaboration of unwritten standards of care are lacking, the court – partly in view of the prohibition of a denial of justice (Art. 13 General Provisions Act) – must be based on a weighing of interests, as these appeared in the proceedings. The elaboration of the standard of care then acquires a highly case-specific character. Among other things, the well-known **factors of the decision in the Kelderluik case** function as a useful pattern for the substantiated weighing of interests which the court must carry out. In the Kalimijnen case, that The Hague Court of Appeal took as the starting point, the duty of care review had the character of a context-bound weighing of interests."*

69. It should be clear that the applicable reference framework as set out by Advocate-General Valk, is the same reference framework as set out in Chapter 2.1 and 2.2 above and that Milieudefensie et al. presented as the basis for its claim. Pursuant to Articles 11 and 13 General Provisions Act, it is the court's task when weighing interests and providing the specific elaboration of the standard of care to make use of these objective reference points.[40] This serves foreseeability and legal certainty as much as possible and eliminates the concerns

[37] Defence on Appeal, para. 3.2.3.

[38] A-G Valk uses the expression 'objective references', whereas Milieudefensie et al. speaks of 'objective reference points'. Both parties are referring to the same thing.

[39] Opinion of A-G Valk, ECLI:NL:PHR:2020:412, for HR 26 June 2020, ECLI:NL:HR:2020:1148, *NJ 2020/293 (ISIS wives)*, paras. 6.1 through 6.8.

[40] Procurator-General Langemeijer and Advocate-General Wissink in their Opinion for the Urgenda case, para. 2.19.

presented by Shell in the area of legal certainty and foreseeability.[41] In addition to the objective reference points referred to above in the Opinion of Advocate-General Valk, international and national legal principles, scientific findings and expert reports can be used to determine and establish what applies from a legal perspective.[42]

70. In this case, in view of the summaries in Chapters 2.1 and 2.2, there are very many objective reference points and relevant facts and circumstances to assess the legal question at hand. As stated, these all point the same way, i.e. that Shell has its own, independent duty of care to make a proportional contribution to preventing dangerous climate change.

71. In this respect it must be noted that said independent duty of care has been foreseeable for Shell for quite some time. This appears, inter alia, from the fact that Shell already knew in the 1990s that in the future it could be held liable for its contribution to climate change, whereby Shell itself already made a comparison with the developments relating to the liability of the tobacco industry.[43] It is therefore difficult for Shell to maintain, with all the knowledge and science which it has gained since the 1980s and 1990s, that in Shell's view legal certainty is at issue in the event the judgement is not in Shell's favour.

72. In addition, the legislature, in line with the case law since Lindenbaum v. Cohen of 1919, opted that as a result of the use of open standards in the law, such as the unwritten social standard of care, which in practice must be elaborated by the court and whereby the court has the discretion to respond to social changes and to developments not foreseen by the legislature, there is a certain degree of legal uncertainty.[44] Contrary to what Shell argues, the requirement of foreseeability therefore does not stand in the way of a legal finding and legal development via case law. This has also been confirmed by the ECtHR.[45] The situation that Shell appears to imply, that in this manner the court is elevating its subjective views regarding what is right to law, is not at issue at all.[46]

73. It also ensues from the above that Dutch legislation is only one of the many objective reference points with regard to the judicial assessment to be made. There is no reason for the opinion that a priori this reference point weighs more heavily than other objective reference points.

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[41] Shell refers in this respect in its footnotes with the Appeal, para. 3.2.4 to other cases that are not applicable, being *Taxibus, De Rooyse Wissel* and *TNT.* The judgements in these cases do not detract from the above and are without prejudice to the reference framework as this applies when establishing a legal duty via Article 6:162(2) DCC. Milieudefensie et al. responded at first instance in Notes on oral arguments 9 to these cases and explained why they do not apply.

[42] See, inter alia, K.J.O Jansen, GS Onrechtmatige daad, art. 6:162 BW, note 6.1.9, in which the following perspectives are discussed to inform the societal duty of care: (i) subjective rights (note 4.1.5); (ii) legislation (notes 5.1.5 and 5.5); (iii) industry customs and private regulations (note 6.1.10); (iv) disciplinary case law (note 6.1.11); (v) expert report (note 6.1.12); (vi) constitutional rights, international law and general legal principles (note 6.1.13); (vii) statutory and unwritten duties of care (note 6.1.14); (viii) other sources of unwritten law (6.1.1.5).

[43] Milieudefensie et al.'s Summons, para. 566.

[44] See, inter alia, Geert Corstens and Reindert Kuiper, De rechter grijpt de macht – en andere misvattingen over de democratische rechtsstaat, 2020, p. 77: *"Many laws included 'open standards'. These are standards which have been formulated in terms which are difficult to realise in practice. In such case the court can take account of new developments which were not foreseen by the legislature.";* and on p. 94: "*Due to open standards and interpretation methods based on something other than grammar, legal findings have taken off [...] from a perspective of foreseeability this is not ideal, but there is little that can be done about this. The requirement of foreseeability therefore does not stand in the way of the developing of law via jurisprudence, as determined by the ECtHR some time ago."* (The latter reference is to ECtHR 22 November 1995, ECLI:NL:XX:1995:AD2430).

[45] See preceding footnote.

[46] Insofar as Shell is suggesting that the District Court at first instance had allegedly elevated its own views to rules of unwritten law, this is remarkable, in view of the very substantial file and the hundreds of facts, circumstances and objective reference points which were weighed in this respect.

This applies all the more as the matter concerns a claim which entails that Shell will have to reduce emissions worldwide, not only in the Netherlands, and human rights are threatened on a large scale, the effective protection of which requires that under certain circumstances national legislation or policy must yield.

74. No basis can thus be found for the position that the court is supposedly limited to a straitjacket when assessing the question whether Shell has a social duty of care on the basis of Article 6:162(2) DCC.

75. In short, the District Court (and the Court of Appeal) is free when assessing this dispute on the basis of Article 3:296(1) DCC, to determine what applies legally and by which Shell is legally bound, taking all perspectives deemed relevant from objective reference points into consideration. The court is not limited in the sense argued by Shell.

76. In Chapter 4, Milieudefensie et al. discusses the substance of the legal principles of the claim in further detail, which will further clarify that the objective reference points listed in Chapter 2.1 are perfectly suited to serve as perspectives to establish the social standard of care. In Chapter 4, Milieudefensie et al. will also discuss Shell's argument that the Kelderluik criteria supposedly do not apply to this case.

77. Milieudefensie et al. will now first go into the Urgenda case and what the Netherlands Supreme Court considered in the framework of the discussion on the order to reduce emissions imposed on the State. This is necessary to show that the relevant considerations do not have the consequences that Shell attributes to them in this case and that in this case the court has a clear role to play.

3.5 A reduction order to the State is not a disruption of the relationship between the legislature and the judiciary

78. In the climate case of Urgenda against the State, in the context of Art. 3:296 DCC, extensive attention was paid to the question whether the court order sought by Urgenda to compel the State to reduce Dutch emissions in 2020 by 25%, would be an unacceptable legal order to create legislation. District Court, Court of Appeal and Supreme Court, as well as Procurator-General Langemeijer and Advocate-General Wissink, in the Opinion they presented to accompany the Netherlands Supreme Court judgement, held that this was not the case.

79. The court is only not permitted to issue an order to create legislation with a specific content. According to the Netherlands Supreme Court, a court order imposed on the State to take measures in order to achieve a specific goal is permitted.[47] The Netherlands Supreme Court continued:

"In light of the foregoing, the District Court's order, upheld by the Court of Appeal, constitutes an application of the main rule of Article 3:296 DCC. Indeed, this order does not amount to an order to take specific legislative measures, but leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020. This is not altered by the fact that many of the possible measures to be taken will require legislation, as argued by the State. After all, it remains for the State to determine what measures will be taken

[47] HR 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda v. State), para. 8.2.6.

and what legislation will be enacted to achieve that reduction. The exception to Article 3:296 DCC made in the case law referred to in 8.2.2 above therefore does not apply in this case."[48]

80. After the Netherlands Supreme Court hereby confirmed that a court can compel the State to reduce emissions, without thereby disrupting the (power) relationship between court and legislature, the Netherlands Supreme Court got around to discussing the State's more general defence that it is not the task of the court to make political considerations which are necessary for decision making on the reduction of greenhouse gas emissions. The Netherlands Supreme Court considered in this respect:

"As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion the government and parliament have remained within the limits of the law by which they are bound."[49]

81. What the Netherlands Supreme Court is saying here is that in a state based on the rule of law (the term says it all) everyone, including the government and the parliament, is bound by the law. Although government and parliament have a large degree of discretion to make political considerations, that freedom is not unlimited. It is limited at the point where the law is breached by the legislature or is at risk of being breached. The Netherlands Supreme Court held that due to the State's inadequate climate policy, the rights of Dutch citizens under Articles 2 and 8 ECHR are at risk of infringement and considered:

"This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed [...] The State is obliged to do 'its part' in this context [...] The policy that the State pursues since 2011 and intends to pursue [...] whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established [...]. In this case, therefore, the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020."[50]

82. In short, an order to reduce emissions imposed on the State to realise a specific percentage in emissions reduction pursuant to Article 3:296(1) and (2) DCC, is not an order to create legislation. On the basis of the primary rule of Art. 3:296 DCC, the State can be ordered to do so by a court. According to the Netherlands Supreme Court, in this situation in a general sense there is no disruption of the balance of power between judiciary and legislature/political decision makers. In addition, the Netherlands Supreme Court acknowledges that dangerous climate change is an exceptionally threatening phenomenon that must be dealt with urgently and in which the State (even if the matter concerns a danger that is being caused on a global scale) will have to do its part.

3.6 A reduction order to Shell is not a disruption of the relationship between the legislature and the judiciary

83. Just as in the Urgenda case there was no order to create legislation, this is also not the case in this matter against Shell, but then for an evidently different reason: in this case no order is being

[48] Ibid, para. 8.2.7.

[49] Ibid, para. 8.3.2.

[50] HR 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda v. State), para. 8.3.4.

sought against the State, but an order against Shell, a private party. There therefore cannot be an order to create legislation.

84. In a more general sense, in this case there is no (potential) disruption of the relationship between legislature and judiciary. Shell appears to suggest this by repeatedly referring to this relationship and by citing passages from the Urgenda case and the related conclusion and using them out of context. The passages Shell refers to concern: (i) the power of the government and the parliament with regard to decision making on climate action and the freedom to make political considerations (para. 3.4.2 Appeal) and (ii) the restraint of the court when providing for a legal deficit, or, as Shell asserts, when providing for "*a whole regulatory system*" (para. 3.4.3 Appeal).

85. With regard to point (i) Shell refers to the passage from the Urgenda case already cited above that "*in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament"* and that they *"have a large degree of discretion to make the political considerations that are necessary in this regard."*[51] According to Shell it ensues from this that only the Dutch government and parliament may decide on (the method of) reduction of greenhouse gas emissions. According to Shell this would also mean that the decision making regarding the question whether a private party can have an obligation to reduce emissions, can only belong to the government and the parliament. De facto this thus comes down to the very far-reaching argument that in the Urgenda case, civil liability law in climate-related cases has been side-lined.

86. In the Urgenda case the question was not at issue whether in addition to the State, private parties can also be held liable for their own special position and influence on dangerous climate change. The Netherlands Supreme Court did not make any pronouncements in this respect. In the passage cited by Shell it is therefore impossible to read that only the State has a responsibility with regard to (the method of) reducing the emission of greenhouse gases. The State's reduction obligation and the policy discretion the State has in this respect, is therefore separate from the question whether Shell in addition has its own responsibility. The State's reduction obligation and the policy discretion that the State has in this respect, is also separate from the question whether, in addition to the government and the parliament, the court can have an opinion regarding the question who is subject to a duty of care to effect a reduction of emissions.

87. When answering the question regarding the independent reduction obligation of Shell, the court – other than in proceedings against the State – need not take a restrained approach. In addition, in this case it is not state policy that is the topic of discussion, but Shell's policy. This policy can be reviewed in full and without restriction. As stated, that there is allegedly a limitation of civil liability law in climate-related cases does not ensue from the Urgenda case, nor does it ensue from (the history behind the establishing of) the laws and regulations of the State of the Netherlands with regard to climate action.

88. Nor does Shell present any reference points for such a far-reaching conclusion. The mere circumstance that climate regulations exist or are in the process of being made, is definitely insufficient for drawing the conclusion that there can be a limitation of civil liability law. In that case this would mean that any form of public law climate regulations, regardless of the content thereof, would wholly and entirely stand in the way of the exercising of a fundamental right of citizens, i.e. the right to present a claim based on unlawful act, thereby preventing damage and

[51] HR 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda v. State), para. 8.3.2.

harm to human rights. Such a far-reaching opinion, which would deprive citizens of this fundamental right, should at the very least demonstrate a clear and explicit choice of the legislature for a (civil law) exhaustive working. The climate regulations in question should, moreover, also cover the civil claim at hand, the interests that play a role in this respect must have been weighed completely and exhaustively and should therefore have to protect those interests in a sufficiently effective manner.[52] This applies all the more now the most fundamental human rights are at issue and Article 13 ECHR requires that effective protection be offered. There have (unfortunately) been no such effective (state or interstate) regulations to date. States also know this too, year after year they express their concern during climate conferences about not closing the global emissions gap and have therefore been asking non-state actors (including business enterprises) since 2012 to take their own responsibility to help close this emissions gap, thereby helping to prevent dangerous climate change.[53]

89. For all these reasons there is thus not a situation that the 'system of the law' would stand in the way of imposing an order to reduce emissions on Shell.

90. With regard to point (ii) Shell argues in para. 3.4.3 Appeal that imposing a reduction order on Shell would mean that the court would have to design and implement an "*entire system of regulations*" and that for that reason the court is required to show restraint (after all). Shell refers by way of substantiation thereof to paras. 5.23 – 5.28 of the Opinion of the Urgenda case. However, those considerations are about another situation, i.e. the situation in which the court, with application of Articles 93 and 94 of the Dutch Constitution, must leave out application of a statutory regulation due to conflict with another binding convention provision.

91. Failure to apply a statutory rule can result in a gap in the law (a legal deficit). In such case the court will have to use techniques to deal with such gap and adjudicate the case. The court can do so, for example, by interpreting the statutory prescription in accordance with a treaty or convention. The court can also expand or limit the statutory prescription or develop new law in some other manner.

92. In general, the court has turned out in such situations to be willing to make provision for the legal deficit, if it can be sufficiently clearly deduced from the system of the law, the cases regulated therein and the principles forming the basis thereof, or the legislative history, how such is to be effected. In such cases, however, in which various solutions are conceivable and the choice thereof is partly dependent on general considerations of government policy or important choices of a legal-political nature, it is appropriate for the court to take a more reserved position and to leave that choice up to the legislature for the time being (at first instance). If the legislature is familiar with the legal deficit and it continues to fail to comply with the obligation laid down in the convention, it is not excluded that the consideration must have a different result (and the court makes that choice after all).[54]

93. Shell regularly refers to these legal considerations of the last paragraph, as well as to the equivalent considerations on this specific situation in Langemeijer and Wissink's Opinion for the Urgenda case.[55] In section 5 of said Opinion, Langemeijer and Wissink set out (paras. 5.23 – 5.28) the arguments in favour of and the arguments against a restrained attitude of the court in these situations, in which on the basis of Articles 93 and 94 of the Dutch Constitution, a

[52] See in this respect also Milieudefensie et al.' Notes on oral arguments 4.

[53] Judgement, para. 4.4.26.

[54] See Tekst en Commentaar, Grondwet en Statuut, 2018, with explanation of Articles 93 and 94 of the Dutch Constitution.

[55] E.g. Appeal, para. 3.1.2 under c and paras. 3.4.3-3.4.5.

statutory regulation is not applied. They indicate, inter alia (para. 5.28) that in the event that a(n) (imminent) violation of fundamental rights of persons is at issue, the court will be more likely to see itself forced to provide effective legal protection. They assert that the greater the risk of a violation of fundamental rights and the more serious the consequences of the disaster to be feared, the higher the expectation of court intervention. In such case there will be a less restrained approach of the court to make provision for the legal deficit which has arisen (due to application of Art. 94 of the Dutch Constitution). On the other part, they assert (para. 5.25) that a good reason for a restrained approach on the part of the court when formulating a new rule can be, for example, that the breached convention provision entails that not only might it be necessary to replace one statutory provision, but a new regulatory system will have to be conceived and introduced.

94. These are all logical considerations in light of the fact that in these circumstances the court must review a national statutory arrangement (the work of the legislature) against the Dutch Constitution as to whether it can be reconciled with a convention and, in the event it cannot be reconciled with said convention, pursuant to the Dutch Constitution, this statutory arrangement must not be applied, and the court might have to apply the arrangement differently than was intended, might have to expand or limit it or otherwise develop new law by means of a general rule. After all, by doing so the court is taking on the work that is in the first instance charged to the legislature.

95. The review by the court of a national statutory arrangement as to whether it can be reconciled with convention provisions is, however, a different review than the review which has been allocated to the court to determine whether on the basis of Article 6:162(2) DCC, the duty of care between two private parties has been taken into account. Shell fails to note this difference and the importance thereof.

96. When carrying out a review against the social duty of care, there is no general rule that was established by the legislature which the court is making ineffective, resulting in a gap in the legislation for which several solutions are conceivable. When reviewing against the societal duty of care, the court is not creating law, but is making a finding of law in a specific case presented to the court, bearing in mind all facts and circumstances relevant to the case. It is case-based law. The opinion presented by the court in such case is relevant for the legal relationship between the relevant parties to the proceedings. In addition, the court's judgement can have value and be a guideline for other cases in which the facts and circumstances are identical or comparable. This does not mean, however, that the court is thereby issuing general rules or designing a regulatory framework when reviewing and assessing the societal duty of care, thereby taking on the role of the legislature.

97. The case-specific nature of the societal duty of care also appears because this 'unlawful' category is in essence an allocation of power to the court to declare behaviour unlawful, outside of the cases of an infringement of a right or conflict with a statutory duty.[56] By means of the open standard of Article 6:162(2) DCC, the legislature specifically intended to have the case decided by the court, and by the court alone.

98. In addition, under the ECHR, the judiciary is in principle deemed to be on equal footing with other government agencies. Therefore, just like other government agencies, the court is bound to realise the fundamental rights guaranteed in the ECHR.[57] This is possible by means of

[56] Verheij, Onrechtmatige daad (Mon. Pr. No. 4) 2019/16.

[57] Asser/Hartkamp 3-I 2019/20 and 221, under b.

factoring in ECHR rights and the values embodied therein when elaborating the open standard of Article 6:162(2) DCC, as the District Court rightly did in the Judgement.[58]

99. By deciding on the case presented to it pursuant to Article 6:162(2) DCC, the court is therefore not taking on the role of the legislature, but on the basis of Articles 11 and 13 General Provisions Act is doing precisely what the legislature requires of and has charged to the court. There has thus been no disruption of the relationship between the legislature and the judiciary in this case.

100. The District Court therefore applied Article 6:162(2) DCC and Article 3:296 DCC in the correct manner.

3.7 No restrained review when assessing the societal duty of care

101. The fact, as has been explained above, that the legislature has charged the judiciary to assess per case on the basis of Article 6:162(2) DCC and Article 3:296 DCC what the unwritten societal standard of care encompasses in the given facts and circumstances and to attach an order to an established legal duty, indicates that there cannot be a restrained approach by the court. The contrary is true. It has, in fact, been precisely left up to the court to come to a full and complete weighing of interests and by means of that weighing of interests to review and to assess whether an unwritten standard of care exists and is being violated or such violation is imminent.

102. This task and discretion of the court is emphasised because the legislature, according to the parliamentary history, intended, when establishing the open standards in the Dutch Civil Code, to allow the court to create the option of responding to societal changes and developments not foreseen by the legislature.[59] In this manner, the law is not only given shape in legislation, but it is also shaped by judicial interpretation in the cases presented to the court in which the invoking of an open standard in the Dutch Civil Code is made.

103. The matter at issue, is that of the duty of care between private parties. As will be discussed hereinafter when discussing the unwritten standard of care, the matter concerns a judicial weighing of interests and both private interests and societal interests can be involved and weighed against each other. This is encompassed in the criterion "what is deemed socially acceptable according to unwritten law" of Art. 6:162(2) DCC. In this respect it is not just the political decision makers who guard the public interest, but the judiciary can also review conduct against relevant public interests.

104. An example is the consideration that the Netherlands Supreme Court made in the Kalimijnen case about environmental pollution caused by salt discharges in a river. In that case the Netherlands Supreme Court considered that when answering the question whether the salt discharges (for which permits were granted in France) were contrary to what according to

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[58] Judgement, para. 4.4.9.

[59] See inter alia Geert Corstens and Reindert Kuiper, De rechter grijpt de macht – en andere misvattingen over de democratische rechtsstaat, 2020, p. 77: *"Many laws included 'open standards'. These are standards which have been formulated in terms which are difficult to realise in practice. In such case the court can take account of new developments which were not foreseen by the legislature.";* and on p. 94: "*Due to open standards and interpretation methods based on something other than grammar, legal findings have taken off [...] from a perspective of foreseeability this is not ideal, but there is little that can be done about this. The requirement of foreseeability therefore does not stand in the way of the developing of law via jurisprudence, as determined by the ECtHR some time ago."* (the latter reference is to ECtHR 22 November 1995, ECLI:NL:XX:1995:AD2430).

unwritten law is deemed socially acceptable with regard to users downstream of the river, depends on "*the nature, the seriousness and the duration of the damage caused to the latter and the further circumstances of the case*", whereby account must be taken, inter alia, of "*on the one hand the nature and the weight of the interests served by the discharges and on the other with the interests served by the downstream use*". Following on this, the Netherlands Supreme Court considered "*that when weighing these mutual interests, the interests of the downstream user can be attributed a special weight that the latter may in principle expect that the river is not excessively contaminated by substantial discharges*."[60]

105. In his note with the Kalimijnen case, Nieuwenhuis says with regard to this matter that the legitimacy of this expectation does not lie in a comparison of the financial advantages and disadvantages of the discharges, but in the belief that a river (just like the atmosphere in this case) is intended for "sustainable and joint use" and consequently thus serves a public interest. The weighing of interests is thus a legal (normative) weighing of interests between all private and public interests involved and not a legal-economic "cost-benefit analysis".[61]

106. Involving public interests in the consideration nevertheless does not mean that the court is busy drawing up regulations. It should also be clear that the Netherlands Supreme Court in the Kalimijnen case – as Shell asserts in this case – did not have to decide against making a decision, because due to its determination on liability it would create a 'regulatory system' for (chloride) discharges in rivers, thereby placing the court in the chair of the legislature. Nor did aspects of public law, such as the discharge permits granted in France to the polluter MDPA[62] and the circumstance that the discharges satisfied the Convention for the Protection of the Rhine from Pollution by Chlorides (3 Dec. 1976, Trb. 1977, 33),[63] stand in the way of accepting liability. The Kalimijnen case, just as this case, concerned a finding of law in the specifically presented case, bearing in mind all objective reference points and facts and circumstances relevant for the case, including public interests.

107. As it is now clear that there has been no creation of regulations, but a finding of law in a specific case, Shell also cannot maintain its assertion that by applying the societal standard of care, an inequality of rights has been created, as the Judgement has only been pronounced with regard to Shell. First of all, there is no inequality of rights, as not all cases are the same. The facts and circumstances relating to Shell and which are described in Chapter 2 are different from those of the baker around the corner, this much will be clear. It is inherent in the application of open standards that every case must be assessed on its own merits.

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[60] HR 23 September 1988, ECLI:NL:HR:1988:AD5713, NJ 1989/743 with notes by Nieuwenhuis and J.C. Schultsz, para. 3.3.2.

[61] See also K.J.O. Jansen, Informatieplichten (R&P no. CA5) (diss. Leiden) 2012, par. 4.1.3, 2012, who argues that a unilateral focus on the costs of risk and precaution is irresponsible from a legal perspective.

[62] HR 23 September 1988, ECLI:NL:HR:1988:AD5713, NJ 1989/743 with notes by Nieuwenhuis and J.C. Schultsz, para. 3.4 *"[T]he French discharge permit, which MDPA is in compliance with as regards the regulations, does not have the purport to weigh the eligible interests to such degree that the permit holder would supposedly be indemnified against liability on the basis of unlawful act."* In his note with the judgement, Nieuwenhuis considers in this respect that a permit holder cannot derive any indemnifying effect from the permit, if he, in view of his advanced knowledge, must understand that, even when he complies with the rules laid down in the permit, he is nevertheless causing serious damage to the environment.

[63] Ibid, para. 3.2. There was *"no indication whatsoever that the Convention (…) in part intended to regulate the relationship of the citizens of the Contracting States among themselves, including in such sense that the courts in one of said States would be bound to decide a dispute between said citizens on the basis of the Convention."* The convention thus did not have an intended exhaustive effect (in terms of civil law) and compliance with the convention did not stand in the way of liability. Nor in this case is there any indication that the public law laws and regulations invoked by Shell have the effect in the Netherlands or Europe to exercise influence on a liability relationship between Shell and Milieudefensie et al.

108. This is without prejudice to the fact that as a result of the finding of law in the case against Shell, this can result in the forming of law, so that the judgement finding against Shell can have a broader effect. Companies that are comparable to Shell will be informed by their attorneys, accountants, banks, etc. as to the climate responsibility which in the event of application by analogy of the Judgement will (potentially) also apply to them as well. Legal scholars will map the scope of the Judgement for the business community and draw conclusions from this. The adjustments in behaviour on the part of the business community which arise as a result, will further support the legal standard found and determined by the court in the Shell case. Undoubtedly, legal proceedings will be instituted against other types of companies and depending on the outcome of those proceedings, the law and legal sciences can continue to develop in relation to the topic of climate change and corporate responsibilities.[64]

109. This law-forming effect of case law is nothing new under the sun and is an important source in the development of law in the light of changing societal developments. This law-forming process not only occurs in this manner in the Netherlands, but also abroad.[65] Nevertheless, this does not mean that the court is creating a regulatory system by means of the opinion in an individual case or is encroaching on the policymaking discretion of the State of the Netherlands.

110. Furthermore, sight must not be lost of the fact that the equality principle that Shell is invoking, relates to the vertical relationship between the government and (legal) persons and not to the horizontal relationship between (legal) persons among themselves. When assessing the societal duty of care, the court must be able to make a finding regarding said horizontal relationship, without having to involve the equality principle. A natural person or legal person in a state based on the rule of law is free to turn to the civil courts in a violation or imminent violation of the rights to which they are entitled and, if several parties can be accused of such violation, to determine whether they wish to bring legal action against all these alleged infringers of standards or only (whether or not at first instance) one or a few of them. This is a valuable right. If the matter were different, open standards which in practice are to be interpreted on a case by case basis, would be an unwieldy phenomenon that cannot make a contribution to legal protection, findings of law and the development of law.

111. In short, on the basis of the above it can be concluded that neither the District Court nor the Court of Appeal need take a restrained approach when reviewing and assessing Shell's societal duty of care pursuant to Article 6:162(2) DCC.

112. A final note. This case concerns a(n) (imminent) violation of fundamental rights for which legal protection is sought and which legal protection can only effectively be offered by means of the requested court order. Moreover, this case concerns a very considerable risk of infringement of fundamental rights, the consequences of which are very serious and substantial and possibly catastrophic and irreversible. In those cases it nevertheless applies that even in the event of a restrained judicial assessment, judicial intervention must be expected, according to Langemeijer and Wissink in para. 5.28 of the Opinion for the Urgenda case. The outcome in the Urgenda case also demonstrates this.

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[64] This process of law forming has already been embarked upon in connection with the judgement of the District Court in this case. Both inside and outside the Netherlands, the case has been widely discussed in the media and in the law literature and comparable cases have already been instituted.

[65] See Milieudefensie et al.'s Notes on oral arguments 2 at first instance, paras. 113–128, with regard to the way in which courts in the world relating to the climate problem refer to judgements from other jurisdictions in their judgements. In addition to this, see also the climate cases against the Belgian, German and French governments which were won subsequently, in which the relevant foreign courts made reference to, inter alia, the judgement in the Urgenda case, to provide substantiation for their opinion (Milieudefensie et al. will pay attention to these cases in Chapter 4).

3.8 The societal duty of care and government regulation

113. In its Appeal, Shell discussed the (statutory / policy) climate action of the State of the Netherlands. That national climate action would, as it were, indemnify Shell against liability.

114. That as a rule government regulations and government policy (including permits which have been obtained) do not have an indemnifying effect, has already been extensively explained in detail in Milieudefensie et al.'s Notes on oral arguments 4, as well as above in Chapter 3.6.[66]

115. In supplementation thereof, Milieudefensie et al. wishes to briefly go into Shell's argument that the Court of Appeal should attach specific value to the specific policy approach which the Netherlands has chosen to reduce national emissions of citizens and companies. The view is that the approach to the climate task of the State of the Netherlands does not impose an obligation to reduce emissions on one individual company, so the court may therefore not assume a legal duty on the part of Shell.[67]

116. The way in which the Dutch government and other governments around the world reduce emissions by means of legislation and policy in their own country is, however, not decisive with regard to the question whether Shell is subject to a societal duty of care. States express and implement their own responsibility relating to the reduction of emissions by means of regulations. Normally no laws are written which are specifically and alone applicable to one company. However, the fact that countries do not establish climate regulations for individual companies, cannot lead to the conclusion that pursuant to liability law an individual company can never be subject to a duty of care. If this reasoning were to be followed, this means that when invoking Article 6:162(2) DCC, the court would have to look for regulations in which Shell is specifically regulated. If this regulation is not found, according to Shell this would stand in the way of liability. If this regulation were to be found, Shell would, however, undoubtedly argue that this also stands in the way of liability, because of an alleged indemnifying effect of said specific regulations. This makes it clear that Shell does not see room for its own (unwritten) legal duty, regardless of whether and what the legislature regulates on this point. According to Shell it can apparently only be held accountable when acting in violation of the law. This finds no support in the law and is miles from the above-discussed background of Article 6:162(2) DCC and would make the unlawful act on the basis of the societal duty of care meaningless.

117. Shell's reasoning on the importance of the Dutch climate action in relation to the impossibility of a duty of care on the part of Shell, therefore fails. In addition, Shell is being called to account for its global activities, and for that reason it is not clear why the Dutch policy approach should be of decisive importance in assessing this case.

3.9 Shell's duty of care is not an encroachment of the state's discretion to determine the climate policy itself

118. In the Appeal, Shell emphasised several times that the Netherlands Supreme Court's decision in the Urgenda case allegedly showed that government and parliament have full discretion to determine themselves how to deal with climate policy, provided this policy achieves the reduction target that the court ordered the State to meet. It is Shell's contention that imposing an order to reduce emissions on Shell would constitute an unacceptable encroaching of the

[66] See furthermore Milieudefensie et al.'s response to Shell's Ground of Appeal I(f).

[67] Appeal, paras. 3.3.4, 3.3.10 and 7.2.3(b)(iv).

State's discretion because the State would then have to take account of the fact that Shell has its own task. This could limit the State in its own choices. More or less the same would apply to other countries.

119. This reasoning of Shell misses the mark for many reasons.

120. First of all, as explained in Chapter 3.6, it does not ensue from the Urgenda judgement that this will result in an indemnifying effect for Shell's conduct (or the conduct of any other party in the Netherlands). Nor does the judgement show (naturally) that this has side-lined Dutch liability law in any form, nor that in addition to governments, there cannot be any other entities which bear an independent responsibility in preventing dangerous climate change. It should be evident that this judgement does not in any way stand in the way of holding Shell liable for its own responsibility on the basis of Dutch liability law.

121. Second, there is no indication that and how Dutch climate policy is (unacceptably) encroached on by the order imposed on Shell. Nor did the government assert that such was the case in the Parliamentary Letter of 6 December 2021.[68] On the contrary, the minister concluded in the Parliamentary Letter: *"As such this judgement does not give the Dutch government direct cause to adjust the climate policy."*[69] With regard to other countries than the Netherlands, it has been neither asserted nor proven that an order that Shell reduce emissions supposedly encroaches on government policy in an unacceptable manner.

122. Third, the Dutch government must accept that if a private party in the Netherlands, in conformity with Dutch liability law pursuant to Article 3:296(1) DCC, is made subject to a court order, said party will have to live with the consequences thereof. The State must accept the court's decision, even if this has large societal consequences. The Urgenda case and the nitrogen cases are examples of this. When a question of law is presented to the court, the court will have to answer it. If the court opinion encroaches on political policy or political wishes, such encroachment is justified, provided the separation of powers is respected.

123. Fourth, pursuant to international private law, human rights law and Dutch liability law, other countries must also accept that a parent company of a multinational company (formerly) headquartered in the Netherlands, has been made subject to an order imposed by a Dutch court with cross-border consequences.[70]

124. Fifth, the order imposed on Shell does not relate to specific goals which Shell must realise in the Netherlands. The court order imposed on Shell concerns the reduction of Shell's global emissions and Shell is entirely free to realise this as it sees fit. If so desired, on the basis of the order it can leave the emissions in the Netherlands unaffected, provided they decline at global level in accordance with the order.

125. The Dutch government comes to the same conclusion in the aforementioned Parliamentary Letter, in which the minister asserts: "*RDS is free to perform the obligation to reduce emissions*

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[68] **Exhibit MD-341**, Parliamentary Letter, p. 4: "*The Shell judgement does not lead to direct legal obligations for the Netherlands. The Dutch government continues to implement the Dutch Climate Agreement, the European Green Deal and the Paris Goals.*"; Letter from the Minister of Economic Affairs and Climate Policy to the President of the Netherlands House of Representatives of the States-General of 6 December 2021, concerning 'Analysis of Shell judgement', reference DGBI-TOP / 21271745.

[69] Ibid, p. 4.

[70] Milieudefensie et al.'s Notes on oral arguments 1, paras. 170-181; Milieudefensie et al.'s Notes on oral arguments 3, in particular paras. 93-103; Milieudefensie et al.'s Notes on oral arguments 5, in particular paras. 80-93.

as it sees fit and to shape the corporate policy for the Shell Group as it sees fit. RDS is thus also not obliged to further reduce emissions in the Netherlands, as long as the imposed reduction target is achieved by measures elsewhere in the world."[71]

126. The court order therefore has no direct effect whatsoever on the policy of the Dutch State or any other state whatsoever. The order is directed against Shell and its only direct consequence is that Shell must change its corporate policy, taking account of the order. Only after Shell changes this corporate policy will the Judgement see de facto consequences, via the adjustment of that policy. What consequences these will be, cannot be stated a priori as this remains at Shell's discretion. It is not the order, but Shell's actions as a result of the order that will have an effect on third parties, including Netherlands, but this is decided by Shell.

127. Sixth, the State of the Netherlands, just like other states, is a party to the UN Climate Convention, the Paris Agreement and the Sustainable Development Goals. Just like other states, since 2012 the State of the Netherlands has determined under the UN climate regime that it is necessary for companies to be proactive when it comes to climate action and the energy transition, as only in this manner will it be possible to prevent dangerous climate change. It is in this manner that the hurdle of the power vacuum must be taken, which is why, inter alia, the UNGP was established as a guideline for multinational enterprises to engage in self-regulation, because they cannot be properly regulated by national states.

128. It is therefore not surprising that the UNGP confirms that companies have their own responsibility to respect human rights, separate from (the policy of) states:

"The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[72]

129. States, in turn, must guarantee effective protection on the basis of Article 26 of the UNGP when it comes to human rights violations by business enterprises:

"States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy"[73]

and,

"States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business

[71] Exhibit MD-341, Parliamentary Letter, p. 1.

[72] Exhibit MD-220, Commentary with UNGP Article 11.

[73] Exhibit MD-220, Article 26 UNGP.

actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed."[74]

130. When viewed against this background, it cannot be a surprise for the Netherlands and the other countries if business enterprises are in fact legally obliged to protect human rights and the urgently necessary climate action and energy transition requested by these states will actually occur. States expect this of each other (indeed, they are bound to do so on the basis of the conventions) and in view of their request to the business community, they also expect that of the business community.

131. That states expect this of each other and expect that each of them (and thus the global community as a whole) urgently have to take large transformative steps, is strikingly described in the preamble of the Sustainable Development Goals:

This Agenda is a plan of action for people, planet and prosperity. [...] All countries and all stakeholders, acting in collaborative partnership, will implement this plan. We are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet. We are determined to take the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path. As we embark on this collective journey, we pledge that no one will be left behind." [75]

132. That states also expect climate action from business enterprises is again confirmed in the above-cited Parliamentary Letter, with the renewed request of the government to business enterprises to take their own responsibility with regard to taking climate action and to independently working toward the global goal of climate neutrality in 2050:

"In addition, the cabinet encourages companies to take on responsibility on a voluntary basis for their task of reducing emissions by setting goals based on climate science, e.g. by aligning with the Science Based Target Initiative (SBTi). More than 40 Dutch companies have already done so. As further encouragement, earlier this year the cabinet in addition formally gave its support to the Carbon Disclosure Project (CDP), that encourages companies to publicly report on their impact on the environment. The cabinet furthermore supports the World Benchmarking Alliance in the formulation of benchmarks, also based on science, by which performance of companies can be measured and is welcoming when companies publicly commit themselves to climate neutrality in 2050. By taking such steps now, businesses can gain a competitive advantage."[76]

133. It is evident that the State of the Netherlands does not take the position that its climate policy will be encroached on if companies choose themselves to act in line with the Paris goals. Indeed, it is encouraged. Whether the urgently necessary energy transition arises because of companies voluntarily heeding the states' request, or because companies are obliged to do so by the court, the consequences and the impact on state policy are the same. As BP decided of its own volition to reduce its oil and gas production by 40% before 2030 (Exhibit 283), Shell will have to take measures pursuant to the court order.[77] The effect is the same. Milieudefensie et al. already

[74] Exhibit MD-220, Commentary with Article 26 UNGP.

[75] Exhibit MD-335, UN Resolution on Sustainable Development Goals, p. 1, paras. 1 and 2; for a more comprehensive discussion, see Milieudefensie et al.'s Notes on oral arguments 5, paras. 38-44.

[76] Exhibit MD-341, Parliamentary Letter, p. 3.

[77] Milieudefensie et al. is not suggesting in this respect that BP's climate policy is adequate.

discussed this topic in great detail at first instance and explained in a broader sense that the requested order does not affect the sovereignty of states.[78]

134. Seventh, it must be borne in mind that Shell's policy decisions have had an influence on the policies of countries for decades. Every decision of Shell, whether it is made without a judgement or because of the judgement, has an influence on states and other third parties. Moving Shell's Dutch head office to the United Kingdom after being based in the Netherlands for over 100 years to escape Dutch dividend tax, is only one example of this. Shell first attempted for years to persuade Dutch political decision makers to abolish dividend tax and after several failed attempts, the company relocated to another country, so that fewer taxes had to be paid to the public coffers. This is an encroachment on the policy and the wishes of the State of the Netherlands and Shell is not concerned with this.

135. Because of the enormous international size of the Shell Group, every decision of Shell has a gigantic influence on other (legal) persons, states and societies worldwide no matter what. This is, not in the last place, due to the political and societal influence stemming from the (lobby and PR) policy, the actions and investments of Shell.

136. It would therefore not be appropriate if it were to be held that climate action was left solely up to political decision makers, without any independent and legally enforceable responsibility for system players like Shell. This applies all the more when it must be admitted that globally, countries are not doing enough to prevent dangerous climate change, partly as a consequence of the very influential lobbying of Shell and the oil and gas industry to which it belongs. This process must be halted, if there is to be a chance of combating dangerous climate change.

137. When it comes to encroaching on public policy and public wishes, this is precisely the case as long as Shell's policy is evidently not in accordance with the goal of the international community to prevent dangerous climate change.

138. The Judgement and the related order in fact brings Shell's private interests back in line with the public interests of the Netherlands and of other states and prevents a wrongful encroachment on said public interests. In that manner Shell will be forced to conform to preventing one of the greatest dangers humans have ever been confronted with.

139. Eighth, in its claims Milieudefensie et al. has intentionally factored in the special position of the developing countries[79], thereby taking account of the principle of Common But Differentiated Responsibilities. It does so by only claiming that Shell be made subject to a reduction percentage of 45% for 2030, a percentage that is equal to the global emissions reduction goal for that year. The following serves by way of explanation.

140. This global goal of a 45% reduction is the percentage that on average must have been achieved in the world by 2030. Taking account of the principle of Common But Differentiated Responsibilities, the global average, i.e. the total of the climate action that necessarily must be generated by the developed countries (which must realise reductions of more than the average of 45%) and the climate action of the developing countries (which have to realise reductions of less than the average of 45%).

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[78] Milieudefensie et al.'s Notes on oral arguments 5, paras. 1- 96 and Notes on oral arguments 2, paras. 100-103.

[79] By using the terms developing countries and developed countries, Milieudefensie et al. seeks to align with the terminology of the Paris Agreement and will use these terms in this Defence on Appeal. Normally it applies the more neutral terms of global North and global South.

141. As Milieudefensie et al. indicated at first instance, there are good grounds for arguing that Shell should follow the much higher reduction speed of the developed countries (and therefore will have to have achieved reductions of considerably more than 45% by 2030). Shell is one of the richest and most influential Western companies and receives the bulk of its revenue from the Western countries.[80] In addition, Shell has acknowledged that it can reduce faster than the global average and therefore, according to its own views, should achieve faster reductions.[81]

142. Despite all of this, Milieudefensie et al. intentionally opted to demand no more of Shell than the global average. This is because Shell is also active in various developing countries. The global average takes account of the more limited reduction task which can be expected of the developing countries as of 2030, as explained above. In this manner Milieudefensie et al. has intentionally taken account of the special position of the developing countries. With this Milieudefensie et al. has at the same time sought the absolute lower limit of what can be asked of Shell.

143. The Shell reduction order therefore does not lead to an encroachment on the principle of Common But Differentiated Responsibilities.[82]

144. Ninth, without prejudice to the principle of Common But Differentiated Responsibilities, there are still "common responsibilities", entailing that all countries, both developed countries and developing countries, accepted in the Paris Agreement that because of the limited carbon budget they have to work toward net zero emissions. As Shell therefore also indicates: "*On the basis of the Paris Agreement, governments must choose scenarios which are in accordance with the carbon budget.*"[83]

145. Unfortunately, the conclusion must be that only a handful of countries are reducing their national emissions at a speed and in a manner which is in accordance with, or comes close to, what must necessarily be done to stay in line with the limited carbon budget. The Netherlands and the EU are not among that handful of countries. The emissions reduction goals of the Netherlands and the EU of 55% for 2030 are not high enough above the global average of 45% for these richest regions of the world to be able to qualify as fair and adequate contributions.

146. Because in virtually all other countries in the world the climate policy being implemented is inadequate (hence the large global emissions gap), Shell cannot assert that because of the reduction order there is an encroachment on adequate national climate policy.

147. Tenth and last, without detracting from the order to reduce emissions which was imposed on Shell, countries can and must themselves address the negative (for some) consequences of the necessary climate action, which is desired by everyone. These are choices which in all countries are fully within the political domain and the reduction order imposed on Shell does not does not infringe this.[84]

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[80] As will be explained further on in the Defence on Appeal in Chapter 5.2, 69% of Shell Group revenue is generated in developed countries and 31% in developing countries.

[81] See Milieudefensie et al.'s Notes on oral arguments 9, para. 10 with references; Milieudefensie et al.'s Notes on oral arguments 8, paras. 28-34; Milieudefensie et al.'s Notes on Oral arguments 7, paras. 20-24.

[82] As further substantiation of this conclusion, additional grounds will be presented in Chapter 5.2 and Chapter 5.3.

[83] Appeal, paras. 2.3.6.

[84] See Milieudefensie et al.'s Notes on oral arguments 5, paras. 74-79.

148. For example, it is evident that the fossil sector will have to shrink and that this will affect the people working in this sector.[85] These employees will have to be supervised in the change process, so that the transition will also be fair to them. But this is nothing new, this has always been the case. The farmers in the Netherlands are now in the middle of such a transition in connection with the nitrogen file and are suffering disadvantages. Government policy will have to ensure that said transition will be fair, e.g. by buying out the farmers concerned in an adequate manner. Another example, somewhat further in the past, was the transition in the Netherlands from coal to gas, so that the coal mines in the Zuid-Limburg were closed, resulting in large unemployment problems. In that case too it was up to the government to deal with the negative consequences thereof for the region as much as possible and to offer people another perspective.

149. All countries, none excepted, will be facing these kinds of challenges and must respond to them at their discretion. In the Paris Agreement it was agreed, inter alia, that the developed countries will support the developing countries in the form of financing, technology transfer and capacity expansion.[86]

150. The order to reduce emissions imposed on Shell does not infringe this. As such, the order to reduce emissions does not cause this transition problem, but it will arise, no matter what. The longer we wait with the energy transition, the shorter the time period during which it will have to be realised, and it will only be more difficult, more drastic and more expensive.

151. In short, for the ten above-mentioned reasons the determination by the District Court of Shell's duty of care and the related need to reduce its CO2 emissions is not an (unacceptable) encroachment on the freedom of the state to determine climate policy itself. The Judgement only legally forces Shell to join in a transformation which the entire world deems urgent and necessary and which at the same time serves other global general interests, such as energy security, affordability of energy and sustainable economic development. The above has already been explained in detail in the introduction to this Defence on Appeal on the Sustainable Development Goals.

152. Lastly, it is once again repeated that precisely the current corporate policy followed by Shell (and its policy of the past decade) constitutes an encroachment of public policy. Shell's corporate policy is evidently not in conformity with the biggest and most important public goals in the world; goals which in essence are all concerned with a worthy existence on a habitable plant for humankind. To this day Shell's corporate policy is still geared to continuing the fossil business model for as long as possible and to the greatest degree possible. Shell continues to go all out in making large-scale investments in new fossil projects. This is despite the fact that according to the IEA there is no room whatsoever for new oil and gas projects (see Chapters 5 and 6). The production gap in the oil and gas market (the gap between planned oil and gas production and the maximum that can still be produced in relation to climate action) is only further increased by this policy of Shell. With this Shell is creating new lock-in effects which make achieving the Paris Goals de facto impossible. By continuing to invest in new fossil projects, the financial-economic interest of Shell in the production of fossil fuels is increased and kept at a high level. With this Shell retains to an equal degree a large interest in temporising the energy transition (in Shell speak, this is referred to as an orderly transition and realistic

[85] This is aside from the circumstance that the renewable energy sector creates employment, in the meantime even more than the fossil industry, according to the IEA. See **Exhibit MD-342**, Press release of the International Energy Agency of 8 September 2022.

[86] See also Appeal, para. 2.3.2.

policy). Shell thus creates and retains its own resistance to a rapid energy transition, thereby encroaching on the public climate policy. The Judgement makes a break with this trend. This is also necessary to keep the aim of achieving the Paris Goals alive.

153. For all these reasons the Court of Appeal therefore does not have to show restraint when it comes to affirming the Judgement and affirming the reduction obligation which was imposed on Shell. On the contrary, in Article 3:296 DCC and Article 6:162(2) DCC the legislature did give the judiciary both the power and the instruction to assess per case, what in a specific case the unwritten social duty of care constitutes under the given facts and circumstances and to attach an order to a legal duty that has been determined to exist. When a legal question is presented to the court, the court has no choice but to make a judicial determination, even if this has political or social consequences.

154. Now Milieudefensie et al. comes to the discussion of the societal standard of care and the appropriateness of that standard in deciding this case, as the District Court did. Shell disputes that the standard is appropriate.

4. Legal grounds

4.1 Introduction

155. In this chapter Milieudefensie et al. will refute Shell's assertion that the social standard of care and the doctrine of hazardous negligence and the 'Kelderluik' factors as a case example of said doctrine, are supposedly not suitable for application in this case. Milieudefensie et al. will also explain that it has based its claim on more legal grounds and objective reference points than only the doctrine of hazardous negligence, and that all these grounds and reference points, point in the same direction, i.e. that Shell has a legal duty to make a proportional contribution to preventing dangerous climate change. This chapter will, inter alia, provide an update of developments in the intersection of climate change and the violation of human rights.

4.2 The societal standard of care is a context-bound standard and not a general rule

156. That an act or omission can be contrary to what according to unwritten law is deemed appropriate according to commonly accepted principles, speaks for itself. Humans form part of society and, when utilising their freedom to act, are subject to a certain responsibility in relation to the interests of their fellow humans. This does not go so far as to mean that they must neglect their own interests and that in all cases extreme prudence relating to others is required, but they must weigh their own interests and those of others against each other and be led in such case by what people can reasonably expect of each other in society. It is therefore, in addition to the violation of a duty imposed by law and a violation of someone else's right (the two other categories of unlawful acts), unlawful to not observe the duty of care which is appropriate in society.[87]

157. In essence, when assessing the societal duty of care the issue is always a specific weighing of, on the one part, the interest of the defendant to have the freedom to act in his own interest and on the other the interest of the claimant to be held harmless from unlawfully caused loss or other violation of his rights.[88] This thus concerns a consideration to be determined by the

[87] Asser/Sieburgh 6-IV 2019/56.

[88] K.J.O. Jansen, GS Onrechtmatige daad, art. 6:162 BW, note 6.1.4.2.

courts in a given situation of the legitimate interests of the claimant and those of the defendant in the circumstances of the dispute which has been brought before the court.

158. Characteristic for the social standards of care is consequently not their general character, but their context-related character. Due to this context-related / case-specific character, the standard of care encompasses an infinite number of possible types of actions. This is the reason why this open standard in legal practice is far and away the most important ground for determining wrongful act.[89]

159. Shell fails to note the reference framework of Article 6:162(2) DCC and wrongly asserts that the matter should concern a standard which is so self-evident, is common knowledge, socially obvious and in accordance with the cases regulated in the law, that this standard (therefore) must also be legally complied with.[90] Shell does not cite any legislative history, legal literature or jurisprudence from which this legal rule supposedly ensues. Shell apparently came up with this rule itself. Hereinafter Milieudefensie et al. will explain that this rule does not exist.

160. In essence, Shell is asserting here that the legal duty ensuing from the societal standard of care must be of such degree of legal certainty and foreseeable, up to the specific reduction percentage, that it is virtually equally recognisable as a rule that is literally included in the law. Shell's argument again de facto comes down to the view that there can only be unlawful act if it is acting contrary to the law.

161. The demarcation formulated by Shell itself is not supported by the law, however, and leaves no room for the establishing and application by the courts of unwritten law. A case-specific legal duty which is found on the basis of Article 6:162(2) DCC need not satisfy the overly strict threshold, made up by Shell itself and the criteria of foreseeability and legal certainty are sufficiently served by applying the cited objective reference points and the circumstances of the case.[91]

162. In light of the above Shell introduces what it claims are two more 'essential legal questions' in para. 3.2.12 Appeal, to which reference is made for the sake of brevity. In light of the above, these legal questions are not correct either. According to Milieudefensie et al., instead of the two questions posed by Shell, the following legal questions are relevant:

    1. *Is a company in Shell's position subject to its own, individual responsibility and legal duty to proportionally and adequately contribute to preventing dangerous climate change?*

    2. *What does this proportional and adequate contribution specifically entail for Shell?*

163. With regard to legal question 1: as already indicated, there are more than sufficient objective reference points for assuming such an independent legal duty. Paragraphs 4.4 and 4.5 Defence on Appeal go into the substance of these objective reference points in greater detail. Shell itself has also indicated that there is consensus that doing nothing is unacceptable and that

[89] Tekst & Commentaar, Burgerlijk Wetboek Boek 6 BW, 2021, artikel 6:162 BW, note 2(d); Hijma & Olthof, Compendium Nederlands vermogensrecht 2020/408; Hartlief, Van Boom, Keirse, Lindenbergh, Verbintenissen uit de wet en Schadevergoeding, 2021 under para. 40.

[90] Appeal, para. 3.2.12.

[91] P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, ECLI:NL:PHR:2019:887, para. 2.19 and the Opinion of A-G Valk, ECLI:NL:PHR:2020:412, para. 6.1 et seq.

companies must take measures to reduce their emissions.[92] This makes the existence of any own legal duty a fact.

164. With regard to legal question 2: having established that there is a legal duty, it must then be reviewed what this legal duty entails in Shell's context-related situation.

165. In this respect too there are more than sufficient objective reference points for the opinion that a reduction of at least 45% in Scope 1, 2 and 3 emissions in 2030 is proportional and appropriate. Milieudefensie et al. pays attention to this topic in Chapter 5 Defence on Appeal. In this respect, the elaboration of the legal duty must in any case lead to an effective legal protection as referred to in Article 13 ECHR, and that therefore in this case there thus must at least be a proportional contribution to what is necessary to prevent dangerous climate change and limit warming to 1.5°C.

166. Answering the two above-mentioned questions leads to a standard of care and legal duty specific to the case of Shell. Milieudefensie et al. will now first go into the case-specific nature of the societal standard of care in general.

167. The case-specific nature of the societal standard of care also appears from the fact that this 'unlawful' category is in essence an allocation of power to the courts to qualify acts as unlawful outside of the cases of a violation of law or conflict with a statutory obligation.[93] In addition to the conflict with the statutory duty, the existence of the societal standard of care in essence shows that Shell's defence, that there can be no unlawful act as long as all relevant government regulations are satisfied, is legally incorrect.[94]

168. A duty of care is thus concerned with unwritten legal standards, the content of which is not demarcated in advance by the legislature by a subjective law which is recognised as such or a legal duty which is described as such. The unwritten standard is an open standard, so there is no unwritten standard on which the court can rely. It ensues from this that the court must 'determine' what in the specific case the societal standard of care legally requires.

169. A standard of care must therefore be determined on a case-by-case basis, on the basis of the specific facts and circumstances of the case.[95] See in the same sense also P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case:

"Characteristic for this category of unlawful act is its context-related nature: what the unwritten law entails in a given set of circumstances must be assessed on a case-by-case basis. This comes down to a weighing of interests."[96]

170. Precisely because of the context-related character of the societal standard of care to be applied, these legal duties can be very much a matter of legal casuistry. A good example of this is the judgement of the Netherlands Supreme Court in the caustic soda case regarding the eye injury of a waste collector due to exposure to the corrosive substance caustic soda, which personnel of a town house (in a bucket, packed in a box and a rubbish bag) put out with the rubbish. The

[92] Appeal, para. 3.2.17 and para. 7.2.3, under a(iii).

[93] Verheij, Onrechtmatige daad (Mon. Pr. No. 4) 2019/16.

[94] This topic was discussed in detail in Milieudefensie et al.'s Notes on oral arguments 4.

[95] K.J.O. Jansen, GS Onrechtmatige daad, art. 6:162 BW, note 6.1.4.1; Hijma & Olthof, Compendium Nederlands vermogensrecht 2020/408.

[96] P-G Langemeijer and A-G Wissink, ECLI:NL:PHR:2019:887, para. 2.18.

Netherlands Supreme Court applied a very case-specific standard, which can hardly be deemed a commonly accepted standard. The Netherlands Supreme Court considered:

"It is contrary to the standard of care required in society […] to put out a bucket with an unknown liquid in a cardboard box, covered by nothing more than a tied-up plastic rubbish bag for removal by a rubbish collection service, unless they either know or have valid reason to assume that the liquid is one which when a human comes into contact with it, will not constitute a danger, or the person putting out the rubbish keeps control of the rubbish bag in question and warns the person who wishes to pick up the bag of the presence in the bag of a bucket with a dangerous liquid."[97]

171. There are more examples of a comparable standard of care formulated on an individual case basis. For example, see also the judgements in the Veenbroei case and the Taxus case.[98]

172. These kinds of examples of standards formulated on an individual case basis show that when applying the standard of care and the weighing of interests that this requires, the matter need not concern finding a common, self-evident standard that is already known to everyone, as Shell wrongly asserts.

173. Nor need the matter concern standards, the breach of which is 'evidently unlawful'.[99] The foregoing is also encompassed in the fact that when applying the societal standard of care, the matter concerns a specific weighing of interests in a specific case (context-related). The court must, after all, generally take account of numerous special circumstances which in the specific situation of the dispute which has been brought before it, are relevant when making the decision. As jurisprudence shows time and again, a small nuance in the facts can sometimes be sufficient to come up with a contrary opinion.[100] Even in a specific case before the court, it can sometimes be difficult to determine the inflection point between lawfulness and unlawfulness.[101]

174. It also ensues from the foregoing that the 'unwritten' standard determined in court in the context of the case at hand does not have to be suitable to be able to be applied in general. In his Opinion for the Taxus case, acting A-G Bloembergen stated in this respect that in the event of case-based standards of care *"caution [is] required when seeking to generalise the case-based rule*" (under 3.3). The legal literature also mentions this need for caution when it comes to generalisation.[102]

175. The standard found in a case on the basis of all specific facts and circumstances of the case therefore cannot easily be translated into general rules. Application of the law by the court always depends on the circumstances of the case. The legal standard applicable in a specific situation and the legal consequence to be attached to a breach of the standard are determined and 'coloured' by the specific case and applies under the circumstances of that case; this cannot be deemed equivalent to a generally applicable rule.

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[97] HR 8 January 1982, NJ 1982/614, with notes by C.J.H. Brunner (Natronloog), para. 4.

[98] HR 27 May 1988, NJ 1989/29, with notes by W.C.L. van der Grinten (Veenbroei) and HR 22 April 1994, NJ 1994/624, with notes by C.J.H. Brunner (Taxus).

[99] Hartlief, Van Boom, Keirse, Lindenbergh, Verbintenissen uit de wet en schadevergoeding, 2021, under para. 43.

[100] Asser/Sieburgh 6-IV 2019/57.

[101] Verheij, Onrechtmatige daad (Mon. Pr. No. 4) 2019/16.

[102] See, e.g., Hartlief, Van Boom, Keirse, Lindenbergh, Verbintenissen uit de wet en schadevergoeding, 2021, under para. 38.

176. That, when applying the standard of care, the matter thus need not concern finding a general, self-evident standard that is already known to everyone, also appears from the fact that even an existing general and wide-spread use in a specific sector or professional group, can be socially careless. In such case the breached standard thus reads completely differently than the sector itself assumes; the standard is diametrically in contrast to what is common use.[103]

177. The scope of the duty of care is determined, inter alia, by the scope of the risk and therefore custom and use are not decisive for determining the care to be observed. Even someone who adheres to what is customary or usual in their profession or business, can nevertheless be acting unlawfully.

178. The reason for this is, inter alia, that it is possible to reduce the risk by taking precautionary measures which in the light of all facts and circumstances cannot be deemed onerous. The general custom relating to asbestos and the usual conduct of asbestos producers and companies that worked with asbestos, therefore did not stand in the way of their liability for personal injury due to exposure to asbestos. They could not hide behind custom and common use in society.

179. In short, unlawfulness concerns the care which society deems appropriate and not the care which is usual or customary in society.[104] This shows that there need not be a general standard with which everyone is or can be familiar.

180. The fact that the individual breaching the standard cannot hide behind government regulations and that these do not detract from their own responsibility, indicates that the standard determined by the court in a given case on the basis of all facts and circumstances is not self-evident and does not have to be common knowledge.[105]

181. The above shows that a verdict against Shell and an order to reduce emissions therefore need not be based on a rule that is commonly known to everyone, nor will it lead to a general rule which will apply to every random company. The Judgement is well-founded on the basis of the facts and circumstances which are specific to Shell's situation and the Judgement is also only exclusively directed against Shell. The matter concerns the finding of the societal standard of care which applies to Shell in this case. The issue does not concern a finding of a general standard which applies to all or to other companies.

182. Shell also explicitly acknowledges this in para. 10.2.8 Appeal, where Shell literally asserts that "*the Judgement considers, in para. 4.4, no less than fourteen circumstances - which are often specifically geared to Shell - to inform the unwritten standard of care in this case*". That there is a context-related interpretation of the unwritten standard of care – and not of a general rule issued by the court – therefore cannot be a matter of discussion.

183. In a climate case against other companies, the elaboration of the standard and the applicability thereof will also always depend on the particular facts and circumstances applicable to those

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[103] Verheij, Onrechtmatige daad (Mon. Pr. No. 4) 2019/16.

[104] Van Dam, Aansprakelijkheidsrecht, 2020, para. 206.

[105] HR 2 October 1998, NJ 1999, 683, with notes by Vranken (De Schelde/Cijsouw II), para. 3.3.2. This case concerned the circumstance that the Labour Inspectorate did not prescribe or recommend any protective measures when using asbestos and the circumstance that the use of asbestos as such had been prescribed by a public authority. Despite these circumstances, liability of the employer was assumed. This topic was discussed very extensively at first instance in Milieudefensie et al.'s Notes on oral arguments 4.

other companies and the related context. Contrary to what Shell appears to argue, the court needs not first define a general standard, against which it will then review Shell's conduct.[106]

184. This is without prejudice to the fact that the Judgement against Shell (and the affirmation thereof) will provide guidance for what can be expected of companies for which the facts and circumstances are comparable to those of Shell. The Judgement will definitely set a law-forming process in motion – a process which in essence has already been put in motion – and consequently have a great significance for the development of law in the Netherlands and abroad regarding the responsibilities of companies in relation to the climate problem.[107] But that development of law will take place by means of, inter alia, legal science and further jurisprudence regarding this topic and does not entail that the court is creating general regulations. The Judgement only forms one step in the development of law, as is the case for other legal cases.

185. It is therefore also legally incorrect to assert as Shell does (and it is also based on nothing) that it would have been the District Court's task to make it clear when passing judgement against Shell, to what other (kinds of) companies the order issued by the court and the related standard would apply. That is not the court's duty in this case. The court's duty to adjudicate is limited to the case of Shell before the court.

186. Lastly: just as the District Court is not issuing a general legal measure with the Judgement in this case, it is also the case that when passing the Judgement, the District Court did not establish a general rule which is directive for national energy transitions or the global energy transition as a whole. Shell wrongly asserts such and the Court of Appeal is not being asked to make regulations. Milieudefensie et al. only seeks a determination as to what Shell's obligations are in relation to the climate problem. To use the words of Nieuwenhuis in his note with the Kalimijnen case, a legal (normative) weighing of interests should only take place between the interests of Shell and the interests that Milieudefensie et al. defends.

4.3 The relationship between the societal standard of care and the doctrine of hazardous negligence

187. At first instance, when elaborating the societal duty of care applicable to Shell, Milieudefensie et al. made use of the doctrine of hazardous negligence espoused by the Netherlands Supreme Court. It has been explained why application of said doctrine leads to the determination that Shell is failing in its societal duty of care and consequently is acting unlawfully with regard to the interests of humans and the environment, which interests Milieudefensie et al. defends.[108]

[106] See also: Asser/Sieburgh 6-IV 2019/57 and in the same sense the Opinion of A-G Van Peursem for HR 7 February 2020, ECLI:NL:PHR:2019:1147 and ECLI:NL:HR:2020:2010 respectively.

[107] For a further description of that law-forming process, see Chapter 3.7 of this Defence on Appeal. See also Chapter 8 of this Defence on Appeal for the indirect effects emanating from the Judgement (and the affirmation of the Judgement).

[108] Milieudefensie et al.'s Summons, para. 41 et seq. and Chapter VIII; Notes on oral arguments 1, 6, 7 and 8 .

188. Hazardous negligence means creating a danger to persons or property and/or allowing a danger to persons or property to continue to exist, including leaving out sufficient precautionary measures to prevent the manifestation of that danger.[109]

189. The Netherlands Supreme Court has made hazardous negligence a systemic tool since the Kelderluik case via a number of factors or criteria which, when taken in conjunction, determine the standard relating to situations of hazardous negligence. Milieudefensie et al. named and elaborated on these factors at first instance. With regard to the application in this case this concerns (i) the nature and extent of the damage as a result of climate change, (ii) the knowledge and foreseeability of this damage, (iii) the risk that dangerous climate change will manifest itself, (iv) the nature of Shell's conduct and (v) the onerousness of the precautionary measures to be taken by Shell.

190. On the basis of these Kelderluik factors, Milieudefensie et al. has shown that Shell has helped to create the danger of dangerous climate change and allowed such to continue to exist and that Shell (in view of the seriousness, extent and probability of this danger) has the legal obligation to make a proportional contribution, by taking precautionary measures, to preventing that danger.

191. Shell asserts in its Appeal that Milieudefensie et al. was wrong to involve the hazardous negligence doctrine of the Netherlands Supreme Court and the related Kelderluik factors for the interpretation of the societal duty of care. According to Shell, the hazardous negligence doctrine does not lend itself to this case and the Kelderluik factors can only be applied to simple one-to-one situations whereby a specific danger for one other person (or a very limited number of other persons), is caused by only one defendant. Shell also asserts that the Kelderluik factors only apply to the party that actually causes the damage itself and that Shell is not the damage-causing party, because it is the subsidiaries that emit the CO_2 emissions and the emissions of Shell itself (as parent company) are negligible.

192. Milieudefensie et al. will explain why these principles of Shell are not correct and form a far too limited approach to the legal importance of the hazardous negligence doctrine and the Kelderluik factors for reviewing what constitutes socially careful (or careless) behaviour.

193. When applying the Kelderluik factors, in essence a consideration is made between on the one part the risk and on the other the onerousness of the precautionary measures to be taken. The idea behind the elaboration of the societal duty of care, is that in daily life everyone is responsible, when exercising their constitutional freedoms, for taking a certain responsibility with regard to the interests of their fellow humans. It is in essence a part of our social contract. It is not possible to make a statutory provision for every act that may occur in society. This is a non-starter. It also often takes a long time before manifest dangers are (adequately) regulated in law. The asbestos file and the nitrogen file are examples of this. For these kinds of reasons, much of our conduct is exclusively governed by the unwritten societal standard of care. As has already been explained above, there is a good reason this unwritten standard is the most important ground for unlawful act.

194. The Kelderluik factors apply to many more cases than hazardous negligence situations and also apply outside of the one-to-one situation that Shell describes. The foregoing also appears clearly from the legal literature, as explained below.

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[109] K.J.O. Jansen, Groene Serie Onrechtmatige daad, art 6:162 BW, note 6.3.1 with reference to, inter alia, Asser/Sieburgh 6-IV 2019/58 and C.H.M. Janssen, Onrechtmatige daad: algemene bepalingen (Mon. BW. No. B45) 2009/21.

195. According to Verheij, with regard to hazardous negligence, the Kelderluik factors form *"the most general test for unlawfulness, the essence of which can also give some guidance outside of those cases."* He asserts *"Without these factors the debate on unlawfulness due to violation of the unwritten standard of care would become rudderless in many cases."* He continued: *"both courts and attorneys would be wise to explicitly include the Kelderluik factors in their considerations."*[110]

196. In line with the broad interest of the Kelderluik factors outlined by Verheij, Jansen asserts: *"[In view of] the general ratio of the Kelderluik factors, it is assumed in the literature that they lend themselves for similar application outside of hazardous negligence situations."* Jansen cites as an example that *"it is argued in financial law that "financial hazardous negligence" – either the creation or allowing the continued existence of a risk of pure financial loss – can be assessed by analogy with the hazardous negligence jurisprudence*." Jansen furthermore asserts that *"in a general sense it is assumed that the Kelderluik factors refer to the basic risk considerations which every human is deemed to make in daily life."*[111]

197. According to Van Maanen, the Kelderluik factors are *"so basic, such common sense, that will exist in any liability system."*[112] P-G Langemeijer and A-G Wissink determined in a similar sense *"that the Kelderluik factors are in line with basic notions about dealing with risks"* and these factors are therefore *"also accepted, in similar phrasing, in other legal systems."* Furthermore *"these factors are still applied even in cases which do not involve hazardous negligence (by analogy, supplemented with additional points of view, if necessary)",* according to Langemeijer and Wissink.[113]

198. The general common sense character of the Kelderluik factors is again underlined because the perspectives that the ECtHR applies in its jurisprudence shows similarities with the Kelderluik factors.[114] Similar application of the Kelderluik factors can also be found in, e.g., the Principles of European Tort Law and the Oslo Principles on Global Climate Obligations.[115]

199. We also see this broader and general use of the Kelderluik factors in the case law in relation to findings of duties of care. A few examples are set out below.

200. In the judgement of the Netherlands Supreme Court of 7 April 2006, NJ 2006/244 (Bildtpollen v. Miedema, para. 3.3.), the Netherlands Supreme Court considered in a general sense that *"when answering the question whether there are acts contrary to what according to unwritten law is commonly acceptable, not only must account be taken of the risk of damage, but also of the nature of the act, the nature and seriousness of the possible damage and the onerousness and customary use of taking precautionary measures (cf. HR 5 November 1965, NJ 1966, 136)."* That case was concerned with property damage and according to the Netherlands Supreme Court, the Court of Appeal had failed to note that when applying unwritten standards of care of Article 6:162(2) DCC, the hazardous negligence factors of the Kelderluik judgement must be applied.

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[110] A.J. Verheij, Onrechtmatige daad (Mon. Privaatrecht no. 4), 2019, no. 16.

[111] K.J.O. Jansen, Groene Serie Onrechtmatige daad, art 6:162 BW, notes 6.3.9.4 and 6.3.9.7.

[112] G.E. van Maanen, NTBR 2008/5 p. 46. et seq.

[113] P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, ECLI:NL:PHR:2019:887, para. 2.23. See also Opinion of A-G Valk, ECLI:NL:PHR:2020:412, with HR 26 June 2020, ECLI:NL:HR:2020:1148, *NJ 2020/293 (IS wives)*, para. 6.8.

[114] P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, ECLI:NL:PHR:2019:887, para. 2.23.

[115] Ibid.

201. The Netherlands Supreme Court even applies the Kelderluik factors outside of the framework of Article 6:162(2) DCC. This appears, inter alia, from the Wilnis case.[116] The judgement relates to risk liability pursuant to Art. 6:174 Dutch Civil Code for a subsided peat dike. The Netherlands Supreme Court asserts in para. 4.4.3 a priori that in the framework of Art. 6:174 Dutch Civil Code, the matter concerns the requirements which may be set from the perspective of safety with regard to the relevant structure. According to the Netherlands Supreme Court, account was to be taken in this respect of "*the actual risk of manifestation of the danger connected with the structure*", as well as *"the possibility and onerousness of safety measures to be taken."*

202. See for another example where the Netherlands Supreme Court applied the Kelderluik factors outside of the framework of Article 6:162 DCC, the Bayar v. Wijnen case.[117]

203. In short, the Netherlands Supreme Court views the Kelderluik factors as a general perspective against which an assessment on the basis of Article 6:162(2) DCC must be reviewed. The Kelderluik factors equally apply as a perspective for risk-creating circumstances outside of the domain of Article 6:162(2) Dutch Civil Code. Milieudefensie et al. therefore rightly invoked these factors.

204. It can be deduced from the above that the Kelderluik factors must also be applied to cases in which a far broader circle of persons cause damage due to acts of hazardous negligence. This can be deduced from the case law of the Netherlands Supreme Court. It would be strange to thoroughly review the creation of one hazard with regard to one or a number of persons against the Kelderluik factors, while not doing so with regard to a substantial hazard for many people.

205. The preliminary ruling relating to earthquake damage is a good example of risky conduct that entails hazard for very many persons that was reviewed by the Netherlands Supreme Court taking account of the Kelderluik factors. The Netherlands Supreme Court considered in this respect that the State was acting wrongfully as referred to in Article 6:162 DCC if it knew or should have known: (i) that the gas extraction in Groningen entails dangers which are connected to ground movements, (ii) that the chance of these dangers manifesting themselves is real, (iii) that the manifestation of these dangers can lead to serious or wide-spread damage, and (iv) the State nevertheless failed, in view of the circumstances of the case, to take timely suitable and reasonably required measures to prevent the arising of damage as a result of the gas extraction.[118]

206. In this case the Netherlands Supreme Court thus reviewed the unlawfulness of actions of hazardous negligence in the context of an impending danger in a large region with hundreds of thousands of residents against the Kelderluik factors.

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[116] HR 17 December 2010, ECLI:NL:HR:2010:BN6236, NJ 2012/155, with notes by Hartlief (Dijkdoorbraak Wilnis).

[117] HR 11 November 2005, NJ 2008/460, with notes by G.J.J. Heerma van Voss under NJ 2008, 465 (Bayar v. Wijnen). The judgement concerns employer's liability pursuant to Article 7:658 for a work accident involving a dangerous machine. The Netherlands Supreme Court considered in para. 3.3.2. that when elaborating on the duty of care to which the employer is subject with regard to the safety of the work environment, it is relevant "*with what degree of probability the failure to observe the required diligence and caution can be expected, the likelihood of the chance that this will result in accidents, the seriousness of the consequences thereof and the degree of onerousness of the safety measures to be taken.*"

[118] HR 19 July 2019, ECLI:NL:HR:2019:1278, NJ 2020/391, with notes by J. Spier, para. 2.7.3.

207. The Netherlands Supreme Court applied similar criteria in the Mothers of Srebrenica case of 2019, which also concerned danger to (the lives of) thousands of people.[119]

208. In the same sense, reference can be made to the judgements of the district court and the court of appeal in the case relating to the fireworks disaster in Enschede. In said case the claimants not only accused SE Fireworks of having caused unacceptable danger by the storage of fireworks in Enschede, but the State was accused that as supervisory body it had a duty of care to limit those dangers. The district court and the court of appeal applied the Kelderluik factors in full, to both SE Fireworks and the State.[120] That the State was ultimately not held liable was not because the Kelderluik factors did not apply to the State, but because the State did not know, nor was it required to know how dangerous the situation was at that time, and it thus had not violated a duty of care. SE Fireworks was aware of those dangers and was therefore liable.

209. At first instance Milieudefensie et al. also extensively discussed the application of the Kelderluik factors by the District Court of The Hague in the Urgenda case, which also shows that these factors lend themselves for assessing acts of hazardous negligence that create a danger for very many people and even for all residents of the Netherlands. This approach also received a lot of support in the legal literature, with as purport that the Kelderluik factors are extremely well suited to address the dangers of climate change, as they are a general assessment framework for dealing with risks.[121] As stated, it cannot be justified that the creation of a danger for a single person (such as opening a cellar hatch) can result in unlawful hazardous negligence, but the creation of a danger that can cause great harm to very many people cannot.[122] As Van Dam states: *"The more people at risk, the greater the care that is required."*[123]

210. That in the Urgenda case both the Court of Appeal and the Netherlands Supreme Court (contrary to the District Court) directly based their determinations on the duties of care ensuing from Arts. 2 and 8 ECHR does not detract from this, because neither judgement considered that the application of the Kelderluik factors by the District Court was not possible. In addition, as regards the duties of care under the ECHR, they must be reviewed in a 'Kelderluik-like manner' by the ECtHR and that the ECtHR also applies this review to situations in which very many persons are at risk. In such case the ECtHR offers a "*general protection to society*", which was the approach taken by the Court of Appeal and the Netherlands Supreme Court in the Urgenda case.[124]

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[119] HR 19 July 2019, ECLI:NL:HR:2019:1223, with notes by C.M.J. Ryngaert and J. Spier, para. 4.2.5. *"When assessing whether the actions of Dutchbat were unlawful because they were contrary to the standard of care laid down in Art. 6:162 DCC, it must therefore be reviewed whether the Dutchbat officers in charge at the time of acting knew or should reasonably have known that there was a real risk that the rights of the Bosnian refugees protected by Arts. 2 and 3 ECHR would be violated and, if so, whether Dutchbat failed to take the measures that — in view of all circumstances of the case — could reasonably be expected of it to avoid that risk."*

[120] District Court of The Hague, 13 December 2006, ECLI:NL:RBSGR:2006:AZ4247, NJ 2007, 197, paras. 20.2 and 20.3; The Hague Court of Appeal, 24 August 2010, ECLI:NL:GHSGR:2010:BN4316, NJ 2011/418, para. 13.22 et seq.

[121] See, e.g., C.H. van Dijk, 'Opwarming van de Aarde en de Kelderluikcriteria', Milieu en Recht 2016/43 (iss. 4), pp. 279-286; A- Castermans, 'Het klimaatgevaar en het gouden kelderluik', AA 2016 (iss. 1), pp. 34-40; Cf. earlier: E.H.P. Brans and K. Winterink, 'Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?', in N. Teesing (ed.), 'Naar aansprakelijkheid voor de (gevolgen van) klimaatverandering?', The Hague, 2012, p. 121; J. Spier 'uncertainties and the state of the art, a Legal nightmare', Journal of Risk Research (14) 2011-4; W.Th. Braams, A.B. van Rijn and M.W. Scheltema, 'Het recht van het klimaat', in Klimaat en recht. Is het recht klaar voor klimaatverandering?, Deventer, 2010, p. 5 et seq.; C.H. van Dijk, privaatrechtelijke aansprakelijkheid voor opwarming van de aarde, NJB 2007/2866, iss. 45/46, p. 2866.

[122] See, inter alia, J. Spier 'uncertainties and the state of the art, a Legal nightmare', Journal of Risk Research (14) 2011-4, p. 504.

[123] Van Dam, Aansprakelijkheidsrecht, 2020, paras. 207-2.

[124] See P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, paras. 2.23 and 2.59 et. seq.

211. The above shows that the Kelderluik factors lend themselves toward assessing acts of hazardous negligence with results for very many persons, such as gas extraction in Groningen, the fireworks storage case in Enschede and the State's contribution to dangerous climate change. The District Court extended this line of reasoning to this case against Shell.

212. What the decisions relating to the earthquake damage, the fireworks disaster in Enschede and the Urgenda case against the State also have in common, is that in those cases the State was not the direct causer of the damage. This shows that Shell wrongly asserts that the Kelderluik factors supposedly only apply in cases in which the direct damage causer is held liable. Every case is concerned with assessing the legal duty to which the specific individual actor against whom action has been taken is subject, in view of the context and its role as an individual case in the whole, on the basis of the circumstances of the case.

213. With regard to the earthquake damage resulting from the gas extraction, the gas extraction is not carried out by the State. The State is thus not the direct causer of the harm. The gas extraction takes place on the basis of a concession granted by the State to NAM. NAM is a joint venture of Shell and ExxonMobil. The policy relating to the gas extraction on the basis of this concession is conducted by the Maatschap Groningen, in which NAM and EBN are the partners. The State is the sole shareholder of EBN and thus does not participate directly in the partnership. Despite the fact that there is no direct cause of damage by the State, the Kelderluik factors are nevertheless relevant in assessing the State's position, because the State does have a certain degree of influence and control over the hazardous negligence situation. It has this influence and control via the shares it holds in EBN and the concession granted to NAM.

214. In the case relating to the fireworks disaster in Enschede, as has already been explained above, the State did not face claims as the causer of the damage, but in its role as supervisory body. The Kelderluik factors were applied when assessing the duty of care in that role, again because of the possibility of control and influence which emanates from the position of the State in relation to the act of hazardous negligence.

215. In the same manner, the State is not being called to account in the Urgenda case for its own role as carbon emitter, but for the national emissions of the Netherlands, which is the total of the carbon emissions of all companies, institutions and citizens in the Netherlands together. The State was held responsible due to the control and influence which the State can exercise on the emissions of Dutch companies, institutions and citizens.

216. In all these cases the State was thus accused of not having applied the control and influence which it has on the acts of hazardous negligence, in accordance with the standard of the duty of care which may be demanded of the State in those cases. In all cases the duty of care was assessed in accordance with the criteria ensuing from the Kelderluik factors. In none of these cases was the State the direct causer of the damage.

217. In this case against Shell, the District Court continued in the same vein, so that Shell can be held liable for the control and influence which it has as parent company and policy maker of the Shell Group.

218. Furthermore, the judgement of the Netherlands Supreme Court in the Urgenda case shows that co-responsibility for the act of hazardous negligence is sufficient. The Netherlands Supreme Court considered in this respect that the assumption of co-responsibility aligns with what internationally and nationally is assumed in actions in contravention of the law, whereby only a

part of the cause of the damage is created, and that many countries have rules which correspond with co-responsibility in their liability laws.[125]

219. Just as the Netherlands Supreme Court established co-responsibility on the part of the State for the climate problem, the co-responsibility of Shell can also be established for the climate problem.

220. On the basis of all of this, it must therefore be concluded that the Kelderluik factors lend themselves well to being applied in this case against Shell.

4.4 Application of the hazardous negligence doctrine to Shell's conduct

4.4.1 Introduction

221. Milieudefensie et al. explained in very great detail at first instance why application of the hazardous negligence doctrine must lead to the conclusion that Shell is acting carelessly from a societal perspective and thus unlawfully with regard to the interests of humans and the environment, which interests Milieudefensie et al. seeks to protect.[126]

222. In line with the use of the Kelderluik factors by the District Court of The Hague in the Urgenda case in the context of the doctrine of hazardous negligence, Milieudefensie et al. individually discussed these factors at first instance. It has been demonstrated that each of these factors has been satisfied.[127] This relates to the factors:[128]

(i) The nature and extent of the damage caused by climate change;
(ii) The knowledge and foreseeability of climate change for Shell;
(iii) The risk that dangerous climate change will manifest itself if no precautionary measures are taken;
(iv) The nature of Shell's conduct;
(v) The onerousness of the precautionary measures to be taken.

223. There is no actual discussion between the parties regarding the first four factors. This is different with regard to the fifth factor. The following serves as explanation of the five factors.

4.4.2 Kelderluik Factor 1: nature and extent of the climate damage

224. The parties agree that (the threat of) dangerous climate change is of unprecedented seriousness and that this will affect the entire world's population and all ecosystems in the world, thus also in the Netherlands. Nor did Shell present grounds of appeal against the consequences of climate change described by the District Court in Chapter 2.3 of the Judgement at global, European and national level. Shell also asserts in the Appeal that: *"[…] not up for discussion that the consequences of climate change threaten to have consequences for people's lives, including people living in the Netherlands."* [129]

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[125] Urgenda judgement of the Netherlands Supreme Court, para. 5.7.6.
[126] Milieudefensie et al.'s Summons, para. 41 et seq. and Chapter VIII; Milieudefensie et al.'s Notes on oral arguments 1, 6, 7 and 8.
[127] Ibid
[128] Milieudefensie et al.'s Summons, para. 512, explained in further detail in Milieudefensie et al.'s Summons, para. 41 et seq. and Chapter VIII and Milieudefensie et al.'s Notes on oral arguments 1, 6, 7 and 8 .
[129] Appeal, para. 4.2.5.

4.4.3 Kelderluik Factor 2: knowledge of and foreseeability of climate damage

225. There is no discussion regarding the knowledge and the foreseeability on the part of Shell with regard to the dangers of climate change. Milieudefensie et al.'s assertions in this respect at first instance were not disputed by Shell, either at first instance or in appeal.[130]

226. Bearing in mind its familiarity with the (expected) climate damage if no precautionary measures are taken, since 2017 Shell has implemented a Net Carbon Footprint Ambition for the Shell Group, setting out ambitions to reduce the carbon intensity of Scope 1, 2 and 3 emissions of the Shell Group.[131]

227. The knowledge and foreseeability of climate damage for Shell in any event dates from the 1980s and 1990s and appears, e.g., from the following determination by the District Court in para. 2.5.9 of the Judgement (in respect of which Shell has not presented a ground of appeal):

> *"In 1988, the then Shell group published an internal report on climate change, which had been drawn up in 1986, entitled 'The Greenhouse Effect'. In it, and in the information film, 'Climate of concern', the then Shell group warned about the dangers of climate change. In a brochure with the title 'Climate Change, what does Shell think and do about it' from March 1998, the following is stated about the role of the then Shell group in changing energy markets: "They must play their part in the necessary precautionary measures to limit greenhouse gas emissions. Shell companies expect to do the following: (…) Reduce emissions of greenhouse gases in their own operations as well as helping their customers to do the same."*[132]

228. The knowledge and foreseeability of climate damage appears, inter alia, from an internal Shell document from 1998 that describes a scenario in which the company and other fossil companies can be held liable in the future, if they do not act in conformity with the findings of climate scientists (including their own scientists) and continue to sell fossil fuels unaltered. The internal document makes a comparison with the lawsuits against the tobacco industry to underline the risk of climate law cases. This too thus shows that climate change was known and foreseeable at that time.[133]

229. In this respect it is important to know that the then Shell Group was already calculating its Scope 1, 2 and 3 emissions in the 1980s and on the basis thereof knew that at the time it was causing approx. 4% of total global emissions and was therefore a substantial actor in causing the climate problem and the related climate damage. There was thus full knowledge and foreseeability of its own role in the problem.[134]

4.4.4 Kelderluik Factor 3: manifestation of climate danger without precautionary measures

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[130] Summons, paras. 530-574.

[131] Judgement, para. 2.5.11.

[132] Judgement, para. 2.5.9; in its Summons, paras. 541-547, 550, 562-570) Milieudefensie et al. went into the contents of the report, the film and the brochure to which the District Court refers in this paragraph of the Judgement in great detail. This clearly shows that Shell was well aware of the enormous seriousness and extent of the problem, even then.

[133] Milieudefensie et al.'s Summons, para. 566.

[134] Milieudefensie et al.'s Summons, para. 550.

230. As was established by the District Court in the Judgement in paras. 2.4.5 and 2.4.6, since 2010 UNEP has been reporting annually about the 'emissions gap'. It ensues from this year after year that the chance is very great that dangerous climate change will occur if the course is not changed. The District Court included in that respect in the relevant considerations of the Judgement, that UNEP concluded that if the 'emissions gap' were not closed by 2030, it is highly unlikely that it will be possible to realise the Paris goal.

231. Shell has not presented grounds of appeal against these determinations in the Judgement.

232. The District Court determined in para. 4.4.28 of the Judgement:

"As has been described by the IEA in its World Energy Outlook 2020 (see 2.4.11), the next ten years will be crucially important for preventing dangerous climate change. This also follows from the conclusion of the UNEP (of 2019) (see 2.4.6)."

233. Shell did not present a ground of appeal against this determination either.

234. The District Court then determined in para. 4.4.29 of the Judgement:

"The SR15 report shows that only reduction pathways aiming for a net 45% reduction of CO2 emissions in 2030, relative to 2010 levels, yield a 50% chance of limiting global warming to 1.5°C and an 85% chance of limiting global warming to 2°C. Since there still is a 15% chance that the temperature will rise by over 2°C, these reduction pathways offer the best possible chance to prevent the most serious consequences of dangerous climate change. From this the court deduces that reduction pathways aiming for a net 45% reduction of CO2 emissions in 2030, relative to 2010 levels, offer the best possible chance worldwide to prevent the most serious consequences of dangerous climate change."

235. Shell has not presented a ground of appeal against this determination in the Judgement either.

236. As regards the manifestation of dangerous climate change if substantial emissions reductions are not achieved and as regards the fact that this decade is crucial for tackling the climate problem, there is thus no debate between the parties.

237. That an adequate approach to the climate task requires both the action and precautionary measures of state and non-state parties such as Shell, was established by the District Court in para. 4.4.26 of the Judgement. Shell has not presented a ground of appeal against this determination, so that the importance of climate action on the part of Shell is also not up for discussion.[135] Shell also acknowledges in this respect that there is societal consensus regarding the fact that individual companies must take measures to reduce their emissions and that doing nothing is not acceptable.[136]

238. In that respect it cannot be left unmentioned that it had already been known for decades within the Shell Group that the group will necessarily, by means of taking precautionary measures, have to contribute to the reduction of global emissions to combat the dangers of climate change. This appears, inter alia, from the citation from para. 2.5.9 of the Judgement included in the discussion of factor (ii) above. This citation shows that in 1998 it was already understood by

[135] See for the further substantiation of the need for non-state action, inter alia, Milieudefensie et al.'s Notes on oral arguments 1, paras. 130-147.

[136] Appeal under 7.2.3.a.(iii); see also Appeal, paras. 2.2.9, 2.3.10, 3.2.17 and 5.2.3.b.

the then Shell Group that non-state climate action and thus action and precautionary measures on the part of the Shell Group would be necessary to combat climate danger. Both the own emissions of the Shell Group and the emissions of the customers of the Shell Group (Scope 3 emissions of the Shell Group) would therefore have to be reduced, this was already internally known at the time.

239. That this was known to Shell, is only logical. Not only because of the knowledge it had regarding the relationship between its activities and climate change, but due to the fact that the burning of fossil fuels on a large scale de facto makes the prevention of dangerous climate change impossible, because of the related emissions. The vast majority of global CO2 emissions (81%)[137] are caused by the fossil industry. Every approach will therefore necessarily (also) have to come from that fossil industry, that has the power to reduce these emissions.

240. In 1999, against the background of what has been set out above, Shell made its intentions with its new renewable energy branch clear in a large ad in the Financial Times: "*Shell is playing a major part in the move from oil and gas, and now we're planting the seeds of renewable energy with Shell International Renewables, a new business committed to making renewable energy viable.*"

241. As Milieudefensie et al. already discussed in the Summons, this is clear proof that at the time Shell was very aware of the need to move away from oil and gas ("*the move from oil and gas*") and to transform into a renewable energy company to thereby, by means of precautionary measures, make its contribution to preventing the serious consequences of climate change.[138]

4.4.5 Kelderluik Factor 4: the nature of Shell's conduct

242. The Urgenda case shows that in the case of conduct that, by its nature, creates a danger that is as great as that of (dangerous) climate change and which is, moreover, also highly likely to cause damage, stringent duty of care requirements can and should be imposed, even if the onerousness of the precautionary measures to be taken is considerable.[139]

243. Milieudefensie et al. demonstrated at first instance that Shell is in charge of the climate and transition policy of the Shell Group and thus has control over the Scope 1, 2 and 3 emissions of the Shell Group, and thereby has control over serious climate danger that is connected with this.[140] The District Court took over this position in para. 2.5 of the Judgement. No ground of appeal was presented against this.

244. Milieudefensie et al. explained at first instance that it is logical that Shell's responsibility extends to the Scope 3 emissions of the Shell Group, particularly as they constitute over 85% of all emissions.[141] Milieudefensie has shown that Shell has complete control over the Scope 3 emissions of the Shell Group, because Shell determines the energy portfolio of the Shell Group

[137] See Chapter 5 of this Defence on Appeal.

[138] Milieudefensie et al.'s Summons, paras. 567-568.

[139] This applies in general as soon as constitutional rights are at issue, see Van Dam, Aansprakelijkheidsrecht 2020, paras. 207-1.

[140] Milieudefensie et al.'s Notes on oral arguments 1, paras. 31-82.

[141] Judgement, para. 2.5.5. Chapter 6 of this Defence on Appeal will show that the percentage of Scope 3 emissions is in fact 95%.

and consequently determines what energy products are offered and sold to customers of Shell.[142]

245. The District Court took over this position in its Judgement and established in para. 4.4.25 that Shell *"[…] determines the energy package of the Shell group – and consequently, the range of energy products […] Through the energy package offered by the Shell group, RDS controls and influences the Scope 3 emissions of the end-users of the products produced and sold by the Shell group."*

246. Shell has not presented a ground of appeal against these passages of the Judgement.

247. Nor does Shell dispute that it has full control over what is provided in its energy package and the related emissions. It even acknowledges that it can reduce the fossil products in the energy portfolio of the Shell Group, which would lead to a reduction in the Scope 3 emissions of the Shell Group.[143] Throughout the Appeal, Shell then tries to draw attention away from this determination by pointing out that it has no control or influence over the consumer demand for energy. This assertion is not correct. Shell creates fossil lock-in effects, lobbies for oil and gas and, for example, annually spends tens of millions in marketing and PR to keep its customers' demand for oil and gas high, instead of influencing the behaviour of customers by offering renewable energy products.[144] Aside from this, the forced focus on the behaviour of Shell's customers is irrelevant.

248. When determining Shell's duty of care, the issue is Shell's own conduct, not the conduct of others. Shell has its own co-responsibility to do its part with regard to the emissions over which it has control and influence. Now that it has been established between the parties that Shell has full control and influence on the products offered in the energy package of the Shell Group, Shell must use this control and influence to make its proportional contribution to tackling the climate problem. That Shell does not have complete (but nevertheless significant) control over the conduct of its customers and thus over the demand for energy, does not detract from its own responsibility for the energy products offered to customers.

249. The conduct of Shell's customers (the demand for energy) would only be relevant when assessing the effectiveness of the reduction order. The effectiveness will be addressed in Chapter 8 of the Defence on Appeal.

250. On the basis of the above it is therefore established between the parties that Shell has complete (100%) control over what products the Shell Group produces and sells and consequently also complete (100%) control over the Scope 3 emissions connected with those products that are sold.

251. Furthermore, Milieudefensie et al. demonstrated at first instance that the control and influence that a company like Shell has on the Scope 1, 2, and 3 emissions of the group is faster, more direct and more efficient than the control the State of the Netherlands has on the emissions of Dutch society.[145] Shell did not dispute this, either at first instance or in the Appeal.

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[142] Milieudefensie et al.'s Summons, paras. 611-618, Notes on oral arguments 1, paras. 51-62.

[143] Appeal, paras. 1.6.2.a and 8.4.5.

[144] Milieudefensie et al.'s Notes on oral arguments 1. See also Chapter 6 of the Defence on Appeal.

[145] Milieudefensie et al.'s Summons, Chapter VIII.2.1.5, Notes on oral arguments 3, paras. 49–53 and Notes on oral arguments 7, paras. 27 – 29.

252. This is important to note, because a reduction order was not imposed on the State of the Netherlands in the Urgenda case because of its own share in the national emissions, but because of the control and influence that the State has on the emissions of Dutch companies, citizens and institutions. Milieudefensie et al. made it clear in this respect that if the State, due to its control and influence on the emissions of Dutch society, can be held legally liable, the same must apply to Shell, which has an even more direct and greater control over the emissions of the Shell Group.[146]

253. That, in light of the nature of the conduct as a Kelderluik factor, control and influence over acts of hazardous negligence are decisive when assessing the duty of care, not only appears from the Urgenda case, but also from the preliminary ruling of the Netherlands Supreme Court with regard to earthquake damage and the judgements of the district court and the court of appeal in the case relating to the firework disaster in Enschede. This was discussed and explained in Chapter 4.3 of the Defence on Appeal.

254. In short, Shell has control and influence on all emissions of the Shell Group and consequently control and influence on the climate consequences connected with those emissions. Its control over those emissions is greater and more direct than those of the State over the emissions of Dutch society. In addition, as previously demonstrated, the emissions of the Shell Group are many times greater than those of the Netherlands, so that the climate damage caused by Shell is many times greater than the damage caused by the emissions of Dutch society. Shell's control over the (Scope 3) emissions of the Shell Group is discussed in further detail in Chapter 7.3 of this Defence on Appeal.

255. By its nature Shell's conduct thus creates a great danger and entails a very great chance of damage to humans and the environment, so that stringent duty of care requirements must be set in this respect.

256. Against this background Milieudefensie et al. will now discuss the Kelderluik factor relating to the issue of onerousness.

4.4.6 Kelderluik Factor 5: the onerousness of taking precautionary measures

257. It appears from the foregoing that it can be determined that there is in essence no discussion between the parties regarding the elaboration and application of the first four Kelderluik factors.

258. There is some discussion regarding the question whether the order to reduce the Scope 1, 2 and 3 emissions of the Shell Group by 2030 by at least (net) 45% is an appropriate measure that does not place an unduly onerous burden on Shell.

259. Shell does not believe the reduction order that has been imposed is appropriate and believes it is unreasonably onerous. It substantiates this, inter alia, by referring to the influence on the level playing field for the oil and gas market. However, Shell does not provide any further substantiation for this. It did not explain in the Appeal what the consequences of that influence would be for it and why those consequences would supposedly be unreasonably onerous for it. Shell did not present specific grounds for this defence at first instance either, which is why it

[146] Milieudefensie et al.'s Summons, Chapter VIII.2.1.5, Notes on oral arguments 3, paras. 49–53 and Notes on oral arguments 7, paras. 27 – 29.

was dismissed by the District Court (para. 4.4.53 of the Judgement). Shell has not presented a ground of appeal against that specific consideration of the District Court.

260. On the other hand, Milieudefensie et al. asserted and presented substantiation in great detail at first instance that Shell can still be a profitable company if its oil and gas company were only half of the current size in 2030.[147] Shell did not dispute this, which is why the consequences for Shell's business – regardless of the unsubstantiated argument of the level playing field – cannot entail that there is an unreasonably onerous reduction order.

261. In addition, Shell asserts that it has anticipated and is positioned for the transition to renewable energy and renewable electricity generation[148] and that wind energy and solar energy from a technical and commercial perspective are on an even footing with oil and gas, are commercially profitable and that it can invest in them.[149] Shell therefore has the choice of becoming either a smaller but profitable oil and gas company, or a larger renewable energy company. Once again there is no unreasonably onerous reduction order.

262. Two other arguments that Shell presents in the context of the onerousness of the reduction order are (i) that there are no grounds for translating the global target of 45% to a mandatory target for an individual company (and it is thus unreasonable to impose that target on Shell) and (ii) that every reduction order will be ineffective because the emissions reductions which will consequently take place within the Shell Group, will be cancelled out by others because competitors will take the place of the Shell Group (the defence of perfect substitution).

263. Although Shell has not discussed these defences in the context of the fifth Kelderluik factor regarding the onerousness of the measures to be taken (it disputes the applicability of the Kelderluik factors), according to Milieudefensie et al., when applying the Kelderluik factors it is logical to discuss these defences of Shell under this fifth factor.

264. Whatever the case may be and under whatever part of the legal grounds of Milieudefensie et al. these defences are dealt with (whether that is in the context of one of the other Kelderluik factors, in the context of Article 3:303 Dutch Civil Code or otherwise), these defences of Shell must fail regardless.

265. As the matter concerns two of Shell's most important defences, Milieudefensie et al. will dedicate a separate chapter to each of these defences. Milieudefensie et al. will therefore demonstrate in Chapter 5 that the District Court took the correct starting point by imposing a reduction order that is in line with the global target of a 45% reduction in 2030. In Chapter 8 Milieudefensie et al. will then demonstrate that this reduction order is also effective.

[147] Milieudefensie et al.'s Notes on oral arguments 8, paras. 73-107 and Milieudefensie et al.'s Summons, paras. 619-633.

[148] Milieudefensie et al.'s Notes on oral arguments 8, paras. 86-88.

[149] Milieudefensie et al.'s Notes on oral arguments 8, paras. 84-85.

4.4.7 Conclusion

266. The points discussed above with regard to the Kelderluik factors in the light of the relevant facts and circumstances, show that the hazardous negligence doctrine is applicable to this case and that said application must lead to affirmation of the Judgement of the District Court.

267. To wind this point up, it is worth remembering that Milieudefensie et al. is not only invoking the Kelderluik factors to elaborate the societal duty of care, but also the horizontal working of Articles 2 and 8 ECHR, the applicable human rights guidelines and the other objective points of reference that Milieudefensie et al. used to substantiate the assertion that Shell is in violation of its societal duty of care by not making a proportional contribution to preventing dangerous climate change. These points were already briefly touched upon in Chapter 2.1 Defence on Appeal. Milieudefensie et al. will explain these additional grounds and objective reference points for the elaboration of the societal duty of care in the following chapter, whereby it will go into the content of Chapter 4 of the Appeal, in which Shell set out its vision of the human rights aspects in this case.

4.5 Application of human rights law to Shell's conduct

4.5.1 The relationship between climate change and human rights

268. Milieudefensie et al. provided an explicit explanation of the relationship between climate change and human rights violations. The following can be said about this, in short.

269. Resolution 10/4 of the UN Human Rights Council of 2009 established that the consequences of climate change are a danger to human rights on a global scale. The resolution refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[150]

270. In that same year, 2009, a report was published under former UN Secretary-General, Kofi Annan, which shows that annually hundreds of thousands of people die due to, hundreds of millions are seriously affected by and billions of people are vulnerable to the consequences of climate change.[151]

271. In 2010 the parties to the UN Climate Convention laid down in the Cancun Agreements that climate change is a potentially irreversible threat to human societies.[152]

272. Earlier, in 2001, the CJEU had already established the relationship between climate policy, renewable energy and the right to life.[153]

273. In 2014 it was indicated and clarified in the IPCC AR5 report (and in other reports) that the family life and well-being of people will be affected by climate change in many ways.[154]

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[150] Milieudefensie et al.'s Summons, paras. 653-655.

[151] Ibid , para. 659.

[152] Ibid , para. 656.

[153] Ibid , paras. 657-658. This relates to the judgement: ECJ PreussenElektra v. Schhleswag AG, C-379/98 of 13 March 2001, ECLI:EU:C:2001:160.

[154] Ibid , paras. 660-661.

274. In 2015 reference was made to human rights in the Paris Agreement in relation to the need to tackle the climate problem.[155]

275. In 2018 the Court of Appeal of The Hague determined in the Urgenda case that due to the realistic threat of dangerous climate change, there is a serious risk that residents of the Netherlands will be faced with the loss of life and/or a disruption of family life. The Court of Appeal noted that due to climate change in the Netherlands, the right to life and the right to an undisrupted family life are at issue.[156]

276. In 2019 the Netherlands Supreme Court determined in that same case that climate change threatens human rights, including in the Netherlands, and that this is also internationally recognised outside of the context of the Council of Europe.[157] The Netherlands Supreme Court also concluded that the right to life and an undisrupted family life are under pressure in the Netherlands.

277. In 2019 the UN Special Rapporteur on Human Rights and the Environment concluded: a safe climate is "*absolutely essential to human life and well-being*", after which he continued: "*Climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.*"[158]

278. After the Judgement various other courts held that climate change puts human rights at risk.

279. In 2021 the district court in Brussels held that the Belgian climate policy was inadequate and that consequently the constitutional rights of Belgian residents were being violated, in particular Articles 2 and 8 ECHR.[159]

280. In 2021 the Constitutional Court in Germany determined that if there is a mismatch between the emissions reduction up to 2030 and that of after 2030 and consequently the emissions reductions after 2030 must take place with even greater speed and urgency than those from before 2030, this is a violation of the constitutional freedoms to which younger generation(s) are entitled.[160]

281. In 2021 the UN Human Rights Council passed Resolution 48/13, in which it was established that the right to a clean, healthy and sustainable living environment is a fundamental human right. The UN Resolution considers, inter alia:

> *"The Human Rights Council,*
> *Guided by the purposes and principles of the Charter of the United Nations […]*
> *Recalling also States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change […]*

[155] Milieudefensie et al.'s Notes on oral arguments 6, para. 28.
[156] Milieudefensie et al.'s Summons, paras. 662-665.
[157] Milieudefensie et al.'s Notes on oral arguments 6, para. 26.
[158] Ibid , para. 32.
[159] For a further discussion see Chapter 4.5.3.3.
[160] For a further discussion see Chapter 4.5.3.3.

Recognizing further that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life […]

1. *Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;*
2. *Notes that the right to a clean, healthy and sustainable environment is related to other existing rights and existing international law;*
3. *Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;"*[161]

282. In 2022 the Supreme Federal Court of Brazil held that the Paris Agreement as international environmental convention must also be seen as a human rights convention that prevails over domestic legislation and against which the Brazilian climate policy can be reviewed by the court. The Brazilian Supreme Federal Court thus decided, like the UN Human Rights Council, that the right to a healthy environment and a safe climate is a human right. According to an English language summary of the decision provided by Columbia University New York, the Supreme Federal Court specifically decided in the judgement:

" [T]hat environmental law treaties constitute a particular type of human rights treaty, which enjoy "supranational" status. This "supralegality" of human rights treaties means that they are above "regular" laws in the legal hierarchy. Accordingly, any Brazilian law or decree that contradicts the Paris Agreement, including the nationally determined contribution, may be invalidated. Any action or omission contrary to this protection is a direct violation of the Constitution and human rights."[162]

283. In 2022 the Philippines Commission on Human Rights again emphasised the seriousness of the climate problem in relation to human rights in the report of its national inquiry on climate change and climate responsibilities:

"Anthropogenic climate change is "the greatest human rights challenge of the 21st century". It negatively affects a host of, if not all, human rights […] Some of the individual rights adversely impacted are the rights to life, food, water, sanitation, and health. Collective rights are also affected, including the right to food security, development and sustained economic growth, self-determination, preservation of culture, equality and non-discrimination. Vulnerable sectors are also impacted, such as women and children, indigenous peoples, older adults, and persons with disabilities. Climate change also impacts the rights of future generations, which brings to fore the duty of stewardship upon the present. Climate change is also now a major cause of migration and a threat to global security."[163]

284. In 2022 the UN General Assembly, like the UN Human Rights Council, held that the right to a clean, healthy and sustainable living environment is a fundamental human right. The General Assembly underlines the responsibilities of business enterprises:

"Recalling the Guiding Principles on Business and Human Rights, which underscore the responsibility of all business Enterprises to respect human rights[…] Calls upon States, International organizations, business enterprises and other relevant stakeholders to adopt

[161] **Exhibit MD-343**, Resolution 48/13 of 8 October 2021 of the UN Council of Human Rights.

[162] **Exhibit MD-344**, Summary of judgement of 30 June 2022, PSB et al. v. Brazil (on Climate Fund).

[163] **Exhibit MD-345**, Philippines Commission on Human Rights 2022, National Inquiry on Climate Change, p. 33.

policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."[164]

285. Finally, in 2022 the UN Special Rapporteur published his report on the 'Promotion and protection of human rights in the context of climate change', with as the central message that we are in an unprecedented human rights crisis:

"Human-induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. In its article 28, the Universal Declaration of Human Rights guarantees that all human beings are entitled to a social and international order in which their rights and freedoms can be fully realized. Climate change already undermines this order and the rights and freedoms of all people. We are being confronted with an enormous climate change crisis of catastrophic proportions. It is happening now."[165]

286. In view of the above there can thus be no misunderstanding that in the meantime it has been widely acknowledged that the consequences of climate change constitute a worldwide infringement of human rights, including in the Netherlands.

287. Shell acknowledges that climate change will have serious consequences in the Netherlands and that the rights laid down in Articles 2 and 8 ECHR are at issue.[166] Shell states that it is therefore *"not up for discussion that the consequences of climate change threaten to have consequences for people's lives, including people living in the Netherlands."*[167]

288. It is thus not a topic of discussion between the parties (as already made clear in the discussion of the Kelderluik factors) that the consequences of dangerous climate change are serious and substantial, nor is it a topic of discussion that consequently the right to life and the right to an undisputed family life are at risk of being impacted.

289. Shell does indicate that the Judgement does not provide sufficient substantiation on how Articles 2 and 8 ECHR are taken into account in the District Court's analysis of Article 6:162(2) DCC.[168] Shell points out that the ECHR only imposes direct obligations on states and not on business enterprises. The Judgement should therefore have better clarified how the ECHR played a role in the elaboration of the unwritten duty of care for a non-state player like Shell.

290. Milieudefensie et al. will clarify below that and how the District Court correctly applied the horizontal effect of Articles 2 and 8 ECHR in the Judgement and in what manner this doctrine was taken into account by it in the framework of the weighing of interests to be made with regard to Shell's duty of care.

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[164] **Exhibit MD-346**, Resolution 76/300 of 28 July 2022 of the UN General Assembly.

[165] **Exhibit MD-385**, UN Special Rapporteur, 'Promotion and protection of human rights in the context of climate change', para. 1.

[166] Appeal, paras. 4.2.4 and 4.2.5.

[167] Appeal. para. 4.2.5.

[168] Appeal, para. 4.2.3.

4.5.2 The horizontal effect of human rights law

291. The District Court considered in the Judgement (para. 4.4.9) that the ECHR rights apply in the relationship between states and citizens and that therefore direct invoking of the ECHR is not possible in this case. The District Court goes on to explain that these ECHR rights can be attributed an (indirect) horizontal working via the open standard of Article 6:162(2) DCC. This determination is not surprising, as this (indirect) horizontal working of human rights is widely applied in Dutch case law and is widely supported in legal literature.[169]

292. A citation of *Prof. mr.* A.S. Hartkamp was cited at first instance that aptly represents why that horizontal working exists and why it is important that it exists:

> *"The values embodied in the fundamental rights are important to society as a whole that it is desirable that such rights can also, that is, to a certain extent, be invoked by citizens in their relationship with other citizens, including associations and other organisations of a private law nature. This corresponds with today's reality in which these organisations are able to exert such legal, economic or actual control over individuals that the need for protection against such control is comparable to the need for protection against the control exerted by public organisations."* [170]

293. Other authors come to the same conclusion and also indicate that individuals are being increasingly confronted with private law organisations which possess considerable power and which determine their living conditions and living circumstances to a significant degree. It is thus no longer only governments which are in a position of power with regard to citizens. Whereas constitutional rights were once established to protect individual citizens against the state as authority, as a result of globalisation multinationals have now become so big, that they are now at least equally powerful societal factors. The inequality of power that has arisen recurs again and again in Dutch case law and literature as an argument for a far-reaching horizontal working. This has been explained and elaborated on at first instance.[171]

294. The District Court considered in line with this, and against this background, as follows in para. 4.4.9 of the Judgement:

> *"Due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between Milieudefensie et al. and RDS. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care."*[172]

295. This consideration of the District Court must be seen against the preceding determinations of the Judgement, including the determination (in para. 4.4.5) that the CO2 emissions of the Shell Group are greater than those of many states, including the Netherlands (with which the District Court expresses that Shell has a greater impact on the consequences of climate change than many states), and the determination (in para. 4.4.7) that those CO2 emissions will have serious and irreversible consequences for Dutch residents and the inhabitants of the Wadden region.

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[169] Milieudefensie et al.'s Summons, paras. 666-671 and Milieudefensie et al.'s Notes on oral arguments 6, paras. 36-46.

[170] Milieudefensie et al.'s Summons, para. 667.

[171] Milieudefensie et al.'s Notes on oral arguments 6, paras. 47-57.

[172] Judgement, para. 4.4.9.

296. The District Court concluded, against the background of these determinations, de facto that in this case the situation has arisen in which Shell's conduct in relation to the climate issue, has a greater impact on human rights and the everyday lives of Dutch citizens than, e.g., the conduct of the State of the Netherlands.

297. That the District Court in such a case, like Hartkamp, comes to the conclusion that the ECHR rights at issue must therefore be included in the weighing of interests, is not only understandable but is a pure application of the doctrine of the horizontal working of human rights.

298. That the ECtHR has not granted direct effect to ECHR articles in horizontal relationships, does not detract from this. The ECtHR leaves it up to the domestic courts to grant the rights encompassed in the ECHR horizontal effect in a suitable case (see also Article 53 ECHR).

299. Hartkamp states in this respect:

> *"As stated, the European Court of Human Rights has not attributed direct horizontal effect to the rights provided for in the European Convention on Human Rights, leaving the matter up to the domestic courts. In the Netherlands the problem will be resolved in the same manner as the fundamental rights laid down in the Constitution: the court is free in its interpretation of the convention and can attribute a horizontal effect thereto if the court believes this to provide the desired outcome."*[173]

300. Van Dam states in this respect:

> *"Obligations to which the State is subject on the basis of the ECHR, can have a horizontal effect (between citizens and business enterprises among themselves). The domestic court is obliged to protect the convention rights in horizontal relationships as well. It does so by shaping liability law, in particular the corresponding duties of care, in such way that the fundamental rights of the injured party are adequately protected. If it does not do so, then it is violating the ECHR as an agent of the state."*[174]
>
> At another point, Van Dam says:
>
> *"It is thus the task of the State to protect fundamental rights, inter alia by means of liability law, which is consequently a part of the constitutional framework of a state based on the rule of law."* [175]

301. It is evidently important for the fundamental rights that Milieudefensie et al. seeks to protect that Shell's duty of care is given shape in such way that these fundamental rights are actually protected. See in this respect also the required effective legal protection of Art. 13 ECHR which must be provided by the domestic courts in the event of a(n) (impending) human rights violation.[176]

302. In view of Shell's power and influence as one of the world's largest multinationals, it is subject to a duty of care to respect fundamental rights that is equal to that of states. This is also one of

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[173] Asser/Hartkamp 3-I 2019/226.

[174] Van Dam, Aansprakelijkheidsrecht, 2020, paras. 820-1.

[175] Van Dam, Aansprakelijkheidsrecht, 2020, para. 107.

[176] Article 13 ECHR will be discussed in further detail in Chapter 4.5.3.

the reasons why the court judgements in the Urgenda case against the State are important and provide guidance when assessing Shell's duty of care. The United Nations Guiding Principles on Business and Human Rights, to be discussed below, underline that independent duty of care of business enterprises, which is separate from the duty of care and regulations of states, to respect human rights and act accordingly.[177]

303. The considerations in the Judgement provide insight that and how the seriousness, extent and impending irreversibility of the human rights violations relating to climate change were included in the District Court's considerations when assessing what can be expected of Shell in the context of the duty of care. This appears, e.g., from para. 4.4.53 of the Judgement:

"The court assumes that the reduction obligation will have far-reaching consequences for RDS and the Shell group [...]. However, the interest served with the reduction obligation outweighs the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even growth of these activities. Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Wadden region, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change."[178]

304. The District Court included the interest of protecting human rights in a similar manner in, inter alia, its considerations when reviewing the proportionality of the claimed reduction order (para. 4.4.54), when assessing the relativity requirement (para. 4.5.4) and when assessing the interest requirement (para. 4.5.5).

305. The District Court showed with this that the interest of protecting fundamental human rights and the values embodied therein for society as a whole, must outweigh Shell's commercial interest in keeping its fossil activities at the same level or even having them grow. This must be viewed against the background of the other circumstances of this case, including the determination of the District Court that there is no evidence that the reduction task would be too onerous in light of the seriousness of the situation.

306. This is a correct consideration of the District Court. It is evident that in a state based on the rule of law, the most fundamental rights, and the related societal interest for the whole of society, must be granted greater importance than the corporate interest of a private company.

307. This first of all has to do with the fact that societal interests as a whole have a special value. This applies not only for the public interest of the protection of fundamental rights, but also for other societal interests, such as the sustainable use of a river. This appears from the Kalimijnen judgement of the Netherlands Supreme Court, that concerned damage to downstream gardeners due to excessive upstream industrial salt discharges in the Rhine. In this judgement a weighing of interests was necessary between, on the one part, the interests of the horticulturists in being able to make use of the Rhine and sweet water supply for irrigation of their lands and, on the other, the commercial interests of the industry to have the (permitted) salt discharges to the Rhine take place. The Netherlands Supreme Court considered in this respect: "*that when weighing the interests of the various parties, the interests of the downstream user must be attributed such special weight that the latter may in principle expect that the river is not excessively contaminated by substantial discharges*."[179]

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[177] Exhibit MD-220, Commentary with UNGP Article 11.

[178] Judgement, para. 4.4.53.

[179] HR 23 September 1988, ECLI:NL:HR:1988:AD5713, NJ 1989/743 with notes by Nieuwenhuis and J.C. Schultsz, para. 3.3.2.

308. In his note with the judgement, Nieuwenhuis says with regard to this matter that the legitimacy of this expectation of the horticulturists does not lie in a comparison of the financial advantages and disadvantages of the discharges, but in the belief that a river is intended for "sustainable and joint use" and consequently thus serves a public interest.[180] The importance of sustainable use therefore has a particular and greater value in the legal (normative) weighing of interests to be made.

309. The mere determination that the case against Shell concerns the sustainable and collective use of a stable and safe climate, on which all human life and nature depends, shows that the societal interests that Milieudefensie et al. seeks to protect must be attributed a special and more serious weight than Shell's commercial interests.

310. Human rights were not at issue in the Kalimijnen case. The special character of public interest is therefore not only connected with public interests which involve a violation of human rights. As soon as this is the case, as in this case, the particular weight of the public interest that is served will only increase.

311. In the Urgenda case the protection of climate-related human rights prevailed over political choices and compromises.[181] It then speaks for itself that in a state based on the rule of law like the Netherlands, the protection of fundamental human rights, such as the right to life and the right to an undisrupted family life, must also prevail over the commercial choices and interests of private companies. If public choices have to yield to the protection of fundamental rights, then private choices must certainly do so as well.

312. Another consequence of the fact that Shell's conduct put human rights at risk is that, contrary to the Kalimijnen case, different types of damage are at issue. In the Kalimijnen case, the interests that were weighed related purely to financial loss on both sides. The matter is different in this case. Infringements of fundamental human rights are primarily concerned with personal injury and property damage. Personal injury and property damage carry more weight in a weighing of interests than pure financial loss. This too ensures that the interests which Milieudefensie et al. is seeking to protect prevail over the commercial interests of Shell.

313. Van Dam says in this respect: "*Because personal injury and property damage are the most serious damage categories, whereby there is a direct link to the infringement of a fundamental right, the seriousness of the damage weighs so heavily in these cases, that it will not be quickly assumed that taking precautionary measures is too onerous.*"[182] According to Van Dam, pure financial loss (i.e. loss that does not ensue from personal injury or property damage) is a less serious damage category which carries a different weight.[183] These are incomparable quantities.

314. Because of the above a weighing of interests in this case can never take place on the basis of a cost-benefit analysis. There must be a legal (normative) weighing of interests in which the societal interests of retaining sustainable ecosystems and preventing large-scale human rights infringements (and the related personal injury and property damage), must carry a decisive weight.

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[180] See also K.J.O. Jansen, Informatieplichten (R&P no. CA5) (diss. Leiden) 2012, par. 4.1.3, 2012, which argues that a unilateral focus on the costs of risk and precaution is irresponsible from a legal perspective.

[181] See also Van Dam, Aansprakelijkheidsrecht, 2020, 823-5.

[182] Van Dam, Aansprakelijkheidsrecht, 2020, 207-1.

[183] Ibid

315. In short, it is sufficiently clear – partly against the background of the party debate – why the District Court applied the doctrine of the horizontal working of human rights in this case and in what manner the District Court involved human rights when it weighed the interests at issue. Partly in view of all facts and circumstances presented by Milieudefensie et al. in this case, the District Court, viewing everything in conjunction, has provided sufficient insight into its thought process and reasoning and made the only correct weighing of interests by having the interest of the protection of fundamental human rights (and the societal interest that this serves across society) prevail over Shell's commercial interests. Shell thus wrongly asserts that the Judgement does not provide sufficient substantiation on how the relevant human rights are factored into the analysis of the District Court of Article 6:162(2) DCC.

4.5.3 The margin of appreciation and the order to reduce emissions

4.5.3.1 The margin of appreciation does not require judicial constraint

316. Another objection that Shell has in relation to the horizontal effect of Articles 2 and 8 ECHR as applied by the District Court is that according to Shell these articles cannot be a basis for the imposed reduction order. According to Shell, states are given a "wide margin of appreciation" in cases of difficult social and technical policy areas. This allegedly covers the climate issue and therefore the Court of Appeal cannot or should not want to impose a reduction order. The Court of Appeal should acknowledge that the Dutch executive and legislative powers – and not the civil court – are best able to regulate the issue of emissions reductions with regard to Shell. According to Shell the Court of Appeal must therefore refrain from imposing an order to reduce emissions.[184]

317. This reasoning of Shell cannot be maintained.

318. First, the order to reduce emissions is not based on Articles 2 and 8 ECHR but on Article 6:162(2) in conjunction with Article 3:296 DCC, against the background of all facts and circumstances and objective reference points presented by Milieudefensie et al., including the indirect effect of human rights legislation as accepted in the prevailing case law. These grounds can bear the reduction order in its entirety and demonstrate Shell's legal duty to reduce its emissions by the ordered percentage of at least 45% by 2030. Shell did not present any further claims based on the exceptions of Article 3:296 DCC which could hinder the imposing of an order to reduce emissions, despite the existence of the legal duty applicable to Shell.

319. Second, the margin of appreciation does not lead to a conservative role for the courts (the District Court and the Court of Appeal) that Shell argues should apply. Shell does not properly present the context and working of the margin of appreciation which the ECtHR tends to apply.

320. The margin of appreciation which the ECtHR grants to national authorities when applying Articles 2 and 8 ECHR, with the fair balance criterion as corollary thereof, is not intended to regulate the domestic interrelationships (the domestic court in relation to the national public order or the legislature).[185] The margin of appreciation relates to the question as to the degree of review intensity *the ECtHR* may apply. This question must be asked, because the ECtHR takes a special position in the European system: it is a supranational human rights court. The ECtHR

[184] Appeal, paras. 4.2.6-4.2.19.

[185] P-G Langemeijer and A-G Wissink in the Opinion for the Urgenda case, para. 3.20.

thus in principle only gets around to review after all legal remedies have been exhausted at national level. This means that review by the ECtHR by definition has a subsidiary character, which is also expressed by means of the 'principle of subsidiarity'. The margin of appreciation is a corollary of this principle.

321. ECtHR Judge Schukking characterises this subsidiarity principle as follows:

"[T]he subsidiarity principle [entails] that states primarily have the task of safeguarding the rights and freedoms laid down in the ECHR in their national legal systems. When states fall short in this respect and an effective supervision of compliance with convention obligations at national level is lacking, the [ECtHR] can and must act and provide protection."[186]

322. It is thus not up to the ECtHR to take the place of member states and to function as 'fourth instance'. The ECtHR should only act as a kind of linesman when reviewing whether the discretion primarily granted to member states is not exceeded.[187]

323. The function of the ECtHR is therefore subsidiary to that of the domestic courts. Domestic courts are also better positioned to apply the ECHR in the domestic context. Domestic courts have the greatest knowledge of their own legal order and in general are much closer to the facts and circumstances which are relevant to assess the dispute. As the ECtHR considered:

"[…] it is not normally in the province of the European Court to substitute its own assessment of the facts for that of the domestic courts, and, as a general rule, it is for these courts to assess the evidence before them."[188]

and:

"The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level."[189]

324. The domestic courts can therefore in general carry out farther-reaching and more intensive reviews than the ECtHR. The domestic courts may do so, this ensues from Article 53 ECHR. The judgements of the ECtHR therefore only provide a lower limit, the minimum that the domestic courts must observe. Barkhuysen and Van Emmerik say in this respect:

"This review doctrine [the margin of appreciation, counsel] was developed, however, for the 'constitutional' relationship between the ECtHR and the contracting states and is in part based on the better (practical) assessment position of the domestic authorities. This and Art. 53 ECHR rather encompass encouragement for a more intensive review at domestic level. Precisely what the position of the domestic courts is – within the prerequisite that partly ensues from Art. 13 ECHR that the domestic courts' review may, in principle, not be more limited than that of the Strasbourg court – is left up to domestic constitutional law. The domestic courts would then always on the basis of the national constitutional relationships and on the basis of their own knowledge of the specific facts and circumstances in the Netherlands, have to determine how

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[186] J. Schukking in: NTM|NJCM-Bull. jrg. 43 [2018], no. 3, p. 579.

[187] Gerards, EVRM – Algemene beginselen (2011), p. 184.

[188] ECtHR 16 December 1992, NJCM 1993, 449, para. 34 with notes by E. Myjer (Edwards v. United Kingdom).

[189] ECtHR 19 February 2009, no. 3455/05, EHRC 2009/50 with notes by J.P. Loof (A et al. v. United Kingdom), point 184. See also P-G Langemeijer and A-G Wissink in the Opinion for the Urgenda case, para. 2.69.

intensive their review can be in a specific case and must not blithely follow the Strasbourg 'margin of appreciation'. The 'margin of appreciation' applied in Strasbourg only indicates the lower limit."[190]

325. As P- Langemeijer and A-G Wissink cite in their Opinion for the Urgenda case "*the principle of subsidiarity is not dominated by judicial restraint"*[191] and domestic courts are thus not bound to show restraint in those areas where the ECtHR grants a margin of appreciation to the domestic authorities. They stated in this respect that *"[t]he contrary is in fact claimed in legal literature: where the ECtHR takes a restrained approach because of the subsidiarity principle, the domestic courts must carry out more in-depth reviews. The decision in Fabris v. France*[192] *offers support for this approach."*[193] They also stated that the ECtHR in fact *"requires that domestic courts assess the invoking of human rights "with particular rigour and care", "as a corollary of the principle of subsidiarity"."*

326. At this point it is good to recall the already cited quotation of Van Dam, which entailed that liability law is a part of the constitutional fabric of a state that is based on the rule of law, through which fundamental rights must be protected. Van Dam also indicates against this background that domestic courts must not fixate on the Strasbourg margin of appreciation:

"It is, after all, important that the ECHR usually only provides minimum standards and that States usually have a broad margin of appreciation. This is understandable, because the ECHR covers 47 countries with significant cultural, social, political and economic differences. Art. 53 ECHR therefore stipulates that the domestic courts can go further in the protection of convention rights. If States do this, this can be cause for the ECtHR to increase the level of legal protection. The task of the domestic courts therefore goes further than simply following the case law of the ECtHR. They are independent protectors of the law within the discourse of domestic courts which inform the ECtHR about the course to be followed."[194]

327. Just like the District Court, the Court of Appeal as domestic court is in the best position to assess whether Dutch law and the ECHR rights which form part thereof, provide support for the claims of Milieudefensie et al. Judgements of the ECtHR make it clear in this respect what minimum level of legal protection must be offered, but a higher legal protection is permitted on the basis of the ECHR and is also encouraged via Article 53 ECHR. That the ECtHR for national states (and their courts) applies a specific margin of appreciation because of constitutional reasons and a greater distance to the national context, does not mean that domestic courts should only be

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[190] T. Barkhuysen and M.L. Van Emmerik, Europese grondrechten en het Nederlandse bestuursrecht (MM SBR) 2016/5.2.3.

[191] P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, para. 2.39, with reference to: J.M. Emaus, 'Subsidiariteit, preventie en voorzorg. Een verklaring van het arrest in de Klimaatzaak aan de hand van drie fundamentele beginselen in het recht onder het EVRM', AV&S 2019/11 (iss. 2), p. 57 et seq.

[192] ECtHR (Grand Chamber) 7 February 2013, no. 16574/08, EHRC 2013/50 with notes by J.H. Gerards (Fabris v. France), point 72.

[193] See P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, para. 2.69. They called upon the following sources in this respect: N. Jak and J. Vermont, 'De Nederlandse rechter en de margin of appreciation', NTM-NJCM-bull 2007 (iss. 2), pp. 125-140; J.H. Gerards, 'Oordelen over grondrechtenzaken. Rechtsvinding door de drie hoogste rechters in Nederland', in: L.E. de Groot-van Leeuwen and J.D.A. den Tonkelaar (ed.), Rechtsvinding op veertien terreinen, Deventer: Kluwer 2012, p. 27; J.H. Gerards and J.W.A. Fleuren (ed.), Implementation of the European Convention on Human Rights and of the judgements of the ECtHR in national case-law, Cambridge etc.: Intersentia 2014, pp. 31-32 and 249–250. L. Lavrysen, Chapter 4, System of restrictions, in: P. van Dijk et al. (ed.), Theory and Practice of the European Convention on Human Rights, Cambridge/Antwerp/Portland: Intersentia 2018, discusses on pp. 328–329 the criteria which the ECtHR uses to determine the margin of appreciation. He names as third criterion (with reference to Gerards): "the importance of the affected right".

[194] Van Dam, Aansprakelijkheidsrecht, 2020, paras. 820-2.

allowed to review the infringement of human rights with restraint or marginally. On the contrary, domestic courts are the 'first line of defence' when it comes to the protection of human rights.

328. Without prejudice to the margin of appreciation, the ECtHR obviously follows through when it is clear that no effective legal protection is offered at national level. The margin of appreciation is certainly not an absolute right of the contracting states, let alone for business enterprises. See also Barkhuysen and Van Emmerik:

"The 'margin of appreciation' is consequently not an established 'right' of contracting states, but rather a review policy in the framework of which the ECtHR also tries to substantiate its choice for a specific review intensity (from marginal to very strict)."[195]

329. Following this line, ECtHR Judge Schukking stated:

"The ECtHR has often considered that "the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective." Pursuant to the task allocated to it pursuant to Article 19 ECHR, the ECtHR must act if failure to act would lead to the protection of fundamental rights becoming a hollow phrase. In addition, in its case law the ECtHR has pointed out on various occasions that the ECHR is a 'living instrument' that, in order to retain its significance, must be interpreted on the basis of modern-day circumstances."[196]

330. Schukking is, of course, referring to the effectiveness principle of Article 13 ECHR; a principle that must always be observed and which is strictly supervised by the ECtHR, including in relation to new societal developments and circumstances. The ECtHR therefore views the ECHR as a 'living instrument'.

331. Against this background, the judgements in the Urgenda case and the Shell case will undoubtedly have been received with approval by the ECtHR. The judgements show how the ECHR, in the light of the modern-day danger of climate change, via direct and indirect application, can and must offer protection to the (imminent) violation of human rights which will be the result thereof. The judgements thereby prevent the ECHR from becoming a hollow phrase in a new epoch with new threats for fundamental rights.

332. The District Court, Court of Appeal and Netherlands Supreme Court have also shown in the Urgenda case that the minimum emissions reduction goals to be taken into account can also be determined on the basis of the facts that can be established. The District Court demonstrated this in the Shell case. Both Articles 2 and 8 ECHR and Article 6:162(2) DCC therefore, in conjunction with Article 3:296 DCC, provides the necessary legal foothold to impose a reduction order on Shell.

333. As previously stated, the imposing of a reduction order on the basis of Article 3:296 DCC requires no other or special expertise of the court than that required of the court in other complex cases. Particularly as in relation to the climate issue there is a great degree of scientific and political consensus regarding the seriousness and comprehensiveness of the danger and about what must happen to avoid that danger. It is equally clear that far too little is happening, why that is and who must therefore take the lead to break through the current status quo.

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[195] Barkhuysen and Van Emmerik, Het EVRM en het Nederlands bestuursrecht, 2011, p. 24.

[196] J. Schukking in: NTM|NJCM-Bull. jrg. 43 [2018], no. 3, pp. 580-581, with reference to, e.g., ECtHR 13 May 1980, 6694/74, ECLI:CE:ECHR:1980:0513JUD000669474, para. 33 (Artico v. Italy).

334. That Shell argues that the doctrine of the margin of appreciation supposedly shows that it is up to political decision makers, and not the courts, to direct the climate task, also has to do with the circumstance that Shell does have an influence on political decisions, but not on the judiciary. Shell knows that if it can reduce the climate issue to a matter that can only be assessed by political decision makers, Shell (together with the other oil and gas companies and their collective business associations) can retain influence on the speed at which the energy transition takes place. It is therefore of great importance for the protection of human rights in the Netherlands and the world that the existing status quo is altered.

335. The above legal framework results in the following conclusions:

    (i) The margin of appreciation that the ECtHR grants to the State (including the judiciary), does not in any way entail that a domestic court must show judicial restraint when making its assessment. Indeed, on the basis of the jurisprudence of the ECtHR there is reason for a thorough review of particular stringency and care *("with particular rigour and care"),* partly in view of the effectiveness principle of Article 13 ECHR.

    (ii) If the margin of appreciation (wrongly) were to lead to judicial restraint at domestic level, this restraint only applies in cases against the government. The ECtHR only grants the margin of appreciation to national authorities for the public considerations to be made by them and not to business enterprises for the commercial considerations to be made by them. In this case, in which the Court of Appeal, as domestic court, must weigh the interests of two private parties, the relationship between the State and the ECtHR is not at issue. That is why the margin of appreciation relating to the public considerations of the State is not at issue (see in this respect also the matters discussed in Chapter 3). For this reason the Court of Appeal therefore need not show restraint when assessing this dispute.

336. The conclusion of this is as follows. In the Urgenda case, where there was a restrained review, this review only led to the offering of minimum protection by the court. That is why, within the bandwidth of 25%-40% emissions reduction by 2020 that was at issue in that case, the lower limit of 25% was chosen.[197] As this restraint is not an issue in this case, the Court of Appeal need not limit itself to offering minimum protection. On the contrary, as has been explained above, offering farther-reaching protection fits in with the protective basis of the ECHR and the intensive review which the ECtHR proposes for the domestic courts.

337. The foregoing makes it clear that the margin of appreciation does not apply in this case and that is one of the reasons why the Court of Appeal has a great deal of discretion in its assessment to affirm the order imposed by the District Court as a suitable interpretation of Shell's societal duty of care.

338. In addition, Milieudefensie et al. will now explain that offering effective (minimum) protection against a violation of Articles 2 and 8 ECHR within the meaning of Article 13 ECHR leads to a reduction order of at least 45%. This has to do with the fact, inter alia, that there is only one solution to prevent dangerous climate change, i.e. the reduction of greenhouse gases within the maximum available carbon budget. With regard to the appropriate protective measures to be taken there is consequently no margin of appreciation anymore.

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[197] In any event, it looks as if the Court of Appeal might have been willing in the Urgenda case to order the State to achieve a higher reduction percentage, in view of paras. 3.9, 50 and 75 of the judgement of the Court of Appeal read in conjunction with each other (Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591).

339. There are no effective remedies other than reducing emissions as a mitigation measure to combat excessive warming of the earth. Adaptation measures evidently cannot prevent an excessive warming of the earth and, as the Netherlands Supreme Court considered, in line with the Court of Appeal in the Urgenda case, the disastrous consequences of excessive warming of the earth cannot be adequately prevented by those measures. For these reasons, emissions reductions are urgently necessary, according to the Netherlands Supreme Court.[198] The last IPCC report underlines that conclusion of the Netherlands Supreme Court once again, just as the same conclusion is drawn in the UN Climate Convention and the Paris Agreement.[199] The District Court also acknowledged in para. 4.4.8 that adaptation measures are inadequate to address the consequences of dangerous climate change. Shell did not present a ground of appeal against this point.

340. This means that on the basis of the ECHR, the courts can impose an emissions reduction obligation on states. According to the Netherlands Supreme Court *"Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger."*[200]

341. In view of the horizontal effect of the ECHR, the District Court concluded that a non-state actor like Shell is also subject to a reduction obligation, inter alia because of its far from negligible share in global emissions and its influence on the global approach to tackling dangerous climate change. Just as states must 'do their part', due to its special position Shell must do 'its part'.

342. As there is only one remedy to effectively protect human rights against climate change, i.e. emissions reductions by states and non-state actors, the court can and must, using legal grounds and principles (and with an eye on climate science) determine what the minimum emissions reduction should be for the actor in question. Article 13 ECHR demands that the court provide an effective legal remedy. Without imposing an obligation to reduce emissions, the court cannot provide that effective legal remedy.

343. This is also the essence of the Urgenda judgement. According to the Netherlands Supreme Court, the State must offer an effective legal remedy by taking appropriate measures against climate change. The Netherlands Supreme Court then affirmed the opinion of the Court of Appeal that in that light the State is bound by a minimum reduction in emissions of 25% in 2020.

344. The Netherlands Supreme Court has the following to say about this:

> *"5.3.2 […] If it is clear that the real and immediate risk referred to above in paras. 5.2.2 and 5.2.3 exists, states are obliged to take appropriate steps without having a margin of appreciation. […]*

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[198] HR 20 December 2019, ECLI:NL: HR:2019:2006, para. 7.5.2.

[199] At first instance (Notes on oral arguments 9, paras. 23-26) Milieudefensie et al. clarifies that Art. 2 of the UN Climate Convention and the elaboration thereof via Article 2 of the Paris Agreement, encompass that the 1.5°C limit, inter alia, must not be exceeded because the possibilities of adaptation to the climate consequences are limited. This is again confirmed in the AR6 report of 2022 of IPCC Working Group 2: "*Available evidence on projected climate risks indicates that opportunities for adaptation to many climate risks will likely become constrained and have reduced effectiveness should 1.5C global warming be exceeded and that, for many locations on Earth, capacity for adaptation is already significantly limited. The maintenance and recovery of natural and human systems will require the achievement of mitigation targets."* See **Exhibit MD-347**, Technical Summary of AR6, IPCC Working Group II, p. 43.

[200] HR 20 December 2019, ECLI:NL: HR:2019:2006, para. 5.8.

6.4 The right to effective legal protection under Article 13 ECHR mentioned above in 5.5.1-5.5.3 entails, in a case such as this, that the courts must examine whether it is possible to grant effective legal protection by examining whether there are sufficient objective grounds from which a concrete standard can be derived in the case in question [...]

8.3.5 In this case, therefore, the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020."

345. There is thus no margin of appreciation with regard to that minimum reduction contribution of 25%. This means that in this case the State does not have the freedom to reduce Dutch emissions by less than 25% as of 2020. See also the Opinion for the Netherlands Supreme Court judgement of P-G Langemeijer and A-G Wissink, who also conclude that there is no policy discretion to reduce less than the minimum standard of a 25% reduction established by the Court of Appeal.[201]

346. Because of the crucial importance of emissions reductions to combat dangerous climate change, it is by definition the task of the court to establish that minimum reduction contribution. Only that will offer an effective remedy against the (impending) human rights infringements as a result of the inadequate climate goals of states and relevant non-state parties like Shell. The doctrine of the margin of appreciation therefore does not play a role in the imposing of a minimum reduction goal.

347. The climate problem thereby distinguishes itself from other environmental problems which are at issue in the context of Arts. 2 and 8 ECHR. Excessive warming of the earth can only be prevented by emissions reductions, while excessive noise nuisance due to a nearby airfield can be prevented by many different measures. Houses can be insulated, runways can be relocated or extended, flying altitudes can be modified, air traffic can be limited (e.g. in specific time blocks), specific excessively noisy aircrafts can be denied access, homes can be built on another location, residents can be compensated for the loss of their old home and the like. Such a variety of effective remedies are not available in this case.

348. If an emissions reduction is the sole effective remedy and the consequences of climate change are too serious to allow assessment discretion, consequently a margin of appreciation is not relevant in any event. In order to provide effective legal protection pursuant to Article 13 ECHR against the violation of Articles 2 and 8 ECHR, the imposing of a reduction order is unavoidable.

349. It may not be forgotten in this respect that the reduction order imposed on Shell does not go beyond what is necessary to provide effective legal protection against violation of the human rights at issue. Only a specific emissions reduction is being demanded. Shell retains complete freedom to determine the measures with which the imposed reduction order is achieved.

350. Here too a parallel can be drawn with the Urgenda case, in which the State equally retained the discretion to determine the reduction measures itself, provided the imposed reduction percentage was achieved. According to the Netherlands Supreme Court, this did not encroach on the State's margin of appreciation, as has already been explained above.

4.5.3.2 Judgements of the ECtHR and the margin of appreciation

[201] See also P-G Langemeijer and A-G Wissink in the Opinion for the Urgenda case, paras. 4.224-4.229.

351. Milieudefensie et al. will now go into a number of judgements of the ECtHR which Shell used in its argument on the margin of appreciation. Here too, context is required.

352. At first instance Milieudefensie et al. discussed relevant judgements of the ECtHR in relation to the horizontal effect of the ECHR to be applied.[202] The following, inter alia, was discussed there:

(i) that according to the ECtHR, the prevention and precautionary obligation arises with an increased risk of breach and that this does not require that the breach or the damage has already occurred (Di Sarno v. Italy);
(ii) that the ECtHR applies the precautionary principle and according to the ECtHR this means that in the case of serious environmental damage, adequate measures must be taken in situations of scientific uncertainty (Tatar v. Romania);
(iii) that the ECtHR attaches importance to the question whether there are realistic possibilities for a complainant to withdraw from the environmental pollution by, e.g., relocating or that the complainant in fact has no other choice than to suffer the pollution (Fadayeva v. Russia);
(iv) that the ECtHR decided that where there is a general risk to public health, it can be assumed that there is an individual interest on the part of the complainant (Di Sarno v. Italy; Okyay v. Turkey);
(v) that the ECtHR determined that even when the damage cannot yet be determined with certainty because this may only be suffered in the distant future (after decades), a claim can be made to seek the protection of Article 8 ECHR if there is a generally recognised and foreseeable health risk (Taskin v.Turkey);
(vi) that the ECtHR has held that attempts to reduce a(n) (imminent) violation are insufficient and that the measures must be de facto effective and must have the protection of human rights as a result (Dees v. Hungary).

353. It has been explained at first instance what the relevance of those judgements is for this case.[203] In the Urgenda case the Court of Appeal, as did the Netherlands Supreme Court and the P-G and A-G in their opinion for the judgement, referred, inter alia, to these judgements of the ECtHR so that the relevance thereof will be known. For example, it is evident that no one will be able to escape the consequences of dangerous climate change and great significance is attached to this fact.

354. Against the background of these judgements, Milieudefensie et al. will go into the case law of the ECtHR cited by Shell in Chapter 4 of its Appeal to substantiate its argument relating to the margin of appreciation. Milieudefensie et al. believes that the explanations in the preceding paragraph make it clear that the doctrine of the margin of appreciation cannot lead to another outcome than that of the Judgement (and thus cannot stand in the way of affirmation of the Judgement). Nevertheless, here too there is Milieudefensie et al.'s. need to indicate the correct context with the judgements cited by Shell.

355. The judgements of the ECtHR cited by Shell in the Appeal always concern the type of cases in which there is either (i) no human rights infringement, or (ii) the infringement can be reversed by many different measures. These are other situations than those which were at issue in the Urgenda case and other situations than those which are at issue in this case against Shell.

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[202] Milieudefensie et al.'s Summons, Chapter X.4.
[203] Milieudefensie et al.'s Summons, Chapter X.4.

356. In para. 4.2.12 Appeal, Shell cites the ECtHR case of Hatton and others v. United Kingdom. In this case, in which the complainants asserted that their right to peaceful enjoyment of their home was violated by night flights from Heathrow airport, the ECtHR did not assume an infringement of Article 8 ECHR. Important reasons for that conclusion were: that the government and the airport had already taken as many measures as possible; that only a limited number of local residents suffered sleeping complaints after that; and that these local residents could escape the noise nuisance because they could move house, without suffering financial disadvantage. The market value of their homes had not been affected. Complainants were thus not forced to suffer the noise nuisance.[204]

357. Contrary to this case against Shell, there was thus no violation of Article 8 ECHR and contrary to this case, there was in fact a possibility of escaping the (noise) nuisance. This allowed a 'fair balance' to be found, which could not be found in Urgenda, nor here.

358. In the Fadeyeva case cited by Shell (para. 4.2.13 Appeal) the ECtHR concluded that there was no possibility for Fadeyeva to escape the industrial pollution, which is why the ECtHR held that Russia was violating Article 8 ECHR and had to provide protection against this pollution. This protection could be provided by various alternative routes, such as setting rules to curb pollution, facilitating relocation, etc. The ECtHR left it up to the State to itself make the choice regarding the protective measures that needed to be taken.[205] However, in this case there are no effective alternatives to a reduction order, as discussed in detail above.

359. In the Öneryildiz case which Shell discusses in para. 4.2.9 Appeal, the ECtHR held that Turkey had violated Article 2 ECHR by not taking any precautionary measures against the danger of methane leaks from a rubbish dump in Istanbul known to the government; the dump was illegally inhabited. A methane explosion resulted in fatalities. The ECtHR ordered the Turkish state to pay compensation to the surviving dependants. In relation to the margin of appreciation the ECtHR considered that at the time it was the responsibility of the Turkish government to take the appropriate precautionary measures to protect the illegal residents against the danger of a possible methane explosion. They could have done so, for example, by better regulating the situation around the rubbish dump, by capturing the methane gas with a gas extraction system or otherwise. The ECtHR emphasised that the margin of appreciation does not detract from the need to adequately address the danger: "*when faced with an issue such as that raised in the instant case, the authorities cannot legitimately rely on their margin of appreciation, which in no way dispenses them from their duty to act in good time, in an appropriate and, above all, consistent manner."* [206]

360. This consideration in the Öneryildiz case again makes it clear that the margin of appreciation can only be an issue if the measures chosen by the government are effective in the protection of the human rights at issue and that the government acted timely and adequately to secure that protection. It has turned out that only a reduction order can guarantee that effectiveness, which is why the Öneryildiz case provides support for the approach chosen by the District Court in the Judgement.

4.5.3.3 Judgements of foreign domestic courts regarding the margin of appreciation

[204] Exhibit S-61, para. 127 in conjunction with 74.

[205] Exhibit S-62, paras. 132-134.

[206] Exhibit S-60, para. 128.

361. To substantiate its argument on the margin of appreciation, in addition to the above-discussed judgements of the ECtHR, Shell also referred to judgements of domestic courts. Milieudefensie wants to place these too in the right context.

362. The British case of Richards (Appeal 4.2.15) cited by Shell – regarding personal injury as a result of hydrogen sulphide on a dump site - is comparable to the above-discussed HCtHR cases of Fadeyeva and Öneryildiz. With regard to those ECtHR judgements, the cases do not provide any new insights into the doctrine of the margin of appreciation and therefore require no further discussion.

363. Shell also cites the judgement of the British court in the Plan B Earth case (Appeal, 4.2.18.a). The case was presented to the administrative court at first instance and was brought against the British State. Following is a brief summary of the case.

364. The Climate Change Act 2008 (CCA) has been in force in England since 2008, in which the British government, in short, has undertaken to set interim targets every five years as of 2008 on the road to net zero emissions in 2050, and to describe measures for achieving those targets.[207]

365. It is good to know that the United Kingdom is one of the few Western countries which in 2020 had already achieved a reduction percentage of more than 40%. The target under the CCA is to have reduced the emissions by at least 78% by 2035 and to come to net zero emissions by 2050.[208] The United Kingdom consequently has set a much higher target than countries like the Netherlands and Belgium. (As a side note: other Western countries with a higher target are, inter alia, Denmark with a 70% reduction target for 2030 and net zero in 2050,[209] Germany with a reduction of 65% in 2030 and net zero in 2045,[210] and Finland with a net zero target in 2035.[211])[212]

366. Because of the already high emissions reduction targets which the United Kingdom has set, the Plan B Earth case, contrary to the Urgenda case, was not concerned with the question whether the British reduction targets were sufficiently high. A reduction order was therefore not requested. The dispute related to the specific measures which the government had described to achieve the own interim statutory targets. According to the claimants, the described measures were insufficient.

367. In the Plan B Earth case the court, other than in the Urgenda case and this Shell case, was specifically asked to assess whether certain state measures were appropriate for achieving a statutorily established reduction target. This thus goes further than what was requested in the Urgenda case and what is being requested in this case. For various reasons the British court did not make any statements about the appropriateness of those specific policy measures.

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[207] Exhibit S-64, paras. 11 – 17.

[208] See the website of the British government: https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035.

[209] See the website of the Danish government: https://um.dk/en/foreign-policy/new-climate-action-strategy

[210] See the website of the German Umwelt Bundesamt: https://www.umweltbundesamt.de/en/data/environmental-indicators/indicator-greenhouse-gas-emissions#at-a-glance

[211] See the website of the Finnish government: https://ym.fi/en/climate-neutral-finland-2035

[212] Milieudefensie et al. is not suggesting with this that the policy of these countries is in line with the Paris Agreement.

368. The British court also explicitly considered that the case cannot be compared to the Urgenda case and considered, redundantly, that it therefore could not indicate whether a claim such as that of Urgenda could succeed in the United Kingdom:

> *"I have not been given any comparison of the constitutional laws in play and between the powers of the Dutch and English courts in such matters. However, I note that the challenge in Urgenda was not to a framework of laws, but rather to a change in the State's reduction target. Previously the State pursued a 30% reduction by 2020 but this was lowered to 20% in 2011. (…) I need not and do not decide whether a similar challenge could have been viable in this jurisdiction."*[213]

369. In short, the judgement in the Plan B Earth case does not offer a basis for Shell to argue that the judgements in the Urgenda case or that in the Shell case would not be possible in the United Kingdom. This is aside from what the value thereof would be, as this is in any event possible under Dutch law.

370. A same conclusion as that relating to the British Plan B Earth case, also applies with regard to the German and French cases cited by Shell in which, contrary to the Urgenda case and this Shell case, it was not the emissions reduction targets of the relevant state that were challenged, but the central question was whether the state had taken the correct and/or sufficient measures to achieve the emissions reduction targets which the state had itself established by statute.

371. In the German case of Family Farmers and Greenpeace Germany v. Germany (Appeal, 4.2.18.c.i.) cited by Shell, according to the claimants Germany was on the road to not achieving its own emissions reduction target of 40% by 2020. The claimants asserted that the existing policy would therefore have to be supplemented with additional policy measures presented by the claimants themselves. The District Court at first instance did not agree with this view, particularly not because, even if Germany were to fall below the intended 40% reduction by 2020, it was in any event established that as of 2020 Germany would reduce considerably more than the 25% reduction which had been accepted as the minimum standard in the Netherlands in the Urgenda case. The German state therefore still retained a margin of appreciation.[214] No appeal was filed in that case.

372. The French case of Notre Affaire a Tous and others v. France cited by Shell (Appeal note 226) was equally only concerned about the question whether France had taken sufficient policy measures to achieve its own reduction targets as laid down in the law. There was no challenge regarding the reduction target as such. The case was brought before the administrative court at first instance. The French court determined that France had emitted too many greenhouse gases in the period 2015-2018 (just like the United Kingdom, France was working with limited carbon budgets for certain periods) and ordered the government to offset the excess emissions in that period. The court specified in this respect that the government must see extra reductions of the same quantity of emissions as those which were emitted in excess, in the period up to and including 2022 (i.e. on top of the already planned emissions reductions up to and including 2022). Just as in the Urgenda case, the court left the government free to make its own choices on how the extra emissions reductions ordered by the court are to be realised.

373. In short, the French court determined in this case that the excess emissions before 2020 must be offset as quickly as possible and in any event before the end of 2022. This is in order to

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[213] Exhibit S-64, para. 55.

[214] Exhibit S-66, p. 27.

prevent that the cumulative emissions on the road to the net zero point get too high. If this immediate offsetting does not take place and the cumulative emissions rise, the limited carbon budget will be exceeded and the French state will not make its own established proportional contribution to the global temperature goal of the Paris Agreement.

374. The phenomenon that what is not reduced in emissions before a specific time, must automatically lead to a greater emissions reduction task after that time to remain within the carbon budget, also played a role in the case of Individuals v. Germany of the German Constitutional Court, which was cited by Shell (Appeal, 4.2.18.c.ii.). The case is better known as Neubauer et al v. Germany and the German Constitutional Court provided an English summary of the case.[215]

375. The Constitutional Court held in this case, that the provisions in the German climate legislation in which national climate goals are included and in which the annually permitted emissions quantities are determined up to 2030 (leading to an emissions reduction of 55% in 2030), cannot be reconciled with the fundamental constitutional rights, because insufficient specification has been included in the law for the reductions which must take place after 2030. Consequently it is unclear how the statutory goal of net zero emissions in 2050 will be reached.

376. The Constitutional Court determined that in the climate legislation there is a mismatch between the reduction effort up to 2030 and the effort to be made after 2030, because (with a 55% reduction goal in 2030) the reductions after 2030 must take place with even greater speed and urgency and thus impose a disproportionate burden on the younger generation(s). The Constitutional Court has the following to say about this, in short:

"The provisions irreversibly offload major emission reduction burdens onto periods after 2030 […] For this [climate] target to be reached, the reductions still necessary after 2030 will have to be achieved with even greater speed and urgency […] Provisions that allow for CO2 emissions in the present time constitute an irreversible legal threat to future freedom because every amount of CO2 that is allowed today narrows the remaining options for reducing emissions in compliance with Art. 20a GG [...] Another precondition of constitutional justification is that the provisions on the emission amounts do not lead to disproportionate burdens being placed on the future freedom of the complainants […] According to this requirement, one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom."[216]

377. The Constitutional Court therefore concluded that a disproportional burden on the younger generation(s) is unconstitutional and that therefore the reduction efforts cannot be put off to a future time, so that later on, faster and more far-reaching emissions reductions are necessary, with the concomitant limiting of the freedom which this will entail in due time for the younger generation(s).

378. The Constitutional Court also states that this legal need to take climate action cannot be affected by the argument that the climate problem is a global problem on which Germany only has a limited influence:

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[215] **Exhibit MD-381**, Summary of Neubauer et al v. Germany.

[216] Ibid, p. 1, 2nd paragraph; p. 2, 8th paragraph and p. 3, 1st paragraph; p. 3, 2nd paragraph; p. 4, under a).

> *"The obligation to take climate action arising from Art. 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of one state on its own […] The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. On the contrary, the particular reliance on the international community here gives rise to the constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation."*[217]

379. In this fine consideration, the Constitutional Court makes it clear that adequate climate action at national level is all the more a constitutional obligation, precisely so that the climate problem can be solved globally and other states will not be allowed the excuse that if Germany does not do enough, they too are not bound to implement a good climate policy.

380. In other words: lead by example, this is the only way to solve the climate problem through global action. With this consideration the Constitutional Court once again underlines the legal and factual accuracy of the need to take the lead by implementing and adhering to good climate policy, so that other parties are given an incentive to implement better climate policy themselves. This can result in a flywheel effect in global action, as already explained at first instance in this case.[218] This is also the essence of the set-up of the Paris Agreement, as well as the essence of the proactive participation of companies in tackling the climate problem requested by the states. Participation of non-state parties is of elementary importance in the creation of the flywheel effect.[219]

381. The determination of the German Constitutional Court with regard to the German government was, in short, that on constitutional grounds the greatest possible efforts, or at least proportional reduction efforts, must take place prior to 2030. The German government then announced within one week after the judgement to increase the reduction target for 2030 from 55% to 65%. In addition, the German government has brought the net zero milestone to be achieved forward by five years from 2050 to 2045.[220]

382. That the Constitutional Court did not itself determine this higher percentage of 65% had to do with the fact that the Constitutional Court could not determine on the basis of the available data that the old target of a 55% reduction in 2030 on its own, i.e. aside from the relationship with what is to happen after 2030, was already less than what the minimum reduction standard to be applied for 2030 should be. In other words, where in the Urgenda case sufficient details were known to be able to determine that for 2020 the Netherlands was required to make a minimum contribution of 25% and that the Dutch target of a reduction of 16% in 2020 was thus insufficient, the German Constitutional Court could not determine whether the 55% reduction in 2030 fell under the minimum standard of what can be expected of Germany as a minimum global contribution for 2030. With more complete information the Constitutional Court might have been able to make this determination itself.

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[217] Ibid, p. 3, under 2 a).

[218] Milieudefensie et al.'s Notes on oral arguments 1, paras. 130-147.

[219] Ibid

[220] See for the announcement https://www.reuters.com/business/sustainable-business/germany-aims-65-co2-emissions-reduction-by-2030-sources-2021-05-05/; see for the current new policy Indicator: Greenhouse gas emissions | Umweltbundesamt

383. In Belgium too there has now been a first climate judgement against the Belgian Federal state and the three Regions. Shell also refers to this case (Appeal, 4.2.18.c.iii). In this case the district court in Brussels determined that an inadequate climate policy was being followed in Belgium. The French-speaking court held in its decision (unofficial translation):

"In the implementation of their climate policy the defendants are not acting as normal cautious and careful authorities, which constitutes an error within the meaning of Article 1382 of the civil code;

By implementing their climate policy, the defendants are violating the fundamental rights of the claimants, in particular Articles 2 and 8 ECHR, by not taking all measures that are necessary to prevent the consequences of climate change for the life and the personal living environment of the claimants;"[221]

384. The claimants in this case were the Belgian association Vzw Klimaatzaak and thousands of private claimants, who in addition to the association were declared to have standing in respect of their personal claims and in whose favour the judgement was awarded. The court held that each of them had a personal interest in the claim (unofficial translation):

"Belgium, with its residents, is not immune to the predicted worldwide and European consequences of climate change. The claimants also refer to various undisputed sources to describe the direct consequences of the warming of the earth which have already been observed in Belgium. It can be deduced from this that Belgium is already suffering the direct consequences of this climate change […] Climate projections for Belgium by 2100 indicate an intensification of the already observed and above-described consequences, as well as of a concrete threat to the territorial integrity of the country, and in particular of Flanders that is exposed to the rising of the sea level, and of the health of humans and animals […] This threat forms a serious risk for the current and future generations living in Belgium and elsewhere, that their daily life will be seriously disrupted. In this case the claimants want to attribute part of the responsibility for the current and future harmful consequences of climate change for their daily life to the Belgian government. Each of them thus proves that they have a direct and personal interest in the claim for damages filed by them. The fact that other Belgian citizens may also suffer damage which is wholly or partly comparable to the damage that the claimants can suffer as individuals, is not sufficient to requalify the personal interest of each of them as a public interest."[222]

385. By awarding the claims of the thousands of private claimants on the basis of the fact that the general climate consequences for Belgium are already so serious that they also qualify as a(n) (imminent) human rights violation in respect of each of the claimants individually, the Brussels court took another new step in the development of climate cases and who can successfully act as claimant parties in this respect.[223] Milieudefensie et al. set out in detail at first instance why this must be a legally correct and logical conclusion under Dutch law as well, in particular in view of certain considerations of the Netherlands Supreme Court in the Urgenda case. With regard to the above, reference is made to Notes on oral arguments 2, paras. 75-134, in which this is explained.[224]

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[221] Exhibit S-68, p. 83 French version.

[222] Exhibit S-68, French version pp. 50 and 51.

[223] See in this respect also the ECtHR cases of Di Sarno v. Italy and Okyay v. Turkey, as referred to above in Chapter 4.5.3.2 Defence on Appeal.

[224] For considerations of procedural expedience the individual claimants, together with Milieudefensie, decided not to make the issue relating to the standing of the individual claimants a key topic of these proceedings. After all, their admissibility is

386. In addition to the awarded declaratory judgements, the claimants had also requested a reduction order. The requested order was dismissed with a claim based on the separation of powers. The claimants appealed this, inter alia asserting that the court had not taken sufficient account of the fact that the reduction of greenhouse gases is the sole effective remedy against the climate dangers that the court described in its judgement. According to the claimants, the court should therefore have held in the same way as the Dutch courts in the Urgenda case and should have imposed a reduction order. The Belgian court of appeal gave priority to this appeal by means of special proceedings, so that the oral arguments will take place in the second half of 2023.

387. In any event, the fact that the Brussels court at first instance, despite its determination that the State of Belgium, with its inadequate climate policy, is violating human rights, did not proceed to issue a reduction order, is insufficient grounds to deviate from the clear judgements under Dutch law in the Urgenda case, which show that a reduction order can indeed be imposed. This is aside from the circumstance that the issue here is not the question whether a reduction order can be imposed on the State, where the separation of powers could play a role, but in respect of which it was confirmed in Urgenda that this is possible. The key point is what legal duty a private party like Shell has, in view of the objective reference points and the relevant circumstances of the case. The separation of powers is not at issue here, nor is political assessment discretion.

388. Shell lastly refers to three judgements in countries outside of Europe, in which the ECHR plays no role.

389. In the case of Juliana v. United States cited by Shell (Appeal, para. 4.2.18.d.i) the claimants were declared not to have standing (within the criteria cited therefore in the US, which are different than those in the Netherlands). The claimants in this case had asked the court to order the state to present a climate plan to the court, which plan was to make provision for both the complete energy transition of the country for the coming decades, as well as a large-scale reforestation programme in the United States. The court did not see any options for itself to impose such an order on the state, as the state would then in fact have to subject the entire structure of American society to the approval of the court and this did not fit within the rules of the separation of powers. The court did not deem itself able and equipped to form an opinion on such a society-wide transition plan, nor to monitor, control and where necessary correct the entire execution of the plan for several decades. It should be clear that such a claim cannot be compared to the requested reduction order in the Urgenda case and in this case, whereby the State and the Shell board of directors have retained full freedom to shape the reduction task as they deem appropriate. In these Dutch cases, no transition plans need be presented to the court for approval, nor does the court have to monitor, control or correct them. The outcome in the Juliana case can therefore not have any meaning in this case.

390. Shell furthermore refers to the US case of City of New York v. Chevron Corp (Appeal, para. 4.2.18.d.ii). In this case the city of New York filed suit against five large oil and gas companies, including Shell. In essence, New York wanted to (partly) recover the high costs of climate adaptation from these companies. The city must be better protected against rising sea levels, hurricanes, increasing precipitation and the other consequences of climate change, necessitating large expenditure on restructuring the infrastructure of the city. However, the

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not required for the requested order against Shell. Nevertheless, Milieudefensie et al. believes that there are good grounds for the approach of the Belgian court to be followed in the Netherlands as well. In another case perhaps.

court dismissed this claim as in the United States the possibility of regulating emissions was exclusively mandated by the federal government to the Federal Agency, the EPA (Environmental Protection Agency). Under the federal tort legislation, as a result of this mandate to the EPA, federal courts cannot award any claims in relation to the emissions of business enterprises. This concerns the doctrine of displacement of federal common law. This ensues from the case of American Electric Power Company v. Connecticut, 564 U.S. 410 (2011), to which reference is made in the Chevron case. At state level the rules are different again and courts can adjudicate these types of claims because the displacement doctrine does not apply there. At present various proceedings are ongoing in the United States against fossil companies at state level. In these cases the defendant fossil companies are doing everything in their power to show that only federal courts may make statements about these cases, which is why the progress in these cases is slow.[225] In the meantime, however, it has become clear on the basis of the first judgements of 2022 at state level, that the state courts do indeed believe they are competent to adjudicate claims against the fossil industry. The cases are therefore not referred to federal courts. It is now a matter of awaiting how the courts at state level will substantively respond to the compensation claims that have been submitted.[226]

391. Redundantly: the displacement doctrine, other than at federal level in the US, is not something that is usual in common law jurisdictions.[227]

392. Another reason why this US case cannot be compared to the climate cases in the Netherlands and other European climate cases as cited above, is that this US case relates to obtaining damages, while the European cases concern the need for preventative action.

393. Lastly, the case from New Zealand cited by Shell, Smith v. Fonterra (Appeal, 4.2.18.d). In this case Mr Smith, an elder of the Ngapuhi tribe, a tribe belonging to the indigenous Maori population of New Zealand, brought proceedings against seven companies based in New Zealand because of their greenhouse gas emissions. The case was brought by Smith together with his pro bono attorney (Mr Salmon) with the intention "*to test the legal boundaries of tort law in the public interest*".[228]

394. In addition to a number of declaratory judgements, this case asked that the seven companies be made subject to a reduction order of 100% net by 2030: *"Mr Smith also seeks injunctions requiring each respondent to produce or cause zero net emissions from their respective activities by 2030."*[229]

395. Smith's claims were declared inadmissible in this appeal. This is because, inter alia, in the proceedings Smith and his attorney did not present sufficient substantiation as to why these seven companies had been selected as defendants and what distinguished these companies

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[225] See https://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/.

[226] See https://www.reuters.com/legal/litigation/10th-circuit-hands-boulders-climate-lawsuit-home-court-advantage-2022-02-08/ en https://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/.

[227] The appellate court held in a similar sense in the New Zealand case to be discussed below, also a common law jurisdiction, in connection with the assertion of the claimant (Mr Smith) that New Zealand's climate policy does not in itself stand in the way of a claim of unlawful act against polluting companies in New Zealand, in para. 74 of the judgement: "*the fact the respondents are acting in accordance with all applicable regulatory constraints does not of itself preclude the interference being held unreasonable. The reasonableness assessment is claimant-focused."* See Exhibit S-58.

[228] Exhibit S-58, para. 127.

[229] Exhibit S-58, para. 6.

from other (legal) persons who equally contribute to climate change worldwide. As this remained unclear in the proceedings, the appellate court considered in this respect:

"This claim is brought against a small subset of those responsible for the harm that is being suffered by Mr Smith and those he represents. Mr Salmon was not able to identify any principled basis for singling out the seven defendants in these proceedings. If their contribution to climate change is an actionable wrong, the logic underpinning that finding would apply to every individual and every business that has not achieved net zero."[230]

396. The appellate court was thus confronted in this respect with a case which upon awarding would imply that every individual and every company in New Zealand is acting unlawfully if he or she has not achieved the point of net zero emissions by 2030 latest.

"If the courts were to accept the argument that the emitting activities of the defendants amount to a tort, it would follow that every entity (and individual) in New Zealand that is responsible for net emissions is committing the same tort. That is, all of those individuals and entities would be acting unlawfully, and could presumably be restrained from continuing to do so. That would be a surprising conclusion to say the least, with sweeping social and economic consequences."[231]

397. The problem with which the Court of Appeal was confronted was again underlined by the determination of the court of first instance, which was not disputed, that *"the respondents' collective emissions are miniscule in the context of the global greenhouse gas emissions."* Based on the most recent data, New Zealand as a whole emits 0.09% of global emissions. These seven New Zealand companies individually and collectively only account for a fraction of that 0.09%.[232] What is more, the claimant acknowledged that the matter did not concern a material contribution to global emissions.[233]

398. Insofar as can be determined from the judgement, it was only asserted that each of the companies is active in an industry in which emissions are added to the atmosphere or in an industry in which fossil fuels are supplied. The only other assertion that was added is that these seven companies are aware of or should be aware of the serious consequences of the emitting of greenhouse gas emissions. The facts and circumstances presented by the claimant which claimed to lead to liability were thus extremely summary. Against this background, no award was made in this case.

399. In view of the 172 circumstances (and more) presented by Milieudefensie et al. to support all grounds and circumstances relevant for an award (and which were barely disputed by Shell), Mr Smith's case cannot be a guideline for how to deal with this case.

400. A specific part of this case can be a guideline for how we deal with nature. One of the requested declaratory judgements related to acknowledging the "tikanga Maori", the norms and values of the Maori, which comprise several principles, including the principle for which a declaratory judgement was requested, i.e. the Kaitiakitanga principle (the principle of being a good guardian of the planet). According to the judgement, the requested declaratory judgement entailed:

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[230] Exhibit S-58, para. 19.

[231] Ibid

[232] See https://www.worldometers.info/co2-emissions/co2-emissions-by-country/.

[233] Exhibit S-58, para. 19.

> *"Kaitiakitanga as a principle of tikanga Maori incorporates concepts of guardianship, protection and stewardship of the natural environment including recognising that a right in a resource carries with it a reciprocal obligation to care for its physical and spiritual welfare as part of an ongoing relationship."*[234]

401. That the relationship between humans and nature is reciprocal, was fortunately recognised in 2022 in the UN General Assembly by accepting the right to a clean, healthy and sustainable living environment. The Maori and other indigenous peoples have known about that reciprocity for thousands of years and live their lives accordingly. We now know this too and if we want to respect human rights, we will now have to act in accordance with that wisdom.

4.5.3.4 Conclusion with regard to the margin of appreciation

402. Milieudefensie et al. clarified in this chapter that the margin of appreciation that the ECtHR grants to states applies in the constitutional relationship between the ECtHR and the contracting states of the ECHR.

403. Milieudefensie et al. has furthermore shown that the margin of appreciation only relates to the ECtHR's intensity of review, and not to the intensity of review that the domestic courts should apply. This particularly applies if the review does not concern government action, but the conduct of a private party like Shell. Domestic courts can and may carry out farther-reaching reviews and must do so if this is necessary for effective legal protection. The domestic courts are the first, most important and best equipped guardian of human rights in their jurisdiction, not the ECtHR. This also appears from the subsidiarity principle applied by the ECtHR.

404. The domestic courts have substantial freedom to provide protection above the minimum level that the ECHR seeks to offer. An intensive review also fits in with the protective concept of the ECHR and the method of review which the ECtHR proposes for the domestic courts, partly in view of Article 13 of the ECHR.

405. If this is necessary for an effective protection of rights, the domestic courts can therefore impose an order to reduce emissions. The judgements in the Urgenda show this too and none of the cases of the ECtHR and various foreign courts compared in this chapter stand in the way of that conclusion.

406. A comparison with the discussed foreign cases in fact confirms the need for a reduction order against Shell and shows how unique the climate issue is. No one will be able to escape the consequences of excessive warming of the earth and everyone will, sooner or later, be affected by the serious consequences of dangerous climate change. This even though there is only one single effective remedy for that violation, i.e. emissions reductions. There are no other effective remedies to curb the warming of the earth and the consequences thereof, as was concluded by the Court of Appeal and the Netherlands Supreme Court in the Urgenda case.

407. As there are no alternatives, which were available in the ECtHR judgements in which comparison was sought, with regard to the nature of measures to be taken, there can be no margin of appreciation.

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[234] Exhibit S-58, para. 7.

408. The foreign climate cases that were discussed all point in the same direction as well: the enormous need to achieve accelerated emissions reductions to prevent the violation of national constitutional rights and ECHR rights as much as possible.

409. If it is clear that emissions reductions are the sole effective measure, with sufficient data available, the court must also be able to reasonably determine what level of emissions reductions must be realised in order to make a proportional contribution to tackling the global climate problem. Otherwise the protection of rights cannot be effective, even though Article 13 ECHR requires this. In this case that proportional reduction contribution to be made can be determined for Shell, as will appear from Chapter 5 of this Defence on Appeal.

410. Lastly, it is important that Shell, by means of the requested reduction order, retains the freedom to carry out the reduction target at its own discretion. In this respect it is not being disproportionately impeded.

411. On the basis of these and other findings and conclusions drawn in this chapter, it can be concluded that the Court of Appeal can extend the rights laid down in the ECHR to this case and that the doctrine of the margin of appreciation cannot in any way lead to a restrained judicial assessment of Shell's conduct. This is why the Judgement and the related reduction order can be affirmed, taking account of all other relevant facts and circumstances of this case.

4.5.4 The UNGP and other guidelines for the protection of human rights

412. In the preceding parts of this Defence on Appeal, Milieudefensie et al., with reference to its documents at first instance, has shown that when applying all facts and circumstances of the case, the interpretation of the societal duty of care laid down in Article 6:162(2) DCC entails that Shell is subject to the legal responsibility to effect a proportional and adequate emissions reduction. This conclusion must be drawn both on the basis of the application of the doctrine of hazardous negligence and on the basis of the application of the horizontal effect of human rights law. Both applications show that this reduction obligation for Shell applies under Dutch law.

413. At first instance it was then shown that this outcome according to the rules of law is an outcome which is widely supported in the international community. This is because the international community desires that international companies with a (potentially) large impact on human laws and the environment chart that impact and in the event of (imminent) violations of the vulnerable interests of human rights and the environment, that they take independent and proactive measures to combat or reverse (imminent) violations.

414. This view, which is widely supported within the international community, on the conduct standards for business enterprises can be found in three international guidelines for business enterprises. These are the United Nations Guiding Principles on Business and Human Rights (UNGP), the United Nations Global Compact and the OECD Guidelines for Multinational Enterprises.

415. These three guidelines all de facto have the same content when it comes to the protection of human rights. In addition to human rights, the two latter guidelines specifically focus on protection of the environment.

416. These guidelines are not legally binding, but present the conduct standards which the international community desires (multinational) enterprises to comply with. These conduct

standards include, inter alia, the standard that companies may not undermine the ability of states to perform their state obligations with regard to human rights. Another standard is that the bigger the enterprise and the seriousness of the (impending) impact, the bigger the responsibility of the enterprise to prevent the negative consequences for human rights connected with the enterprise's activities by preventive and mitigating measures.

417. The (further) relevant content of the three stated guidelines was discussed by Milieudefensie et al. in great detail at first instance and is not disputed by Shell.[235]

418. Another important part of these guidelines which Milieudefensie et al. described at first instance has not been disputed by Shell, namely the background of the establishing of these guidelines.[236] The following can be said about this.

419. In the forming and establishing of the three international guidelines for companies it has been widely acknowledged that the globalisation of markets (and the ever larger multinational companies as a result thereof) have a large negative impact on the vulnerable interests of human rights and the environment. Within the system of international market concepts, commerce, upscaling, shareholders' value, stock prices, quarterly figures, short term profit maximisation, bonus structures and the like, enterprises pay little or no attention to protecting human rights and the environment.

420. This is easy to explain because no extra return can be made by means of concern for and protection of these vulnerable interests. Conversely, extra profit can be made by ignoring these vulnerable interests. Savings can be made on operating costs, which increases company profit. This forms a strong incentive for business enterprises to make the interests of humans and environment subordinate to the commercial interests of the business. The private profits of business enterprises are further increased at the expense of the public interests of human rights and the environment.

421. This is the well-known flip-side of globalisation. Van Dam refers in this context to "*wide-spread practices of cost externalisation by multinational enterprises"* leading to *"substantial environmental damage, damaged communities, serious harm to health, unsafe working circumstances, low wages, slave labour and child labour."*[237]

422. The UN Human Rights Council noted an increase in human rights violations by business enterprises in the 2000s as a result of the globalisation trend. The international community saw this as an unintended and unwanted side effect of globalisation that had to be addressed. There was a universal need to take extra measures to better protect human rights (and the environment) against the commercial interests of business enterprises.

423. At the same time it was noted that national governments and public institutions, due to the internationalisation of the business community, do not have a sufficient grip on internationally operating business enterprises, particularly as the business enterprises with an international concern can easily change country and therefore can to a great extent avoid (new) national

[235] Milieudefensie et al.'s Summons, Chapter X.5-X.8.

[236] Ibid

[237] C. Van Dam, Geschriften vanwege de Vereniging Corporate Litigation 2020-2021, p.178.

regulations.[238] Not only that, it was also noted that at international level there was no safety net available because of a lack of international supervision of and international regulation of multinational business enterprises.

424. Because of this discrepancy between nationally organised states and internationally organised business enterprises on the one part and the lack of international regulation of business enterprises on the other, it was established that due to the phenomenon of globalisation a power vacuum (a governance gap) had arisen in which and as a result of which internationally operating business enterprises found it ever easier to operate outside of the rules of individual countries, without fear of national or international sanctioning.[239]

425. UN Envoy, the late John Ruggie, the later author of the UNGP, summarised this as follows:

"The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."[240]

426. Unfortunately, the need mentioned by Ruggie to bridge the governance gap still exists. In 2022 the UN Special Rapporteur on Human Rights and the Environment again pointed to the governance gap, in particular in relation to the climate problem. This problem also exists because of the disproportional access of the (fossil) industry to political decision makers, according to the UN Special Rapporteur:

"Gaps exist in regulating major greenhouse gas emitting industries and sectors both within and outside national boundaries, making the achievement of the Paris Agreement goals more difficult.[241] […] Furthermore, it is evident that business elites with interests in the fossil fuel and carbon intensive industries have disproportionate access to decision-makers, a phenomenon that is described as "corporate capture".[242]

427. In the end John Ruggie concluded at the time in the mandate he received from the UN to study whether and how the power vacuum could be addressed, that self-regulation on the basis of international company guidelines to be drawn up (at that time) was the only achievable solution to close the governance gap as much as possible and actively involve companies in solving increasing infringements of human rights and the environment.

428. Against this background of the need for and the importance of self-regulation to close the power vacuum, Shell, just like many other (listed) multinational companies, committed to the

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[238] This always present threat of removing economic activities in case of extra regulations is what makes the political lobby of multinational companies so powerful. See also Milieudefensie et al.'s Notes on oral arguments 1, paras. 158-170 with reference to findings of John Ruggie, the author of the UNGP.

[239] Milieudefensie et al.'s Summons, Chapter X.5-X.8.

[240] Milieudefensie et al.'s Summons, para. 697.

[241] Exhibit MD-385, UN Special Rapporteur, 'Promotion and protection of human rights in the context of climate change', para. 14.

[242] Exhibit MD-385, UN Special Rapporteur, 'Promotion and protection of human rights in the context of climate change', para. 74.

UNGP, the OECD guidelines and the UN Global Compact, and Shell was even one of the founders of the UN Global Compact.[243]

429. With this Shell committed itself to contribute, in the interests of the protection of human rights and the environment, to closing the international governance gap. It can do so by taking its own responsibility in preventing and where necessary eliminating harm to humans and the environment in which the Shell Group is involved.

430. A basic principle of the UNGP which is important for this case is that companies have their own legal duty, separate from (the policy of) states to respect human rights:

"The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[244]

431. At the same time, Shell has also committed to another important standard, i.e. that it will not undermine the power of states to perform their state-actor human rights obligations.[245]

432. It was shown at first instance that in practice Shell is not performing this self-accepted responsibility to help protect humans and environment, thereby closing the governance gap. Its inadequate climate policy contributes to a non-negligible degree to the (impending) infringement of these vulnerable interests. It has also been shown at first instance that Shell (together with its colleagues in the industry and stakeholder associations) via political lobbying and direct marketing and PR policy, affects and undermines the ability of states to adequately shape the urgently necessary energy transition desired by states. This topic will be dealt with in further detail in Chapter 6 of the Defence on Appeal.

433. When discussing the three international company guidelines (embraced by Shell), Milieudefensie et al. showed at first instance that the duty of care that can be found for Shell via the application of the doctrine of hazardous negligence and the horizontal effect of the ECHR rights, is supported by what is internationally requested of business enterprises.

434. The duty of care is thus already found without making use of the international guidelines and ensues from the control and influence that Shell has on the Scope 1, 2 and 3 emissions of the Shell Group and to which Dutch tort law and Dutch jurisprudence attaches consequences. Having said this, there is no reason not to consider these guidelines when determining the duty of care. These international conduct standards should be considered by the court as objective reference points.

435. That non-binding guidelines can be involved in finding the duty of care ensues, inter alia, from the case law, which to an increasing degree gives meaning to soft law when filling in open standards.[246] This aligns with the intention of the legislature in the supplementary function of the criteria of reasonableness and fairness (Art. 3:12 DCC) and what is socially acceptable (Art.

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[243] Milieudefensie et al.'s Summons, paras. 700, 717, 720. Milieudefensie et al.'s Notes on oral arguments 1, para. 165.

[244] Exhibit MD-220, Commentary with UNGP Article 11.

[245] Exhibit MD-220, Commentary with UNGP Article 11.

[246] Opinion of A-G Valk, ECLI:NL:PHR:2020:412, with HR 26 June 2020, ECLI:NL:HR:2020:1148, *NJ 2020/293 (ISIS wives)*, para. 6.7.

6:162(2) DCC). What is more, practice shows that soft law frequently functions to pave the road for hard law.[247]

436. By means of the 'common ground' method, the ECtHR also attaches value to soft law guidelines. In the Urgenda case the Netherlands Supreme Court sought alignment with this practice of the ECtHR and the Netherlands Supreme Court confirmed that on the basis of the 'common ground' method, agreements and rules that are in themselves not binding can nevertheless have significance. This occurs on the basis that these rules and agreements form the expression of a very widely supported view or insight and are therefore relevant for the elaboration and application of the duty of care to be determined, according to the Netherlands Supreme Court.[248] The above-discussed two guidelines of the UN and the OECD guidelines evidently satisfy this criterion.

437. A similar view can be found in the literature. For example, Van Dam states:

"The UNGPs do not contain any binding obligations, but because many companies commit themselves to the UNGPs, this behaviour is increasingly becoming a part of what is socially acceptable for a company within the meaning of Art. 6:162 DCC. Self-regulation, codes of conduct and soft law play an important role in the development of unwritten law."[249]

438. With regard to the importance of self-regulation by codes of conduct, Van Dam furthermore states:

"[T]he greater the inequality of power and the more the dispute concerns a more fundamental interest, the more the company should have its conduct in part determined by the interests of the injured party. For example, by taking account of the inequality of arms and by not using its position of power for its own benefit."[250]

439. That the inequality of power mentioned by Van Dam leads to extra responsibility also appears from the guidelines themselves, which indicate that the bigger the company and the seriousness of the impact, the greater the responsibility to prevent these negative consequences for human rights by preventive and mitigating measures. Milieudefensie et al. previously showed that the aspect of the inequality of power equally plays an important role in the application of the horizontal effect of human rights.

440. Against the background of what has been asserted above with regard to the application to the doctrine of hazardous negligence, the horizontal effect of human rights and the international business guidelines, nothing else can be said other than that the District Court dealt with these matters in a completely correct context. This appears simply from the summary of Milieudefensie et al.'s assertions presented by the District Court in para. 3.2 of the Judgement.

441. Shell therefore wrongly asserts in its Appeal that the District Court allegedly only based the duty of care and related reduction task established in the Judgement, on the application of non-binding guidelines, in particular the UNGP.

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[247] Milieudefensie et al.'s Notes on oral arguments 6, paras. 58-76, Milieudefensie et al.'s Summons, paras. 712-715.

[248] HR 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda/State), para. 6.3, discussed in Notes on oral arguments 6, paras. 58-76.

[249] Van Dam, Aansprakelijkheidsrecht, 2020, paras. 1203-4.

[250] Ibid

442. The District Court evidently took a much broader approach than the UNGP, which is apparent in para. 4.4.1, in which the District Court asserts that Shell's reduction obligation ensues from the standard of care laid down in Article 6:162 DCC and that when elaborating that standard, it comes down to an assessment of all circumstances of the case. In para. 4.4.2. of the Judgement, the District Court then listed 14 circumstances which it included in the elaboration of the standard. Those circumstances include, inter alia, the implications of the fundamental rights laid down in Articles 2 and 8 ECHR that are at issue and (in line with the reasoning underpinning the doctrine of hazardous negligence) the size of Shell's CO2 emissions, the consequences of the CO2 emissions for the Netherlands and the Wadden region and the onerousness and proportionality for Shell in performing the reduction obligation.

443. The District Court specifically mentions the UNGP as one of the 14 circumstances. Considerations in the Judgement show, however, that the District Court equally attaches importance to the OECD guidelines and the Global Compact, but opted to specifically highlight the UNGP because the UNGP, with regard to content, corresponds with the two other guidelines and the UNGP also provides a guideline in EU context.[251] The substance of the OECD guidelines is, in addition, specifically cited in the Judgement to interpret the unwritten standard of care.[252]

444. That the District Court included as one of the 14 circumstances the above-mentioned guidelines as soft law in the weighing of interests, fits within the above-mentioned whole within the court's task to seek as many objective reference points as possible, when interpreting an open standard in order to establish what the societal duty of care should encompass in the case in question.

445. In view of the above, Shell therefore wrongly asserts that the District Court only relied on the UNGP.

446. In addition, Shell wrongly asserts that the District Court incorrectly interpreted the UNGP. The following can be said about this.

447. According to Shell the District Court supposedly confused the terms "control" and "influence" with the "responsibility" under the UNGP for all companies to respect human rights, which responsibility depends on the degree of involvement of a company in the negative consequences for human rights. Shell furthermore asserts that the District Court acknowledged on the one part that the UNGP is not a binding legal framework, but on the other considers that it is internally generally accepted that business enterprises should respect human rights. The District Court should therefore not have used the word "should" because it suggests a hard legal obligation.

448. By means of this reasoning on the allegedly incorrect interpretation of the UNGP by the District Court, Shell first of all fails to note that in this case the words "control" and "influence" primarily have a meaning outside of the application of the UNGP. The terms control and influence are terms of Dutch liability law, specifically the doctrine of hazardous negligence, and are applied as such by the District Court.

449. Within the context of the doctrine of hazardous negligence, at first instance a great deal of attention was paid to the control and influence that Shell has on the CO2 emissions (Scope 1, 2 and 3) of the Shell Group. As discussed in this Defence on Appeal when discussing Kelderluik factor 4 (the nature of the conduct), in that context the District Court determined the

[251] Judgement, para. 4.4.11.

[252] Judgement, para. 4.4.14.

aforementioned control and influence of Shell and Shell did not present a ground of appeal against this point.

450. The importance of having control over and influence on the acts of hazardous negligence and/or the conduct in violation of fundamental rights appears, inter alia, from the cases already discussed in this Defence on Appeal, the Urgenda case, the cases relating to gas extraction in Groningen and the fireworks storage in Enschede, as well as the court judgements in foreign climate cases. What these judgements have in common with each other is that the parties breaching the law were accused in all these cases of not having exercised the control and influence that they have on the acts of hazardous negligence and the conduct in violation of fundamental rights, in accordance with the standard of the duty of care that may be demanded.

451. In short, the legal obligations that apply to Shell due to its control over and influence on the Scope 1, 2 and 3 emissions of the Shell Group, ensue from the application of the doctrine of hazardous negligence and the Dutch legal doctrine of the indirect horizontal effect of the rights laid down in the ECHR. Therein lies the basis of the hard legal obligation for Shell to reduce the size of the CO2 emissions of the Shell Group in order to address its share in the hazardous negligence and the (imminent) human rights violations.

452. Contrary to what Shell suggests, neither the District Court nor Milieudefensie et al. has asserted that the UNGP (and other international guidelines) in itself establishes the legal duty. The UNGP (and the other international guidelines) do demand of Shell that it address the (imminent) human rights violations and does what is necessary to prevent these violations.

453. That the UNGP also lean toward reduction measures being taken, as the District Court has assumed, is fully in alignment with the findings of the UN Special Rapporteur on Human Rights and the Environment. The UN Special Rapporteur indicated in his report of 2019 that the rules of the UNGP in relation to the climate problem require, inter alia, that companies (i) reduce their own emissions and those of their subsidiaries, (ii) reduce the emissions of their products and services, (iii) reduce the emissions of their suppliers and (iv) must cease their lobby against public climate policy.[253] This clearly shows that a correct interpretation of the UNGP means in the light of the climate problem that in this case the degree of involvement of Shell in the (imminent) human rights violations is so close that it bears responsibility for the reduction of the Scope 1, 2 and 3 emissions of the entire Shell Group which it manages.

454. The foregoing demonstrates that the District Court rightly allocates to Shell a legal reduction obligation. The outcome found by the District Court not only fits within the Dutch legal system, but also within what the international community desires and expects of internationally operating business enterprises that have an impact on human rights and the environment. It is evident that Shell, with its conduct, actually does have such impact.

455. Where the District Court asserts that the UNGP indicates that companies must respect human rights, it is clear that the District Court understands that this must be understood in a soft law context and the District Court uses no other words than those which are literally used in the UNGP itself: *"Business enterprises should respect human rights."*[254] Shell cannot reproach the District Court for adhering to the same terminology as that which is used in the UNGP itself.

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[253] Statement on the record, being an explanation of the amendment of claim in relation to the relief sought, part 1A of Milieudefensie et al., para. 36 and Exhibit 270, pp. 19 and 20.

[254] Exhibit MD-220, UNGP Article 11. See also Milieudefensie et al.'s Summons, para. 711.

456. It is against the background of this correct use by the District Court of both the hard law components and the soft law components of this case, that the District Court determined on correct grounds that Shell has a duty of care to reduce emissions.

457. The decision of the District Court is a good example of the state protection which case law must offer on the basis of the UNGP against legal infringements by companies. Van Dam comes to the same conclusion and summarises it well:

"On the basis of UNGP 1 states must take appropriate measures to prevent, investigate, punish and rectify human rights violations by businesses by means of effective policy, legislation and case law […] The decision of the District Court [in the Shell case] can be seen in the light of the principles in the UNGP's. UNGP 26 charges states with taking appropriate measures to guarantee the effectiveness of legal proceedings when tackling business-related human rights violations and to prevent that justified claims cannot be addressed, e.g. because the way '... in which legal responsibility is attributed among members of a corporate group facilitates the avoidance of appropriate accountability."[255]

458. Concerning the UNGP, Shell lastly reproaches the District Court that no specific and concrete reduction obligation of 45% by 2030 can be deduced from the UNGP and that therefore the reduction order should not have been imposed.

459. It is correct that such a specific reduction obligation is not in the UNGP, just as no such specific reduction obligation can be found in Article 6:162(2) DCC or in Articles 2 and 8 ECHR. But this is irrelevant. What is at issue is whether in conjunction with the other facts and circumstances and objective reference points of this case, a specific and adequate elaboration of the duty of care can be achieved. This is also the basic principle of the UNGP which requires "*adequate measures"* for every (imminent) violation.[256]

460. In view of all facts and circumstances and objective reference points in this case, the (minimum) adequate measure that must be taken is that Shell must reduce the emissions of the Shell Group by at least 45% by 2030. The District Court rightly imposed an order in this respect. The accuracy of the reduction percentage of 45% will be explained in further detail in Chapter 5 of the Defence on Appeal. In that chapter, as well as in Chapters 7.3 and 7.4, Milieudefensie et al. will, inter alia, also go into the value of the Oxford report, as Shell makes that value a topic of discussion, in particular in relation to the reduction obligation with regard to the Scope 3 emissions.

4.5.5 Conclusion

461. In this Chapter 4.5 Milieudefensie et al. has first of all clarified the globally accepted relationship between climate change and the violation of human rights. It was then shown that the District Court applied the doctrine of the horizontal effect of human rights in the right way. It has also been shown that sufficient substantiation was presented in the Judgement and how the human rights at issue were involved in the weighing of interests by the District Court and that the weighing of interests that were made are correct.

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[255] C. Van Dam, Geschriften vanwege de Vereniging Corporate Litigation 2020-2021, pp. 179 and 207.

[256] Exhibit MD-220, Commentary with Article 11 UNGP.

462. Furthermore, Milieudefensie et al. demonstrated that in human rights law the domestic court must ensure effective legal protection against (impending) human rights violations and that the reduction order for Shell is necessary to provide that effective legal protection. It has also been demonstrated that Shell's private policy discretion will not be further limited by the reduction order than is necessary and that Shell retains the freedom to implement the reduction task as it sees fit.

463. The District Court therefore drew on the rights laid down in the ECHR on the correct grounds and method in the assessment of Shell's duty of care and the reduction order that was imposed.

464. The District Court, also on the correct grounds and method, involved the international business guidelines (which were embraced by Shell), which demand of multinational business enterprises that they and their business activities respect the vulnerable interests of human rights and the environment and act accordingly, in order to, in that manner, independently cooperate in bridging the evident power vacuum created by globalisation (the governance gap).

5. Applying the global reduction percentage of 45% by 2030 to Shell's duty of care

5.1 Introduction

465. In Chapter 5 of the Appeal, Shell specifically objects to the reduction percentage of at least 45% by 2030 that the District Court imposed on Shell.

466. Milieudefensie et al. will explain in Chapter 5.2. below that the District Court rightly imposed this specific reduction percentage of at least 45% and that there are sufficient objective reference points for this. Said explanation will furthermore show that, in view of the context-related character of the societal duty of care, precisely the specific facts and circumstances that apply to Shell, show that a 45% reduction as of 2030 is the absolute lower limit of what Shell should do.

467. Chapter 5.3 clarifies that Shell's argument on the sectoral reduction pathways based on model calculations for oil, coal and gas respectively, is not a reason to decide against affirmation of the order imposed by the District Court to achieve a net 45% reduction in 2030. That many model calculations lead to a faster phasing out of the coal production than of oil and gas production, has to do with specific (purely) theoretical assumptions, with regard to which the IPCC and others openly acknowledge that these assumptions are somewhat at odds with the principle of Common But Differentiated Responsibilities, the precautionary principle and other aspects related to the international conventions and social contracts in societies. When it comes to the 'real world' division of the reduction task by industrial sector, the theoretical model outcomes are therefore only usable to a limited degree and are certainly not the best guideline for determining what an honest, proportional and adequate contribution must be for an individual business. It will also be clarified that there is no coordination between the oil, coal and gas sectors regarding which sector will make which contribution to tackling the climate problem. Yet one more reason why the model outcomes are not translated into practice. It is therefore not surprising that international protocols for the emissions reduction task for companies are based on at least maintaining the global reduction average of a minimum of 45% reduction by 2030 and, in addition, encouraging companies to apply higher reduction targets for 2030.

468. Chapter 5.4 clarifies that Shell's argument that account should be taken of Shell's specific customer portfolio, cannot succeed. Shell argues that it has many customers in the 'harder to abate' sectors and that for that reason maintaining the global average cannot be demanded of

it. It will be clarified that in 2030 Shell will still be able to sell a quantity of 55% or more of the fossil fuels sold in 2019, that this is sufficient and that in 2021 the IEA clarified in its NZE2050 report that no industrial sector requires investments in new oil and gas fields. It will appear that continuing with said investments, as Shell is doing, will only make the energy transition more difficult for all industrial sectors. Furthermore, this chapter will clarify that for another reason too Shell's customer portfolio cannot be a guideline for finding the right reduction duty. This would mean that Shell's obligation is supposedly only derived from the reduction tasks of Shell's customers and not from Shell itself. However, this case is evidently concerned with Shell's own obligation and not that of its customers.

469. Lastly, Chapter 5.5 will demonstrate that the global reduction task for 2030 is now already above 45% and is becoming increasingly urgent. Even the developments in climate science that have taken place after the Judgement show that the urgency of actions since the Judgement has only increased, as has the importance of (upholding of) the reduction order the District Court imposed on Shell.

5.2 The global 45% CO2 reduction to be realised by 2030 as minimum starting point

470. Milieudefensie et al. set out at first instance on the basis of IPCC data that by 2030 global CO2 emissions must have been reduced by at least 45% relative to 2010. After that the CO2 emissions must continue to drop and the net zero point must have been reached globally by 2050 latest. This emissions reduction pathway gives a 50% chance that global warming can be limited to 1.5°C. At the same time it gives an 85% chance that the warming will stay well below 2°C.[257]

471. This global emissions reduction pathway does not offer any guarantee that the earth will not warm by more than 1.5°C or even more than 2°C this century. It does offer the world the biggest possible chance of preventing the most serious consequences of dangerous climate change.[258]

472. The District Court took over these facts in the Judgement[259] and Shell did not present a ground of appeal against this establishing of facts.

473. At the end of 2021 (after the Judgement), the Glasgow Climate Pact was made during the UN Climate Conference in Glasgow.[260] The countries that signed the Paris Agreement, in their collective decision making as the "Conference of the Parties" (COP), indicated in said Pact that the "*critical decade*" is now upon us to close the gap between words and deeds:

"The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Recalling Article 2 of the Paris Agreement […] Stresses the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement;" [261] (emphasis added by counsel)

474. The Conference of Parties confirmed in the Glasgow Climate Pact the need for the global reduction task of 45% for 2030 and the net zero goal for 2050:

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[257] Milieudefensie et al.'s Summons, Chapter XI.2.2, Notes on oral arguments 8, paras. 19-42.

[258] Ibid

[259] Judgement, paras. 2.3.5.2 and 4.4.29.

[260] **Exhibit MD-348**, Glasgow Climate Pact, Decision 1/CMA.3 of 13 November 2021.

[261] Exhibit MD-348, Glasgow Climate Pact, beginning and para. 5.

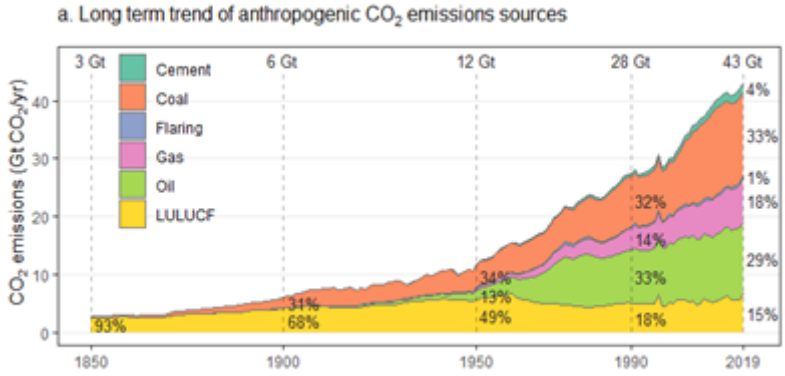
"Recognizes that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around midcentury, as well as deep reductions in other greenhouse gases" [262]

That there is no misunderstanding about what the global reduction targets are for 2030 (45%) and 2050 (net zero) also appears from Shell's acknowledgement relating to these goals.[263] The need to reduce global CO2 emissions by 45% in 2030 relative to 2010 levels is therefore not up for discussion.

475. Milieudefensie et al. explained at first instance what this global consensus on the reduction goals for 2030 and 2050 means for the energy sector. In that respect reference is made to the World Energy Outlook 2020, published in 2020, in which the International Energy Agency (IEA) introduced the "*Net Zero Emissions by 2050 (NZE2050)*" scenario. In that scenario the IEA applied the globally necessary emissions reduction path to net zero in 2050 to the energy sector.[264]

476. The District Court took over these facts in the Judgement[265] and Shell did not present a ground of appeal against this establishing of facts.

477. The global emissions reduction target of 45% in 2030 and net zero in 2050 is of direct importance for the energy sector. This can also be explained because no less than 81% of the CO2 emissions in the world are caused by the production and burning of oil, coal and gas. Global CO2 emissions are almost equal to the emissions of the use of these fossil fuels. This also appears from the following figure in the IPCC report of 2022:[266]



478. This figure of the IPCC shows that the use of oil, coal and gas accounts for 29%, 33% and 18% respectively of global CO2 emissions. An additional 1% of the emissions is caused by flaring of the gases released in the extraction and processing of oil and gas. The use and extraction of oil, coal and gas together account for 81% of global CO2 emissions.[267]

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[262] Exhibit MD-348, Glasgow Climate Pact, para. 22.

[263] See, inter alia, Appeal, para. 3.2.10.(b).

[264] Milieudefensie et al.'s Notes on oral arguments 8, paras. 23-26.

[265] Judgement, para. 2.4.11.

[266] **Exhibit MD-349**, IPCC AR6 WGIII, Technical Summary, Figure TS.3 on p. TS-16.

[267] As appears from the figure of the IPCC, the other sources of CO2 are: cement production (4%) and land use (15%). Land use is referred to by the abbreviation LULUCF, that stands for Land Use, Land Use Change, Forestry.

479. The emissions of the energy sector consequently account for more than a 4/5 share of global CO2 emissions. In order to be able to achieve the global reduction targets for 2030 and 2050, the energy sector will therefore have to contribute to the global task equally and fully.

480. Milieudefensie et al. explained at first instance that according to the Science Based Target Initiative, it is best practice to use at least the same reduction targets for 2030 for individual companies as those that apply at global level.[268] As in 2030 the global emissions must have decreased by a minimum of 45%, the same percentage as best practice for individual companies.[269] The same basic principle is used as best practice for business enterprises in the protocol for business enterprises, Race to Zero, that is discussed further on in this chapter. Race to Zero operates under the flag of the United Nations.

481. For companies in the energy sector (and the energy sector in general), adhering to this best practice is all the more important, in view of the importance of those companies (and the sector) for reducing global CO2 emissions.[270]

482. Bearing in mind the above-mentioned transition from global level to sector level, and from global level to company level, Milieudefensie et al. argued at first instance that Shell must at least adhere to this percentage of 45% in order to realise its societal duty of care.

483. An additional reason given by Milieudefensie et al. for this conclusion is that within the global energy sector there are no existing or pending agreements, regarding which company or which part of the energy sector will make which contribution to achieving the global target. In the event of lack of the existence of such division agreements within the sector, there is therefore, bearing in mind the precautionary principle, all the more reason for Shell to seek alignment with the global target.[271]

484. This same approach was also applied by the District Court, the Court of Appeal and the Netherlands Supreme Court in the Urgenda case.

485. The reduction percentage of at least 25% in 2020 relative to 1990 that was imposed on the State of the Netherlands was the reduction percentage for which it was scientifically determined that this was the minimum percentage that the total group of developed countries (the 42 Annex 1 countries to the UN Climate Convention) should have achieved in 2020. This scientifically determined percentage was then taken over by the Conference of Parties to the UN Climate Convention. In science and in COP-context it was explicitly not indicated that the percentage of a minimum of 25% in 2020 that was applicable to the Annex 1 group, should be achieved by each of the 42 Annex 1 countries individually.

486. Nevertheless the District Court, the Court of Appeal and the Netherlands Supreme court translated this target of a minimum reduction of 25% reduction in 2020 to an individual obligation for the State of the Netherlands. This is because the Netherlands is one of the richest countries, emits a relatively large amount per capita and consequently also has a greater responsibility than average to reduce emissions. The Netherlands should therefore at least

[268] Milieudefensie et al.'s Notes on oral arguments 8, para. 22 in conjunction with Notes on oral arguments 7, paras. 33 and 34.
[269] Ibid
[270] Further on in this chapter it will be clarified that the energy sector as a whole (coal, gas and oil sector together) must have reduced CO2 emissions by 49% by 2030 relative to 2019.
[271] Milieudefensie et al.'s Notes on oral arguments 8, para. 26.

adhere to the average emissions reduction level that applies to the group of developed (Annex 1[272]) countries as a whole, i.e. 25% in 2020.[273]

487. In line with this reasoning, it can also be established for Shell that, seen from both a global and sector perspective, Shell has a greater responsibility than average for the climate problem (and how to tackle it) and thus must at least maintain the emissions reduction level that must be globally realised by 2030. As was made clear at first instance, Shell, both from a historical perspective and a contemporary perspective, is one of the biggest climate polluters in the world and it has, as one of the biggest and richest companies in the world, the (financial) capacity, knowledge and skill for effecting far-reaching emissions reductions and bearing the burdens thereof.[274]

488. If the developed countries and developing countries together with their citizens and companies must on average achieve a 45% reduction in 2030 in order to be able to adequately tackle the climate problem at a global level, it is no more than reasonable to demand that one of the richest companies, which at the same time is also one of the companies most responsible for causing the climate problem, must at least align with that global average.

489. It is therefore not surprising that Oxford University, in its analysis of the climate protocols for companies that are in circulation, comes to the conclusion that there is great agreement within these different climate protocols regarding the basic principle that large companies from Western jurisdictions that emit a lot of greenhouse gases and also bear a historical responsibility for the climate problem, must set the most far-reaching emissions reduction targets of all.[275] This too shows that the minimum standard for a company like Shell really cannot be less than what may be expected on average from companies on the basis of these climate protocols. (Milieudefensie et al. will discuss the authoritative status of the Oxford Report in Chapter 7.)

490. Everything, in fact, indicates that Shell should do far more than the global average reductions by public and private parties. Just like a developed country on the basis of the principle of Common But Differentiated Responsibilities (CBDR principle), as embedded in the global climate regime,[276] must have reduced far more CO2 than the global average of 45% by 2030, so a company like Shell also has a much greater responsibility than an average company and according to the same CBDR principle (that is also part of the business protocols) Shell would therefore have to reduce by more than 45% by 2030. The CBDR principle in essence means that the parties that have a historic responsibility for the climate problem and have the most capacity to address the problem, must take the lead in the global climate task.

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[272] The term Annex I countries is related to the UN Climate Convention and refers de facto to the group of companies which are noted as developed countries in Annex I to the UN Climate Convention. The developing countries are therefore also referred to as Non-Annex I countries.

[273] Ibid, paras. 27-29 with reference to para. 60 of the judgement of the Court of Appeal in the Urgenda case and the support expressed by Langemeijer and Wissink in paras. 4.180-4.182 of their Opinion for the judgement. With regard to the fact that during various COPs the scientific findings of a reduction of at least 25% in 2020 for Annex 1 countries has been taken over by the Conference of Parties, see para. 11 of the judgement of the Court of Appeal. Furthermore, for this case the same path of (i) scientific findings, followed by (ii) the taking over of those findings by all countries in COP context, has also occurred with regard to the need for a global CO2 reduction of 45% by 2030, as has already been explained in this chapter.

[274] Ibid, paras. 29.

[275] Milieudefensie et al.'s Notes on oral arguments 8, paras. 30 in conjunction with Notes on oral arguments 7, paras. 16-23.

[276] See UN Climate Convention 1992, preamble and Articles 3.1, 4.1 and 4.2.a; See Paris Agreement, preamble and Articles 2.2, 4.3 and 4.19.

491. In any event, Shell itself shares this opinion. As stated by its CEO, Shell believes that it has to do more than the global average, because Shell, just like the developed countries, belongs to that part of the global society that can move faster than the global average and, according to its CEO, must therefore move faster than the global average.[277] In 2020, based on a scenario in which the world would have to achieve net zero emissions by 2060, Shell believes it must have reached that target at latest in 2050, and if possible, earlier. CEO Van Beurden puts it like this:

"Global society, overall, may have until around 2060 to reach net-zero emissions. But Shell recognizes that it stands within a section of society that needs to move faster. And so that is what we intend to do. […] By 2050, Shell intends to be a net-zero emissions energy business. And we will be net-zero emissions before 2050, if that is possible."[278]

492. This statement by Van Beurden shows the reasonableness of the above-mentioned criteria which apply in the climate protocols for business enterprises, on the basis of which Shell has a more than average responsibility.

493. Bearing in mind the fact that Shell too now recognises that global society no longer has until 2060, but only until 2050 to reach the point of net zero emissions,[279] and that Shell in its own words must move about a decade faster than the world as a whole, Shell must thus have reached the net zero point around 2040 (or earlier).

494. An additional basis for that conclusion is that Shell achieves 69% of its turnover in developed (Annex 1) countries.[280] Because the developed countries, as already indicated above, must have reduced emissions far more than the average 45% in CO2 by 2030, Shell can for the greater part of its turnover take advantage of that requisite higher reduction trend in the developed countries.

495. In this manner Shell will also help reinforce the ambitions and goals of the developed countries. This reinforces Shell's own transition power. This is the flywheel effect that UNFCCC and UNEP believe of great importance, the flywheel effect that can generate climate action on the part of companies and that has become a necessary part of achieving the Paris temperature goal.[281]

496. The fact that Shell primarily obtains its turnover from the richer developed countries and these countries, on the basis of the CBDR principle, in addition to their CO2 emissions, must also phase out their oil and gas production more quickly, makes it all the more reasonable that Shell move faster than the global average.

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[277] Milieudefensie et al.'s Notes on oral arguments 8, paras. 31-34.

[278] Ibid

[279] See, inter alia, para. 1.4.1 Appeal.

[280] **Exhibit MD-350**, Shell Tax Contribution Report 2020. Shell's specification shows that 69% of its turnover comes from developed (Annex 1) countries. This report sets out the "total revenues" per country for the 83 countries in which Shell is active on pp. 144-146. Shell's total annual turnover in those 83 countries comes down to 439 billion US dollars. Of the 83 countries, 29 countries belong to the developed (Annex 1) countries in which an annual turnover of 303 billion is realised. With 303 billion, the Shell activities in the 29 Annex 1 countries consequently contribute for 69% to Shell's total annual turnover of 439 billion. The other 31% of the annual turnover was realised in the 54 non-Annex countries. The 29 Annex 1 countries in question (following the English alphabetical order presented by Shell): Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States of America. See for the list of the Annex 1 countries with the UN Climate Convention, the UNFCCC website via https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states.

[281] With regard to the flywheel effect to which UNFCCC and UNEP attribute such importance, see Milieudefensie et al.'s Notes on oral arguments 1, paras. 136-147.

497. That the developed countries, in order to reduce their CO2 emissions more quickly than average, must therefore phase out their oil and gas production more quickly than average, speaks for itself. One is connected with the other. However, precisely what this means can be determined from the report of the Tyndall Centre for Climate Change Research.[282]

498. The Tyndall Centre is a partnership of four universities in the United Kingdom. They applied the CBDR principle to the carbon budget that is connected to the global target of a 45% emissions reduction in 2030 and net-zero emissions in 2050. They then analysed what this means for the oil and gas producing countries in the world.

499. According to their report from 2022, application of the CBDR principle means that the richest oil and gas producing countries with high CO2 emissions (like the UK, the Netherlands, the US and Qatar) must have phased out their oil and gas production to zero by 2034. The oil and gas producing countries which belong to the middle income group (like Mexico, Oman, China and Brazil) must have reduced their production to zero by 2043. The poorest countries (like India, Iraq, Venezuela and Nigeria) only need reach this zero point for their oil and gas production in 2050.[283]

500. The Tyndall Centre report shows, in conjunction with the fact that Shell derives far and away most of its turnover from the richest countries, that the reasoning of Shell's CEO, i.e. that Shell must achieve net-zero emissions at least a decade earlier than the world as a whole (and even earlier if this is possible for Shell), is correct. This means that Shell should indeed achieve net-zero emissions in 2040 or earlier, with ditto consequences for the 2030 task.

501. The case can be made that Shell should move faster than the global average and thus reduce more than 45% in 2030 and achieve net zero emissions faster than in 2050.

502. That Shell should actually do (far) more than Milieudefensie et al. is requiring as a minimum of Shell, also ensues from the update of the criteria (Criteria 3.0 of 2022) of the Race to Zero initiative touched upon at first instance, which was developed under the auspices of the United Nations.[284] The following serves by way of explanation.

503. The UN initiative Race to Zero falls under the secretariat of the UN Climate Convention (UNFCCC). In the meantime over 1,000 cities and 6,000 companies, investment funds and institutions have been affiliated with this initiative.[285] The Criteria 3.0 encompass, inter alia, that every affiliated private or public party as a basic rule must have reached the point of net zero emissions as quickly as possible (and in any event no later than in 2050) and must have reduced emissions by at least 50% by 2030.[286]

504. The Criteria 3.0 assert that the submitted climate plans of applications are assessed by the Expert Peer Review Group (EPRG), which is chaired by the University of Oxford. In order to inform applicants in advance as to how the plans will be reviewed, the EPRG has compiled a

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[282] **Exhibit MD-351**, Tyndall Centre for Climate Change Research, Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets, 2022.

[283] Ibid, p. 6 under 4 and p. 41.

[284] See for the background and the importance of this UN initiative Milieudefensie et al.'s Notes on oral arguments 7, paras. 13-16.

[285] **Exhibit MD-352**, Extract from the website of the UNFCCC Race to Zero Campaign.

[286] **Exhibit MD-353**, UNFCCC Race to Zero Criteria 3.0 of 2022, p. 2.

guide (Interpretation Guide) in which it is described how the Criteria 3.0 will be applied. The Interpretation Guide sets out, inter alia, that applicants must in any event develop the following target for 2030 and 2050:

"Pledge at the head-of-organisation level to reach (net) zero GHGs as soon as possible, and by 2050 at the latest, in line with the scientific consensus on the global effort needed to limit warming to 1.5C with no or limited overshoot, recognising that this requires halting deforestation and phasing down and out all unabated fossil fuels as part of a global, just transition. Set an interim target to achieve in the next decade, which reflects maximum effort toward or beyond a fair share of the 50% global reduction in CO2 by 2030. Targets must cover all material greenhouse gas emissions: 1. Including scopes 1, 2 and 3 for businesses and other organizations."[287] (Emphasis added by counsel)

505. In addition, applicants who can do so, must set farther-reaching targets for 2030 because account must be taken of the principle of "fair share" (abbreviated titled for the principle of Common But Differentiated Responsibilities). The Interpretation Guide has the following, inter alia, to say about the realisation of that 'fair share':

"One key dimension, amongst others, informing "fair share" is the time by which actors reach a state of (net) zero emissions.

i. Many actors in Race to Zero can and must go beyond 50% of emissions reductions by 2030, and must achieve an end state net zero well before 2050, as part of the requirement for entities in the campaign to contribute their fair share of achieving net zero as soon as possible.

ii. In parallel, developing country actors may require more flexibility on their pathway to net zero and may find it challenging to halve their emissions by 2030."[288] (Emphasis added by counsel)

506. Where companies and cities in developing countries are thus given some flexibility, companies and cities from the developed countries, if they can reduce by more than 50% in 2030, they should do so, because of the fair share principle. More is thus required of companies like Shell, because they have the capacity to bring about higher reductions than 50% in 2030 and achieve net zero earlier.

507. Despite there being sound reasons to state that for the above-mentioned reasons Shell should reduce by far more than 45% by 2030, Milieudefensie et al. opted in these proceedings to seek alignment with the global average, so that a detailed discussion regarding the question whether Shell should do more than the global average is not necessary. The fact that this case is the first of its kind in the world, has also contributed to that restrained approach. In addition, adhering to the global average in all respects ensures that Shell retains the leeway to remain active in developing countries, even if this is only a limited part of Shell's activities. The order therefore does not in any way encroach on the principle of Common But Differentiated Responsibilities, but in fact supports this (whoever can do more, must do more). The order would provide even more support for this principle, in view of the fact that Shell is active in particular in developed countries, if a higher percentage than 45% were imposed on Shell. The fact that this approach ensues from the protocols of an initiative that is being carried out under the flag of the United Nations, underlines that the order issued by the District Court does not affect the CBDR principle.

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[287] **Exhibit MD-354**, Interpretation Guide Race to Zero Expert Peer Review Group Version 2.0 June 2022, p. 3.

[288] Ibid, p. 6.

508. On the basis of the above, and partly bearing in mind the above-discussed considerations in the Urgenda case, it is easy to clearly determine that a reduction standard of 45% CO2 reduction in 2030 is the absolute lower threshold of what Shell must do to realise its duty of care. If Shell reduces less than (net) 45% CO2 by 2030, it will definitely be taking more risks than is socially responsible.

509. It is established that Shell can actually realise that emissions reduction of 45% and at the same time still be a profitable company in 2030. Milieudefensie et al. presented detailed substantiation for this at first instance, without dispute from Shell.[289]

510. It is furthermore evident that Shell will have to reduce its emissions to net zero in 2050 or earlier no matter what, as Shell itself also asserts. The 45% emissions reduction which was ordered by the District Court must in any event be realised by Shell at some point in time, on the road to its own net zero target by 2050 latest. The 45% reduction in 2030 is in this respect thus a "no regret" reduction, because this reduction will at some point be unavoidable for Shell no matter what. It underlines that the reduction order imposed on Shell is not unreasonably onerous.

511. Milieudefensie et al. explained at first instance that every year that there are insufficient global reductions, the reduction task for 2030 will only increase further and will therefore be greater than the 45% reduction relative to 2010 levels which the IPCC calculated in 2018 in the SR15 report of that year.[290] This now turns out to be the case.

512. The IPCC AR6 report of 2022 presents in the Summary for Policymakers of Working Group 3 that the CO2 emissions must have been reduced by 48% by 2030 relative to 2019 levels (and thus no longer relative to 2010 levels) to remain within the carbon budget that gives a 50% chance to limit the warming to 1.5°C:

"In pathways that limit warming to 1.5°C (>50%) with no or limited overshoot global net CO2 emissions are reduced compared to modelled 2019 emissions by 48% [36–69%] in 2030 and by 80% [61–109%] in 2040;"[291]

513. The global task has thus become larger, due to slow climate action, not only because the emissions reduction percentage has increased from 45% to 48%, but also because global CO2 emissions in 2019 (the new reference year applied by the IPCC) are greater than those of 2010. That larger amount of CO2 of 2019 must now be reduced by 48%, so that the quantity of CO2 emissions to be reduced by 2030 is thus greater than before. This reflects the enormous urgency of the task and consequently the need to immediately reduce CO2 emissions in a manner that is "*rapid, deep and sustained"*, to quote the previously cited words of the Glasgow Climate Pact.[292] This also shows, once again, that the emissions reduction of 45% demanded by Milieudefensie et al. compared to the level of 2019 is not asking too much.

514. The IPCC still sees the 48% reduction task for 2030 compared to 2019 as achievable. According to the IPCC, the mitigation potential (the utilisation of all available mitigation options) is such that the global emissions in 2030 can still fall by more than 50% compared to 2019:

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[289] Milieudefensie et al.'s Summons, Chapter XI.5, Notes on oral arguments 8, paras. 73-106.

[290] Milieudefensie et al.'s Notes on oral arguments 8, paras. 6 et seq.

[291] **Exhibit MD-355**, IPCC AR6 WGIII, Summary for Policymakers, p. 21 under C.1.2.

[292] Exhibit MD-348, Glasgow Climate Pact, para. 22.

"The total emission mitigation potential achievable by the year 2030, calculated based on sectoral assessments, is sufficient to reduce global greenhouse gas emissions to half of the current (2019) level or less (high confidence). This potential – 31 to 44 GtCO2-eq – requires the implementation of a wide range of mitigation options."[293]

515. According to the IPCC, in 2019 the total greenhouse gases emitted in that year, including CO2 (and expressed in CO2 equivalents) was 59 Gt CO2eq.[294] The mitigation potential of 31-44 GtCO2eq therefore means that the IPCC acknowledges the possibility of reducing 52.5% to 74.5% emissions in 2030 relative to 2019. This means that the necessary global emissions reduction of 48% by 2030 relative to 2019 is still possible.

516. On the basis of all of this, not only can it be concluded that it is possible for Shell to reduce the emissions of the Shell Group by 2030 by 45% relative to 2019, but also that the global community can still achieve this task (and that of 48%) with rapid and far-reaching emissions reductions in this critical decade.

517. The finding regarding the capacity of the global community to achieve the 45% goal (and that of 48%) in 2030, is separate from the considerably larger capacity of Shell to achieve this goal in 2030. This means that even if it were to be noted that the world as a whole were to no longer have the capacity to realise the 2030 goal (and, for example, would only be able to achieve it in 2035), this would not release Shell from its own obligation to continue making its contribution of a 45% reduction in 2030. It is precisely in such a situation that it is all the more important that the parties that have the capacity to realise the 45% reduction goal by 2030, must at least make that contribution, so that the global goal of 45% can be achieved as quickly as possible. This creates the greatest possible chance that dangerous climate change can be avoided.[295]

518. Against the background of all of the above reasons it is therefore just and correct that the District Court held that Shell must have reduced the CO2 emissions of the Shell Group by 2030 by at least (net) 45% relative to 2019.[296]

5.3 Differences in sectoral reduction pathways for oil, coal and gas are not a reason to not impose an order for a net 45% reduction in 2030 on Shell

519. An important argument of Shell against the assumption of a reduction obligation for Shell of (net) 45% by 2030, are the different reduction pathways shown by model calculations for oil, coal and gas. By way of example Shell refers to the IEA NZE scenario that shows that the CO2 emissions of coal must have been reduced in 2030 by 60%, as a result of which the CO2 emissions of oil only have to fall by 35% in 2030 and that of gas by 18%. According to Shell, as Shell does not produce or sell coal, but only oil and gas products, this demonstrates that the grounds presented by Milieudefensie et al. for a 45% emissions reduction in 2030 cannot succeed.[297] Milieudefensie et al. will set out below that this reasoning of Shell cannot succeed.

520. There are good reasons why the starting point of the UN initiative Race to Zero is that companies must seek alignment with the global average and not with a sector average. As already

[293] Exhibit MD-349, IPCC AR6 WGIII, Technical Summary, p. TS-107.

[294] Exhibit MD-349, IPCC AR6 WGIII, Technical Summary, Table TS.1, p. TS-9.

[295] See also Milieudefensie et al.'s Notes on oral arguments 8, paras. 130-134.

[296] This is subject to the net component, which is contrary to the primary wish of Milieudefensie et al. (see Notes on oral arguments 8, paras. 39-42). We will come back to this topic in Chapter 6.4.

[297] Appeal, paras. 2.3.9-2.3.11.

described, there are no coordinated agreements in the world regarding which sector or which company will be responsible for what part of the global 45% task for 2030. Nor need such agreements on a division of the task be expected any time soon. As they do not exist, alignment must be sought with the global average, partly bearing in mind the precautionary principle. This offers the only good chance that the target can actually be achieved by 2030. The discussed addition to that basic point is that companies that can do more than only seek alignment with the global average, should in fact do more. In that way the chance of achieving the global 2030 target will be further increased.

521. The alignment with the global average furthermore prevents sector stakeholders from selectively shopping around for model calculations and basing a claim on that part of the calculations which for their sector lead to the lowest possible reduction task for 2030. The outcome of a model calculation depends on the data, the assumptions in the model and targets that are introduced. If the basic principle of the model calculation is that the own sector must make the lowest possible contribution to 2030, this will also have to be the outcome of the model calculation. Other sectors will then automatically have to bear the heavier burdens up to 2030. If every sector goes looking for the most minimal reduction contribution in that manner, it will never be possible to achieve the global task by 2030. It also reinforces a delayed approach because every sector has reason in advance to anticipate a minimum contribution and will then look for the data and model calculations that substantiate this.

522. Such sector-wide postponement behaviour is the gist of the problem and this is made visible in the Production Gap report of UNEP et al.[298] which shows that both the coal sector and the oil and gas sector wish to continue their production levels up to 2040 as much as possible or even wish to grow in this respect.[299] In short, every sector is busy protecting its own interests and agreement between sectors on emissions reductions is non-existent. For that reason the oil and gas sector cannot assume that the coal sector will make a two to three times greater contribution to the global reduction task up to 2030 than the oil and gas sector. There is no indication whatsoever that this will happen. In addition, it is not in conformity with the agreements made in the UN Climate Convention and the Paris Agreement.

523. A facet that cannot be ignored in this respect is that particularly developing countries like China, India, Indonesia, Vietnam and South Africa to a great extent are dependent for their energy provision on the use of coal.[300] Although it is clear that these countries too will have to make their contribution to climate action, maintaining a sector approach in which the CO2 emissions of coal must have been reduced by 60% by 2030, means that many developing countries are being asked to lead the way on global climate action. This does not correspond with the international agreements that have been made. On the basis of the agreements in the UN Climate Convention and the Paris Agreement, it is the developed countries that are supposed to take the lead when it comes to climate action.[301]

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[298] UNEP et al., the drafters of the Production Gap Report, exist next to the United Nations Environment Programme (UNEP) of the Stockholm Environment Institute (SEI), the International Institute for Sustainable Development (IISD), the Overseas Development Institute (ODI) and E3G.

[299] **Exhibit MD-357**, Production Gap Report from 2021, in which this is made clear at a glance with Figure ES.2 on p. 4 of the Executive Summary. The red lines show the production plans and projections. On the basis thereof coal production will remain more or less the same up to 2040, while oil and gas production will grow on the basis of those plans.

[300] **Exhibit MD-358**, summary of BP Statistical Review of World Energy 2020 in the business magazine Forbes, p. 4.

[301] See, inter alia, Article 3.1 of the UN Climate Convention: "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity [..] Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof*." and Article 4.2.a: "*The developed country Parties [..] will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions*

524. By leaning disproportionately hard on the accelerated phasing out of coal use in scenarios like that of the IEA, the developing countries in the period to 2030 will be burdened more onerously in their reduction task than the developed countries, which rely more on oil and gas consumption. This does not fit within the CBDR principle.

525. That the developed countries rely more on the use of oil and gas than the developing countries, appears, inter alia, from the fact that approx. 50% of global oil and gas production is used by the approx. 1.3 billion people who live in the developed countries. The other 50% of the global oil and gas production is used by the approx. 6.4 billion people in the developing countries. In specific, the developed countries use (rounded) 53% of global gas production and 45% of global oil production.

526. These ratios can be determined from the report BP Statistical Review of World Energy 2022, and are represented in Table 1 below by Milieudefensie et al.

Table 1: comparison of number of residents and energy consumption of oil, gas and coal between the group of Annex 1 countries and the group of Non-Annex 1 countries. Energy consumption represented in Exajoules (EJ) and as percentages of the total global consumption[302]

	Oil		**Natural gas**		**Coal**		**Number of residents**
	EJ	%	EJ	%	EJ	%	x million
Annex 1	82.93	45%	77.67	53.4%	31.01	19.4%	1335
Non-Annex 1	101.28	55%	67.68	46.6%	129.10	80.6%	6418
Total world	184.21	100%	145.35	100%	160.10	100%	7753

527. It furthermore ensues from this table that the 1.3 billion people of the developed countries use 82.93 Exajoule in energy from oil and 77.67 EJ from gas. This brings the energy consumption in oil and gas of the developed countries to 160.10 EJ. This is more than the 129.10 EJ which the 6.4 billion people of the developing countries use in energy generated by coal.

528. Furthermore, the table shows that at global level the consumption of oil, coal and gas together is good for 489.66 EJ. Oil has a share of 184.21 EJ (38%), gas 145.35 EJ (30%) and coal 160.10 EJ (32%). This means that 2/3 of the global energy consumption from fossil fuels comes from oil and gas and only 1/3 from coal. The quantity of oil and gas that must be reduced globally on the road to net zero emissions in 2050 is thus twice as big as the quantity of coal.

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consistent with the objective of the Convention". See also, inter alia, Article 4.4 of the Paris Agreement: "*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets*."

[302] For this data, use was made of the report BP Statistical Review of World Energy 2022 (**Exhibit MD-359**). On p. 9 of this report the primary energy consumption for oil, coal and gas is presented per country/region over 2021. Milieudefensie et al. then sub-divided these figures into Annex 1 countries and Non-Annex 1 countries. For the lists of Annex 1 and Non-annex 1 countries, use was made of the data of the UNFCCC. These lists can be viewed on the UNFCCC website via https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states. For the number of residents of the group of Annex 1 and Non-annex 1 countries, use was made of the data of the World Bank over 2020, which can be viewed on https://data.worldbank.org/indicator/SP.POP.TOTL.

529. Because of this large difference between worldwide oil and gas consumption and coal consumption, the oil and gas sector cannot just sit back and wait to see what the coal sector, primarily in developing countries, is going to do.

530. The fact that when burning coal per unit of energy consumption, more CO2 emissions are released than when burning oil and gas,[303] does not detract from that conclusion. As appears from Figure TS.3 of the Technical Summary of IPCC Working Group 3 discussed previously in Chapter 5.2 of the Defence on Appeal, oil and gas consumption is responsible for 48% of global CO2 emissions and coal consumption for 33%.[304] On balance the production and the consumption of oil and gas therefore remains far and away the biggest contribution to the climate problem.

531. That coal burning per energy unit produces most CO2, does mean that CO2 reduction due to reduction of the coal use in principle is cheaper and more cost effective than CO2 reduction by reducing oil and gas consumption. It is this element of cost effectiveness that is decisive for the outcomes of sector model calculations, which allocate the greatest task to the coal sector up to 2030. This is because those models are specifically arranged as to cost effectiveness and do not take account of other important factors like justice, precaution and international agreements that were made. The following serves by way of explanation.

532. The models that are used to develop emissions reduction scenarios are known as Integrated Assessment Models (IAMs). These models are used to understand how (expected or possible) developments in global society, like economic developments and choices to be made by society, intervene with the natural environment and the climate. These models make it clear, inter alia, how many greenhouse gases in case of certain economic developments and choices of society on balance will still be emitted to the atmosphere and what the consequences thereof will be.

533. Conversely these models can also calculate what emissions reduction pathways must be followed to remain within specific pre-specified carbon budgets. This latter approach forms the basis of the finding that, to remain within the carbon budget that gives a 50% chance to limit the warming of the earth to 1.5°C, globally a 45% CO2 reduction by 2030 is necessary, followed by net zero emissions in 2050.

534. These IAMs are therefore extremely important for the calculation of these emissions reduction pathways, but also have limitations in the allocation to countries and sectors; limitations which the IPCC also mentions itself.[305] One of those limitations is that most IAMs work on the basis of the principle of cost effectiveness. Most models are based on the assumption that the same CO2 price applies worldwide for all markets and sectors.[306] By increasing and decreasing the CO2 price in the models and/or by increasing and decreasing carbon budgets, it will be visible

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[303] In Chapter 8 Milieudefensie et al. will discuss an Expert Letter, in which it is made clear on pp. 5-6 that burning gas depends on the goal thereof (electricity generation or heat generation) has between 33% and 50% less emissions than burning coal. The differences between coal and oil are smaller because burning oil is more polluting than burning gas.

[304] As appears from that discussion in Chapter 5.2 Defence on Appeal, oil consumption is responsible for 29% of global CO2 emissions, gas is responsible for 18% while an additional 1% of global CO2 emissions is caused by the flaring of the gases that are released in the extraction of oil and gas. Together oil and gas are consequently responsible for 48% of global CO2 emissions versus the 33% connected with coal consumption.

[305] **Exhibit MD-360**, IPCC AR6 WGIII, Chapter 3 under 3.2, pp. 3-12 through 3-15 (a short summary of which is cited further on in this Chapter 5.3 Defence on Appeal).

[306] In reality there is no global economy-wide carbon price. However, IAMs use the global carbon price as an alternative for climate policy because all individual policy initiatives are more difficult to formulate.

how markets and sectors respond to those changes. It provides insight into how far-reaching the global emissions reductions will or must be at a specific CO2 price in order to remain within a specific carbon budget. It also provides insight into where in the world, i.e. in what countries and sectors, most CO2 emissions reductions will take place.

535. The typical outcome of these model calculations is that most emissions reductions take place at that place in the world (in those countries and sectors) where they can be realised most cheaply. The models are not coded on other important aspects like the political, social or legal reality within countries and the global community. The IPCC therefore indicated that the models do not take account of what the IPCC calls "equity", which according to the IPCC encompasses the aspects of social contracts, national politics and international conventions.[307]

536. The IPCC makes it clear that in the IAMs no account is taken, inter alia, of important principles from the climate conventions such as the principle of Common But Differentiated Responsibilities, the principle that the developed countries must take the lead on global climate action (in terms of emissions reductions, financing and transfer of knowledge) and the precautionary principle. IAMs are thus primarily economically-steered models that are looking for the most cost-effective possible distribution of mitigation measures across the world.[308]

537. Because emissions reductions in developing countries are usually cheaper than in developed countries, in these models many reductions take place in the shorter term in developing countries. The IPCC acknowledges those limitations and therefore indicates that the way in which the models divide the reduction task among countries and sectors, must be understood in this context and that therefore caution must be shown on this point when interpreting that division. The model division is therefore not the same as a "real world" division according to the IPCC.[309]

538. The explanation of the working of IAMs provided by Milieudefensie et al. above and the related limitations are worded by the IPCC in several reports (and chapters of reports) and in Chapter 3 of the AR6 report of 2022 of Working Group 3, the IPCC says the following, in short:

"Scenarios are not predictions or forecasts. [...] In practice, models implement climate constraints by either iterating carbon price assumptions (Strefler et al. 2021b) or by adopting an associated carbon budget (Riahi et al. 2021). In both cases, other GHGs are typically controlled by CO2-equivalent pricing. [...] IAMs necessarily make simplifying assumptions and therefore results need to be interpreted in the context of these assumptions. [...] Mitigation scenarios developed for a long-term climate constraint typically focus on cost-effective mitigation action

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[307] Exhibit MD-360, IPCC AR6 WGIII, Chapter 3 under 3.2, pp. 3-12 through 3-15. With regard to the elaboration of the term 'equity', see IPCC AR6, WGIII, Technical Summary p. 36 (Exhibit MD-349) in which the IPCC states: "*Equity deals with the distribution of costs and benefits and how these are shared, as per social contracts, national policy and international agreements*." The IPCC makes it clear there that giving substance to the principles of equity is important for the acceleration of the global reduction task: "*Equity can be an important enabler, increasing the level of ambition for accelerated mitigation (high confidence)."*

[308] In any event, the IPCC acknowledges that the IAMs do not provide a full picture of the cost effectiveness of measures because in the models in most cases, no account is taken of the costs of the consequences of climate change: "*The vast majority of IAM pathways do not consider climate impacts*", see IPCC AR6 WGIII, Chapter 3 on p. 3-14 (Exhibit MD-360). According to the IPCC, IAMs have difficulty in dealing with and predicting social changes. In particular changes on the demand side of the economy are not given sufficient attention according to the IPCC: "*While IAMs are particularly strong on supply-side representation, demand-side measures still lag in detail of representation despite progress since AR5.*" (IPCC AR6, WGIII, Chapter 3 on p. 3-15 (Exhibit MD-360). For more information on the working of IAMs, see Carbon Brief Q&A: How 'integrated assessment models' are used to study climate change, see **Exhibit MD-361**.

[309] Exhibit MD-360, IPCC AR6 , WGIII, Chapter 3 under 3.2, pp. 3-12 through 3-15.

towards a long-term climate goal. [...] Equity hinges upon ethical and normative choices. As most IAM pathways follow the cost-effectiveness approach, they do not make any additional equity assumptions [..] Regional IAM results need thus to be assessed with care, considering that emissions reductions are happening where it is most cost-effective, which needs to be separated from the fact who is ultimately paying for the mitigation costs. Cost-effective pathways can provide a useful benchmark, but may not reflect real world developments [..]."[310]

539. It is therefore relevant to conclude that the IAMs, in their division into countries and sectors, are geared to cost effectiveness and not to a "real world" division and reality in which account must be taken of what is a just and fair division of the task and who should primarily bear the efforts and (financial) burdens. At several points in its report the IPCC therefore provides a disclaimer on this point to make it clear that the IAMs do not take account of these "real world" aspects.[311]

540. When it comes to tackling the climate problem in accordance with the rules of what is fair and just and what applies on the basis of the law, social contracts and international conventions, the model divisions based on cost effectiveness are therefore not a good guideline for the division between countries and sectors. This is a significant shortcoming of IAMs, because issues of division are precisely about what is fair, just and has been agreed and certainly not only the question regarding what is the most cost-effective division.

541. The conclusion of this is that the percentage of a 60% reduction modelled by the IEA on the basis of cost effectiveness in the coal sector in 2030, is a percentage that does not do justice to the (social, political and legal) reality, because it places too much of the burden of the global task with the developing countries, which is not where that burden should be. By placing a disproportionately heavy reduction burden on coal use (and thus primarily with developing countries), a disproportionately lighter reduction burden is placed on oil and gas consumption (and thus primarily on the developed countries). As appears from the above-discussed IPCC sources, this outcome does not do justice to the social, political and legal reality.

542. This can also be seen in how countries position themselves with regard to each other. Although in 2021 all countries in the Glasgow Climate Pact, in their capacity of the Conference of Parties, embraced the outcomes of IAMs that for a 50% chance of limiting the warming of the earth to 1.5°C, global CO2 emissions must have been reduced by 45% by 2030 and must be net zero in 2050, the Conference of Parties does not embrace the idea that from now on the developing countries must now take the lead in tackling the climate problem. It would be an encroachment on the convention-based CBDR principle. There are no agreements about this.

543. This takes Milieudefensie et al. back to the previously cited point that although there is global consensus about the need for a 45% CO2 reduction in 2030, there is no global coordination nor are there agreements about what part of the fossil sector will make a contribution to the global task. There is no such coordination between the countries nor between the sectors themselves nor between the business enterprises in those sectors.

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[310] Ibid

[311] See, e.g., the disclaimer of the IPCC in the division of the reduction task by regions in the world in Chapter 6 of WGIII, represented in Figure 6.27 on p. 6-100, whereby the IPCC indicates: *"Most mitigation scenarios are based on a cost-minimizing framework that does not consider historical responsibility or other equity approaches."* See https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_06.pdf.

544. This means that for a company like Shell, with all its discussed specific characteristics, it is at least required that it will have to follow the global average percentage of 45% as elaboration of its societal duty of care, and even more than that, because it belongs to the category of actors in society who can and therefore must reduce more quickly.

545. For the above reasons Shell therefore cannot hide behind the model calculations of the IEA or the IPCC (or of other bodies such as the EU) which are primarily based on cost effectiveness. These outcomes do not do justice to what is a just and legitimate division of efforts and therefore cannot serve as guideline for elaboration of Shell's duty of care.

546. The conclusion is that Shell's ground of appeal relating to the reduction percentage of 45% cannot succeed. The fact that Shell does not supply coal, in combination with the circumstance that IAM models, based on cost effectiveness, assume a faster phasing out of coal than oil and gas, is not a clear argument for asserting that the District Court should have stipulated a different reduction percentage than 45% with regard to the elaboration of Shell's legal duty. The foregoing confirms, on the other hand, the accuracy of the reduction percentage of 45% applied by the District Court as the minimum proportional contribution to be made by Shell.

547. Nevertheless, below Milieudefensie et al. will go into the common thread relating to outcomes of those sector model calculations that are based on the principle of global cost effectiveness, and what this would mean for the oil and gas sector if the sector tasks were to be divided worldwide without taking account of the aforementioned "real world" reality, but purely on the basis of global cost effectiveness. In that case the models show that the oil and gas sector must have reduced by at least 36% (oil) and 28% (gas) by 2030 relative to 2019. The following serves as explanation of that conclusion.

548. The 2021 Production Gap report of UNEP et al. sets out that the sector outcomes of IAMs on balance come to a reduction percentage of 11% per year for coal, 4% for oil and 3% for gas between 2020 and 2030:

> *"To be consistent with limiting warming to 1,5C, global coal, oil and gas production would have to decrease by around 11%, 4% and 3%, respectively, each year between 2020 and 2030."*[312]

549. A footnote was added for this conclusion in the report, which shows that the reduction percentages to be applied to 2030 for coal (11%), oil (4%) and gas (3%) represent the median of the outcomes of all IAM calculations analysed by UNEP et al. from the IPCC database.[313]

550. The median means that half of the outcomes of the IAMs show a higher reduction percentage than the median and the other half of the outcomes show a lower reduction percentage than the median.[314] The reduction percentages applied by UNEP et al. therefore represent the mean value of all analysed IAMs in the IPCC database. There is thus a 50% chance that the reduction percentages should be higher per year than the median of 11% (coal), 4% (oil) and 3% (gas) to be able to achieve the climate targets. The median is therefore the minimum percentage that should be maintained to realise the global temperature target with a chance of 50%.

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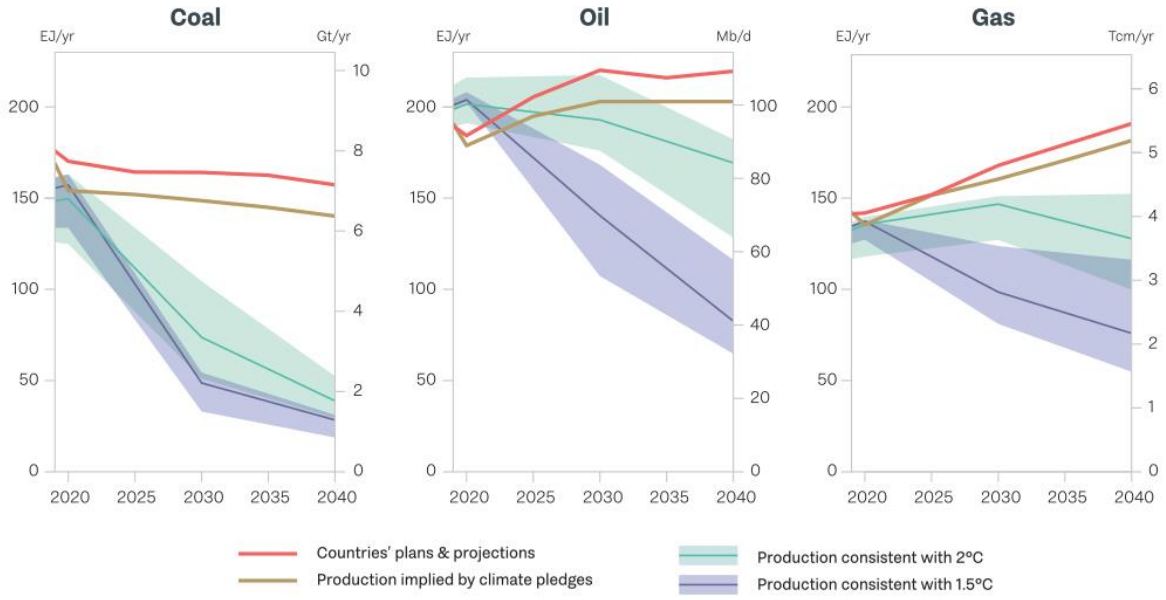
[312] Exhibit MD-357, Production Gap Report 2021, p. 15.

[313] See for the fact that the matter concerns the IAMs from the database of the IPCC: Exhibit MD-357, Production Gap Report 2021, p. 15, footnote 7: *"As explained in our previous production gap reports, a global wind-down of fossil fuel production that would be consistent with limiting warming to 1.5°C or 2°C could be achieved by a different mix of decline rates for coal, oil, and gas. The median trajectories shown in Figure 2.2 are dependent on the underlying assumptions of the integrated assessment models."*

[314] Ibid.

551. In the report the medians for coal, oil and gas reduction are graphically represented in the following figure (Figure 2.2 of the report)[315] in which the dark blue fastest falling lines represent the above-mentioned reduction percentages up to 2030. The dark blue areas around it show the spread of the outcomes of the IAMs.



552. In the fossil energy sector as a whole (coal, oil, gas collectively) the production according to UNEP et al. must fall by 6% per year between 2020 and 2030.[316] This means a reduction of 49% in 2030 relative to 2019.[317]

553. These different reduction percentages per year for coal, oil and gas have already been calculated by UNEP et al. on the basis of the IAM mitigation scenarios gathered by the IPCC and thus provide a fair picture of sector-based reduction tasks if global cost effectiveness is the starting point.[318]

554. For oil, a 4% reduction per year means that in 2030 the production must have been reduced by 36% compared to 2019 levels.[319] For gas, a 3% reduction per year, calculated as of 2020, means that in 2030 the production must have been reduced by 28% compared to 2019 levels.[320] For

[315] Exhibit MD-357, Production Gap Report 2021, p. 16.

[316] **Exhibit MD-356**, Production Gap Report 2020, p. 12.

[317] If the reductions of 6% per year must start in 2020, then at the end of 2030 a reduction of 49% must have been achieved in the fossil energy sector compared to the reference year 2019. With a 6% reduction per year, the growth factor is 0.94 per year, and that up to the 11th power is (rounded) 0.51, i.e. a reduction of 49%.

[318] Ibid, p. 35: "*As shown in Chapter 2, annual decline rates of around 11% for coal, 4% for oil, and 3% for gas between 2020 and 2030 would be consistent with limiting warming to 1.5C, based on the mitigation scenarios compiled by the Intergovernmental Panel on Climate Change (IPCC).*"

[319] If the reductions of 4% per year must start in 2020, then at the end of 2030 a reduction of 36% must have been achieved in the oil sector compared to the reference year 2019. With a 4% reduction per year, the growth factor is 0.96 per year, and that up to the 11th power is (rounded) 0.64, i.e. a reduction of 36%.

[320] If the reductions of 3% per year must start in 2020, then at the end of 2030 a reduction of 28% must have been realised in the gas sector compared to the reference year 2019. With a 3% reduction per year, the growth factor is 0.97 per year, and that up to the 11th power is (rounded) 0.72, i.e. a reduction of 28%.

coal, an 11% reduction per year means that in 2030 the production must have been reduced by 72% compared to 2019 levels.[321]

555. In short this means that in 2030 the fossil energy sector will have to produce 49% less than in 2019, divided into a reduction of 72% for coal, 36% for oil and 28% for gas.

556. Because the decrease in global production is on balance equal to the decrease in global consumption (and vice versa), the global decrease in production is also equal to the global decrease in the CO2 emissions due to that reduced consumption.[322]

557. The above means that on the basis of IPCC data, as analysed by UNEP et al. in the Production Gap report, and based on a sector-based division on the basis of global cost effectiveness, the CO2 emissions in the energy sector must have fallen by at least 49% by 2030, in the coal sector by at least 72%, in the oil sector by at least 36% and in the gas sector by at least 28%.

558. If such a sector-based division were at issue for the coal, oil and gas sector on the basis of global cost effectiveness, which as previously asserted does not, inter alia, do justice to the basic principles of the global climate regime relating to justice and precaution, and if Shell were to adhere to the average of the oil and gas sector, Shell would have to have reduced the CO2 emissions of its oil and gas activities by at least 36% and 28% by 2030 relative to 2019. All of this is based on IPCC data as analysed by UNEP et al. which show that between 2020 and 2030 the oil sector must see a reduction percentage of 4% per year and the gas sector a reduction percentage of 3% per year.

559. Shell cites the IEA NZE2050 report and asserts that this shows that the oil sector in 2030 must have achieved a CO2 reduction 35% relative to 2019 (comparable to the above-mentioned 36%) and that the gas sector in 2030 must have realised a CO2 reduction of 18% relative to 2019 (i.e. less than the above-mentioned 28%).[323]

560. It can be stated a priori that it is correct that these are the reduction percentages for CO2 which ensue for the oil and gas sector from the IEA NZE2050 scenario.[324] It must also be stated a priori that the outcomes of the IEA scenario are only based on one scenario, the scenario developed by IEA itself, while the outcomes of UNEP et al. are based on very many scenarios from the IPCC database and are consequently more robust and provide more authoritative guidance. The IEA itself says in the NZE2050 report that the reduction pathway modelled by it is one of many: *"There are many possible paths to achieve net-zero CO2 emissions globally by 2050 and many*

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[321] If the reductions of 11% per year must start in 2020, then at the end of 2030 a reduction of 72% must have been achieved in the oil sector compared to the reference year 2019. With a 11% reduction per year, the growth factor is 0.89 per year, and that up to the 11th power is (rounded) 0.28, i.e. a reduction of 72%.

[322] The production of coal, oil and gas is equal to the consumption and thus burning thereof, which determines the CO2 emissions. This is clearly described in the report of Tyndall Centre, p. 27 (Exhibit MD-351): "*This project is primarily concerned with the production side of the emissions equation. At the global level, annual production is in lockstep with annual consumption of fossil fuels [...] The empirical data on annual production and consumption volumes neatly bear out this one-for-one relationship.*"

[323] Appeal, para. 10.2.7.b.

[324] The 35% CO2 reduction for the oil sector maintained by the IEA can be traced back to Table A4 on p. 199 of the IEA report Net Zero by 2050 – A Roadmap for the Global Energy Sector, 2021 (**Exhibit MD-362**). Under "Combustion activities" it can be seen that the CO2 emissions connected with oil in 2019 were 11,505 Mt CO2 and in 2030 these fall to 7,426 Mt, a decrease of 35%. The same table shows that the CO2 emissions connected with gas in 2019 were 7,259 Mt CO2 and in 2030 they will drop to 5,960 Mt, a drop of 18%.

uncertainties that could affect any of them; the NZE is therefore a path, not the path to net-zero emissions."[325]

561. In any event, the basic outcome of the IEA relating to the oil sector is equal to the 4% reduction per year of UNEP et al. In its "Net Zero by 2050" report, with regard to oil production the IEA comes to "*an annual average decline of more than 4% from 2020 to 2050*."[326]

562. The basic outcome of the IEA relating to the gas sector is equal to the 3% reduction per year of UNEP et al. With regard to gas production, in its "Net Zero by 2050" report the IEA comes to: "*an annual average decline of just under 3% from 2020 to 2050*."[327]

563. The IEA too therefore assumes an annual reduction of oil production by 4% and an annual reduction of gas production by 3%. As has been explained above, this should lead to an emissions reduction in the oil sector of 36% in 2030 relative to 2019 and an emissions reduction of 28% in the gas sector in 2030.

564. As stated, with regard to the oil sector the IEA comes to a 35% emissions reduction in 2030, so on this point UNEP et al. and IEA are virtually in sync. However, for the gas sector the IEA does not come to an emissions reduction of 28% in 2030 but of only 18%; on this point the outcomes of UNEP et al. and the IEA thus deviate from each other.

565. That difference in the gas sector is explained because although the IEA maintains the 3% reduction per year as average for the entire period 2020-2050, it has opted, prior to 2030, to reduce less than 3% a year. The IEA lets the gas production rise up to the middle of this decade, to only then start dropping.[328] That is why in 2030 the reduction in emissions is not by 28% but by 18%. In the period 2030-2050 there will then be reductions of more than 3% per year so that the long-term average over the period 2020-2050 will average 3%.

566. Why the IEA opted, in the critical decade of the climate task, to spare the gas sector as much as possible, is not made entirely clearly in the report, but it will have to do with the fact that the IEA modelled the NZE2050 scenario using, inter alia, the basic principle "*minimising stranded assets where possible"*, that is one of the three core principles chosen by the IEA itself.[329] In other words, an important starting point for the IEA was to protect the assets of the fossil industry where possible as much as possible against stranded assets (premature depreciation of assets due to the need to shut down production earlier than planned).

567. The IEA thus has opted for a conservative scenario and lets the interests of the oil and gas industry weigh very heavily in its modelling.[330] This naturally has consequences for the outcomes of the calculations.

568. Companies in the oil and gas sector, including Shell, have lobbied extensively for the (self-promoted) idea of gas as a fuel for the future, so that this sector invested a great deal in new

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[325] Exhibit MD-362, IEA NZE2050 report p. 49.

[326] Exhibit MD-362, IEA NZE2050 report, p. 57.

[327] Ibid, p. 58.

[328] Ibid, p. 58, where the IEA clarifies that the production of gas peaks "*in the mid-2020s before starting to decline as it is phased out in the electricity sector.*"

[329] Exhibit MD-362, IEA NZE2050 report, p. 50: "*The Net-Zero Emissions by 2050 Scenario is built on the following principles [..] minimizing stranded assets where possible and aiming to avoid volatility in energy markets*."

[330] The International Energy Agency was founded in 1974 in connection with the oil crisis of 1973. The IEA's goal as of that time has been to secure the supply of oil (and later gas) to the West as much as possible.

gas projects.[331] The IEA apparently wanted to protect these investments as much as possible, which is why the emissions attached to gas use up to 2030 will only fall by 18% instead of the minimum 28% that is necessary on the basis of a 3% reduction per year in the period 2020-2030. This is a choice, just as other choices could have been made which would have led to other outcomes. Other scenarios of other modellers therefore lead to other outcomes, which is all the more reason to hold on to the findings of UNEP et al. insofar as a sector-based reduction division were to be the starting point.

569. It is not clear why there should be deviation from those findings of UNEP et al. on the basis of one model calculation which gives preference to protecting fossil interests as much as possible and because of that preference is willing to accept that it is less certain that the emissions reductions for an adequate tackling of the climate task will actually be achieved. That the IEA made that trade-off between, on the one part, the interests of the fossil industry (which dominate) and on the other the interests of proper climate action (which come last), appears from Chapter 2.7 of the report that deals with the "Key uncertainties" that are connected with the choices made by the IEA.

570. To protect the assets of the fossil industry, in the period to 2030 the IEA foresaw a growth in Carbon Capture and Storage (CCS)[332] of more than 4000%.[333] Furthermore, the IEA assumes that the quantity of negative emissions[334] will be a factor 317 bigger in 2030 relative to 2019.[335] The IEA made this choice because with the assumption of a very explosive growth of CCS and negative emissions, the fossil sector can leave its infrastructure operational for longer, so that the risks of stranded assets for the fossil industry are decreased.

571. However, the IEA realises full well that the assumption of so many CCS and negative emissions is one of the three "Key uncertainties" in its modelling and that it is uncertain whether the necessary emissions reductions can actually be realised with this. The IEA has the following to say about this in Chapter 2.7 with the title "Key uncertainties":

"A failure to develop CCUS for fossil fuels would substantially increase the risk of stranded assets and would require around USD 15 trillion of additional investment in wind, solar and electrolyser capacity to achieve the same level of emissions reductions."[336]

572. The IEA says in this respect (in the context of the other findings of its report), freely translated: if a choice were to be made for more investments in sustainable options like wind and solar energy, the necessary emissions reductions can be realised; but because we have opted to protect as many assets of the fossil energy sector as possible, we assumed large quantities of CCS; we recognise that the reality level thereof is very uncertain so that, if the assumption of the explosive CCS growth does not become reality, there is still a substantial risk of fossil

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[331] We will return to this topic in Chapter 6 Defence on Appeal.

[332] The essence of CCS is that the CO2 emissions are captured before they end up in the atmosphere, to then be stored underground or in some other way. The feasibility and scalability of this is very uncertain.

[333] On p. 199 of NZE2050 it can be read that "Total CO2 captured" of 40 Mt in 2019 will be scaled up to 1665 Mt in 2030, a growth of 4,000%, i.e. a factor of 40. A CCS capacity of 1665 Mt in 2030 means that in such case over 10x the annual quantity of emissions of the Netherlands must be captured via CCS.

[334] The essence of negative emissions is that CO2 emissions that have been realised into the atmosphere, can also be removed from the atmosphere. The feasibility and scalability of this is very uncertain.

[335] On p. 199 it can be read that "Total CO2 removals" of 1 Mt in 2019 will be scaled up to 317 Mt, a growth factor of 317. This means that it must be possible to remove another 2x of the annual quantity of emissions of the Netherlands from the atmosphere in 2030.

[336] Exhibit MD-362, IEA NZE2050 report, p. 84.

stranded assets; the emissions reduction targets can, in the event CCS does not work, only be achieved by shutting fossil power stations down immediately and definitely; at the same time there will have to be considerable extra investments in sustainable energy to provide the energy capacity that will be lost due to having to shut down fossil power stations.

573. Reading this, one can imagine that other modellers will make other choices and will immediately focus on more investments in sustainable solutions. It is once again a reason to assume at least the mean values of UNEP et al.

574. The delay in the emissions reductions that the IEA implemented in the fossil sector in general, also entail that the IEA scenario in its 2021 scenario (contrary to those in its 2020 scenario) will not come to a CO2 reduction of 45% by 2030 (or the 49% reduction which ensues from the Production Gap report), but only of 41%.[337] This too shows that the IEA has to a certain extent made the climate interests subordinate to the financial interests of the fossil sector. In the critical decade of tackling the climate problem, that delay, in view of the seriousness of the consequences of dangerous climate change, cannot be justified in Milieudefensie et al.'s opinion and certainly not to protect the financial interests of the fossil industry, which to a great extent helped to cause these consequences.

575. In that context it cannot remain unmentioned that the fossil industry has been aware for over 10 years of the stranded asset risk as a result of the "Carbon Bubble". It has therefore had over ten years to prevent stranded assets.

576. In 2011 the ground breaking report of Carbon Tracker on this topic was published: *Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble?*[338] Said report highlights that the fossil industry invests too much in exploring and exploiting new fossil stocks. The signalled danger is that those stocks will for the greater part have to be written off early (and become stranded assets) if real effort is put into preventing dangerous climate change. It will be necessary to remain within a limited carbon budget worldwide and those stocks can then partly no longer be burned and thus also no longer be sold. In that case the valuations of stocks and assets on the balance sheets of fossil companies will remain over-valued compared to their actual value, according to the report. After that the phenomenon of the carbon bubble quickly became more widely known.[339]

577. This means that as of 2011 there was insight into the fact that the fossil energy sector had built up a financial carbon bubble which will partly lead to worthless assets (stranded assets) in the event of effective climate action. It can be compared to the mortgage bubble that banks built up and with which they pushed the world into an economic crisis in 2008, when many mortgages turned out to be worthless. The difference is, however, the fossil industry is very well aware of this risk of the carbon bubble and the risk of stranded assets, while many banks were at the time ambushed by the mortgage bubble because they did not have this risk in their sights.

578. It is not clear why the fossil sector is still being protected in the way it is by the IEA. This only increases the problem of the carbon bubble, because the fossil sector has latched on to the

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[337] The CO2 reduction of 41% maintained by the IEA for the entire energy sector can be traced back to Table A4 on p. 199 of the NZE2050 report. It is indicated there that the total CO2 emissions of the sector were 35,926 Mt in 2018 and that they will still be 21,147 Mt in 2030. This is a drop of 41%.

[338] **Exhibit MD-363**, Carbon Tracker, Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble?, 2011, primary findings also available via https://carbontracker.org/reports/carbon-bubble/.

[339] See for the rise and etymology of the phenomenon of the carbon bubble and stranded assets the English-language Wikipedia via https://en.wikipedia.org/wiki/Carbon_bubble.

promise of CCS to just continue investing in new fossil infrastructure, even though that promise is extraordinarily uncertain and the explosive growth thereof is not realistic. The fossil sector has long spoken of the CSS promise (think of the "clean coal" campaign from the US which has been waged since 2008 because of the alleged CCS promise),[340] but it has not come up with any noteworthy performance in that area to this day.[341]

579. It specifically applies to Shell too that it has long been familiar with the phenomenon of the carbon bubble. Milieudefensie et al. explained at first instance that Shell, in connection with the publicity relating to the phenomenon of the Carbon Bubble and related stranded assets, received questions from various shareholders and investors who were concerned with the financial risks which this could entail for Shell. Shell then published an open letter in 2014 in which shareholders and investors were comforted with the notice that the global temperature target will not be achieved and there will thus be no stranded assets. This is because of a lack of laws and regulations and because of the decades-long depreciation terms for investments in the energy sector so that the transition will be slow, according to Shell in its open letter of 2014.[342] Shell would thus rather sacrifice the opportunity to make a proportional contribution to the global climate goal, than to adapt its investment choices to the findings relating to the carbon bubble.

580. It was also explained at first instance that Shell in the meantime, in its annual reports and CDP specifications, does indeed mention the risk of a financial impact on the company in the event of accelerated climate action, but that it is willing to take this risk as part of its "strategic risk appetite." Shell has known for a long time of the existence of the risk of stranded assets, but waved these away at first instance, on the premise that the global climate task will not succeed and then simply accepted the risks that successful global climate action would entail for the Shell Group, because the proceeds of oil and gas sales are so high that this climate-related risk is accepted as the price of doing business. Milieudefensie et al. can imagine that Shell would like to invoke a model scenario whereby the emphasis is placed on protecting fossil assets as much as possible, but such an approach is at odds with an effective approach to preventing dangerous climate change.

581. The foregoing applies all the more because Shell, despite all its knowledge of the carbon bubble and the related risks for its assets, was very active in the past decade (and longer than that) in promoting gas as a transition fuel, precisely so that it could keep investing as much as possible in the expansion of its worldwide gas production and sales. As will appear from Chapter 6, this is now more than ever one of the spearheads of Shell's current policy. This even though gas is not necessary as a transition fuel, nor can gas be a transition fuel due to the related CO2 emissions, which do not fit within the global temperature goal, according to UNEP et al.[343]

582. Shell's expansion plans in the area of gas production and sales also do not fit within the findings of the IEA in the NZE2050. Even with the favourable assumptions for the fossil industry used in the model, in the IEA scenario no further new oil and gas fields are necessary from 2021 onwards and the world can make do with the existing fields in the transition to net zero by 2050:

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[340] See New York Times, What clean coal is – and isn't. Available via https://www.nytimes.com/2017/08/23/climate/what-clean-coal-is-and-isnt.html.

[341] This point will be discussed in further detail in Chapter 6 regarding Shell's policy.

[342] Milieudefensie et al.'s Summons, paras. 586-588.

[343] Exhibit MD-276, UNEP et al., Production Gap Report 2019, p.18, Box 2.2. (Gas as transition fuel?).

"*Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required. […] the focus for oil and gas producers switches entirely to output – and emissions reductions – from the operation of existing assets."*[344]

583. From everything that has been discussed up to now in this chapter, it is once again clear that seeking alignment with the global reduction task is the minimum realisation of Shell's duty of care. Due to the discussed IAMs limitations, a sector-based approach cannot be followed. Indicating what sector must reduce at what speed cannot be exclusively answered by modelling on the basis of what is most cost effective on a global scale. The IPCC is well aware of this. It does not do justice to the "real world" circumstances in which the climate task must be tackled and does not do justice to international law principles, like the precautionary principle and the CBDR principle, so that the persons with the greatest capacity must also take the lead and bear the heaviest burdens. Passing on an excessively large part of the task to developing countries (i.e. the coal sector) in this critical decade, because from a global perspective this is more cost effective, does not do justice to all of this and will therefore never be able to lead to the necessary result. This applies all the more now that there is no coordination or agreements between the various sectors regarding which sector will take on what part of climate action for its account. The oil and gas sector can therefore not wait for the coal sector, but will now really have to move on to far-reaching emissions reductions. The oil and gas sector was good for 2/3 of global CO2 emissions by the energy sector and therefore bears great responsibility. In addition, it is particularly the developed countries that burn disproportionate amounts of oil and gas, while it is precisely those countries that on the basis of the Climate Conventions are the first who have to reduce their CO2 emissions at greater speed. Shell achieves its revenue primarily from those countries and will have to make its contribution as one of the biggest emitters in the world. This contribution should be an emissions reduction of at least 45% by 2030 over all group activities of Shell and not a contribution of 36% over its oil activities and a contribution of 28% over its gas activities, let alone an even smaller contribution.

5.4 Differences in portfolios per enterprise are not a reason to not impose an order for a net 45% reduction by 2030 on Shell

584. This brings Milieudefensie et al. to Shell's suggestion that if there were a customer portfolio that consists more than average of (companies in) sectors which are harder to abate, it is not possible to maintain a global average reduction percentage, nor a sector-based reduction percentage.[345] It will be explained below that said assertion fails, in part for the same reasons why a sector-based percentage cannot be applied, partly for other reasons. The following should first be noted in this respect.

585. If in 2030 Shell has reduced the CO2 emissions of the Shell Group by 45% it will, if it divides the task equally among its Scope 1, 2 and 3 emissions, in 2030 at least be able to sell 55% of the volume in fossil fuels that it sold in 2019. Indeed, in 2030 it can sell even more than the remaining 55% in fossil fuels in the case of application of CCS and/or if it reduces its Scope 1 and 2 emissions by more than 45% and consequently will have to reduce its Scope 3 emissions (being the sale of fuels) by less than 45%.[346]

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[344] Exhibit MD-362, IEA NZE2050, p. 21.

[345] Appeal, para. 2.3.8 et seq.

[346] In case of application of CCS an emissions reduction of 45% can also be achieved with, e.g., a 40% emissions reduction and a 5% emissions reduction which will be effected by means of CCS. Furthermore, there is a second option that if Shell were to have reduced its Scope 1 and 2 emissions by 100% net by 2030, this extra created reduction volume within Scope 1

586. It is up to Shell to determine to what sectors it will sell the volume in fossil fuels remaining in 2030 and in what degree. If Shell wants, it can still continue to fully serve what it calls sectors that are harder to abate – which do not come close to forming 44% of its portfolio as Shell claims – [347] in 2030 with its remaining supply of 55% or more.

587. This particularly applies because those sectors that are hard to abate will also have seen emissions reductions by 2030 relative to the situation in 2019 and this will have decreased the dependency on fossil fuels. What the Shell portfolio will look like in 2030 compared to 2019, will therefore not only depend on the choices that Shell will have to make to comply with the reduction obligation of 45% net. In addition, all sectors, from industry sector to transport sector, from real estate sector to electricity sector, from services sector to agricultural sector, etc., want to (and must) become sustainable. This will also have an effect on the demand for fossil fuels and that will therefore also have an influence on the development of the Shell customer portfolio. The Shell customer portfolio and the division by sectors and companies in that portfolio, is therefore not a static fact, but changes continuously due to choices of Shell and due to choices of Shell's customers.

588. Shell is very well aware that its customers want to become sustainable, that this is also a trend that is seen across society and that this has an impact on its portfolio. Shell says, inter alia, the following about this in its annual report for 2021:

> *"Rising concerns about climate change and effects of the energy transition could continue to lead to a fall in demand and potentially lower prices for fossil fuels. [...] This increasing focus on climate change and drive for an energy transition have created a risk environment that is changing rapidly [..] We also expect that actions by customers to reduce their emissions will continue to lower demand [...] In summary, rising climate change concerns and effects of the energy transition have led and could lead to a decrease in demand and potentially affect prices for fossil fuels."*[348]

589. It is therefore also clear for Shell that customers want to reduce their own emissions and that this changing behaviour on the part of customers, as well as the society-wide concerns regarding climate change and the effects of the energy transition in general, will lead to a reduced demand for fossil fuels. According to Shell this leads to a risk environment for its business model which is subject to rapid change.

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and 2, can be deducted from its reduction task in Scope 3. Shell's task is to reduce the total volume of Scope 1, 2 and 3 by 45% net. It can thus move reduction percentages around within that task within the various Scopes, provided the total comes down by 45% net in 2030. Lastly, there is a third option – but this is an option which leaves a lot to be desired in terms of credibility – that if Shell, for example by planting trees, were to create a CO2 absorption capacity that is equal to a 5% emissions reduction, it would have to reduce its production capacity by 5% less. These three options thus mean that in 2030 Shell will retain a reduction capacity of at least 55% and thus more production capacity when applying one or more of these methods.

[347] Shell asserts in para. 2.3.8.b Appeal that 44% of its customer portfolio falls among the transport sector, which is harder to abate. However, according to the IEA that category also includes personal vehicles, motorcycles, scooters, mini vans, buses and trains which, contrary to shipping, air travel and heavy road transport, do not belong to the category that is harder to abate and use far and away the greater share of fuels of the transport sector. More than half of the transport sector thus consists of transport that can easily be made sustainable. See in this respect IEA, Global CO2 emissions from transport by subsector, 2000-2030 (**Exhibit MD-365**). Furthermore, gas production in general is primarily supplied for electricity generation and for space heating, as well as sectors that are easy to abate. The share of Shell sectors that are hard to abate is more limited than Shell makes it seem.

[348] Exhibit MD-377, Shell Annual Account 2021, p. 23.

590. In the annual report for 2021, Shell furthermore clarifies that customers in the sectors which it deems more difficult to make sustainable (harder-to-abate sectors), like air travel and road transport, increasingly wish to reduce their CO2 emissions and that this has become a top priority of board members in these sectors:

"Business customers in the harder-to-abate sectors of road freight and aviation are increasingly keen to cut their carbon emissions. Shell and Deloitte's Decarbonising Aviation: Cleared for Take-off report, published in September, found that 90% of aviation executives and experts interviewed said cutting emissions was one of their top priorities. The equivalent figure in the January 2021 report Decarbonising Road Freight: Getting into Gear was more than 70%."[349]

591. In another harder-to-abate sector mentioned by Shell, i.e. marine shipping, efforts are being put into emissions reductions. A good example of this is the international sea shipping company Maersk, the biggest shipping company for container transport in the world. In its transition plan Maersk clearly explains why precisely a sector like marine shipping must be able to become sustainable quickly. Maersk also states that transition fuels offered by oil and gas companies like LNG (Liquified Natural Gas) are not solutions to the challenges facing the shipping sector. Making use of fossil transition fuels means that the sector will first have to invest (as an interim solution) in new fossil ships and infrastructure, even though this is evidently not a final solution for shipping, according to Maersk. For that reason the company does not see any salvation in LNG as a transition fuel, which is why it will not make use of it and will immediately 'leapfrog' to sustainable propulsion for its container ships. Maersk says in this respect:

"We are in a climate emergency, and any emergency requires an emergency response. Fighting climate change has become an imperative for all of us as individuals and as companies. We must all do the most we can – and we must start now. Global logistics emits more than 3.5 Gigatons of CO2 every year, and that is clearly not sustainable. [...] It is evident that very good solutions are available today that can have an immediate impact. There is no need to wait for 'perfect' solutions, future studies, or emerging technologies to mature before we act. There is no excuse not to act now. Across global supply chains low-carbon or carbon-neutral solutions are available. Trucks can be electrified or operate on green hydrogen, warehouses can operate on renewable energy, terminals can operate on renewable energy or biofuels, and container vessels can be propelled by carbon neutral fuels. There has been much talk about so-called transition fossil fuels, such as Liquified Natural Gas (LNG) in shipping. We do not consider that a solution at all. The burning of fossil fuels is the problem that needs to be solved, so introducing yet another fossil fuel in the mix can never be a permanent solution. We simply do not see any credible fossil fuel with acceptable lifecycle emission reductions, and the cost associated with infrastructure etc. to work with such fuels could slow the transition to sustainable solutions. We want to leapfrog to the fuels of tomorrow, today. And we can. Methanol technology is available for marine propulsion, and methanol has the potential to be made in a carbon neutral manner either as bio-methanol from sustainable biomass, or as electro-fuel from green hydrogen and biogenic CO2. [...] This means we are ready to scale, and therefore we have now placed an order for eight 16,000 TEU ocean going container vessels, the first of which will be delivered in early 2024. [...] Today vessels, tomorrow trucks, warehouses, terminals, and airplanes. Our ambition is to ensure that not only our ocean leg, but our supply chain end to end is sustainable. This is the decade where we must take bold action, and it is on us to do it."[350]

[349] Ibid, p. 11.

[350] **Exhibit MD-366**, Statement Maersk, A decade of action.

592. There are sustainable alternatives for marine shipping, which requires investments in these alternatives and not in pseudo-solutions like LNG which do not offer an end solution, according to Maersk. According to Maersk, investing in fossil interim solutions is capital destruction and a danger to the speed of the energy transition. Because of its intended investments in sustainable (end) solutions, the biggest container shipping company in the world expects to reach net zero emissions by 2040.[351] This makes it clear that in a harder-to-abate sector like shipping, reductions can be achieved faster than the global average and CO2 neutrality can be reached by 2040. Maersk makes it clear in the passage cited that this is also possible for other harder-to-abate sectors like road transport.

593. Maersk's vision aligns with the above-discussed finding of the IEA that as of 2021, because of more than sufficient sustainable alternatives in which investments are possible, no further investments are necessary in new oil and gas fields and that the oil and gas sector must limit itself to (at most) the exploitation of the existing fields and must further primarily concentrate on effecting the necessary emissions reductions.

594. No sector in society requires investments in new oil and gas fields when there are sufficient investments in sustainable alternatives, including the harder-to-abate sectors. According to the IEA, they can even handle stranded assets in the fossil sector.[352] Even if some of the existing fields have to be taken out of production early and consequently this will leave less oil and gas production from existing fields, all sectors can handle this because there are enough options for sustainable energy generation.[353] For the transition of the harder-to-abate sectors it is thus certainly not necessary for Shell to still invest in new oil and gas fields. At Shell there can even be an early loss of (a part of) its existing oil and gas production as stranded assets and there will still be sufficient oil and gas to provide for the remaining demand of the harder-to-abate sectors.

595. These findings of the IEA are furthermore interesting because Shell, as will appear from a report of Oil Change International to be discussed in Chapter 6, can reduce the emissions relating to the sale of the oil and gas products produced by it by (almost) 45% by deciding against further investments in new oil and gas fields. Its oil and gas production will automatically decrease by (almost) this percentage if Shell only keeps extracting from its existing oil and gas fields. These are becoming ever more empty. The reduction order imposed by the District Court will therefore, provided Shell stops investing in new oil and gas fields, lead to no or virtually no stranded assets for Shell with regard to those fields. Continuing to invest in new fossil projects will, on the other hand, lead to stranded assets. It again shows that Milieudefensie et al., with its claim of a 45% reduction by 2030, did not present an excessive claim and that the consequences thereof, indeed, fit within the fossil-friendly approach of the IEA. It makes it clear that in essence every investment in new oil and gas fields cannot be reconciled with the 1.5°C goal of the Paris Agreement.

596. The findings of the IEA and Maersk also show that the idea skilfully promoted by the oil and gas sector of gas as a necessary transition fuel, serves no other purpose than to be able to continue its own fossil business model for as long as possible.[354] At first instance Milieudefensie et al. referred in that respect to Shell's public request to the gas industry in 2017 to jointly ensure as

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[351] **Exhibit MD-367**, Statement Maersk, Setting the bar to net zero.

[352] See in this respect the above-discussed possibilities on dealing with stranded assets via sustainable energy if modelled CCS capacity is not achieved.

[353] Ibid.

[354] See also Milieudefensie et al.'s Notes on oral arguments 7, para. 55 et seq. and Milieudefensie et al.'s Notes on oral arguments 9, para. 12 et seq.

an industry that gas is publicly seen as part of the solution to the climate problem and not as part of the climate problem; this because otherwise the future of gas is not guaranteed.[355] The lobby and PR campaign in which gas is praised as a transition fuel has for years served the interests of Shell and the oil and gas sector in general and has nothing to do with adequate climate action, certainly not if this leads to continuing investments in new gas fields for which it is clear that there is no need or space this for anymore.

597. None of Shell's customers, including those in harder-to-abate sectors, therefore need investments in new oil and gas fields. As stated, according to the IEA these sectors can suffice with the supply options from the existing oil and gas fields. The concept of gas as transition fuel as excuse for those extra investments is outdated. Indeed, it only makes the necessary transition more difficult, including the transition of Shell's customers. UNEP et al. stated in its first Production Gap Report that the supply of fossil fuels creates demand for fossil fuels and this delays the transition to new energy systems:

"*Research has found that increasing natural gas production and the resulting decrease in gas prices may instead lead to a net increase in global emissions and risk delaying the introduction of near-zero-emission energy systems [..] lower prices and greater availability of natural gas stimulate higher overall energy use and emissions [..] the rapid advance of renewable energy and battery technologies has decreased the need for a potential gas bridge. Thus, the continued rapid expansion of gas supplies and systems risks locking in a much higher gas trajectory than is consistent with a 1.5°C or 2°C future."*[356]

598. The continuing investments in oil and gas thus only make it more difficult for Shell's customers to go through their own transition. To do so, they need Shell to provide sustainable alternatives. However, Shell only wishes to make limited investments in this respect, certainly compared to its willingness to invest in fossil fuels. This even though this investment shift from fossil energy to sustainable energy solutions is the key instrument for achieving the Paris goals, as Article 2.1.c of the Paris Agreement also makes clear.

599. However, if the biggest energy providers in the world like Shell continue to focus on selling as much fossil fuels as possible and continue to promote and offer gas as a transition fuel, it is made unnecessarily difficult for other sectors in society to become more sustainable. Particularly as by means of those fossil investments (and the influence thereof on supply, price, lock-in effects, etc. of those fuels) Shell is continuing to get in the way of companies that do want to scale up quickly in offering sustainable alternatives.

600. If the Court of Appeal were to give Shell the option of reducing fewer emissions (and thus continuing to sell more oil and gas) the more it focuses on the harder-to-abate customers, it becomes even more difficult for those customers to transform, because the remaining large supply of oil and gas and the market and price effects as a result thereof, would be an incentive to above all not become sustainable too quickly. This is putting the horse behind the cart, particularly because other oil and gas producers will happily follow this escape route. The production gap will never be closed in this manner.

601. In this respect it is, moreover, important to note that no single sector and no single company can claim a right to a specific part of the remaining global carbon budget, including Shell and its customers. Consequently they cannot claim any right to a part of the stock in fossil fuels still

[355] Milieudefensie et al.'s Summons, para. 600.

[356] UNEP et al, 2019 Production Gap Report, p. 18 Box 2.2. (Exhibit MD-276).

available within that budget. There are no agreements on which sector is entitled to which part of the carbon budget and thus precisely who should contribute to the global climate task. These agreements do not even exist at the highest abstraction level between harder-to-abate sectors and easier-to-abate sectors. This is a good thing, as it is quite predictable that it is easier for a multinational enterprise in the steel industry to make its production process sustainable by means of its substantial (financial) capacity and political-economic power and network, than it is for a low-income family to make car transport more sustainable by replacing a second-hand diesel car that was purchased after a lot of saving, with an electric vehicle. It therefore does not say much in a "real world" environment whether something is in general more difficult (metal) or easier (passenger vehicle) to make sustainable. This is also one of the reasons why the IAMs are not suitable for answering division questions, as explained above. This is also precisely the reason why certainly the richest and most CO2-intensive companies in the world by maximum capacity must reduce their CO2 emissions. Shell can do this, as can its industrial customers.[357]

602. Because of all these kinds of factors, what every sector and company is still entitled to is thus uncertain and will, depend on developments of, inter alia, a political, social, economic and legal nature, whether or not in connection with ever increasing and visible climate disasters. This visibility could suddenly just initiate a worldwide response whereby society will have to suffer drastic measures to curb CO2 emissions, as also turned out to be necessary to combat the corona crisis and deal with the current nitrogen crisis. As soon as the seriousness and the urgency of the situation is also better understood by the wider public, nothing can be excluded in this area. It is the question whether CO2-intensive companies that have not taken any adequate climate steps will have to be saved by the government again with rescue packages or that there will no longer be any support for this, because these companies could have become sustainable long ago.

603. Large (listed) companies must and can respond to and anticipate these kinds of developments. They also possess the knowledge, skill, lobbying power, PR options and the capital to commit to a strategy which is in conformity with the Paris temperature goal. For that reason alone these customers of Shell would do well to seek alignment with an emissions reduction of at least 45% by 2030. It also aligns with the principle laid down in Corporate Governance Codes, i.e. that the board of directors of a company must focus on long-term value creation of the company and the business affiliated with it, taking account of the environment and respect for human rights.[358]

604. In short, there is a need for companies and sectors to change to the best possible capacity and to take the road of energy efficiency and transition to sustainable energy. This is a passable road, which can lead to an emissions reduction of at least 45% worldwide by 2030, while at the same time there is sufficient energy access for every sector. No economic sector or individual company can reasonably or morally seek sector divisions which ensue from the assumptions under the IAM scenarios. In that respect IAMs fall short on a number of points, as was explained in the previous chapter. In addition, there are no division agreements between economic sectors or companies. No sector or relevant company can therefore argue that they have the right to reduce less than they could reduce. Every relevant actor will have to act and perform to the best of its capacity and ability. This is also what, inter alia, the UN Race to Zero protocol is based on.

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[357] In this respect it is reminded that 69% of Shell's turnover is generated from sales to customers situated in the developed countries.

[358] See, e.g., Article 1.1.1 of the Corporate Governance Code applicable in the Netherlands.

605. For the above reasons, Shell's defence, that because of harder-to-abate sectors in its customer portfolio, a 45% reduction cannot be imposed, cannot succeed. Choosing Shell's customer portfolio as the basic principle for elaborating Shell's duty of care, would mean that for every (sub)sector or company from the Shell portfolio on the basis of IAMs, an individual reduction percentage would have to be established and applied, while for the above reasons this cannot be a good guideline. Just as important is that Shell's reduction obligation is then no longer an individual obligation, but a derivative obligation of the reduction tasks of Shell's customers. However, this case revolves around Shell's own, independent reduction obligation, not that of its customers. This own reduction obligation can be established for Shell and has also been established by the District Court.

606. On the basis of all of the above, Milieudefensie et al. believes that the District Court, with good cause and rightly, fixed Shell's duty of care to make a proportional contribution to preventing dangerous climate change at a minimum reduction to be achieved by the Shell Group of at least 45% net in 2030. The defences of Shell against the determining of the percentage that were discussed in this chapter therefore cannot succeed.

5.5 Confirmation of the need for at least a 45% reduction by 2030

607. Chapter 5 has already shown what will be necessary in emissions reductions up to and including 2030 (both globally and for Shell) to retain a 50% chance of limiting the warming of the earth to 1.5°C. This Chapter 5.5 will briefly review the latest scientific findings which once again underline the importance of achieving that goal.[359]

608. The 12th UNEP Emissions Gap Report was published at the end of 2021. The report shows for the 12th year in a row that there is a large gap between the emissions reduction that is necessary to prevent dangerous climate change and the emissions reduction that actually ensues from the existing and intended climate policy. The report shows that countries have tightened their climate ambitions prior to the 2021 climate convention in Glasgow, but that is still far from enough to have closed the emissions gap in 2030.[360]

609. The consequences of failing to close the gap before 2030 are enormous. If rapid and large-scale emissions reductions do not occur immediately, it will no longer be possible to limit warming to 1.5°C and probably not even to 2°C , according to UNEP (with reference to the IPCC). Without farther-reaching interventions prior to 2030, there is a 50% chance that within twenty years the danger threshold of a global 1.5°C warming will have been exceeded.[361]

610. Because of the danger this involves for humankind, UNEP cites the words of the Secretary General of the United Nations, who announced upon publication of the last IPCC report: "*it is now a code red for humanity*."[362]

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[359] The consequences of climate change are already disastrous right now. See in this respect the detailed description of the worldwide consequences by the UN Special Rapporteur for Human Rights and the Environment in his report 'on the promotion and protection of human rights in the context of climate change', Chapter III 'Loss and damage: a litany of human rights impacts' (pp. 8-15), added as Exhibit MD-385.

[360] **Exhibit MD-368**, UNEP, Emissions Gap Report 2021: The Heat is On, Executive Summary, p. XVI.

[361] Ibid.

[362] Ibid.

611. In this Defence on Appeal and at first instance, Milieudefensie et al. made it clear that for more than a decade there has been the awareness that countries cannot take climate action on their own and that business enterprises must take action to close the emissions gap. This certainly applies to a company like Shell. It applies all the more now that we are in the critical decade and the urgency has never been so great as now.

612. This urgency is not only underlined by the existing emissions gap, but also by the findings of the IPCC regarding the lack of adaptive capacity of humans in relation to climate change, and by the findings relating to the increased risks of climate tipping points.

613. With regard to adaptation, the IPCC established in 2022 that for many regions in the world the current warming has already led to considerable limitations in adaptation options and that in a world that warms up by 1.5°C or more, the options for adaptation to many climate risks are limited and less effective. According to the IPCC, the only way to keep human and natural systems intact and to still be able to recover, is by reducing emissions (and thus not by adaptation).[363]

614. In addition to the more limited options of adaptation for both humans and nature, as soon as the warming of the earth reaches 1.5°C or more, in case of such warming, the risk of tipping points in the climate system increases. This includes large-scale changes in the climate system that will usually be irreversible (on human time scales). The IPCC believes that these tipping points can lead to abrupt serious shocks in regional climate, such as unprecedented weather and extreme temperatures with an increase in droughts and forest fires.[364]

615. In a study published in September 2022 into tipping points in Science Magazine, one of the most renowned scientific magazines in the world, the importance of not exceeding the 1.5°C limit is again underlined.[365] This study concludes that in the event of a warming of 1.5°C, according to best scientific understanding, climate tipping points (CTPs) will be reached with regard to: (i) the melting of the Greenland ice cap and the West Antarctic ice cap (of direct importance for the Netherlands including the Wadden region in connection with rising sea levels), (ii) the dying off of tropical coral reefs as breeding chambers for marine life and (iii) the abrupt boreal permafrost (releasing the greenhouse gas methane, resulting in accelerated further warming).[366] The study emphasises that if these tipping points are reached at 1.5°C, the chance increases that the other tipping points will also be reached.[367]

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[363] Exhibit MD-347, IPCC AR6 WGII, Technical Summary, p. 43: *"[O]pportunities for adaptation to many climate risks will likely become constrained and have reduced effectiveness should 1.5C global warming be exceeded and that, for many locations on Earth, capacity for adaptation is already significantly limited. The maintenance and recovery of natural and human systems will require the achievement of mitigation targets."* See also **Exhibit MD-477**, IPCC, AR6, WGII, Summary for Policymakers, p. 26.

[364] **Exhibit MD-364**, IPCC AR6 WGI, Technical Summary, p. 106: "*Some regional abrupt changes and tipping points could have severe local impacts, such as unprecedented weather, extreme temperatures and increased frequency of droughts and forest fires*." See also **Exhibit MD-476**, IPCC, AR6, WGI, Summary for Policymakers, p. 21.

[365] **Exhibit MD-369**, D.I. Armstrong McKay et al., Science 377, 'Exceeding 1.5°C global warming could trigger multiple climate tipping points', eabn7950 (2022). DOI: 10.1126/science.abn7950.

[366] Ibid, Figure 2 on p. 8 and clarifying description in Table 1 on p. 3.

[367] Ibid, p. 1: "*Our assessment provides strong scientific evidence for urgent action to mitigate climate change. We show that even the Paris Agreement goal of limiting warming to well below 2°C and preferably 1.5°C is not safe as 1.5°C and above risks crossing multiple tipping points. Crossing these CTPs can generate positive feedbacks that increase the likelihood of crossing other CTPs."* CTP stands for Climate Tipping Point.

616. Other important negative effects of climate change that are signalled and expected worldwide include, according to the IPCC: harm to ecosystems and biodiversity,[368] increase in extreme weather,[369] harm to food security,[370] harm to water security,[371] harm to physical and mental health and well-being of humans,[372] increasing migration and displacement,[373] increasing vulnerability of humans, cities, infrastructures and economic sectors,[374] risks of rising sea levels,[375] risks of accumulated climate effects[376], risks due to the five specific reasons for concern relating to (i) unique and threatened systems, (ii) the consequences of extreme weather incidents, (iii) the distribution of climate impact, (iv) the total global impact and (v) the consequences of large-scale single climate events ('tipping points'),[377] and the risks of a temporary 'overshoot' of the danger threshold.[378]

617. These negative effects of climate change have long been known, were already discussed at first instance and partly form part of the determination of facts in the Judgement (para. 2.3.5). An important and concerning conclusion of the IPCC AR6 report in that framework is, however, that in comparison to the IPCC AR5 reports of 2013/2014 and the special IPCC report on 1.5°C of 2018, the highest levels of climate risks will, for the above-mentioned five reasons for concern, occur at lower levels of global warming.[379]

618. The above-mentioned consequences of climate change are on the radar of various security experts. The International Military Council on Climate and Security (IMCCS) - an international cooperative body of top military staff, security experts and security institutes – carried out a survey among security experts.[380] The survey shows that the respondents increasingly see climate change as a security risk. Increasing consequences like food and water scarcity, climate disasters, harm to ecosystems and growing inequality are factors which these experts designate as disruptive with possible (international) security risks. An important conclusion in the report is (emphasis added by counsel):

> *"[W]ithin the next twenty years, security risks stemming from climate phenomena will present severe and catastrophic levels of risk. The increase in severity that our expert respondents anticipate over the next two decades is stark. [...] Though climate security threats are perceived as generally low-moderate now (2021), respondents see those risks quickly growing in severity over the next decade. Particularly concerning in the short-term will be direct environmental impacts, including precipitation changes, sea-level rise, and more severe natural disasters, as well as the subsequent effects that those impacts will pose to agricultural, economic, and healthcare systems worldwide."*[381]

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[368] Exhibit MD-347, IPCC AR6 WGII, Technical Summary, TS.B.1 and TS.C.1 (Ecosystems and biodiversity), p. 45, p. 55.
[369] Ibid, TS.B.2 and TS.C.2, p. 47 and p. 56.
[370] Ibid, TS.B.3 and TS.C.3 (Food systems, food security and forestry), p. 48 and p. 57.
[371] Ibid, TS.B.4 and TS.C.4 (Water systems and water security), p. 49 and p. 61.
[372] Ibid, TS.B.5 and TS.C.6 (Health and wellbeing), p. 50 and p. 63.
[373] Ibid, TS.B.6 en TS.C.7 (Migration and displacement), p. 52 and p. 64.
[374] Ibid, TS.B.7-9 and TS.C.8-10 (Human vulnerability; Cities, settlements and infrastructure; Economic sectors), pp. 52-55 and pp. 65-67.
[375] Ibid, TS.C.5 (Risks from sea level rise), pp. 62-63.
[376] Ibid, TS.C.11 (Compound, cascading and transboundary risks), pp. 67-68.
[377] Ibid, TS.C.12 (Reasons for concern (RFC)), pp. 68-70.
[378] Ibid, TS.C.13 (Temporary overshoot), p. 69.
[379] Ibid, TS.C.12.1: *"Compared to AR5 and SR15, risks increase to high and very high levels at lower global warming levels for all five RFCs (high confidence), and transition ranges are assigned with greater confidence."*
[380] **Exhibit MD-370**, International Military Council on Climate and Security (IMCCS), World Climate and Security Report 2021.
[381] Ibid, p. 13.

619. The respondents see this impact and risks everywhere in the world. The report highlights various regions, including Europe. It mentions a diversity of safety risks for Europe, such as: tensions with Russia and China concerning the (European) Arctic area, where the melting ice will expose new fairways, raw materials and fish stocks; possible threatened conflicts in areas which are very vulnerable to the consequences of climate change, usually in and around Europe; climate impact such as rising sea levels and increasing drought which in Europe can cause problems in, inter alia, food production, supply routes, public health and military preparedness; exhaustion of the finances and raw materials of European states due to adjustments to changing physical circumstances and due to the damage which will be caused annually due to climate change; overburdening of the options for European humanitarian assistance in other parts of the world due to an increase in natural disasters and crises worldwide.[382]

620. In its report of 2022 the IPCC paid specific attention to the consequences of climate change in Europe.[383] Although the main points of the consequences of climate change described by the IPCC above are occurring worldwide, thus also in Europe and the Netherlands, the consequences can differ per continent and region. With regard to the consequences in Europe it is noted that the current warming has already led to damage to natural and human systems, inter alia due to extreme weather incidents:

"Our current 1.1°C warmer world is already affecting natural and human systems in Europe (very high confidence). Since AR5, there has been a substantial increase in detected or attributed impacts of climate change in Europe, including extreme events (high confidence).[…] Climate change has resulted in losses of and damages to people, ecosystems, food systems, infrastructure, energy and water availability, public health, and the economy (very high confidence)."[384]

621. For the future it is expected, inter alia, that in most parts of Europe food production will drop substantially due to a combination of heat and drought:

"KR2: Due to a combination of heat and drought, substantive agricultural production losses are projected for most European areas over the 21st century, which will not be offset by gains in Northern Europe (high confidence)."[385]

622. Europe will also be hit by water scarcity:

"KR3: Risk of water scarcity will become high at 1.5°C and very high at 3°C GWL in Southern Europe (high confidence), and increase from moderate to high in Western Central Europe (medium confidence)."[386]

623. Another great danger for Europe is the rising sea level and the changing precipitation patterns, entailing an increasing danger of flooding near the coast and the river areas, with partly existential consequences:

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[382] Ibid, pp. 54-57.

[383] **Exhibit MD-371**, IPCC AR6 WGII, Chapter 13 (Europe).

[384] Ibid, p. 1819.

[385] Ibid.

[386] Ibid, p. 1820.

> *"KR4: Due to warming, changes in precipitation and sea level rise (SLR), risks to people and infrastructures from coastal, riverine and pluvial flooding will increase in Europe (high confidence). Risks of inundation and extreme flooding will increase with the accelerating pace of SLR along Europe's coasts (high confidence). [...] Coastal flood damage is projected to increase at least tenfold by the end of the 21st century, and even more or earlier with current adaptation and mitigation (high confidence). Sea level rise represents an existential threat for coastal communities and their cultural heritage, particularly beyond 2100."*[387]

624. In general, the urban areas of Europe are also exposed to risks of extreme heat, drought and flooding:

> *"European cities are hotspots for multiple risks of increasing temperatures and extreme heat, floods and droughts (high confidence)."*[388]

625. The consequences of climate change are becoming increasingly clear in Europe, as demonstrated by, for example, the many forest fires in the summer of 2022 in Europe as a result of long-lasting drought and heat on the continent.[389] Other risks include such events as, for example, the flooding in Limburg, Germany and Belgium in 2021 as a result of extreme rainfall.[390]

626. Extensive attention has already been paid at first instance to the consequences of climate change, including for the Netherlands and Western Europe. The District Court included those consequences in its considerations and Shell did not present a ground of appeal against this establishing of facts.[391] The above shows that the dangers of a warming of 1.5°C are greater than previously thought. This once again underlines the importance of enforcing the reduction order of at least net 45% in 2030 imposed by the District Court.

6. Shell's policy

6.1 Introduction

627. Shell is responsible for substantial carbon emissions,[392] which indisputably contribute to the warming up of the earth and a dangerous change in the climate. Indeed, if we compare Shell's emissions with the emissions of countries, worldwide there are only four countries with greater emissions. These are China, the United States, India and Russia.[393] In terms of carbon emissions Shell is thus not only comparable to a country, but it is comparable to a major state actor.

> Note: The CO2 emissions of the other 188 countries that signed the Paris Agreement is only a fraction of that of Shell. For example, the CO2 emissions of another industrial major power like the United Kingdom is not even 1/3 of Shell's footprint and the footprint of the Netherlands is only 1/9 that of Shell. The size of the emissions connected with the Shell Group is equal to approx. 2.5% of

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[387] Ibid.

[388] Ibid.

[389] **Exhibit MD-372**, NOS article "*Bosbranden verwoesten nu al fors meer Europese natuur dan in heel 2021*".

[390] **Exhibit MD-373**, NOS article "*Overstromingen in Limburg en buurlanden op een na duurste natuurramp van 2021*"

[391] Judgement, paras. 2.3.6 – 2.3.9.

[392] In 2021 the CO2 emissions connected with Shell's energy products according to Shell's own specifications was a rounded 1.4 Gt (**Exhibit MD-377**, Annual Report 2021, p. 91).

[393] Source: https://ourworldindata.org/co2-emissions (China: 10.67 Gt, US: 4.71 Gt, India: 2.44 Gt, Russia: 1.58 Gt on the basis of CO2 emissions from fossil fuels and industry in 2020 (exclusive of emissions from land use).

global greenhouse gas emissions[394] and is even greater than assumed by Milieudefensie et al. at first instance.

628. It is not a topic of discussion between the parties that Shell determines the corporate policy of the Shell Group. This chapter focuses first and foremost primarily on that corporate policy. With this corporate policy Shell – and Shell alone – determines how much oil and gas the Shell Group will put on the market up to and including 2030 (and thereafter) and consequently also how much CO2 the Shell Group will yet emit up to and including 2030 (and thereafter) by means of its business activities and the fossil fuels it sells.

629. Milieudefensie et al. would first like to recall a number of established facts. There is universal consensus on the need to have the global CO2 emissions fall, up to and including 2030, in an absolute sense by at least 45% compared to 2010 levels, to retain a 50% chance to limit the warming to 1.5°C.[395] Shell acknowledges this.[396] It is evident that the still remaining carbon budget for limiting the warming of the earth to 1.5°C is quickly decreasing and in the event annual emissions remain the same as those today, will have been fully used up around 2030. This is not a topic of discussion between the parties.[397] Tackling climate change requires limiting cumulative emissions and thus requires immediate action. In the words of the District Court: "*The longer it takes to achieve the required emissions reductions, the higher the level of emitted greenhouse gases, and consequently, the sooner the remaining carbon budget runs out.*"[398] It is clear that the coming years are crucial in relation to not exceeding the danger threshold established by the international community and still being able to prevent the biggest risks of climate change.[399,400] If global emissions are not cut by almost half this decade, then the chance of 1.5°C will have passed. The above means that it is not the achieving of (net) zero emissions by 2050 that is key in preventing dangerous climate change, but the road to 2050. Achieving net zero emissions in 2050 says nothing about the cumulative emissions which are emitted up to that time. What is far more important therefore is that emissions fall immediately and as much as possible up to and including 2030.

630. Despite all of this, with its current corporate policy Shell will not make a contribution to this all-determining task for 2030. Shell does not even have a target to actually reduce the total emissions of the Shell Group up to and including 2030. According to Shell's own statement, the emissions of the Shell Group will not fall up to 2030. Shell will, moreover, continue investing in oil and gas activities up to at least 2030. Milieudefensie et al. will explain these points in further detail in this chapter.

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[394] PBL Netherlands Environmental Assessment Agency, Trends in global CO2 and total greenhouse gas emissions: 2021 Summary Report, p. 4. On the basis of global emissions in 2020 of 55.5 $GtCO_2eq$ (including emissions from land use).

[395] As also confirmed by all parties to the UN Climate Convention during COP26, see Glasgow Climate Pact, para. 22 (Exhibit MD-348).

[396] See, inter alia, Appeal, para. 1.2.3.

[397] See Judgement, paras. 2.3.4, 2.4.5. Shell did not present a ground of appeal against this point.

[398] See Judgement, para. 4.4.28.

[399] See Judgement, para. 4.4.28. "*As has been described by the IEA in its World Energy Outlook 2020 (see 2.4.11), the next ten years will be crucially important for preventing dangerous climate change. This also follows from the conclusion of UNEP (of 2019) (see 2.4.6)..*"

[400] The consequences of climate change are already disastrous and will only increase further. It must be borne in mind in this respect that every ton of emissions results in extra warming and that certain processes like rising sea levels will continue for centuries, even after the net zero point has been achieved (see also Judgement, para. 2.3.2). The effects which are felt today, are thus to a great extent the result of emissions of dozens of years ago and are therefore only a glimpse of what awaits us if the warming of the earth is not kept within the established danger limit.

631. What is noteworthy is that in the Appeal, Shell itself only paid little attention to its own policy and in particular the implications thereof. Most attention goes to the complexity of the energy transition in general. Page 52 of the Appeal provides a screenshot of Shell's "climate-related" goals, but an explanation of the way in which Shell wishes to concretely implement those goals up to and including 2030 is lacking. From page 152 of the Appeal on, Shell discusses its *Powering Progress* strategy, where a number of selected parts of the policy are discussed. Important components that are of crucial importance for the CO2 emissions caused by Shell remain unmentioned. Among other things, Shell does not pay any attention to the following:

    (i) Although Shell mentions the expectation that its oil production will keep falling by 1-2% per year up to 2030, Shell does not mention (i) that said drop is much lower than the natural production reduction of existing fields, which in Shell's own words runs to approx. 5% per year,[401] (ii) that it intends to continue making considerable investments in oil production, (iii) that up to and including 2030 it wishes to further expand its gas activities to 55% of the total fossil portfolio and (iv) that even a somewhat lower production does not mean that Shell intends to purchase and sell less oil (and gas), as long as Shell keeps ignoring its responsibility for reducing its Scope 3 emissions in an absolute sense;

    (ii) Nor does Shell mention that as part of its annual billions in investments in new and existing fossil activities, up to and including 2025 it expects to invest another USD 1.5 billion per year in "*new frontier exploration entries*." This relates to exploration for new oil and gas fields in regions where Shell does not yet have any significant oil and gas infrastructure, but in which it wants to acquire a position in the coming years. Shell has an interest in no less than 756 still undeveloped oil and gas projects.[402]

632. All in all, even after the Judgement, Shell is still following a policy that is contrary to what is necessary to be able to prevent exceeding the universal danger threshold as laid down in the Paris Agreement. On the contrary, Shell likes to present itself as part of the solution. But an ambition to be a company with net zero emissions in 30 years time has little significance without a target and a credible plan to actually reduce emissions in the shorter term.

633. Below Milieudefensie et al. will provide an explanation of Shell's policy and the implications thereof (Chapter 6.2). There will then be a discussion of the resources that Shell uses to protect its fossil business model as long as possible and to keep stimulating the demand for fossil fuels: (i) greenwashing via advertising and PR and Shell's ceaseless lobbying (Chapter 6.3) and (ii) the developing and offering of carbon credits to "offset" fossil emissions afterwards (Chapter 6.4).

634. It shows that Shell does not have an adequate plan to make a proportional contribution to preventing dangerous climate change and will not change of its own accord. Instead, with its investment policy, Shell will create hugely excessive cumulative emissions at the expense of the remaining carbon budget. With its investment budget Shell is also creating an increasingly larger lock-in of CO2-intensive infrastructure and an excessive supply of fossil fuels. This further complicates the energy transition and climate efforts of other companies and society as a whole, as was already explained in the previous chapter. What Shell describes as *Powering Progress* is consequently in reality *Powering Destruction.*

6.2 Shell's policy

[401] **Exhibit MD-378**, Shell Energy Transition Strategy, p. 23.

[402] This is explained in further detail on the basis of a study of Oil Change International in Chapter 6.2.7 Defence on Appeal.

6.2.1 Shell's plans have only been modified to a limited degree

635. It was explained at first instance that Shell has had specific knowledge of the seriousness of the dangers of the greenhouse gases connected to its products at least since the 1980s. In the 1990s Shell could see that it would have to take (precautionary) measures to reduce its emissions – including the emissions related to the use of products sold by Shell – and that the quantity of these fossil fuels to be reduced would have to be limited.[403] Shell set up a business unit to make renewable energy solutions commercially (more) profitable. At the beginning of this century Shell announced it was looking for solutions for CO2 mitigation, like the large-scale capture and storage of CO2.[404]

636. As is known, the renewables business unit was closed down a few years later and at the same time Shell started making large-scale investments in of all things the most CO2-intensive unconventional oil and gas sources: tar sand oil and shale gas. The technology for capturing and storing CO2 is now - almost 20 years later - still not available on a large scale – not at Shell, not at other companies.

637. In the end it would not be until 2017 before Shell saw itself forced to – as a result of increased social, economic and political pressure after the making of the Paris Agreement – to formulate a conditional ambition which should serve as Shell's contribution to the solution to the climate problem. That year Shell announced the ambition to reduce the CO2 intensity of its total energy portfolio by 2050 by 50%: the Net Carbon Footprint ambition. It was thus not the goal of this ambition to reduce the CO2 emissions of the energy portfolio in an absolute sense, but the only goal was to reduce the CO2 intensity of the energy portfolio. This is definitely not the same thing.

638. As Milieudefensie et al. already explained at first instance, applying an intensity target to an energy portfolio is something completely different than applying an absolute emissions reduction to an energy portfolio.[405] The following two examples will further illustrate this point.

639. The meaning of an absolute emissions reduction: suppose we start in 2019 with an energy portfolio of 100 units of fossil energy. Suppose that those total CO2 emissions are 100 units of CO2. Then the CO2 intensity of each product in the portfolio is 1 (100 units CO2 divided by 100 units of energy). If the absolute emissions reduction target for that energy portfolio is 50% in 2030, only 50 units of CO2 can be emitted in 2030. As a result of this, only 50 units of fossil energy can be sold.[406] CO2 emissions will then have been halved in an absolute sense (as it will have fallen from 100 to 50). This is an outcome which is favourable and necessary for the climate. The CO2 emissions must fall in an absolute sense to be able to remain within the still limited carbon budget.

640. The meaning of an intensity target: let us say we start in 2019 with that same energy portfolio of 100 units of fossil energy, which together emit 100 units of CO2. The CO2 intensity will again

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[403] See, inter alia, Summons, Chapter VIII.2.1.2.b - Shell has known for a long time that fossil fuels result in climate change and that this will have serious consequences for humans and the environment. See also Chapter VIII.2.1.2.e - Shell has known for a long time that the warming of the earth has to stay below 2°C/450 ppm.

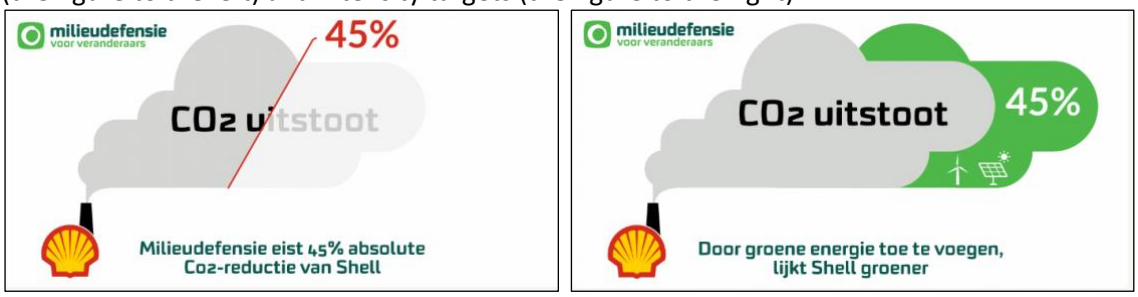
[404] See Summons, Chapter VIII.2.1.2.e - Shell has long known that it must take (precautionary) measures.

[405] See also Summons, Chapter XI.4.3 - Shell's climate ambition concerns a relative emissions reduction and not an absolute emissions reduction. See also Milieudefensie et al.'s Notes on oral arguments 7, para. 1.c - Shell's Net Carbon Footprint ambition does not lead to absolute emissions reductions.

[406] It is possible that more than 50 units could be sold in case of application of CCS, as explained in Chapter 5. This is not relevant with regard to this example.

be 1 per product. This time the target is to have reduced the average CO2 intensity per product in 2030 by 50% (and thus reduce it to 0.5 in 2030). This reduction of the average CO2 intensity per product of the energy portfolio can be achieved, by supplementing the portfolio of 100 units of fossil energy by 2030 by 100 units of emission-free (renewable) energy. In 2030 the energy portfolio will then consist of 200 units of energy which together emit 100 units of CO2. This is the emission of the 100 units of fossil energy which are still in the energy portfolio. The average CO2 emissions per product (i.e.: the CO2 intensity) has fallen by 50%, and is now 0.5 per product (100 units of CO2 divided by 200 units of energy). Because in 2030, just as in 2019, 100 units of fossil energy are still being sold, however, the total CO2 emissions in 2030 remain fully the same as the total CO2 emissions in 2019. The CO2 intensity has halved, but the absolute emissions have remained the same. This lack of absolute emissions reductions between 2019 and 2030 is an outcome that is unfavourable for the climate task, as absolute emissions reductions are necessary to remain within the still limited carbon budget.

641. For the climate the mere use of a CO2 intensity target is therefore problematic, because this does not guarantee absolute emissions reductions. Naturally the addition of 100 units of renewable energy is not problematic, but it is if it is accompanied by a permanently high supply of fossil energy (and the related CO2 emissions). What is necessary for adequate climate action, is both a reduction in the supply of fossil energy, and the biggest possible increase in renewable energy (supplied by Shell or other parties), as well as the biggest possible advancement in energy efficiency. Shell is therefore free to expand its renewable energy products, as long as it reduces its CO2 emissions in an absolute sense by at least (net) 45%.[407] The following figures provided by Milieudefensie illustrate the difference between absolute emissions reductions (the figure to the left) and intensity targets (the figure to the right):



642. Milieudefensie et al. will now return to the discussion of the developments in Shell's policy.

643. The Net Carbon Footprint ambition of 2017 was tightened in April 2020. However, this explicitly remained an intensity target. Shell announced it was reducing the average CO2 intensity of its energy portfolio by 2-3% in 2021, 3-4% in 2022, 30% in 2035 and 65% in 2050.

644. Shortly after that Shell started to see that in order to retain its societal legitimacy – its *social licence to operate* – would have to show its ambitions for achieving net zero CO2 emissions by 2050.[408] That ambition was announced in the autumn of 2020 and in April 2021 Shell presented

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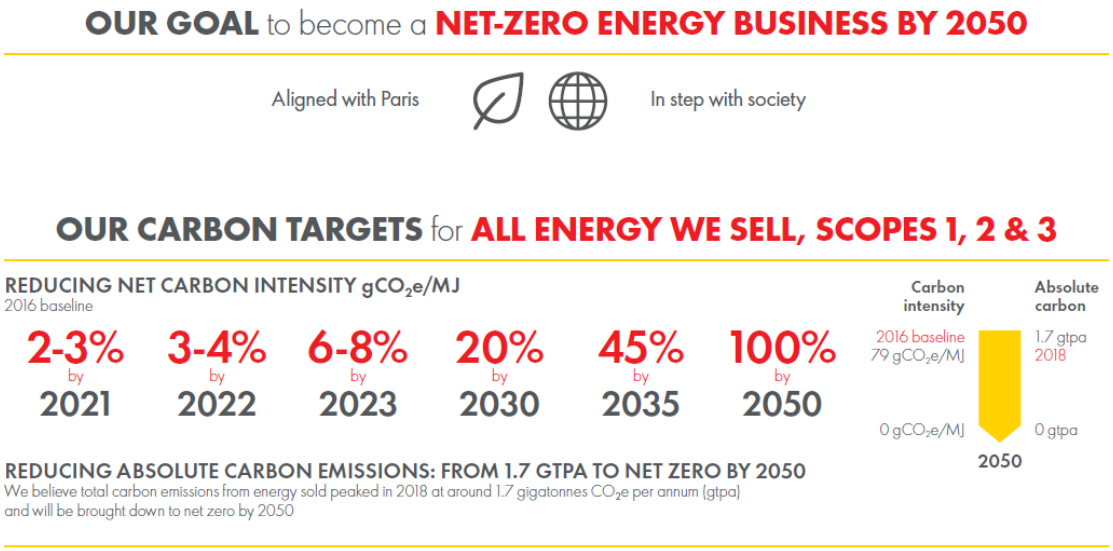
[407] In para. 2.3.12 of the Appeal Shell expresses its preference for intensity targets on the basis of an example. The Company B referred to there would, with an intensity target, make a better contribution to the energy transition than Company A, which works with an absolute target. The example is misleading, because Company B, in the example of Shell, realises an absolute emissions reduction of 40%. This corresponds precisely with Milieudefensie et al.'s argument, that it is fine to work with an intensity target, if in addition the necessary absolute emissions reductions are also realised.

[408] See, e.g., **Exhibit MD-382**, D. Kenner, R. Heede, 'White knights, or horsemen of the apocalypse? Prospects for Big Oil to align emissions with a 1.5˚C pathway', Energy Research & Social Science 79 (2021) 102049, p. 8: "*BP and Shell's net zero ambitions are essential to retaining their social license to operate. […] Both companies want stakeholders, including governments, to trust that a government-led phase out of fossil fuels is unnecessary and that they should be left to pursue*

its related company strategy under the heading *Powering Progress.* In *Powering Progress,* once again the only issue is intensity targets for the period before 2050. There is therefore no single target for the interim targets to reduce CO2 emissions of the Shell Group in an absolute sense. The intensity targets were, moreover, made dependent on the speed at which society moves, whereby Shell still reserves the right to be able to move more slowly (see also para. 4.5.2 Judgement). In essence, the modified plan comes down to an extra (conditional) target to reduce the average carbon intensity of Shell's energy portfolio by 2023 by 6-8% and by 20% by 2030. This is in combination with a modification of the already existing intensity targets for 2035 and 2050. These points have been recorded in Shell's Energy Transition Strategy 2021, which was prepared for the wider public. This is represented as follows in that document:[409]



645. Shell is creating the impression that its modified policy is a pioneering new plan and that the District Court would have come to a completely different opinion if this policy had been included in the assessment. In reality the matter concerns modifications which do not provide for a reduction of the total CO2 emissions of the Shell Group on the way to 2030, as will appear from the following. It will be shown that the modification of the policy cannot lead to another opinion than that of the District Court at first instance.

646. The percentages referred to in the figure above for the period up to and including 2035 only relate, as stated, to reducing the average carbon intensity of Shell's energy portfolio. These goals thus give no guarantee whatsoever that the absolute emissions will be reduced in the coming years. This is, however, what Shell suggests to the wider public by means of this illustration. Nowhere in its Energy Transition Strategy is it made clear that up to 2035 there will be no efforts to reduce the CO2 emissions in an absolute sense. This will thus remain hidden from the broader public. Shell's own administrative specification to the CDP shows, however, that with its intensity target Shell does not have any absolute emissions reductions in mind up to 2030, as explained further on in Chapter 6.2.4 Defence on Appeal.

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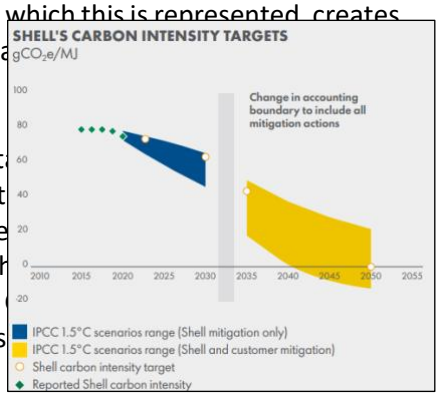
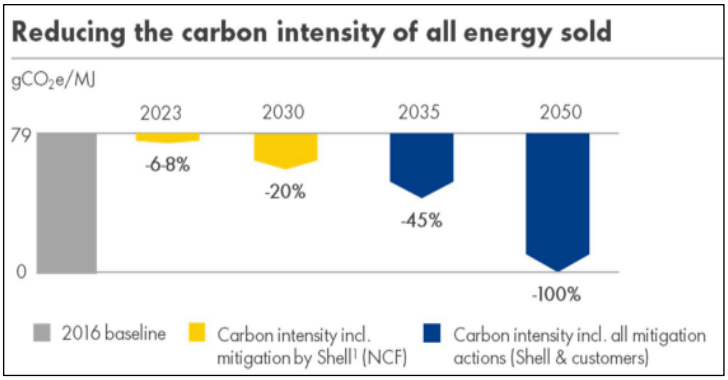
their own emissions reductions and renewable energy investment targets at the speed they want to do this, i.e. "become a net zero company by 2050 or sooner." This voluntary approach over a thirty-year timeframe is clearly preferable to being forced to end exploration and extraction of oil and gas in the short-term by government policy." See also **Exhibit MD-377**, Shell plc Annual Report 2021, pp. 28, 152 and 192, which show that the retention of that licence to operate is seen as crucial, and is related to the way in which Shell deals with the societal expectations relating to climate change.

[409] Exhibit MD-378, Shell Energy Transition Strategy (April 2021), p. 5.

647. The above figure furthermore shows that Shell has the ambition of reducing the average CO2 intensity of its energy portfolio in 2050 to net zero. The way in which this is represented creates the suggestion to the wider public that the new policy will lea 2021, while this is not the case.



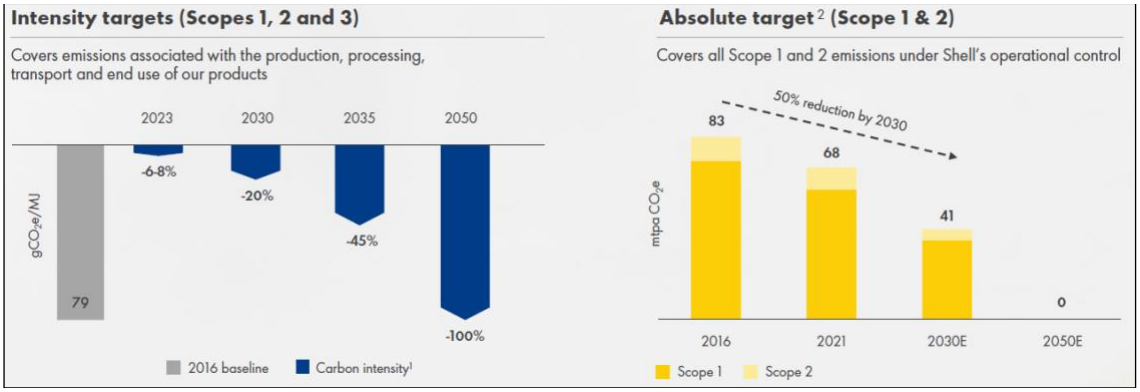
648. This picture is reinforced by visualisations of Shell's intensity t which keep moving in the direction of zero in 2050. As stated t Shell will reduce its absolute emissions by these percentage 6.2.2 below). What is also striking – and this cannot be emph does Shell make any pronouncements on the level of its total to 2050 and thus nowhere does it make any pronouncements absolute emissions reductions will be achieved prior to 2050.



649. Shell has in the meantime added an extra target to its policy. In October 2021 Shell announced to want to halve the Scope 1 and 2 emissions of the Shell Group by 2030 relative to 2016. For the first time this concerns an interim target for achieving absolute emissions reductions. However, this is a conditional ambition, that Shell called a forecast and a goal in the Appeal.[410] That target, however, only relates to 5% of the total emissions of the Shell Group and thus barely has any impact on the absolute CO2 emissions of the Shell Group (about which more later). There is still no absolute reduction target for 2030 (or thereafter) for the Scope 3 emissions, which form 95% of the emissions of the Shell Group. The intensity target for 2030 remains the same for the rest. Shell again illustrates this by means of arrows and line diagrams heading to zero, without explaining to the public the large discrepancy in the CO2 implications between targets which are based on absolute emissions reductions and targets which are based on carbon intensity:[411]

[410] In para. 9.2.9 Appeal, Shell characterises its own policy targets as "forecasts". In the title above para. 3.3.11 Appeal, Shell asserts that its "aim" is to achieve its new Scope 1 and Scope 2 emissions targets. Chapter 6.2.9 explains that Shell's policy comes with all kinds of reservations on all fronts.

[411] See, e.g., Exhibit S-57, Shell Plc, Q4 2021 Results, p. 21.



650. These visualisations, in combination with public statements of Shell, create the suggestion that the total CO2 emissions of the Shell Group from now on and on the road to 2050 will only fall, and in 2030 will in any case be considerably lower than is the case now.

651. That this is incorrect should now be clear. Shell actually intends to sell the same amount or more fossil fuels this decade.[412] The lack of an absolute emissions reduction applicable for 2030 for its Scope 3 emissions leaves plenty of leeway for this.

6.2.2 Shell's 'dilution strategy': a reduction of the average carbon intensity is not equivalent to a reduction in total CO_2 emissions

652. As has been explained above, there is a crucial difference between the reduction of the average carbon intensity of a product portfolio and the actual reduction of the CO2 emissions in an absolute sense.

653. The following two components of Shell's policy show how Shell can have the average carbon intensity of the product portfolio of the Shell Group, while total emissions in an absolute sense remain the same or can even rise:

(i) Shell has the policy intention to sell (somewhat) fewer oil products, but on the other hand plans to sell (far) more fossil gas. In that case the average carbon intensity of the total will be lower, because oil (per energy unit) has a somewhat higher CO2 footprint than gas, but the total of emissions can grow in the event of increasing sales in gas products.[413] Shell calls this partially shifting focus from oil to gas part of its policy to achieve its intensity targets:

"*Hydrocarbon sales reflect the effect of lower sales of oil products, and higher sales of natural gas. Emissions associated with gas are lower than those of oil products.*"[414]

(ii) In the coming years Shell expects to sell more low-carbon energy products and services, in addition to continuing sales of fossil fuels. This too means that the average carbon intensity of the portfolio will fall, without Shell's total emissions being reduced. Shell even calls this the most important part of its policy to reduce the carbon intensity up to 2030:

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[412] See Chapter 6.2.7, Defence on Appeal and further.

[413] In 2021 Shell reported the following carbon intensity per product: 91 CO2eq/MJ for oil products and 'gas to liquids' (natural gas that is converted to petrol or diesel), 70 CO2eq/MJ for LNG, 66 CO2eq/MJ for pipe line gas, 66 CO2eq/MJ for electricity and 41 gCO2e/MJ for biofuels, see Shell Plc Energy Transition Progress Report 2021, p. 13 (**Exhibit MD-380**).

[414] Exhibit MD-380, Shell plc Energy Transition Progress Report 2021, p. 12. Shell illustrates here how it can reduce the net carbon intensity of its products by 2030. The cited sentence is the explanation with the component "*Hydrocarbon sales*".

> "*The biggest driver for reducing our net carbon intensity is increasing our sales of low-carbon products and services.*"[415] And: "*We are diluting our carbon intensity by adding low-carbon products to our existing portfolio*." (Emphasis added by counsel)[416]

654. Freely translated: Shell is continuing its fossil business unhindered but is adding to this – in addition to its fossil business and thus not in the place of – renewable alternatives. What they are attempting to add are, inter alia, the trading and producing of renewable electricity and "low-carbon" products like fuels made from biomass (which according to Shell's own report have 40% fewer emissions than fossil gas, but are still far from emissions-free and certainly are not a sustainable alternative). This dilutes the net carbon intensity of the energy products portfolio, without Shell selling fewer fossil products and thus without Shell's total CO2 emissions being reduced in an absolute sense.

655. In addition, Shell intends to reduce the intensity of its energy products by using carbon credits for 'CO2 offsetting', which are obtained by investments in projects in the area of nature protection and nature restoration (nature-based solutions). In that case too the same number of fossil fuels will be sold, but scarce land will be used to "offset" the emission of fossil products and on the basis thereof to offer those fossil products as so-called carbon-neutral or low-carbon products.[417]

656. The foregoing (again) shows that Shell's goal to reduce the average carbon intensity of 20% in 2030 has nothing to do with the reduction of the total emissions by 2030. Shell is trying to conceal this crucial difference by always focusing on the end point in 2050 in its statements. If the carbon intensity has been reduced to zero, the total emissions in an absolute sense are also zero. But this lawsuit is not about the end point of 2050, but about what Shell will do up to 2030 to lower its emissions in an absolute sense. It is, moreover, unclear what Shell will do in the period after 2030 to execute its plans. Shell itself says it does not know yet.[418]

657. Milieudefensie et al. cannot emphasise this difference between intensity targets and absolute reduction targets enough, as Shell uses both of them next to each other and intermingled, without clearly explaining what the difference is between the two. Shell is hereby (intentionally) causing confusion about the implications of its targets, as also appears from the fact that representatives of the Shell Group present the intensity target as an absolute CO2 reduction

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[415] Exhibit MD-380, Shell plc Energy Transition Progress Report 2021, p. 12.

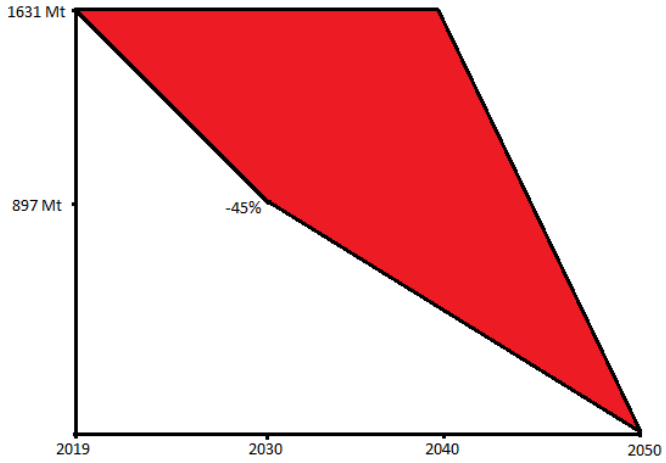
[416] **Exhibit MD-379**, Speech of Shell's CEO on the Energy Transition Strategy 2021 (7 May 2021), p. 4.

[417] This part of Shell's policy is discussed in Chapter 6.4 Defence on Appeal.

[418] Exhibit MD-380 Shell Energy Transition Progress Report 2021, p. 36: "*Shell's operating plans cannot reflect our 2050 net-zero emissions target and 2035 NCF target, as these targets are currently outside our planning period. In the future, as society moves towards net-zero emissions, we expect Shell's operating plans to reflect this movement. However, if society is not net zero in 2050, as of today, there would be significant risk that Shell may not meet this target. "*

target.[419] This strategy also works, as Shell's intensity targets are seen by others (certainly journalists too) as targets to reduce the absolute emissions of the Shell Group.[420,421]

658. As stated, as long as there is only a net zero target for 2050 and there are no hard absolute reductions targets for 2030 and for the period between 2030 and 2050, Shell can implement scenarios whereby the emissions up to 2030 or 2040 remain the same (or even continue rising), to only drop in the period 2040-2050. Shell can set up its current and future fossil investments in such way that they will only be written off shortly before 2050, after which they will not be replaced by new fossil investments. The extra accumulation in emissions which will arise in the period from 2019 to 2050, in comparison to the scenario where there will be an absolute emissions reduction of 45% in 2030 on the road to net zero in 2050, is made clear in the red section in the figure below. The CO2 emissions remaining the same to 2040 presented in this figure are fictitious. For example, this line could keep rising to 2040, as already explained. The figure shows that in case of an absolute emissions reduction of 45% in 2030, followed by a linear reduction to zero in 2050, only the white section in cumulative emissions is emitted. The use of intensity targets gives Shell the option of, in addition, emitting the red section (or even more) in cumulative emissions and thereby still achieving its intensity target. This will see the total cumulative emissions rise considerably. Precisely limiting cumulative emissions as much as possible is crucial for achieving the Paris goal and that is why achieving the 45% reduction in an absolute sense in 2030 is so important, as clearly illustrated in the figure below.



659. In the Appeal (paras. 2.3.11 – 2.3.16) Shell defends the use of intensity targets with a number of simplistic and/or irrelevant examples. Firstly, those examples assume the perfect substitution asserted by Shell between the decrease in sales of fossil products by Shell and the seamless and

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[419] Such as, e.g., Marjan van Loon, the president-director of Shell Nederland in the radio broadcast of NOS Met het Oog op Morgen of 9 January 2019, 'Klimaatserie: wat doet Shell eigenlijk?', from minute 19:50 (about Shell's old policy of 2017-2019): "*[…] We prepared a scenario last year. The International Panel for Climate Change also saw this as a genuine credible scenario that they recorded. On that basis we aligned our ambition with Paris to halve CO2 emissions by 2050. […] This is worldwide.*", this can be listened to via https://www.nporadio1.nl/podcasts/met-het-oog-op-morgen/3573/met-het-oog-op-morgen-09-01-2019.

[420] See, e.g., **Exhibit MD-383**, De Correspondent 15 February 2021, pp. 3-4: 'Shell's green PR babble is worse than hypocritical. It is treason': "*Shell wants to reduce the footprint of its products by 45 percent by 2035, while the safest IPCC scenario prescribes the same reduction of the global emissions in 2030 – i.e. five years earlier.*" See also Trouw 11 February 2021, 'Shell vergroent, maar pas echt na 2030': "*All in all Shell believes it will have limited its greenhouse gas emissions by 2030 by 20 percent, compared to 2016 emissions.*" (**Exhibit MD-384**).

[421] See, e.g., New York Times, 28 November 2017: Shell, to Cut Carbon Output, Will be Less of an Oil Company: "*Bowing to pressure from shareholders and the Paris international climate accord, Royal Dutch Shell pledged on Tuesday to increase its investment in renewable fuels and to cut its carbon emissions in half by 2050*."

concomitant increase of oil and gas sales by other suppliers. This is not the case, however, as already explained at first instance by Milieudefensie et al. and for which further substantiation will be present in Chapter 8 Defence on Appeal. As Shell assumes perfect substitution, Shell believes that an absolute target is pointless, while a reduction of carbon intensity would indicate the use of low-carbon alternatives and that this would be a good barometer for measuring and comparing contributions between different companies to the energy transition.

660. The global task to prevent dangerous climate change is, however, not to show that in 2030 lower-carbon alternatives are also being used (in addition to an excess of oil, coal and gas consumption), nor to show in a relative sense what company does better than others with regard to CO2 intensity of its energy portfolio. The global task is to have reduced global CO2 emissions in an absolute sense by at least 45% by 2030. This is the barometer of successful climate action up to 2030 and intensity targets can only contribute to this if they are simultaneously accompanied by clear and adequate targets for an absolute emissions reduction by 2030. This is what is necessary to effectively protect the Netherlands and the world against dangerous climate change. This protection requires absolute emissions reductions and these can only take place by reducing oil and gas activities. By continuing these activities and the related investments in full and even expanding them, CO2 emissions cannot fall in an absolute sense and, moreover, Shell remains a drag in the global energy transition, in view of, inter alia, the considerable related lock-in effects. The GHG Protocol thus rightly refers to intensity goals such as "*Less environmentally robust and less credible to stakeholders because absolute emissions may rise even if intensity decreases (e.g., because output increases more than GHG intensity decreases).*[422]

6.2.3 Shell has no target for reducing the total emissions of the Shell Group in an absolute sense

661. The above shows that there can be no doubt that Shell has no target for reducing the Scope 3 emissions of the Shell Group by 2030 in absolute terms, and as Shell explicitly showed in the 2021 annual report (yellow markings by counsel):[423]

[422] GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard, p. 102, Table 9.3 (Exhibit RK-19). The appendix of the GHG Protocol which Shell submitted as Exhibit S-119 concerns the calculation and reporting of intensity for products with a long product life cycle, because absolute emissions could then present an incorrect picture. Because the Scope 3 emissions are calculated on the basis of the total lifetime emissions of products that are sold, in that case companies that produce more sustainable products with a longer economic life would come out worse. However, Shell's energy products are only used once, so that situation is not at all relevant here. Nor does the GHG Protocol state that intensity targets could be a good criterion for measuring a company's share in the energy transition, as Shell claims.
[423] Exhibit MD-377, p. 91.

Performance – absolute emissions

	Absolute emissions [D], [F] million tonnes of CO_2e				Targets [E]	
Scope	2016	2019	2020	2021	Target 2030	Target 2050
Scope 1 [A]	72	70	63	60	50% reduction compared with 2016 levels on a net basis	0
Scope 2 [B]	11	10	8	8		0
Scope 3 [C]	1,545	1,551	1,305	1,299	No target	0

662. On the basis of the figures reported by Shell, the Scope 3 emissions represent 95% of the total emissions of the Shell Group.[424] This is even more than the 85% in Scope 3 emissions that Milieudefensie et al. assumed at first instance on the basis of Shell's assertions in the Statement of Defence.[425] Based on the current 95%, in October 2021 Shell set the goal to halve the other 5% - the Scope 1 and 2 emissions - relative to 2016 levels. This concerns a reduction of approx. 40 Mt, which is equal to only 2.4% of the total emissions of the Shell Group on the basis of the total emissions in 2019. In addition, Shell can realise this target without producing fewer fossil fuels (see Chapter 6.2.5).

663. Shell thus does not plan to reduce the total emissions of the Shell Group by 2030. Shell's annual report and other public statements make no mention of whether its policy will actually lead to any absolute emissions reductions up to 2030. Shell refuses to answer questions of shareholders in this respect[426] and sows doubt about the implications of the policy. On 25 April 2022 Milieudefensie et al. sent a letter to the Shell board of directors, in which it explained that Shell's current policy and the related public statements provide an inaccurate picture of reality and that Shell wrongly suggests that its modified policy is to a great extent in line with the reduction obligation imposed by the District Court.[427] Shell did not present a substantive response to this.

664. As will appear from the following, Shell itself does not expect a change in the total emissions.

6.2.4 According to Shell's own report, Shell's current policy up to and including 2030 will not lead to a reduction of the total CO2 emissions

665. The only Shell document in which Milieudefensie et al. was able to find information on the expected consequences of Shell's intensity targets for its total CO2 emissions in 2030 is the summary that Shell presents annually to the Carbon Disclosure Project ("**CDP**").[428] The most

[424] The figure from the 2021 annual report shown above shows that the emissions of the energy products sold by Shell are 1,367 Mt (1,299 plus 60 plus 8), of which 1,299 Mt in Scope 3 emissions, which is equal to a share of 95% (0.95 x 1,367 is (rounded) 1,299).

[425] See paras. 25, 385, 429 and 568 of Shell's Statement of Defence.

[426] During the annual shareholders' meeting of 17 May 2021 Shell's CEO said that it would be a gamble with regard to how high the absolute emissions will be in 2030, see **Exhibit MD-397**, Press release Follow This of 22 October 2021, p. 2.

[427] **Exhibit MD-387**, Letter from Milieudefensie to the Shell board of directors, 25 April 2022 (including Annex 1 and 2).

[428] The CDP manages the worldwide system for publishing information on environmental impact, under the motto: "*You can't manage what you don't measure*." The CDP supports more than 13,000 companies, but in addition also cities, states and regions, when measuring and managing their risks and opportunities in the area of climate change, water security and deforestation.

recent reports of 2021 and 2022 show that Shell does not expect any change in its absolute emissions for 2030 as a result of the current policy. Shell reports to the CDP that the goal of reducing the average carbon intensity by 20% by 2030 will lead to an expected change in the total (absolute) emissions of 0% (yellow marking by counsel):[429]

Target reference number **Int4 - Net Carbon Footprint (NCF) target 2030** **Year target was set** 2021 **Target coverage** Company-wide **Scope(s) (or Scope 3 category)** Scope 1+2 (market-based) + 3 (upstream and downstream)	**Target year** 2030 **Targeted reduction from base year (%)** 20 **Intensity figure in target year (metric tons CO2e per unit of activity) [auto-calculated]** 63.2 **% change anticipated in absolute Scope 1+2 emissions** 0 **% change anticipated in absolute Scope 3 emissions** 0

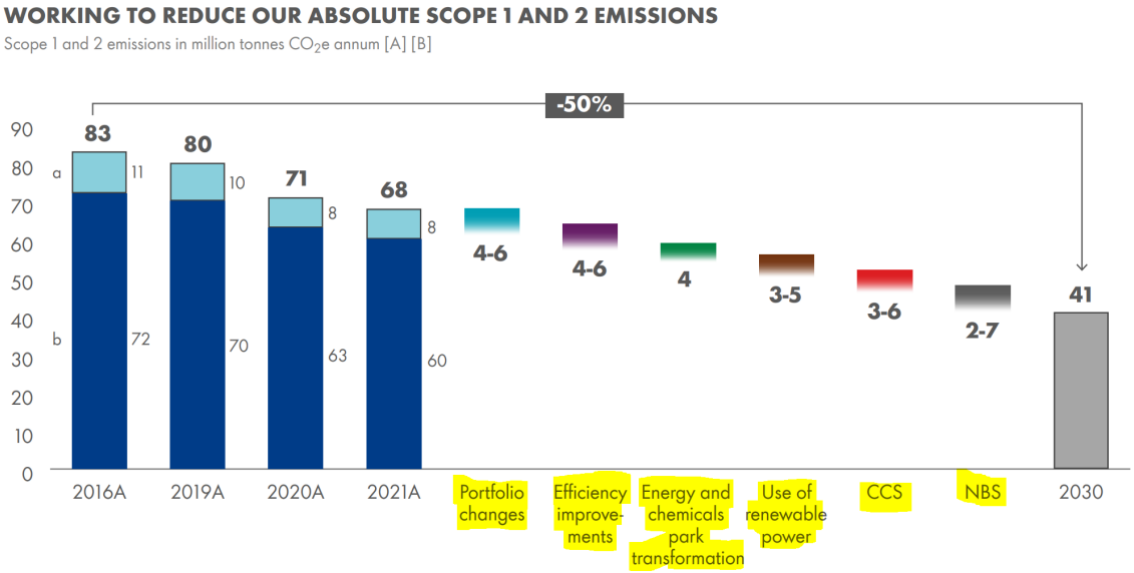
666. In the CDP summary, Shell thus confirmed what it will not say out loud to the public at large: Shell's current policy will not lead to lower CO2 emissions of the Shell Group by 2030.

667. In this respect it is furthermore relevant to point out that the CDP asks for reporting of 'gross' emissions and asserts that the use of carbon credits, avoided emissions or other net removals are not included in the summary: "*If you have a target that will be met in part by offsetting (including carbon neutrality targets), or CO2 removals except for the bioenergy case specified in "Additional information", only the proportion of the target that relates to emissions reductions (and not offset purchases or CO2 removals) should be reported here. If you are uncertain of the proportion that will be achieved through emissions reductions, make an estimation based on the initiatives that you have in place or planned.*"[430] This is also logical, because those carbon credits do not actually represent a change in total emissions of a company, but a specific payment to third party to, e.g., protect part of a forest.

[429] See **Exhibit MD-388**, CDP Climate Change 2021 Information Request – Royal Dutch Shell plc, pp. 62-63.
This remained the same in the 2022 summary, see **Exhibit MD-389**, CDP Climate Change 2022 Information Request – Royal Dutch Shell plc, pp. 60 - 65.
[430] **Exhibit MD-390**, CDP Climate Change 2022 Reporting Guidance, p. 82.

6.2.5 Shell's modified target for Scope 1 and 2 emissions does not lead to less production of fossil fuels

668. It was briefly discussed above that since October 2021 Shell has the target of reducing its Scope 1 and 2 emissions in an absolute sense. These are the emissions related to the production of oil and gas (Scope 1) and the purchase of energy for the production of oil and gas (Scope 2). Together this comes down to 5% of Shell's total emissions. Shell's Energy Transition Progress Report over 2021 represents how Shell plans to achieve that target.[431]



669. The graph shows (yellow markings by counsel) that the reduction of Scope 1 and 2 emissions will be realised for a small part by changes in Shell's portfolio, such as by acquisitions and investments in "low-carbon" projects on the one part and the hiving off of assets on the other. For the rest the reduction will be realised by, inter alia, improvements in energy efficiency and the transformation of refineries to energy and chemical parks and the capture and storage of CO2 (CCS). What is more, Shell is going to produce oil and gas making use of wind and solar energy.[432] In addition, Shell wants to make use of offsetting – Shell calls this nature-based solutions (NBS) – to reduce its (net) absolute emissions in Scope 1 and 2.[433]

670. The intended halving of Scope 1 and 2 emissions does not entail that Shell will produce and/or sell fewer fossil fuels. Nor has Shell modified its expectations on its production after announcing this new target.

6.2.6 Shell continues to reject shareholders' resolutions relating to absolute emissions reductions

671. That Shell does not intend to reduce its total CO2 emissions by 2030 also appears from Shell's annual rejection of shareholders' resolutions which demand absolute emissions reductions in line with the Paris Agreement and the shifting of investments of fossil energy to renewable energy.

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[431] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 9.

[432] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 9 describes the six pillars to "decarbonise" Shell's own business activities, including: "*using more renewable electricity to power our operations*".

[433] This part of Shell's policy is discussed in Chapter 6.4 Defence on Appeal.

672. It was discussed at first instance that since 2016, year after year the Shell board of directors has been rejecting climate-related resolutions of shareholders' collective Follow This and also advises its shareholders to reject those resolutions, because they are supposedly not in the interests of Shell and its shareholders (see also para. 2.2.24 of the Judgement).[434] According to Shell the proposed emissions reductions were commercially unwise and unreasonable.

673. The Shell board of directors did this again in 2021 and 2022. In 2021 – a week before the Judgement was passed – Shell's board of directors deemed the resolution redundant and unnecessary, because it had already set its own targets for the short, medium and long term which were in line with the Paris Agreement and where shareholders could have an advisory voice on the annual shareholders' meeting: "[…] *the Follow This resolution is considered redundant*" […] *Shell has already announced its target to become a net-zero emissions energy business by 2050 in step with society. The Company has also already published Paris-consistent short, medium, and long-term emission reduction targets that cover Shell's operations as well as our customers' emissions from the use of all the energy products we sell.* […] *Based on the above, the Company regards the Follow This resolution as unnecessary given the Company is now providing an advisory vote on its own resolution*."[435] A Shell spokesperson even asserted in this respect that Shell's climate plans would go further than the action requested by Follow This.[436]

674. In 2022, almost one year after the Judgement, Shell called it "*unrealistic*" and "*unreasonable*" to have one company apply targets related to the globally necessary emissions reductions.[437]

675. All in all the Shell board of directors rejected the Follow This climate resolution six times, because the goal of absolute reductions of (also Scope 3) emissions as proposed in the resolution were "*unwise*", "*unreasonable*" "*unnecessary*", or "*unrealistic*".[438]

676. In short, Shell still does not intend to reduce the absolute emissions of the Shell Group in line with the danger threshold of the Paris Agreement.

6.2.7 Shell's policy provides for large-scale investments in oil and gas

677. That the total emissions of the Shell Group up to 2030 will not fall (or in any case will fall insufficiently), also appears from the investments planned by Shell. In 2022 Shell expects to invest USD 8 billion in oil and gas exploration and production (Upstream). This is in fact 33% more than in 2021.[439]

678. In total Shell intends to invest USD 16 to 18 billion in 2022 in the business units Upstream (exploration for and production of oil and natural gas, transport and infrastructure), Integrated Gas (including the LNG business, Gas-to-Liquids,[440] gas exploration and extraction) and Chemicals and Products (inter alia, the processing and trading of oil products).[441]

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[434] See, inter alia, Chapter XI.4.6 of the Summons.

[435] **Exhibit MD-386**, Royal Dutch Shell Plc Notice of Annual General Meeting 2021, p. 7.

[436] **Exhibit MD-391**, Reuters 28 April 2021, Shell climate plan should be opposed at AGM-funds group.

[437] **Exhibit MD-392**, Shell Plc Notice of Annual General Meeting 2022, p. 7.

[438] **Exhibit MD-393**, Follow This press release 20 April 2022: Shell rejects climate resolution amidst increasing investor pressure.

[439] Exhibit S-57, Fourth Quarter 2021 Results, Slide 18.

[440] This is the production of petrol or diesel from natural gas.

[441] Exhibit S-57, slide 18.

679. In the years after that Shell will continue to make significant investments in oil and gas, according to the milestones formulated by Shell in its own policy for 2030. One of the six milestones is the natural gas shift, which indicates that Shell wants to expand the share of gas up to and including 2030 to approx. 55% of its fossil portfolio. In 2020 the share of gas was 47%.[442] Shell will thus make considerable investments in new gas projects, including 7 million tons of new LNG capacity per year.[443] Shell furthermore expressed the expectation that its oil production had peaked in 2019 and would now slowly drop by an average of 1-2% per year. Shell's own production from existing fields is, however, falling much more quickly than that, i.e. by around 5%.[444] Shell will thus keep making considerable investments to keep its oil production at the same level. In addition, it is unclear whether Shell's oil production will actually come down somewhat this decade. After all, it is nothing more than an expectation, not an established policy goal.

680. The above-mentioned parts of Shell's policy entail that Shell will (continue to) invest considerably in new oil and gas fields. The *Powering Progress*-strategy states that Shell up to and including 2025 still expects to invest USD 1.5 billion per year in "*new frontier exploration.*" In its own words, it has "*attractive exploration opportunities in the first half of this decade.*"[445] Shell expects (but this is not a firm commitment) to stop "*new frontier exploration entries*" after 2025.[446] This could create the suggestion that Shell will completely cease exploration for new, as yet undiscovered oil and gas fields as of 2026. However, this is not completely correct. This expectation only relates to the expected termination of exploration in regions where Shell does not yet have a significant oil and gas infrastructure. The annual report over 2021 shows that in addition Shell still has exploration activities in 19 countries worldwide where Shell already has fields in production or development and where no expectation has been pronounced about a possible exploration stop.[447]

681. Such an investment policy is at odds with the goals of the Paris Agreement and the danger threshold laid down in the Paris Agreement. First, there is broad consensus that in any event there is no space for new oil and gas fields, nor for new LNG infrastructure, to retain a chance of 1.5°C.[448] In addition, production from existing infrastructure must in any event remain within the still available carbon budget and existing oil and gas production must therefore decrease considerably. Even the IEA NZE2050 scenario – this is based on assumptions and models which work particularly favourably for the oil and gas industry (see also Chapter 5 Defence on Appeal)

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[442] Exhibit MD-388 CDP summary 2021, p. 99.

[443] Exhibit MD-378, Shell Energy Transition Strategy 2021, p. 17: "*We intend to extend our leadership in LNG volumes and markets, with selective investments in competitive LNG assets to deliver more than 7 million tonnes per annum (mtpa) of new capacity on-stream by the middle of the decade.*"

[444] Exhibit MD-378, Shell Energy Transition Strategy 2021, p. 23: "*A natural decline in production happens in oil and gas reservoirs at a rate of around 5% a year across the oil and gas industry. It takes constant reinvestment to sustain production and extract resources. Our planned capital investment of $8 billion in our Upstream business in the near term is well below the investment level required to offset the natural decline in production of our oil and gas reservoirs, and will not sustain current levels of production. As a result of this planned level of capital investment, we expect a gradual decline of about 1-2% a year in total oil production through to 2030, including divestments.*"

[445] Exhibit MD-378, Shell Energy Transition Strategy 2021, p. 17.

[446] Ibid.

[447] Exhibit MD-377, Shell Annual Report 2021, p. 60.

[448] See, inter alia, Exhibit S-8, p.. 21. Nor does the IEA NZE2050 scenario include any room for new LNG facilities, while Shell is fully focusing on expansion of its LNG business: "*No new natural gas fields are needed in the NZE beyond those already under development. Also not needed are many of the liquefied natural gas (LNG) liquefaction facilities currently under construction or at the planning stage.*" This shows that in any event there is no room for new LNG infrastructure; even a part of infrastructure still under construction is no longer necessary.

– establishes that the current infrastructure would lead to a considerable exceeding of the still available carbon budget by 30%: "*If today's energy infrastructure was to be operated until the end of the typical lifetime in a manner similar to the past, we estimate that this would lead to cumulative energy-related and industrial process CO2 emissions between 2020 and 2050 of just under 650 Gt CO2. This is around 30% more than the remaining total CO2 budget consistent with limiting global warming to 1.5 °C with a 50% probability (see chapter 2).*"[449]

682. The IEA is trying to avoid the noted 30% overrun of the carbon budget, as a result of the continuing use of the existing fossil infrastructure, inter alia by assuming a large quantity of CCS in its modelling and by modifying the energy mix for the future in such way that the existing fossil infrastructure can be used as much as possible for, e.g., biofuels. But both assumptions regarding the quantities of usable CCS and biofuels, belong to the "Key uncertainties" of its modelling described by the IEA. This entails that if that uncertainty becomes reality, the necessary fossil infrastructure will have to be taken out of rotation as stranded assets, to be able to remain within the carbon budget.[450]

683. The IPCC also warns in the 2022 report that assumptions relating to CCS are very uncertain: "*Implementation of CCS currently faces technological, economic, institutional, ecological-environmental and socio-cultural barriers. Currently, global rates of CCS deployment are far below those in modelled pathways limiting global warming to 1.5°C or 2°C.*"[451]

684. A recent peer-reviewed study of Trout et al. concludes that if the "Key uncertainties" in the IEA report relating to CCS were to materialise, 40% of the oil, coal and gas stocks which are in use or which are still in development, cannot be burned in order to still remain within the danger threshold of 1.5C.[452]

685. Despite these findings Shell continues to invest in new oil and gas infrastructure. In the period 2019 – 2021 Shell was in the Top 4 biggest investors – and as sole Western multinational – in the exploration of new oil and gas fields, as appears from the Global Oil & Gas Exit List of NGO Urgewald.[453] The annual USD 1.5 billion that Shell still wants to invest up to 2025 in new frontier exploration belongs to the highest investments of the oil and gas industry worldwide. The same data furthermore shows that Shell belongs to the world's biggest producers in two of the six categories of unconventional oil and gas production. This concerns coalbed methane (fossil gas that is extracted from coalbeds) and ultra-deepwater drilling for oil and gas in the Gulf of Mexico.[454] Shell also has other large unconventional projects, such as the production of shale oil and gas by means of fracking in Canada and Argentina.[455]

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[449] Exhibit S-8, p. 39. The IEA assumes a carbon budget of 500 Gt by 2020, to retain a 50% chance of limiting the earth's warming to 1.5°C , see p. 54: "*IPCC SR1.5, which indicated that the total CO2 budget from 2020 consistent with providing a 50% chance of limiting warming to 1.5 °C is 500 Gt CO2 (IPCC, 2018).*" IPCC SR1.5 assumes a carbon budget of 580 Gt as of 2018 and between 2018 and 2020 approx. 80 Gt CO2 was emitted. See also IPCC AR6 WGIII, 6-114: "*Current investments in fossil infrastructure have committed 500-700 Gt-CO2 of emissions, creating significant risks for limiting warming to 1.5℃ (Callaghan 2020) (high confidence).*"

[450] Exhibit MD-362, IEA NZE2050, pp. 83 and 84. For more detail see Chapter 5 Defence on Appeal.

[451] IPCC AR6 WGIII, Summary for Policymakers, p. 32, C.4.6 (Exhibit MD-355).

[452] **Exhibit MD-394**, Trout et al 2022 Environ. Res. Lett. 17 064010, Existing fossil fuel extraction would warm the world beyond 1.5 °C, see Abstract. The study assumes the same carbon budget as the IEA (580 Gt as of 2018, being 500 Gt as of 2020).

[453] **Exhibit MD-395**, Urgewald, 4 November 2021, NGOs Release the First "Global Oil & Gas Exit List" at Glasgow COP, p. 2.

[454] Ibid, p. 5.

[455]See, e.g., https://www.shell.com/energy-and-innovation/shale-oil-and-gas/shale-oil-and-gas-locations.html.

686. Research of Oil Change International ("**OCI**") shows that Shell has an interest in 756 as of yet undeveloped oil and gas projects. If Shell develops these assets, OCI estimates that this will be accompanied by approx. 4.3 Gt in additional CO2 emissions (these are approx. 30 times the total annual CO2 emissions of the Netherlands), on top of the 7.4 Gt in CO2 emissions which are related to Shell infrastructure which is already in use or development.[456]

687. OCI's investigation (on the basis of data of Rystad Energy UCube[457]) establishes that since the Judgement, Shell has continued approving new projects for oil and gas production. If Shell had stopped approving such projects as of September 2022 and had ceased the construction of infrastructure which was still in development, then Shell's emissions which are related to its oil and gas production would automatically have fallen by 43%.[458] If Shell had taken action immediately after the Judgement, that reduction would probably have been even bigger.[459]

688. It must be borne in mind in this respect that Shell's total climate impact is far greater than only the emissions related to the burning of oil and gas which Shell itself produces. In its own words, more than half of the products that Shell sells is produced by others. Those producers make use of Shell's worldwide capacities in the area of, inter alia, transport, distribution and marketing to be able to offer their products to customers (see in this respect also Chapter 8 Defence on Appeal).

689. Shell's substantial investments in fossil energy are in sharp contrast to Shell's investments in alternative renewable energy sources. Between 2010 and 2018 Shell only made 1.3% of its total investments on behalf of the Renewables and Energy Solutions business unit.[460] But since 2018 the investments have only risen marginally. In 2020 Shell invested USD 0.9 billion in Renewables and Energy Solutions (instead of the promised USD 2 billion). In 2021 that amount was at USD 2.4 billion, on a total capital expenditure of USD 20 billion.[461]

690. In the Appeal, Shell attempted to sketch another picture of its future plans by asserting that Shell expects that in 2025 half of the expenditure of the Shell Group will go to low-emission or emission-free activities.[462] In a presentation of the quarterly figures over Q4 2021 Shell stated: "*In 2025, 50% of total expenditure expected to be driving the Energy Transition*".[463] This statement regarding Shell's expectation (i.e., not a target), provides a distorted picture and, moreover, does not in any way show that the total emissions of the Shell Group will fall as a result thereof, let alone in the degree that is necessary. Shell's statement furthermore provides a distorted picture due to the following.

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[456] **Exhibit MD-396**, Oil Change International and Milieudefensie, 30 September 2022, Shell's fossil fuel production: still pushing the world towards climate chaos, p. 4.

[457] As already explained at first instance (Notes on oral arguments 8, para. 43), Rystad Energy is a renowned Norwegian consultancy agency, that produces data on the energy market. See also Exhibit MD-396, p. 19: "*Rystad Energy's UCube is a commercial, asset-based database and model that contains reserves, production, economics and valuation data for every oil and gas field, discovery and exploration license globally. Historical data and forward projections span 1900 to 2100, and are updated monthly*."

[458] Exhibit MD-396, p. 4.

[459] Ibid.

[460] Exhibit MD-382, Kenner, D. & Heede, R. 'White knights, or horsemen of the apocalypse? Prospects for Big Oil to align emissions with a 1.5 °C pathway, Energy Research & Social Science 79 (2021), p. 4.

[461] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 33. The amounts are exclusive of investments in the construction of charging stations, which fall under the Shell marketing segment.

[462] See, inter alia, Appeal, para. 3.3.11 under (c).

[463] Exhibit S-57, p. 19.

691. Shell's definition of low-emission or emissions-free activities (also called "Energy Transition Spend"[464]) not only includes expenditure on, inter alia, charging stations and investments in renewable energy, but also:

(i) investments in nature projects to "offset" fossil emissions;
(ii) the purchase, production and trading of fossil and renewable electricity generated (in 2021 the fossil and renewable electricity generated by Shell per Mj/energy collectively had the same CO2 intensity as natural gas[465]);
(iii) considerable investments in CCS technology to continue the fossil business model (regardless of the outcome and feasibility of those CCS projects);
(iv) hydrogen produced with fossil gas;
(v) biofuels with a high carbon footprint;
(vi) Shell's convenience retail business (these are the 55,000 Shell petrol stations in the world where primarily fossil fuels are sold); and
(vii) the production and sale of non-energy products, such as chemical products and lubricants.

692. What ensues from this, is that Shell's investments in actual renewable alternatives are marginal and it is difficult to maintain that all other investments qualify as expenditure to make an energy transition that is in conformity with the Paris Agreement possible.

6.2.8 Shell's policy can lead to an increase in Shell's total emissions

693. It has already been discussed above that Shell's intensity targets leave room for an increase in emissions.

694. Analysts of Global Climate Insights (GCI) – an initiative of the Australasian Centre for Corporate Responsibility[466] – predict on the basis of extensive research into Shell's policy that the emissions of the Shell Group will actually increase up to and including 2030.[467]

695. GCI predicts, inter alia, that the emissions of the Shell Group from gas activities (LNG and Gas-to-Liquids) will rise by approx. 60% in the coming ten years[468] and that the effects of a slight decrease in the oil production by 1-2% per year do not weigh up against the extra emissions as a result of the planned growth of the gas activities of the Shell Group.[469]

696. GCI also places very critical question marks regarding the feasibility of Shell's current policy. GCI points out in this respect, inter alia, that Shell's strategy very heavily leans on CCS and on CO2 offsetting, even though this does not provide any guarantee that emissions will actually and permanently be reduced.[470]

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[464] Shell's (non-exhaustive) definition can be found on p. 39 of Exhibit S-57.
[465] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 13.
[466] GCI is studying the implications of the policy of various large oil and gas companies to provide investors with information prior to the annual shareholders' meetings. One of the carbon analysts of GCI is a Dutch scientist who worked for Shell for years.
[467] **Exhibit MD-398**, Global Climate Insights October 2021, Initiation of coverage, Part 1: Royal Dutch Shell GHG emissions, pp. 18 – 19.
[468] Exhibit MD-398, GCI Report, see the explanation with the figure on p. 9.
[469] Exhibit MD-398, GCI Report, p. 19.
[470] Exhibit MD-398, GCI Report, p. 10 and pp. 26 – 29.

697. With regard to CO2 compensation, in 2030 Shell wants to offset no less than 120 Megatons per year in CO2 emissions by generating carbon credits through nature-based-solutions (by way of comparison: this is equal to 85% of the total annual CO2 emissions of all citizens and companies in the Netherlands (141 Megatons). This would require 240,000 square kilometres of land, approx. the entire surface area of the United Kingdom.[471] A very large surface area of land would thus be necessary to "offset" approx. 9% of the total annual emissions of the Shell Group.[472]

698. In a response to the GCI study, Shell disputed that its total CO2 emissions will increase and asserted that the GCI findings are based on a lot of assumptions. But Shell provides no further information and apparently cannot or will not pay attention to the level of its absolute emissions in 2030. During the shareholders' meeting of 2021, Shell's CEO could not answer a question on this matter and he indicated that the level of Shell's total emissions in 2030 would be a gamble.[473]

699. In September 2022, GCI published an update of its analysis about Shell. The analysis included the most recent Shell financial results and reports. The details have been somewhat modified, but the conclusion remains that according to GCI the total emissions of the Shell Group in 2030 will be 3% higher than in 2019. If CCS and carbon credits are included, this would entail an emissions reduction of 5 to 6 % in 2030.[474] This is, of course, completely insufficient to make a proportional contribution to preventing dangerous climate change.

700. In any event, Shell has no target for reducing its absolute emissions in Scope 3, the targets that Shell does apply leave room for an emissions increase and an increase is also in the line of expectations in view of Shell's large-scale investments in fossil activities. In any event, the current policy will not in any way lead to the necessary emissions reduction of 45% net in 2030 for the Scope 1, 2 and 3 emissions of the Shell Group, as ordered by the District Court.

6.2.9 Shell's policy is conditional on the speed in which society moves

701. As the District Court determined,[475] Shell's policy approach is characterised in that Shell attributes a pioneering role to society. "*We cannot go faster than all our customers, otherwise we would not have any customers to purchase our new products*" is the message that Shell announces day in and day out.[476]

702. "*In step with society*" is the standard slogan behind every reference to Shell's Powering Progress policy. According to Shell, only the short-term targets for the coming 1 to 3 years are unconditional.[477]

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[471] Exhibit MD-398, GCI Report, p. 31.

[472] Based on the CO_2 emissions of the Shell Group over 2021, see Chapter 6.2.3 Defence on Appeal. The CO2 emissions over 2021 were 1367 Mt and 120 Mt amounts to a rounded 9% of that amount.

[473] Exhibit MD-397, Press release of Follow This of 22 October 2021, 'Shell will increase emissions by 4% by 2030, new research by Global Climate Insights shows': "*Where the emissions will be in 2030 is "a guess," answered Shell CEO Ben van Beurden during the shareholders' meeting after questions by Follow This. After GCI's research, it is no longer a guess; emissions will increase, which is incongruent with the Paris Accord and the court ruling.*"

[474] **Exhibit MD-399**, GCI September 2022, Update: Shell emissions forecast, pp. 3 and 13.

[475] Judgement, para. 4.5.2.

[476] See **Exhibit MD-400**, Shell Nederland, Jaar van verandering, 20 January 2022.

[477] Exhibit MD-378, Energy Transition Strategy 2021, p. 10: "*These short-term targets are not conditional on whether society progresses towards the goal of net-zero emissions; and while extremely challenging, they are aligned with our current operating plans. […] In the future, as society moves towards net-zero emissions, we expect Shell's operating plans, outlooks, budgets and pricing assumptions to reflect this movement and continue to be in step with society."* See also p. 28: "*Short*

703. The targets for the medium- and longer-term are thus conditional: "*Our medium- and longer-term targets are to reduce by 20% by 2030, by 45% by 2035 and 100% by 2050, in step with society.*"[478]

704. The reduction target for Scope 1 and 2 and the intensity target for Scope 1, 2 and 3 for 2030 are included in the company plan, but that does not make the targets unconditional.[479] In the 2021 annual report reference is made no fewer than 44 times to the fact that Shell only moves, when society moves. Shell consequently explicitly reserves the right to move more slowly than the already inadequate intensity goals. In essence, every ambition or goal, followed by the words *"in step with society"* has no material significance whatsoever. It means nothing other than that Shell will respond to changes in the consumer market, if and as soon as it thinks it can achieve an economic advantage. This is in essence what every company will do in all circumstances.

705. The Appeal also leaves no doubt that the change has to come from society itself: "*the serious consequences of climate change and the need for society to take action do not lead to the legal conclusion that Shell is subject to a Reduction Obligation.*"[480] According to Shell, supply and demand of the energy market must change at the same time in order for a transition to be possible, i.e. according to Shell this means: first demand must change, then supply can change.[481]

706. Shell's strategy is therefore a customer-first strategy: "*We seek to work with our customers to profitably serve their changing needs, and to help decarbonise the energy system and reach net-zero emissions. Our approach is to start with the customer or sector and ask: what do they want and need – today, and in the future?*"[482]

707. It fits seamlessly in the story that Shell has been asking for attention for years to detract attention from its own responsibility. Not Shell, but the customer is responsible. It is a strategy that in scientific research of policy and communication plans of large fossil companies, is also seen as one of the many strategies to delay climate action.[483] As long as Shell continues pumping tens of billions into new fossil projects, Shell is actively stimulating dependency on fossil fuels and the lock-in of CO2-intensive infrastructure. Milieudefensie et al. has noted that in essence little has changed since the CEO of Shell indicated in an interview regarding the Paris Agreement: "*I will pump up everything there is to pump up in order to meet demand*."

708. Lastly, the conditionality of the ambitions and goals of Shell also ensue from the fixed disclaimers and warnings which are included in all its documents and publications. Its website

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term (up to three years): we develop detailed financial projections and use them to manage performance and expectations on a three-year cycle."

[478] Exhibit MD-378, Energy Transition Strategy 2021, p. 15. See also p. 64, the CDP summary of 2021 (Exhibit MD-388), in which Shell again explicitly indicates that the target for 2030 is also dependent on the speed at which society moves: "*These targets are compared with 2016 and, in step with society: 20% by 2030.*"

[479] Exhibit MD-377, Annual Report 2021, p. 83: "*Shell's targets to reduce absolute Scope 1 and 2 emissions by 50% by 2030, compared with 2016 levels on a net basis, and 20% reduction of net carbon intensity of Scope 3 emissions by 2030 have been included in Shell's operating plan. Meeting the goals of the Paris Agreement requires the global economy to transform in a number of complex and connected ways. Shell will continue to revise its operating plan, price outlooks and assumptions as it moves towards net-zero emissions by 2050, in step with society.*"

[480] Appeal, para. 1.4.1.

[481] Appeal, para. 2.7.5, footnote 131.

[482] Exhibit MD-377, Annual Report 2021, p. 12, See also https://www.shell.com/media/news-and-media-releases/2021/shell-accelerates-drive-for-net-zero-emissions-with-customer-first-strategy.html.

[483] **Exhibit MD-401**, Lamb WF et al. (2020). Discourses of climate delay. Global Sustainability 3, e17, 1–5.

also shows that Shell's future-oriented statements are based on the current expectations and assumptions of the board of directors and there is explicit warning that, among other things, results and performance can turn out completely differently. These forward-looking statements can be recognised by the use of specific terms. Whoever reads Shell's policy, will see that all these specific terms are used to describe Shell's climate ambitions:

"*Forward-looking statements are statements of future expectations that are based on management's current expectations and assumptions and involve known and unknown risks and uncertainties that could cause actual results, performance or events to differ materially from those expressed or implied in these statements. Forward-looking statements include, among other things, statements concerning the potential exposure of Shell to market risks and statements expressing management's expectations, beliefs, estimates, forecasts, projections and assumptions. These forward-looking statements are identified by their use of terms and phrases such as "aim", "ambition", "anticipate", "believe", "could", "estimate", "expect", "goals", "intend", "may", "milestones", "objectives", "outlook", "plan", "probably", "project", "risks", "schedule", "seek", "should", "target", "will" and similar terms and phrases. There are a number of factors that could affect the future operations of Shell and could cause those results to differ materially from those expressed in the forward-looking statements included in this report."*[484]

709. In addition to the fact that the policy is thus not suitable for making a proportional contribution to preventing exceeding of the universal danger threshold, the foregoing and this standard disclaimer of Shell show that at all times the necessary reservations apply with regard to Shell's policy plans. Shell thus expresses expectations in its plans, even if it uses other words for this like 'goal', 'objective', 'plan' or 'target'. In short, Shell can always change its plans and still pass on the leader role to the consumer and other parties in society.

6.2.10 Shell's policy is the corollary of Shell's risk appetite

710. It was demonstrated at first instance that Shell determines the corporate policy and the investment priorities of the Shell Group, with the CEO having final responsibility for the overall policy, including the climate and transition policy.[485] This is not a matter of discussion in appeal. It has also been explained in detail in that respect that Shell has been aware for many years of the considerable risks of climate change and the energy transition for its company activities, and that Shell annually reports on those risks in, inter alia, its annual reports. Shell makes its decisions on the basis of the assessment of those risks and its risk appetite*:* whether the risk is accepted without taking further action; whether the risk is limited or reduced (and in what way); whether the risk is transferred, e.g. to an insurer; whether the activity that gives rise to the risk is to be completely set aside.[486]

711. Just as in prior years, in its strategic report Shell pays detailed attention to the crucial risks for the company. The 2021 annual report states: "*Shell continues to identify climate change and the associated energy transition as a material risk based on the rapidly evolving societal concerns and developments related to climate change and managing GHG emissions. These developments expose Shell to a variety of factors, which could have an impact on demand for*

[484] See, e.g., Exhibit MD-380, Energy Transition Progress Report 2021, p. 35.

[485] See, inter alia, Milieudefensie et al.'s Notes on oral arguments 1, paras. 31– 82 – RDS determines the climate and transition policy of the Shell group.

[486] Ibid.

our products, our operational costs, supply chains, markets, regulatory environment, licences to operate and litigation."

712. According to Shell, climate change and tackling greenhouse gas emissions entail considerable risks which are related to each other and indicate a quickly developing risk landscape, which Shell sub-divides into four sub-areas: (i) commercial risks, (ii) regulatory risks, (iii) social risks (including risks as a consequence of litigation) and (iv) physical risks.[487]

713. Shell acknowledges very explicitly that increasing concerns on climate change and the increasing focus on the role of oil and gas companies in the area of climate change and the energy transition entail considerable risks, including negative consequences for the brand and the reputation of Shell, Shell's licence to operate (the necessary confidence in or supporting base for Shell in the company), a reduced demand for oil and gas products, accelerated laws and regulations, capital destruction, the departing of shareholders, financing risks, liability risks, etc.[488]

714. Nevertheless, Shell is willingly and knowingly making the strategic choice of not acting in line with the global Paris temperature target. This makes its policy a direct corollary of (i) Shell's strategic appetite for accepting the related risks (strategic risk appetite) and (ii) its own estimation of the way in which Shell is able to make these risks manageable.[489] In this respect it was also explained in detail at first instance that Shell's PR and lobby activities, of the wider oil and gas industry and of their industry organisations, play a crucial role in making the risks identified by Shell in its annual reports manageable. Milieudefensie et al. will go into this in further detail in the following paragraphs.

6.2.11 Interim conclusion

715. The above explanation shows that in a clever manner Shell aims to de facto continue following a business-as-usual strategy up to 2030 in any event. For 95% of the emissions of the Shell Group, Shell does not have the goal of reducing emissions and will strive up to and including 2030 for a dilution of its average carbon intensity, simply by adding low-carbon products or services to its (growing) fossil portfolio.

716. Shell continues to invest on a large scale in existing and new oil and gas projects, for which there is evidently no room in the still available carbon budget; new projects which further increase the disastrous lock-in of oil and gas in the energy system. Up to and including 2030 Shell itself does not expect an emissions reduction and in its CDP specification of 2022 concerning its Scope 3 emissions for 2030 indicated a reduction percentage of 0%. The intensity targets give Shell the space of simply allowing the emissions to increase and Shell has made reservations in this respect. With its policy Shell thus evidently does not make an adequate contribution to the unprecedented global challenge to remain within the danger threshold laid down in the Paris Agreement. As the Secretary-General of the UN succinctly put it following the publication of the most recent IPCC report:

[487] Exhibit MD-377, p. 86.

[488] Exhibit MD-377, pp. 23, 28, 80 - 82.

[489] See also Milieudefensie et al.'s Notes on oral arguments 1, paras. 83 – 129 - Making identified transition risks manageable by means of such things as lobby and PR activities.

"*You cannot claim to be green while your plans and projects undermine the 2050 net-zero target and ignore the major emissions cuts that must occur this decade.*"[490]

717. What this chapter also shows, is that Shell's strategy is geared to retaining the fossil business model and the protection of its oil and gas investments. That is why the capture and storage of CO2 and the "offsetting" of CO2 emissions are two crucial pillars of Shell's policy. Instead of large-scale investments in renewable alternatives and the phasing out of the production of oil and gas, Shell is focusing on maintaining the large-scale and permanent fossil dependency of society.

718. Shell's policy thus remains a fossil-based policy, but then in what at first sight looks like a green jacket. The launching of *Powering Progress* and the announcement of Shell's modified intensity targets was accompanied by unprecedented media attention and the Shell PR machine continues running at full speed. Whoever is seen via self-promotion as a sustainable leader and precursor in the energy transition, retains the confidence of political decision makers and society and will be less likely to be regulated. It is a game that Shell plays better than anyone.

719. In the following Chapter 6.3 Defence on Appeal, further attention will be paid to this interplay of greenwashing via advertising and PR and the unceasing lobbying of Shell, the other big oil and gas companies and their hundreds of industry organisations. This provides better insight into the control measures applied by Shell which are intended to mitigate the company risks (connected with its strategic risk appetite) due to the ever-continuing fossil investments.

6.3 Greenwashing with PR, advertising and lobby activities: how Shell continues influencing the public and political decision makers to maintain the fossil business model

6.3.1 Introduction

720. It is clear that *Powering Progress* cannot in any way be seen as a policy that will make a contribution to preventing dangerous climate change, but on the contrary directly anticipates a permanent fossil dependency with very limited investments in actual sustainable energy alternatives.

721. The presentation of Shell's policy and the related PR offensive are geared to convincing the public, political decision makers and shareholders that Shell is taking the necessary action to contribute to the Paris goals, thus retaining social confidence:

"*The 'social licence to operate' is a metaphorical concept. It indicates that companies cannot operate sustainably without the support of society. That licence depends on trust. That is what makes people buy our products, apply for our vacancies, invest in our shares or accept our presence in their communities.*"[491]

722. Ads on radio and television, speeches of and interviews with directors of Shell, sponsoring of cultural and sporting events, online content on Shell's website, content which is distributed via social media (and other digital media) and advertising communications at Shell's worldwide network of petrol stations, day in day out spread the message that Shell is a driver of the energy transition.

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[490] **Exhibit MD-402**, UN News 28 February 2022, IPCC adaptation report 'a damning indictment of failed global leadership on climate', p. 3.

[491] See Exhibit MD-382, Heede & Kenner, p. 8, who cite a statement of the CEO of BP.

723. The way in which Shell is advertising has already been noted as misleading by the Dutch Advertising Code Committee ("**RCC**") several times this year alone, but by the time such a (subsequent) finding is made, the damage has already been done. In most cases the advertising campaign will already be over and Shell will have reached millions of people daily with the message that it wants to present to the public.

724. At first instance it was explained in detail and supported by research which strategies the oil and gas industry use to gain trust and create loyalty in society, such as "issue advertising", with which the companies try to turn social issues with public campaigns to their hand, and "image advertising", intended to improve the legitimacy and the reputation of the companies in a general sense.[492] Shell alone spends tens of millions per year on advertising campaigns, but its competitors and the industry organisations in which Shell participates, also contribute significantly to the continuing promotion of oil and gas companies as socially responsible players in the energy transition. Shell has not disputed what Milieudefensie et al. presented in this respect at first instance. With *Powering Progress* Shell lifted this to an even higher plane, if possible. Examples of this will be discussed below and Milieudefensie et al. will provide more insight into the gaping hole between Shell's public "green" communication and its fossil policy.

725. In addition to using PR and advertising to retain a social supporting base, the influencing by the oil and gas industry of new laws and regulations of national states and the European Union was discussed at first instance. Milieudefensie et al. has explained that the interplay of PR activities on the one part and the unknown economic and political lobbying power of Shell and its colleagues in the industry on the other, explains why Shell is willing to accept the risks of accelerated regulation in the area of climate as part of its strategic risk appetite.[493] Shell barely presented a substantive response, nor did it dispute the astronomical amounts which it spends on such lobby activities. It will be clear that those amounts are not spent for the democratic process between the political domain and citizens. In the Appeal, Shell tried to deflect attention from its lobby activities by emphasising what positions it publicly takes toward the political domain.[494] But the point that Milieudefensie et al. made is precisely that Shell verbally makes representations to the public that there must be regulations, but by means of lobby practices, including via industry organisations with which the company is affiliated, behind the scenes effectively tries to combat or weaken climate policy to prevent that Shell is forced to change, or that it can change at a speed of its choosing. In this way Shell combines two of its important goals, i.e. retaining a public licence to operate on the one part and the limiting of the transition risks for its fossil business model on the other.

726. It is this comprehensive interplay of PR and lobby activities that entails that Shell still dares to continue large-scale investments in new oil and gas activities, with disastrous consequences for the habitability of the planet. "*Shell's 'Transition strategy' is a balancing act of allowing slivers of climate action while aggressively protecting its core business,*" in the words of analyst Ketan Joshi in his assessment of the current policy.[495]

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[492] Milieudefensie et al.'s Notes on oral arguments 1, paras. 99 – 108.

[493] See, inter alia, Summons, Chapter VIII.2.3.1.e – Shell makes the energy transition difficult and Milieudefensie et al.'s Notes on oral arguments 1 of 1 December 2020, paras. 83 – 129: Making identified transition risks manageable by means of such things as lobby and PR activities.

[494] Para. 2.7.2 Appeal.

[495] **Exhibit MD-403,** Joshi, K., 29 April 2021, A major test for Shell's massive multi-purpose greenwashing juggernaut, p. 2.

6.3.2 Greenwashing with PR and advertising: a mismatch between image and action

727. The discussion of Shell's policy entails that there is a mismatch between the picture that Shell presents and the content of its current corporate policy. By letter of 25 April 2022 to the Shell board of directors, Milieudefensie et al. has mentioned many examples of public statements of Shell – partly in connection with the Judgement – which wrongly create the suggestion that the company is a global force for change.[496]

728. In the framework of *Powering Progress* Shell has rolled out worldwide advertising campaigns, like the campaign "*Maak het verschil. Rij Co2-neutraal*"" ["Make the difference. Drive CO-2 neutral"], with which Shell offers CO2 credits in 17 countries to drivers who buy petrol at Shell stations. Or the campaign "*Wij veranderen, verander mee.*" ["We're changing, change with us"]

729. In 2022 alone the Dutch RCC held five times that Shell cannot sufficiently substantiate its advertising claims and is consequently misleading the public regarding certain products and services it offers and Shell's role in the energy transition.[497]

730. In particular, the RCC held that it cannot be justified that Shell refers to itself as one of the biggest drivers of the energy transition. The RCC held in this respect that Shell was painting an overly rosy picture of reality, as Shell has kept its investments in fossil fuels at the same level.[498]

731. In response to other complaints, the RCC also established that Shell wrongly used the term 'green hydrogen'[499] and concluded that the claim "*we make millions of kilometres cleaner"* is misleading.[500] In addition, Shell wrongly created the impression that it makes electric driving easier because thanks to Shell there were going to be 47,000 charging stations.[501]

732. Hereinafter, in Chapter 6.4, the risks of the mitigation of fossil emissions with CO2 credits will be discussed. The related Shell publicity campaign has in the meantime been found misleading on two occasions. Last year the RCC held in connection with a complaint of a group of students in the area of climate liability that various communications of that campaign are misleading, because a result is guaranteed with CO2 offsetting that is not certain.[502]

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[496] Exhibit MD-387, letter of 25 April 2022 to the Shell board of directors, Annex I.

[497] For examples of earlier cases abroad, see the Summons, Chapter VIII.2.3.1.(b).

[498] **Exhibit MD-404**, RCC 14 February 2022, case 2021/00576/A *"As has been acknowledged, however, it has been established that Shell, in addition to investing in transition projects, for the time being is maintaining the level of its investments in fossil fuels and is only phasing them out very slowly. In that situation the Commission does not deem it justifiable that Shell should refer to itself as "one of the biggest drivers of the energy transition", which creates the impression that it is an initiator and accelerator of the transition. This presents an overly rosy picture of reality.*" See also **Exhibit MD-405** Trouw 15 February 2022, Shell misleidt opnieuw consument met groene beloftes, oordeelt Reclame Code Commissie.

[499] **Exhibit MD-406**, RCC 10 February 2022, case 2021/00596: "*In this case it is hydrogen, which is a residual product from the chlor-alkali electrolysis process. That process makes use of energy which according to a certificate is 'green'. This is not what the average consumer will expect with the name "green hydrogen"* ."

[500] **Exhibit MD-407**, RCC 10 February 2022, case 2021/00561. The RCC determined that Shell does not give the consumer the necessary context about Shell's contribution: "*Without context the term "millions of kilometres" creates the suggestion of a significant contribution, while this contribution is (at this time still) slight in relation to the entirety of kilometres driven*."

[501] **Exhibit MD-408**, RCC 08 March 2022, case 2021/00575: *"In the ad Shell wrongly creates the impression that it makes electric driving easier because thanks to it there are going to be 47,000 charging stations. As has been considered above, this is not correct. The communication therefore creates an overly rosy picture of (the extent of) the change by Shell and the contribution that it makes to make electric driving easier*."

[502] **Exhibit MD-409**, RCC 26 August 2021, case 2021/00190, para. 9: "*In that light the disputed communications relating to "Make the difference, Drive CO2-neutral" is too absolute, because a result is guaranteed with excessive firmness,*

733. The RCC considered in this respect, inter alia, that although Shell follows existing standards and guidelines in which the system for purchasing CO2 credits is used to offset the reduced emissions of greenhouse gases, this system is "*a theoretical system based on agreements*". There was no proper, independent, verifiable and generally acknowledged proof that in practice there is any actual guarantee of full offsetting. Consequently Shell's absolute environmental claim was insufficiently substantiated, aside from the arguments that the complainants have brought against the use of those standards and guidelines.[503]

734. In response to the RCC's decision, Shell started using the claim "Make the difference. Offset CO2 emissions" for the product that is offered to customers. According to Shell it is clear to customers that CO2 offsetting does not compensate for the total environmentally harmful CO2 emissions as a result of the burning of fossil fuels. The RCC comes to a different conclusion, i.e. that Shell has not proven that the promised complete offsetting of the CO2 emissions is actually and permanently realised in practice.[504]

735. In the past few years Shell had its fingers rapped by domestic and foreign agencies which wish to safeguard the reliability and credibility of advertising. Other examples of this are claims in Shell's "Let's Go" campaign, consisting of the claim "*Abundancy of natural gas*" in combination with the assertion "*it is far and away the cleanest of all fossil fuels*" and the advertisement in which Shell claims that there is enough natural gas for the next 250 years in combination with references to "*cleaner energy*".[505]

736. These forms of *greenwashing* provide insight into the way in which Shell is continually busy creating a green image which is not in line with its actual activities. This also appears clearly from scientific research, published in the renowned journal PLOS ONE,[506] into the integrity of the clean energy claims of Shell and other oil and gas majors on the basis of their activities and investments. This research established that although in the last ten years more and more attention has been paid to climate and the energy transition in the annual reports of, inter alia, Shell, this attention is not being translated into concrete action: "*the financial analysis reveals a continuing business model dependence on fossil fuels along with insignificant and opaque spending on clean energy. We thus conclude that the transition to clean energy business models is not occurring, since the magnitude of investments and actions does not match discourse. Until actions and investment behavior are brought into alignment with discourse, accusations of greenwashing appear well-founded.*[507]

737. Shell and its fellow energy companies manage by means of greenwashing and with the help of renowned PR companies to exert considerable influence on the public perception about climate change and the role that the oil and gas companies – which now prefer to be called "*integrated*

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that is not certain. It has not been demonstrated that the CO2 emissions of driven kilometres has no negative effect whatsoever on the environment, even though this is claimed."

[503] Exhibit MD-409, RCC 26 August 2021, case 2021/00190, para. 8.

[504] **Exhibit MD-410**, RCC 28 June 2022, case 2022/0100, pp. 7-8. Shell appealed against this decision.

[505] Exhibit MD-197, RCC 8 March 2012, case 2012/00041.

[506] PLOS ONE is an international peer-reviewed scientific magazine. It was established in 2006 and is published by the Public Library of Science.

[507] **Exhibit MD-412**, Li M, Trencher G, Asuka J (2022) The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments. PLoS ONE 17(2): e0263596, see Abstract. With regard to this research see **Exhibit MD-413**, Carbon Brief 16 February 2022, Oil majors 'not walking the talk' on climate action, study confirms.

energy companies" – play in this respect.[508] Earlier this year some 450 climate scientists published a urgent letter in which PR companies are called upon to cease their campaigns for the fossil industry. According to the 450 scientists, those PR campaigns are "*a major and needless challenge*" for climate science and political climate action.[509] This letter came shortly after the publication of a sizeable peer-reviewed study into the role of PR companies in climate politics, in connection with their work for companies in five polluting sectors. In this study Shell, with 231 assignments, is number 2 out of the 25 polluters who have made the most use of the services of large PR companies.[510]

738. In another study submitted at first instance, it was established that media campaigns are particularly deployed at the time that regulatory initiatives relating to climate change are pending, as well as at the time that there is a lot of media attention for climate change. This was also confirmed in recent research.[511]

739. In September 2021 the US House of Representatives, by means of an Oversight Committee, started a public investigation into the influence of the large Western oil and gas companies and the American Petroleum Institute (API) on climate policy. The investigation focuses not only on the way in which the fossil industry has dealt with their knowledge on the dangers of climate change since at least 1977, but also on the credibility of their current net zero promises, the ongoing large investments in fossil infrastructure and the current actions to block climate reform. As part of this public investigation, managers were called up by the Oversight Committee to testify on the actions and plans of their company. In September 2022 the Oversight Committee published its first findings, with one of the central conclusions being: *"The Committee's investigation has shown that, rather than outright deny global warming, the fossil fuel industry has "greenwashed" its record through deceptive advertising and climate pledges—without meaningfully reducing emissions. [Emphasis added by counsel]"*[512] The Oversight Committee published a first selection of internal documents of fossil companies, including Shell.[513] In addition, for example, a US public prosecutor is investigating greenwashing by Shell.[514] In America various lawsuits have been brought against, inter alia, Shell for greenwashing and misleading of consumers.[515]

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[508] **Exhibit MD-414**, Washington Post 21 February 2021, Spin doctors have shaped the environmentalism debate for decades, **Exhibit MD-415**, Foreign Policy 17 February 2022, How PR Firms Captured the Sustainability Agenda. See also **Exhibit MD-416**, regarding the statements of UN Secretary-General Guterres on the destructive role of the PR activities of fossil companies, p. 19.

[509] **Exhibit MD-417**, Clean Creatives 19 January 2022, Scientists Sign Letter Calling on PR and Ad Agencies to Drop Fossil Fuel Clients. See also **Exhibit MD-418**, BBC 23 July 2022, 'The audacious PR plot that seeded doubt about climate change' in which the PR campaign for the Global Climate Coalition – an organisation with which Shell was affiliated up to 1998 – to sow doubt about climate science is discussed.

[510] **Exhibit MD-419**, Brulle R, Werthman C (2021) The role of public relations firms in climate change politics, Climatic Change (2021) 169:8 p. 10.

[511] **Exhibit MD-420**, InfluenceMap, Climate Change and Digital Advertising - The Oil & Gas Sector's Digital Advertising Strategy (August 2021), p. 15: "*Looking at the spend on social issue, election, and political ads over 2020, it is clear there was a significant increase in spend on July 15th, the day after then presidential nominee Joe Biden, announced his $2 trillion climate plan, which was intended to increase the use of clean energy in transportation, electricity and buildings*." Shell was not included in the study, its fellow energy companies and biggest industry organisation API were.

[512] **Exhibit MD-421**, Committee on Oversight and Reform, Memorandum 14 September 2022 re Investigation of Fossil Fuel Industry Disinformation.

[513] **Exhibit MD-422**, Committee on Oversight and Reform - selection of published internal documents of Shell.

[514] **Exhibit of MD-423**, Office of the Attorney General for the District of Columbia 25 June 2020, 'AG Racine Sues Exxon Mobil, BP, Chevron, and Shell for Misleading Consumers About the Role Fossil Fuels Play in Climate Change'.

[515] **Exhibit MD-424**, Center for International Environmental Law, The Rise in Forward-Looking Corporate Climate Cases: From Shell to Santos: "*Lawsuits brought by the District of Columbia, Vermont, and New York City, for example, cite Shell's portrayal of hydrogen as a form of greenwashing. In the DC case, the complaint (https://www.sheredling.com/wp-*

740. That the gap between the 'green' public communication and the actual activities and lobby practices of the fossil companies is large, also appears from a recent study of the organisation InfluenceMap, which concludes:

"Extensive analysis of the public communications of five 'supermajors' oil companies (Shell, BP, TotalEnergies, Chevron, and ExxonMobil) finds that they are spending hundreds of millions of dollars each year on a systematic strategy to portray themselves as positive and proactive on the climate change emergency. This is found to be inconsistent with the companies' plans for capital investment in their business. It is also found to be misaligned from the detailed policy engagement activities of the companies and their industry associations on climate change."[516]

741. Specifically with regard to Shell, InfluenceMap has established that 70% of Shell's public communication relates to green claims in relation to the energy transition, while only 10% of the investments goes into low-carbon investments (which includes nota bene some fossil gas).[517]

742. A recent article of the Financial Times provides insight into PR campaigns that oil and gas companies have used in response to the energy crisis and the war in Ukraine: "*Companies including BP in the UK, Chevron in the US, as well as the American Petroleum Institute, a trade body representing more than 600 members in the oil and gas industry, have launched campaigns pushing an expansion of domestic capacity as a solution to the crisis. But the public relations drive also comes in the context of pledges by governments around the world to phase out polluting fossil fuels, and a new focus among regulators on both sides of the Atlantic over how companies market their environmental credentials.*"[518]

743. Shell has seized upon the energy crisis and the forced withdrawal from Russia to emphasise once again the importance of new oil and gas projects outside of Russia.[519] The hunt for new fossil projects is thus still in full swing, while in the meantime the organisation is working hard to find ways to continue reinforcing Shell's green image.[520] At the same time a large part of the exorbitant profits as a result of the increased energy prices is not being spent on tackling the climate problem, but is being paid out to shareholders and spent on purchasing the organisation's own shares to raise the share price.[521]

744. This is how one of the biggest fossil emitters in the world succeeds in continuing on the fossil road, paying out unprecedented returns to investors and in the meantime contributing at high

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content/uploads/2020/09/2020-06-25-DC-v-Exxon-final-complaint-File-Endorsed.pdf) calls out Shell for advertising hydrogen as "clean" while omitting that nearly all hydrogen produced in the U.S. comes from fossil gas. The case State of Vermont v. ExxonMobil et al. filed in September 2021 also notes (https://ago.vermont.gov/wp-content/uploads/2021/09/SOV-v-Exxon-Complaint-FINAL.pdf) that Shell both overstates its investments in hydrogen and ignores the adverse environmental impacts of this alternative fuel. Shell's omission of the link between fossil gas and hydrogen is also cited in a case filed by New York City on Earth Day 2021 against ExxonMobil, Shell, BP, and the oil and gas lobby group, the American Petroleum Institute, alleging violations of the City's Consumer Protection Law."

[516] **Exhibit MD-425**, InfluenceMap, Big Oil's Real Agenda on Climate Change 2022, An analysis of oil and gas supermajors' public communications, business operations and policy engagement on climate, September 2022, p. 3.

[517] Ibid, p. 4.

[518] **Exhibit MD-426A**, Financial Times, 11 July 2022, Shell takes to TikTok as oil groups try to boost credentials during energy crisis.

[519] Ibid. See also **Exhibit MD-426B**, The Telegraph, 5 May 2022, Shell chief demands nod for big North Sea gas project.

[520] Ibid.

[521] **Exhibit MD-427**, The Guardian, 2 August 2022, Oil firms seem more interested in shareholders than net zero.

speed to the emissions which make earth uninhabitable. All of this under the flag of green self-promotion.

6.3.3 Shell's constant lobbying to influence government policy

745. Whereas PR and advertising are geared to gaining public support for the organisation and the desired policy, Shell in addition, both directly and via lobby and law offices and via industry organisations, has a considerable influence on political decision making. Both strategies are seen as two sides of the same effort to exercise a certain degree of control over the environment, thereby mitigating the risks for the fossil business model and keeping them manageable.

746. At first instance, on the basis of research by the late John Ruggie – the creator of the United Nations Guiding Principles on Business and Human Rights – and other publications, substantiation was provided for the way in which multinational enterprises like Shell exercised considerable lobby power in all political centres of the world, to realise their own strategy and goals, to influence policy and minimise the risks of new laws and regulations on their business operations.[522] Shell itself has indicated this, as can be read on a website affiliated with Shell, describing the mission of Shell's Government Relations team in the United States:

"*The mission of Shell's Government Relations team is to work with federal and state governments, foreign government embassies, and key stakeholders to advance business objectives, enhance the reputation of Shell, affect public policy, and minimize government risks to our businesses. We work closely with the Shell business leaders to identify issues and priorities in order to develop strategies that support business goals in our engagements with public officials and policymakers*"[523]

747. In particular Brussels – where Shell alone has 17 lobbyists with expenditure of some EUR 4 – 4.5 million a year[524] – and Washington DC are political and regulatory centres on which Shell spends many millions to mitigate the risks of its strategic choices.

748. In the United States, Shell is in the third place of companies with the highest expenditure on lobby activities of the entire oil and gas industry.[525] In the past years this concerned USD 7 – 9 million per year.[526] Between 2007 and 2021 this comes down to an amount of USD 132 million for the US lobby.[527] This is exclusive of the many millions that Shell pays to industry organisations and thus also exclusive of the amounts which these industry organisations in turn spend on lobby activities, with the funds obtained from the oil and gas industry.

749. The greater part of that amount is paid by Shell's own lobbyists of the above-mentioned Government Relations team. A selection from the lobby reports delivered by Shell provides insight into the topics discussed in this respect. For example, in a statement over Q4 2015, the

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[522] Milieudefensie et al.'s Notes on oral arguments 1, paras. 83 through 98..

[523] **Exhibit MD-428**, printscreen of the website Shellvoices.com. BIPAC, the Business-Industry Political Action Committee, which is supposed to improve the political climate for companies in the United State, manages the website for Shell, and mentions one of Shell's fixed lobbyists as contact person.

[524] **Exhibit MD-429**, Overview of EU Register of Shell lobbyists: see p. 3 for Shell's lobbyists and p. 4 for the lobby expenditure in Brussels.

[525] **Exhibit MD-430A**, Opensecrets Oil & Gas Lobbying Profile 2021.

[526] **Exhibit MD-430B**, OpenSecrets, Client Profile Shell plc, overviews of annual expenditure 2007 through 2021, see the expenditure between 2013 and 2021.

[527] Ibid.

quarter in which the Paris Agreement was made, it can be seen that the lobby team has direct involvement with the emissions reduction goal of the United States and with the implementation of President Obama's climate plan.[528] In 2020 the agenda included topics such as "*Issues related to energy policy, energy transition*", "*Issues regarding general offshore energy access, including DOI's 5 year leasing program*" and "*Issues related to energy transition and climate change*".[529]

750. As stated, Shell is, in addition, supported by lobby and law firms to represent its interests in Washington DC. One of them is Squire Patton Boggs, an office that lobbied for Shell from 2014 to 2019 regarding, inter alia "*Climate, OCS oil and gas exploration/drilling*."[530] Since 2017 the lobby firm of McLarty Inbound LLC has been working for Shell "*to protect and further the company's interest in the debate over natural gas as an element of European energy security.*"[531] Since 2019 Shell has been paying the Alpine Group to lobby for, inter alia: "*Upstream oil and gas", "Climate change", "Natural gas/LNG", "Financial assurance"* and *"Issues related to Climate change policies"* before the US Senate and the House of Representatives.[532]

751. This is only a handful of the many U.S. lobby activities of Shell. In addition, the hundreds of industry organisations of which Shell is a member also lobby for the benefit of the interests of the oil and gas industry.[533] The American Petroleum Institute ("**API**") is the most important organisation thereof. API is annually supported by Shell with an amount of USD 10 – 12.5 million and Shell sits on both the board of directors and the daily management board of API.[534] Another important organisation is the US Chamber of Commerce. Shell annually supports this organisation with an amount of USD 1 – 2.5 million, where Shell again sits on the board of directors.[535] Both organisations are infamous for their disastrous influence on US climate policy.[536,537]

752. An article in The Guardian from 2021 shows that the individual oil and gas companies use industry organisations, via their membership, to be able to lobby for oil and gas expansion, without themselves being directly exposed to public and political criticism:

"*Earlier this year, an Exxon lobbyist in Washington was secretly recorded by Greenpeace describing API as the industry's "whipping boy" to direct public and political criticism away from individual companies*."[538]

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[528] **Exhibit MD-431**, Lobby report Shell Oil Company Q4 2015, p. 5.

[529] **Exhibit MD-432A**, Selection of lobby reports Shell Oil Company 2020.

[530] **Exhibit MD-432B**, Selection of lobby reports Squire Patton Boggs for Shell Oil Company 2014, 2016 en 2018. The forms state the name of Breaux-Lott Leadership Group; that group forms part of Squire Patton Boggs.

[531] **Exhibit MD-432C**, Selection of lobby reports McLarty Inbound for Shell Oil Company 2018 and 2022.

[532] **Exhibit MD-432D**, Selection of lobby reports Alpine Group for Shell Oil Company 2019 and 2020.

[533] **Exhibit MD-433**, Shell Industry Associations Climate Review 2021 and **Exhibit MD-434**, Shell Industry Associations Climate Review Update 2022.

[534] Exhibit MD-434, Shell Industry Associations Climate Review Update 2022, p. 3.

[535] Ibid.

[536] **Exhibit MD-435A**, The Atlantic, 20 February 2020, The Oil Industry Is Quietly Winning Local Climate Fights. **Exhibit MD-435B**, Inside Climate News, 12 January 2022, On the Defensive a Year Ago, the American Petroleum Institute Is Back With Bravado. **Exhibit MD-435C**, 23 July 2022, The audacious PR plot that seeded doubt about climate change.

[537] **Exhibit MD-436**, Inside Climate News, 29 June 2021, The US Chamber of Commerce has helped downplay the Climate Threat, New Report Concludes, p. 2: "*Chamber boardrooms and committees have long been staffed by executives from fossil fuel corporations like Shell, ConocoPhilips and Southern Company, whose leadership helped shape its climate change strategies*", as cited from the report, just like the determination that the US Chamber of Commerce "*has long been a powerful force obstructing climate action and an active funder, leader and participant of many countermovement groups.*"

[538] **Exhibit MD-437**, The Guardian, 19 July 2021, How a powerful US lobby group helps big oil to block climate action.

753. With regard to the lobby in Europe, Milieudefensie et al. already presented various examples at first instance regarding the way in which Shell and the industry organisations of which it is a member influence the European energy and climate policy.[539] This showed that Shell and important industry organisations in which it participates, have objected to binding European goals for energy efficiency and renewable energy and in a more general sense have tried to temper Europe's climate ambitions.[540]

754. One of the important other topics for which Shell and the industry organisations lobby is promoting fossil gas as fuel for the future.[541] For this purpose Shell is, inter alia, a member of the International Association of Oil and Gas Producers, Eurogas and GasNaturally, to which organisations collectively Shell annually pays between USD 600,000 and USD 1.5 million.[542]

755. The push for fossil gas has been going on for many years. It is for that reason, for example, that Shell (together with, inter alia, Gazprom) has made large-scale investments in the Nord Stream 2 gas pipe line between Russia and Germany, in order to be able to import Russian gas on an even greater scale and distribute it in Europe.[543] This is despite the fact that from the first moment warnings were issued from many quarters regarding the ever increasing dependency of Europe on an unstable and geopolitically dangerous regime like that in Russia, with all related risks to energy certainty and the affordability of energy.[544] These risks evidently manifested themselves in 2022, resulting in an unprecedented gas crisis and precedented gas prices. Shell is reaping the financial rewards of this situation.

756. It is therefore also incorrect, as Shell makes it appear in its Appeal, that continuing to focus on fossil fuels would be favourable for energy certainty and the affordability of energy. The contrary is true, as the Executive Director of the IEA puts it most aptly:

> "*Today's crisis is a reminder of the unsustainability of our reliance on fossil fuels and can be a key turning point to move faster towards a cleaner, more affordable and more secure energy system*."[545]

757. Despite all of this, Shell is seizing upon the gas crisis to emphasise the importance of new gas projects.[546] This shows that Shell's primary goal is to maintain its business model and not to safeguard the affordability and the energy security of society, and certainly not to make an adequate contribution to the requisite accelerated energy transition. This was recently de facto confirmed by Shell's CEO, Ben van Beurden, in so many words during the hearings relating to the parliamentary gas enquiry. Mr Van Beurden stated that for Shell *"a production philosophy that is only based on supply security [was] viewed as disastrous"*.[547] Such a statement is logical, in view of the fact that Shell is a commercial company. The other side of this is that Shell should

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[539] Milieudefensie et al.'s Summons, paras. 593 et seq.

[540] Ibid.

[541] **Exhibit MD-411**, InfluenceMap, 'The EU's Green Deal vs The Fossil Gas Industry', February 2022, p. 3.

[542] Exhibit MD-434, Shell Industry Associations Climate Review Update 2022, p. 3. Shell is a member of the International Oil and Gas Producers (IOGP) and of Eurogas and via these organisations of GasNaturally.

[543] **Exhibit MD-438**, Follow the Money, 11 September 2021, Shell fluisterde Nederlands standpunt in over gas uit Rusland.

[544] Ibid.

[545] See, inter alia, **Exhibit MD-439A**, IEA, 7 September 2022, Executive Director rebuts three myths about today's global energy crisis. See also **Exhibit MD-439B**, Financial Times, 5 September 2022, Three myths about the global energy crisis.

[546] Exhibit MD-426B, The Telegraph, 5 May 2022, 'Shell chief demands nod for big North Sea gas project'.

[547] NOS, '*Shell wilde dat aardbevingen door gaswinning 'weer geaccepteerd werden'*. Available on: https://nos.nl/artikel/2448193-shell-wilde-dat-aardbevingen-door-gaswinning-weer-geaccepteerd-werden.

not pretend in these proceedings to graft its business model on providing supply security and affordable energy for society.

758. The above lobby examples again confirm the considerable influence that Shell continues to exercise day in day out – even to this day – on both democratic processes and on the worldwide public debate on the energy transition, to mitigate the risks that it will be forced to change more quickly. It places the (far too limited) steps that Shell has taken in the past few years in the right context, as has been confirmed by social scientists Heede and Kenner. According to them, Shell's pivot to the promise to become a company with net zero emissions must be seen as an attempt to prevent disruption of their business model and maintain the status quo for the time being.[548]

759. It ensues from that article that the strategy of the big oil and gas companies over the past few decades was "*to try and control the level of disruption to prevent them having to undermine their core business of exploration for and extraction of oil and gas.*"[549]

760. It shows that these companies were primarily engaged in the retention of their social licence to operate, so that political decision makers and the public leave them alone and do not force them to change:

"*Both companies* [Shell and BP, addition by counsel] *want stakeholders, including governments, to trust that a government-led phase out of fossil fuels is unnecessary and that they should be left to pursue their own emissions reductions and renewable energy investment targets at the speed they want to do this, i.e. "become a net zero company by 2050 or sooner." This voluntary approach over a thirty-year timeframe is clearly preferable to being forced to end exploration and extraction of oil and gas in the short-term by government policy.*"[550]

6.4 Shell abuses the possibility to "offset" emissions

6.4.1 Introduction

761. Just like Shell's PR and lobby policy is geared to the retention of Shell's fossil business model, the possibility of "offsetting" CO2 emissions is being used to continue with that business model for as long as possible, and not for adequate climate action, as Shell would like the public to believe. Shell uses the possibility of "offsetting" to put fossil products like "carbon-neutral" products on the market, instead of actually reducing its CO2 emissions.

762. This is relevant for this case because it shows that Shell's policy is not geared to actual (sufficient) phasing out of the fossil activities, which underlines the importance of affirmation of the Judgement. It also furthermore again clarifies why the use of an intensity goal is not appropriate. After all, Shell uses CO2 offsetting to reduce its CO2 intensity, without actually achieving an absolute emissions reduction.

763. It is furthermore relevant to go into CO2 offsetting because the District Court established in the Judgement that Shell may make use of CO2 offsetting to perform its reduction obligation.

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[548] Exhibit MD-382, D. Kenner, R. Heede, 'White knights, or horsemen of the apocalypse? Prospects for Big Oil to align emissions with a 1.5 ◦C pathway', Energy Research & Social Science 79 (2021) 102049, p. 7: "*The evidence presented in sections 3 and 4 suggests that BP and Shell's net zero targets are another strategy that sits alongside those identified in Table 2, to slow down disruption*." (Emphasis added by counsel).

[549] Ibid, p. 3.

[550] Ibid, p. 8.

Toward this end the District Court qualified the reduction obligation as "net" 45%. The consequence of this, however, is that Shell can rely on the option of offsetting without limit, even though this is accompanied by large risks, as explained in this chapter.

764. Although Milieudefensie et al. is of the opinion that there is no space at all for a net component as part of a reduction obligation in 2030, as it argued at first instance, it has opted not to challenge this net component by means of a cross-appeal. The societal importance and the urgency of acquiring rapid affirmation of the Judgement is too big for this.

765. Nevertheless, Milieudefensie et al. sees room for the Court of Appeal to establish more specific boundaries for the net component, so that it will remain possible for Shell to make use thereof, but not to an unlimited extent. Milieudefensie et al. will therefore ask the Court of Appeal in Chapter 6.4.8 Defence on Appeal to, by means of supplementation or improvement of grounds, to indicate how Shell should deal with CO2 offsetting when realising its reduction obligation. Shell's policy plans and the degree in which Shell wishes to rely on CO2 offsetting, form reason for such.

766. Following will first be a discussion of Shell's activities in the area of CO2 offsetting. Milieudefensie et al. will then pay attention to the findings of the IPCC on the role of nature in terms of the climate task. This will show that the use of CO2 offsetting is not a substitute for the far-reaching necessary emissions reductions which must be achieved by the phasing out of the use of fossil fuels. Lastly, Milieudefensie et al. will explain on the basis of scientific publications and relevant company protocols that there is cause to limit Shell's use of CO2 offsetting and it will formulate its request to the Court of Appeal.

6.4.2 Shell's plans in the area of 'CO2 offsetting'

767. It has already been discussed above that Shell intends to gather a large number of carbon credits to "offset" the effects of the fossil emissions of its facilities and the products it sells. Shell does this, inter alia, by investing in projects that can generate carbon credits, by buying up or investing in project developers and the trade in carbon credits on voluntary carbon markets.[551] Worldwide Shell – or the developers engaged by it – looked for possible projects which provide for, e.g., planting trees, preventing deforestation or nature restoration. These projects issue carbon credits for payment, with which companies then "offset" their fossil emissions. 1 carbon credit is equal to 1 ton of CO2 emissions which would either have been avoided (e.g. because deforestation has been prevented) or would have been absorbed by nature (because trees and other natural carbon sinks absorb CO2).

768. In its own words, Shell is one of the biggest global traders in environmental products, consisting of carbon credits for nature-based solutions and renewable energy certificates (hereinafter collectively called "**carbon credits**").[552] Shell is also a driving force behind the scaling up of

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[551] Shell.com, Nature-based solutions: "*In 2020, Shell acquired Select Carbon, an environmental services company that specialises in developing and aggregating carbon farming projects*", available via https://www.shell.com/energy-and-innovation/new-energies/nature-based-solutions.html. **Exhibit MD-440** Redd-Monitor 13 July 2022, How to burn the planet. Shell invests US$38 million in Carbonext, Brazil's biggest REDD offset firm and **Exhibit MD-441**, S&P Global Commodity Insights 26 May 2021, Larger buyers of carbon credits buying entire projects: "*Larger buyers of voluntary carbon credits looking to hedge against the risk of future price increases have been buying entire carbon projects, or large stakes in them […] "Most of these large buyers are from the oil and gas sector," a project developer said. "They have a preference to purchase naturebased projects*."

[552] Shell.com, 'Voluntary Carbon Credits': "*With regional hubs in London, San Diego, Shanghai and Singapore, we are one of the largest environmental product traders in the world. We operate in compliance and voluntary emissions markets globally*

voluntary carbon markets via the Taskforce on Scaling Voluntary Carbon Markets[553], as member of the board of directors of the International Emissions Trading Association (IETA) and as member of the steering group of Markets for Natural Climate Solutions.[554] This is a "*key area of advocacy*" for Shell.[555]

769. Shell expects an explosive growth in the demand for carbon credits and has stated that the use of carbon credits and the increase in the offering of carbon credits is one of the milestones of its corporate policy, both up to 2030 and after.[556] Instead of striving for farther-reaching emissions reductions of the Shell Group, Shell is focusing its efforts on acquiring as many carbon credits as possible and in 2030 Shell wants to use 120 million carbon credits per year, which would be equal to offsetting 120 Megatons in emissions per year. This is almost equal to the total annual CO2 emissions of the Netherlands.

770. Shell offers customers fossil products with the option for customers to buy carbon credits from Shell to allegedly neutralise the fossil emissions. This is how Shell creates two lucrative earning points for itself in every transaction. However, this is at the expense of the very urgent emissions reductions and, moreover, has nothing to do with investing in renewable energy alternatives.

771. Shell wants to use the acquired carbon credits to achieve its own – inadequate – goals and at the same time continue selling as many fossil products as possible for as long as possible.

772. The risks of the use of carbon credits are widely acknowledged, as is explained below. On the basis thereof it is evident that the use of carbon credits cannot be seen as (partial) substitute for immediate and far-reaching emissions reductions. This is, however, what the fossil industry – with Shell leading the way – now uses carbon credits for.

6.4.3 The role of nature in preventing dangerous climate change

773. There can be no discussion about the fact that nature can make a contribution to preventing dangerous climate change, i.e. due to absorption of CO2 emissions in natural carbon sinks, insofar as this absorption capacity is not affected by environmental pollution and/or climate change.

774. The CO2 emissions of fossil fuels accounts for more than 80% of human CO2 emissions.[557] These CO2 emissions partly end up in the atmosphere and are partly absorbed by, inter alia, forests and oceans. Naturally this absorption option is not unlimited – there is only one earth – and is continually decreasing as a result of deforestation and due to seawater becoming warmer (para. 2.3.1 Judgement).

775. As a result of a growing global population and increasing economic activity, ecosystems (and biodiversity) are under pressure all over the world due to, inter alia, overconsumption,

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and can help you compensate for emissions with carbon credits, renewable energy certificates, and nature-based solutions." Available via https://www.shell.com/business-customers/trading-and-supply/trading/shell-energy-europe/clean-energy-solutions/voluntary-carbon-credits.html.

[553] Ibid. See also **Exhibit MD-442**, Desmog, 22 January 2021, 'Shell, BP, and Easyjet: The Big Polluters Designing the Rules for Voluntary Carbon Offsets'.

[554] **Exhibit MD-443**, Website Ncs.ieata.org under Governance. Large fossil companies have the majority in that steering group. In addition to Shell these are BP, Chevron, BHP and Woodside.

[555] Exhibit MD-433, Shell Industry Associations Climate Review 2021, p. 45.

[556] **Exhibit MD-444**, Shell.com, Environmental products.

[557] See Chapter 5.2 Defence on Appeal.

deforestation, pollution and other excessive use of natural resources everywhere. As a result of climate change as well, ecosystems (and biodiversity) are continually under pressure in many ways.

776. At first instance extensive attention was paid to the risks of climate change for natural ecosystems and the consequences thereof for humans.[558]

777. Two of the ways discussed at first instance in which the warming of the earth itself further aggravates the climate problem are that (i) every year the CO2 absorption capacity of the oceans is decreasing due to the warming water and (ii) every year millions of hectares of forest go up in smoke due to forest fires which are incurring increasingly often due to long periods of heat and drought due to climate change. Not only is CO2 absorption capacity lost with these (increasing) forest fires, but large quantities of CO2 are released which further warm up the earth.

778. In addition to CO2 emissions as a result of the production and burning of fossil fuels as far and away the biggest cause of climate change, humans are also causing CO2 emissions as a result of (changes in) land use (such as farming and deforestation) and forestry. This is also referred to as the emissions of the LULUCF sector.[559] Due to activities in the area of LULUCF, emissions are released which had been stored in natural carbon sinks.

779. Although the absorption capacity of nature can be increased by, inter alia, using other forms of farming, planting trees and protecting and restoring nature areas, as stated said absorption capacity is continually under pressure (including due to climate change itself) and that absorption capacity can as a result of, inter alia, risks of forest fires also be destroyed again. In addition, the life of trees is always limited and the storage of CO2 in forests is thus in any event not permanent.

780. The emissions as a result of production and burning of fossil fuels is, on the other hand, permanent. Once CO2 has been emitted to the atmosphere, it will remain there (the part that is not absorbed by nature) hundreds to even thousands of years, as explained at first instance (see also para. 2.3.1 Judgement).

781. This short background illustrates the inherent risks which are connected to "offsetting" of fossil emissions by means of investments in nature. There is no guarantee whatsoever that said nature will not be lost, and the CO2 stored therein will nevertheless be emitted to the atmosphere. These points will be explained below in the discussion of the way in which Shell intends to offset its fossil emissions.

6.4.4 The District Court's opinion on the use of CO2 offsetting

782. According to the IPCC, emissions removals or negative emissions (Carbon Dioxide Removal or "**CDR**") are necessary to keep the warming of the earth within the danger threshold, including in scenarios without or with low overshoot.

783. CDR is described in AR6 WGIII as "*a cluster of technologies, practices, and approaches that remove and sequester carbon dioxide from the atmosphere and durably store the carbon in*

[558] See, inter alia, Summons, Chapter VII – the consequences of dangerous climate change.

[559] LULUCF stands for *land use, land use change and forestry.* Sometimes reference is made to the AFOLU sector. AFOLU stands for *agriculture, forestry and other land use.*

geological, terrestrial, ocean reservoirs, or in products."[560] This concerns a broad range of possibilities, with considerable differences between the various possibilities in terms of applicability and duration of possible storage. Planting new trees (*afforestation*), expanding forests (*reforestation*) and improved forest management are forms of CDR. Shell calls these nature-based solutions (hereinafter: "**NBS**").

784. In the Judgement the District Court established that the IPCC warns against risks which can be connected to the large-scale use of CDR, but the final conclusion was that a reduction obligation without a new component would go further than the consensus, because it is generally accepted that there must be room for scenarios with negative emissions. According to the District Court, this ensues from the IPCC SR15 report and from the circumstance that the EU and the State of the Netherlands in their most recent plans leave room for offsetting CO2 emissions. According to the District Court, a reduction path without the possibility of offsetting therefore goes further than the general consensus (see para. 4.4.30 Judgement).

785. The District Court refers to a citation from the IPCC SR15 report (included in para. 2.5.3.5 Judgement), in which the IPCC establishes that within all reduction paths which limit the warming up of the earth to 1.5˚C without or with little overshoot, use is made of negative emissions during the 21st century. This does not state, however, in what degree use is made of negative emissions in the period up to and including 2030 and by whom, nor of what form or method of negative emissions use would be made. What it does state is that negative emissions will be used to offset remaining emissions during this century (emissions which cannot be prevented) and in most cases to achieve net negative emissions, so that globally more CO2 will be absorbed or captured than is emitted. In Chapter 6.4.5 Defence on Appeal it will be explained on the basis of the most recent findings of the IPCC that the use of negative emissions is explicitly not intended as a substitute for immediate and drastic emissions reductions.

786. The reference to the circumstance that the EU and the State of the Netherlands (in the Explanatory Memorandum with the Climate Act that dates from 2015-2016) in their plans leave room for the "net" component, cannot lead to the conclusion that fossil companies can make use of carbon credits to perform their reduction obligation. The contribution of net removals to the climate goal of the Union up to 2030 is considerably limited precisely in order to ensure that sufficient mitigation efforts (in other words: de facto emissions reductions) are made (see also Chapter 6.4.7 below). In the Netherlands no use is made of net removals via nature, because land use in the Netherlands – partly in view of the large farming sector – is a source of emissions and not a source of removals.[561]

[560] IPCC AR6, WGIII, Chapter 12, p. 35.

[561] See the Explanatory Memorandum with the Bill of 7 July 2022 to Amend the Climate Act (implementation of European Climate Act) Parliamentary Documents II 2021-2022, 36 169, no. 3.

6.4.5 The use of negative emissions is not a substitute for far-reaching emissions reductions

787. As global emissions have increased considerably since the UN Climate Convention in 1992 and the still available carbon budget is very limited, the importance of CDR (negative emissions) has unfortunately only increased. However, all forms of CDR come with big risks, trade-offs and undesirable side effects and most CDR methods cannot yet be deployed at scale. At this time only NBS is used to a relatively large degree.[562]

788. The IPCC acknowledges that the use of NBS can entail considerable risks, such as conflicts regarding ownership of land and the management of the land, the possible reversibility in view of the consequences of climate change, the competing demand for land, conflicts in connection with food security and sustenance, and cultural aspects. In addition, NBS can be reversed by natural fires, disease or plagues and the application of nature-based solutions can result in biodiversity risks, e.g. when reforesting by means of monocultures.[563]

789. The IPCC also explicitly asserts that CDR cannot be a substitute for the far-reaching emissions reductions that are necessary now to prevent exceeding the danger threshold of 1.5 °C.

> "*NbS cannot be regarded as an alternative to, or a reason to delay, deep cuts in GHG emissions. (high confidence)*"[564]

> "*While NbS help us to adapt to climate change and reduce the amount of greenhouse gases in the atmosphere, it is important to note that there are limits to what they can do. To provide a safe environment for both people and nature, it will be essential to radically reduce greenhouse gas emissions, especially those from fossil-fuel burning in the near future*"[565]

> "*To avoid that CDR is misperceived as a substitute for deep emissions reductions, the prioritisation of emissions cuts can be signalled and achieved with differentiated target setting for reductions and removals.*" (Emphasis added by counsel)[566]

790. CDR is thus only an addition to necessary emissions reductions and is primarily seen as an emergency tool to neutralise remaining emissions from harder-to-abate sectors (such as agriculture and air travel) by 2050 and to achieve negative emissions in the longer term. The world will have to both reduce emissions drastically, and in addition (not instead of) increase the absorption capacity of nature. Countries that are a party to the Paris Agreement also agree with this principle. See, for example, the Glasgow Climate Pact which was made in 2021 during the UN Climate Conference, in which the need for quick, thorough and permanent emissions reductions of 45% by 2030 are mentioned in addition to the importance of protecting, maintaining and restoring nature and ecosystems, including forests and other terrestrial and marine ecosystems, in order to achieve the global temperature goal of the Paris Agreement.[567] The Glasgow Climate Pact therefore does not speak of "net" 45% in 2030, but of a necessary 45% reduction.[568] The Glasgow Climate Pact thereby follows the finding of the IPCC in the SR15

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[562] In the form of "Afforestation, reforestation, improved forest management, agroforestry and soil carbon sequestration", see IPCC AR6, WGIII, Summary for Policymakers, p. 40, C.11.1 (Exhibit MD-355).
[563] Ibid, under C.11.2.
[564] **Exhibit MD-445**, IPCC AR6 WGII, p. 203.
[565] Exhibit MD-445, IPCC AR6, WGII, p. 312.
[566] **Exhibit MD-446**, IPCC AR6 WGIII, Chapter 12, p. 64.
[567] Glasgow Climate Pact, paras. 22 and 38 (Exhibit MD-348).
[568] Glasgow Climate Pact, para. 22 (Exhibit MD-348).

report, that in 2030 the issue is a 45% reduction and not a net 45% reduction. Like the IPCC, the Glasgow Climate Pact now speaks of net zero emissions by 2050.

791. In light of the above, the term net thus explicitly does not imply that every actor can continue, without limit, focusing on offsetting options to achieve its own net zero target, let alone to heavily rely on such for the interim target of 2030. This is also completely logical: in order to limit the warming of the earth to 1.5 °C, emissions must have almost halved by 2030 and by 2050 the point must have been reached in which the global emissions are and remain in balance with the absorption capacity of the earth. This means that emissions must be reduced as much as possible, after which remaining emissions (that cannot be reduced) are neutralised. Almost all sectors can fully reduce their absolute emissions and in addition make extra contributions by means of nature-based solutions. Only a few specific sectors, in particular agriculture and air travel, will probably still emit a certain quantity of greenhouse gases in 2050. This is because complete (technical) solutions for those sectors will probably not yet be available at that time. These unavoidable emissions must then be offset by nature-based solutions.

792. The way in which Shell is focusing on CO2 credits from NBS will be discussed in further detail below, whereby it will be shown that Shell's approach cannot be reconciled with the role that NBS is actually intended to play in preventing dangerous climate change.

6.4.6 Shell is combining the sale of fossil fuels with carbon credits as a low-carbon alternative

793. Shell's position relating to voluntary carbon markets was already discussed in Chapter 6.4.2 Defence on Appeal, as was Shell's goal to increase the use of carbon credits in 2030 to 120 million tons a year (this is almost equal to the total CO2 emissions of the Netherlands), that it wishes to use to offset its fossil energy products:

"*we expect to offer our customers nature-based solutions to offset around 120 million tonnes per annum of our Scope 3 emissions by 2030.*"[569]

794. Shell sees carbon credits as an attractive option for offsetting emissions of its products in all sectors.[570] That is why Shell is offering customers a large part of its fossil portfolio in combination with carbon credits.[571] Shell is explicitly promoting these fossil products as carbon-neutral products and products with a reduced CO2 footprint. This concerns, inter alia, retail products like carbon-neutral petrol and carbon-neutral diesel.[572] It also concerns carbon-neutral

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[569] Exhibit MD-378, Shell Energy Transition Strategy 2021, p. 16.

[570] Exhibit MD-388, CDP task 2021, p. 28: "*As customers' and society's demand for the use of low-carbon products and services grows, nature-based solutions are becoming an increasingly attractive option for emissions offsetting for a range of industries and operators. As well as investing directly in projects that protect or restore nature, we are also working with projects that already generate carbon credits for our customers. We are one of the world's most established traders of carbon credits and have been operating in compliance and voluntary emissions markets since 2003. We also provide customers with tailor-made solutions for environmental compliance markets globally.*" See also Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 15: "*nature-based solutions applicable across all sectors*" and Exhibit MD-377, Annual Report 2021, p. 91: "*Our 2030 and 2050 targets are on the net basis (i.e., including carbon credits)*".

[571] **Exhibit MD-447**, Overview of Shell.com, Shell's carbon neutral and reduced carbon footprint products: "*Shell provides customers with products combined with carbon credits from high quality, independently verified projects to reduce or neutralise the emissions associated with using the product.*"

[572] Ibid, Shell.com: "*Consumers can choose to drive carbon neutral with Shell. Shell offsets emissions by purchasing carbon credits generated from the global project portfolio that protects and regenerates forests.*" And "*Shell Fleet customers can now drive carbon neutral by protecting and replanting forests.*"

LNG,[573] carbon-neutral gas,[574] carbon-neutral Gas-to-Liquids,[575] carbon-neutral bitumen[576] and carbon-neutral lubricants.[577]

795. The bizarre consequences of such "solutions" are strikingly represented in a Bloomberg Green article, where a recent TotalEnergies deal is described. Traders of the French oil and gas major were apparently inspired by two enormous trade transactions of Shell in "carbon-neutral" LNG and themselves went in search of a project with which they could neutralise the estimated emissions which would accompany the production, the transport and the burning of the LNG shipment of a full sea tanker. After some research and the engaging of a provider of CO2 credits, the LNG transaction could be called climate neutral by investing in a local project that supports farmers in Zimbabwe in removing undergrowth and loose branches, to prevent fires from spreading rapidly in case of forest fires.[578] Such a project is in itself naturally praiseworthy, but should not lead to a green label for an LNG sea tanker.

796. The sale of "carbon neutral LNG" is a proposition that Shell put on the market and which is being copied at a rapid pace, as confirmed by, inter alia, Akin Gump, one of Shell's former lobbyists in Washington DC.[579] The use of carbon credits to make LNG (and oil) carbon neutral was supposed to be intended to have LNG compete more effectively with renewable alternatives (emphasis added by counsel):

"*Designed to make oil and LNG more competitive environmentally with renewable energy in response to environmental, social and corporate governance (ESG) pressures, climate change and the decarbonization megatrend, carbon-neutral oil and carbon-neutral LNG provide for the offset of the greenhouse gas (GHG) emissions associated with a defined set of oil or LNG activities. […] In the case of LNG, carbon-neutral transactions first emerged in Asia in 2019 after Shell announced the execution of a carbon-neutral LNG transaction with Tokyo Gas, among others, for cargoes sourced from Shell's Queensland LNG terminal in Gladstone, Australia. Since that time, there have been several publicly announced carbon-neutral LNG transactions and other unreported carbon-neutral LNG transactions.*"[580]

797. In the light of everything already discussed in this Defence on Appeal, no further explanation is required to show that this action is at odds with being able to prevent dangerous climate change. Shell actively uses carbon credits to maintain and further increase the demand for its

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[573] Ibid, Shell.com: "*Shell LNG Marketing and Trading can offer carbon neutral LNG for customers to compensate the full lifecycle of their emissions.*"

[574] Ibid, Shell.com: "*Shell Energy offers a combination of natural gas and voluntary carbon credits to business customers to compensate the CO2e emissions that result from the combustion of the natural gas.*"

[575] Ibid, Shell.com: "*Shell offers carbon neutral GTL in the UK, Netherlands, Germany, France and Denmark.*"

[576] Ibid, Shell.com: "*We offer nature-based carbon credits to bitumen customers in Europe to offset the CO2 emissions generated by the extraction, manufacture and storage of bitumen at the refinery.*"

[577] Ibid, Shell.com: "*Shell's nature-based carbon credits will compensate for CO2e emissions from the lifecycle of selected lubricant products.*"

[578] **Exhibit MD-448**, Bloomberg Green, How to Sell 'Carbon Neutral' Fossil Fuel That Doesn't Exist. See also **Exhibit MD-449**, Bloomberg 17 December 2020, The Real Trees Delivering Fake Corporate Climate Progress and **Exhibit MD-450**, ProPublica, 29 April 2021, The Climate Solution Actually Adding Millions of Tons of CO2 Into the Atmosphere.

[579] See also **Exhibit MD-451** , Shell press release of 18 June 2019, Shell Tokyo Gas And GS Energy to receive world's first Carbon neutral LNG cargoes from Shell and **Exhibit MD-452**, Salon, 13 June 2021, Big Oil wants you to believe a tanker full of fossil fuel can be "carbon neutral".

[580] **Exhibit MD-453**, Akin Gump Strauss Hauer & Feld LLP, 1 February 2021, Key Considerations for Carbon-Neutral Oil and LNG Transactions Using Carbon Offsets. See also **Exhibit MD-454**, Financial Times 12 October 2021: Rise of the 'carbon neutral' hydrocarbons.

fossil products. This has nothing to do with the decarbonisation of a product range, with the acceleration of the energy transition or with the compensation of residual emissions.

798. The Dutch advertising standards agency, Reclame Code Commissie, has on two occasions now called the way in which Shell praises carbon credits toward consumers when selling petrol as misleading advertising (see Chapter 6.3.2). This has not stopped Shell from continuing to make similar recommendations for the same products in other countries and for other products worldwide.[581]

799. In its Sustainability Report 2021 Shell has in the meantime included a disclaimer on the penultimate page. Shell explicitly acknowledges there that CO2 offsetting is not an alternative to emissions reductions:

"*CO2 compensation does not imply that there is no environmental impact from the production and use of the product as associated emissions remain in the atmosphere. CO2 compensation is not a substitute for switching to lower emission energy.*"[582]

800. Shell itself thus admits that CO2 offsetting is not an alternative for fewer CO2 emissions. Shell acknowledges this itself in various other documents. However, such remarks have no meaning as Shell has simply continued offering and trading fossil products in combination with carbon credits, through which the customer is primarily sold the message that he is making an admirable contribution to solving the climate problem by purchasing products from Shell. Shell is thus not itself acting in accordance with this crucial basic principle, which is also evidenced by the fact that the use of carbon credits forms an integral part of Shell´s intensity targets.

801. Lastly, a number of comments about the NBS projects that Shell invests in. Most carbon credits that Shell is generating right now relate to alleged avoided emissions, due to "*avoided deforestation*". This relates to the protection of natural areas. In such cases no additional CO2 absorption capacity is realised, but in the best case it is prevented that (temporarily) no existing absorption capacity is lost. Such projects, which are often executed under the flag of the REDD+ framework of the UN, are controversial. There are many examples in which deforestation nevertheless occurred in a protected forest area or deforestation moved to adjacent areas (leakage*)*. Such projects – which occur virtually only in areas with tropical rain forests – have led to illegal expropriations of the local population and other human rights violations.[583] It may in any event not be forgotten that avoided deforestation is not a guarantee that the forests in questions will not be affected by climate change and consequently lose their absorption capacity or even become a source of CO2 emissions. The latter is, for example, already the case with a part of the Amazonian rainforest.[584]

802. An inventory of the Taskforce on Scaling Voluntary Carbon Markets ("**TSVCM**") - an initiative of the private sector in which Shell also participates with the goal of having the voluntary carbon markets grow explosively - shows that 'avoided deforestation' does indeed lead the way for the generation of carbon credits and that in 2020 less than 5% of the carbon credits related to

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[581] Exhibit MD-447, Shell.com.

[582] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 36.

[583] **Exhibit MD-455**, World Rainforest Movement 2022, 15 Years of REDD: A Mechanism Rotten at the Core, see foreword: "*The experience of the past 15 years has shown an overwhelming record of REDD's catastrophic failure to address deforestation and forest degradation – and worse: it has also intensified the climate crisis and left the causes of deforestation untouched. REDD, in fact, has become an underlying cause of deforestation and climate change itself.*"

[584] **Exhibit MD-456**, The Guardian 14 July 2021, Amazon rainforest now emitting more CO2 than it absorbs.

forestation or reforestation and consequently to projects which can actually lead to (temporary) additional emissions removals.[585]

803. The inherent objections and big risks that come with the use of carbon credits are strikingly described in the report 'How Shell is using Nature-Based Solutions to continue its fossil fuel agenda', that was drawn up for Milieudefensie by two experts in this area.[586]

804. The report shows with regard to the aforementioned carbon credits from avoided deforestation that these are based on hypothetical scenarios, for which it can never be proven that emissions have actually been avoided. First, it is uncertain whether the trees would have been cut down even if no payment had been made. Second, insofar as there were a risk of deforestation in the area in question, the deforestation can be moved to adjacent areas. Third, CO2 absorption by trees does not have a permanent character in any event, as trees do not have a permanent lifespan (contrary to fossil CO2 emissions that stay in the atmosphere for thousands of years). Fourth, nature is continually exposed to further threats as a result of climate change, so trees in protected areas – for which carbon credits have already been issued – are lost by, e.g., increasing forest fires.[587]

805. The report succinctly expresses that carbon credits from avoided deforestation "*are an imaginary commodity created by deducting what you hope happens from what you guess would have happened.*"[588] The report also discusses three projects, in Peru, Kenya and Indonesia, which are good for 80% of the carbon credits bought by Shell up to now. For each of those projects there are significant question marks relating to the principles used and the risks referred to above are discussed in detail.[589]

806. "*While we're sitting here counting carbon and moving it around, more CO_2 keeps accumulating in the atmosphere,*" said an investigator with 20 years' experience in the area of CO2 credits who argues that using the instrument might cause more damage than not using it.[590] This is because carbon credits are now being used to 'greenify' the use of fossil energy, so that the necessary real emissions reductions do not occur and are completely inadequate.

807. The risks of using carbon credits at the expense of drastic emissions reductions is widely recognised. The possibility of limiting the warming of the earth to 1.5 °C is dependent on the rapid phasing out of fossil fuels and the upscaling of renewable alternatives. This possibility is undermined if the fossil industry continues to invest in fossil fuels and keeps using nature as a cheap alternative for actually reducing fossil CO2 emissions. This is what Shell does by making the use of carbon credits an integral part of its policy to reduce emissions intensity instead of aiming to achieve actual emissions reductions. In that manner the transition to renewable energy cannot be made quickly enough, because there is too little investment in renewable energy. This even though this investment shift to renewable solutions is necessary for achieving

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[585] **Exhibit MD-457**, Bloomberg, 16 March 2022, Carney's Bid to Grow Carbon Market Rejigged Amid Controversy.

[586] **Exhibit MD-458**, J. Kill and S. Counsell, 13 October 2022, How Shell is using Nature-Based Solutions to Continue Its Fossil Fuel Agenda, pp. 6-8.

[587] Ibid, Chapter 4, 'Why NBS cannot cancel out the climate impact of fossil carbon emissions', pp. 26-33.

[588] Ibid, Chapter 4, p. 28.

[589] Ibid, pp. 35-47 on the Cordillera Azul National Park in Peru, pp. 48-55 on the Kasigau Corridor REDD Project Phase II in Kenya and pp. 56-61 on the Katingan Peatland Restoration & Conservation Project in Indonesia.

[590] **Exhibit MD-459**, ProPublica 22 May 2019, An even more inconvenient truth: why carbon credits for forest preservation may be worse than nothing, p. 2.

the temperature goal of the Paris Agreement, as also appears from Article 2(1)(c) of the Paris Agreement itself.[591]

6.4.7 There is reason to limit Shell's use of carbon credits

808. In view of the need for immediate emissions reductions by 2030, it is widely accepted that carbon credits may not be used or may only be used on a very limited scale to comply with the reduction obligations:

(i) The European Climate Act explicitly deals with net removals of LULUCF separately from absolute emissions reductions and has limited the maximum contribution of these types of removals to the Union's climate goals to 2030 (55% reduction of greenhouse gases relative to 1990) to a total of 225 Mt. This is to ensure that sufficient mitigation efforts (i.e.: actual emissions reductions) are made.[592] This is equivalent to a net component of a maximum of 2.2%.[593] In addition, the European Climate Act explicitly stipulates that after 2050 the EU will aim for negative emissions and consequently will continually aim for improved absorption capacity. By way of comparison: where the entire EU up to and including 2030 cumulatively over that period offers a maximum scope of 225 Mt, Shell is aiming to use 120 Mt in carbon offsetting per year by 2030 to offset the CO2 emissions connected with the Shell Group;

(ii) The IEA NZE-2050 scenario does not make use of NBS: "*Achieving net-zero energy-related and industrial process CO2 emissions by 2050 in the NZE does not rely on any offsets from outside the energy sector.*"[594] In addition, the IEA explicitly warns against the risk that the use of carbon credits can deflect from investments in direct emissions reductions.[595] According to the IEA there is probably only a limited supply of carbon credits consistent with the global net zero emissions to be achieved;[596]

(iii) The GHG Protocol also states that business enterprises must aim for emissions reductions without using offsets or carbon credits: "*Companies should strive to achieve reduction targets entirely from internal reductions from within the target boundary. Companies that are unable to meet GHG targets through internal reductions may use offsets generated from sources external to the target boundary*";[597]

(iv) The statement of A. Hawkes which was submitted by Shell also states that "*the stakeholder community must be mindful that CDR offsets should be used appropriately and should not displace urgent emissions reduction.*"[598] Hawkes refers in this respect to a publication of

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[591] Article 2(1): This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: […] (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

[592] Regulation (EU) 2021/119 establishing the framework for achieving climate neutrality and amending Regulations (EC) no. 401/2009 and (EU) 2018/1999 ("European Climate Act"), Article 4(1). See also Article 4 of Regulation (EU) 2018/841 and recital 27 of the European Climate Act. The gist of the LULUCF Regulation is the "no-debit" rule, that stipulates that emissions from the LULUCF sector may never be higher than booked removals from the LULUCF sector.

[593] Exhibit S-87, p. 52.

[594] Exhibit MD-362, p. 92.

[595] Exhibit MD-362, p. 36.

[596] Ibid.

[597] Exhibit RK-19, p. 102.

[598] Exhibit S-22, para. 11.4.

which he is a co-author and in which harsh criticism is expressed as to the large role attributed to CDR in relation to climate mitigation, in view of the "*major concerns around the scale of CDR deployment in many low-carbon scenarios, and the risk that anticipated future CDR could dilute incentives to reduce emissions now, a phenomenon known as mitigation deterrence.*"[599] The authors determined that CDR is now being used to further facilitate the use of fossil fuels, even though CDR should in fact be used to protect against climate uncertainties, or for maximising climate ambitions, on top of the necessary emissions reductions;[600]

(v) The Oxford Report of 2020 points out that there is a consensus that companies must prioritise emissions reductions above offsetting;[601]

(vi) The UN Special Rapporteur on Human Rights and the Environment writes in his report relating to the '*Promotion and protection of human rights in the context of climate change*' of 26 July 2022 that studies show that nature-based solutions are not a replacement for preventing emissions that are related to the burning of fossil fuels. He expressed his concern that too many countries and business enterprises are hiding behind the planting of trees and unproven technologies to claim realisation of their climate plans:

"too many Governments and corporations are hiding behind planting trees and unproven technologies in order to claim that their 2050 climate change plans will achieve net zero emissions."[602]
And,
"while restoring ecosystems is crucial for planetary health, it is no substitute for preventing emissions from fossil fuels."[603]

(vii) Other scientific literature also emphasises the risks of the use of carbon credits and the explicit need not to delay emissions reductions and certainly not to replace them for the use of carbon credits:

a. See 'The meaning of net zero and how to get it right' in Nature Climate Change: "*Net-zero commitments are not an alternative to urgent and comprehensive emissions cuts. Indeed, net zero demands greater focus on eliminating difficult emissions sources than has so far been the case. The 'net' in net zero is essential, but the need for social and environmental integrity imposes firm constraints on the scope, timing and governance of both carbon dioxide removal and carbon offsets.*"[604]

b. See also 'Assessing the rapidly-emerging landscape of net zero targets' in Climate Policy: "*While immediate efforts to protect and restore natural carbon sinks are needed to achieve global mitigation outcomes, corporate contributions cannot substitute for or delay the decarbonization that is also needed (Allen et al., 2020)*";[605]

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[599] **Exhibit MD-460**, Neil Grant et al. 2021 Environ. Res. Lett. 16 064099, p. 1.
[600] Exhibit MD-460, Neil Grant et al 2021 Environ. Res. Lett. 16 064099, p. 10-11.
[601] Exhibit 287 of Milieudefensie et al., p. 4.
[602] Exhibit MD-385, UN Special Rapporteur, report on the '*Promotion and protection of human rights in the context of climate change',* para. 18.
[603] Ibid , para. 19.
[604] **Exhibit MD-461** , Fankhauser, S., Smith, S.M., Allen, M. et al. The meaning of net zero and how to get it right. Nat. Clim. Chang. 12, 15–21 (2022). https://doi.org/10.1038/s41558-021-01245-w, p. 19.
[605] **Exhibit MD-462**, Thomas Hale, Stephen M. Smith, Richard Black, Kate Cullen, Byron Fay, John Lang & Saba Mahmood (2022) Assessing the rapidly-emerging landscape of net zero targets, Climate Policy, 22:1, 18-29, p. 22. In addition, few forms

c. See also 'Carbon removals from nature restoration are no substitute for steep emission reductions' in One Earth: "*Nature restoration is critical for responding to multiple global crises, including biodiversity loss and climate change. However, nature restoration cannot be scaled up quickly enough to noticeably reduce peak global temperatures and is ultimately limited by existing uses of land. While restoring ecosystems is crucial for planetary health, it is no substitute for preventing emissions from fossil fuels. Ongoing emissions cause extra warming compared with a world in which those emissions never happened—warming that cannot be compensated by nature restoration*."[606]

(viii) A Greenpeace report has established that particularly companies in the oil and gas industry lean heavily on offsetting: "*Shell has not yet published details of its net zero plan, but has suggested it could include planting forests the size of Spain to act as carbon sinks. Eni plans to buy more than 30 MtCO2 a year of forest credits. Given the uncertainties and physical limits of CDR (page 10), these companies' plans could exhaust a disproportionate share of the globally available potential (page 13), leaving less for other companies, individuals and countries.*"[607] Oil and gas companies like Shell have a disproportional hold on the very limited scope that nature can offer to generate extra CO2 absorption, while this limited scope is necessary for businesses enterprises in hard-to-abate sector (particularly agriculture and air travel).

6.4.8 Request to the Court of Appeal

809. The above makes it evident that carbon offsetting can never be used as a substitute for far-reaching emissions reductions. This applies in a general sense, but precisely in particular for oil and gas companies like Shell. This is widely recognised in scientific literature and was emphasised by the IPCC when it repeated in the context of nature-based solutions: *it will be essential to radically reduce greenhouse gas emissions, especially those from fossil-fuel burning in the near future*"[608]

810. In the first place, Shell does not have any adequate reduction targets, but the targets that it does have – based on the reduction of average carbon intensity – are riddled with the use of carbon offsetting to continue the fossil business model on the same footing. What Shell offers now is carbon-neutral fossil fuels. It does so instead of reducing its oil and gas sales and instead of offering true renewable alternatives. In essence this is nothing other than a business-as-usual scenario in a green coat. This is definitely not what the District Court intended when it permitted the possibility of CO2 offsetting. The District Court clearly considered that the reduction obligation requires immediate action and demands, inter alia, a change in course, whereby the energy package of the Shell Group will have to be modified (para. 4.4.53). The District Court also considered that this can mean for Shell that it refrain from making new investments in extracting fossil fuels and/or its production of fossil fuels must be limited (para. 4.3.9). The District Court furthermore made it clear that Shell can be required to take far-reaching

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of offsetting are suitable for neutralising actual residual emissions, because they are insufficiently permanent: "*Further, few existing approaches to offsetting are aligned to the requirements of net zero, which ultimately requires that any residual emissions be fully neutralized by permanent removals (Allen et al., 2020; Kreibich & Hermwille, 2021; Michaelowa et al., 2021; Schneider & Theuer, 2019).*" This applies in particular to avoided emissions, because no emissions are avoided with this.

[606] **Exhibit MD-463**, Dooley et al., 2022, One Earth 5, 812–824, p. 1.

[607] **Exhibit MD-464**, Greenpeace UK, January 2021, Net Expectations: Assessing the role of carbon dioxide removal in companies' climate plans.

[608] Exhibit MD-445, IPCC AR6, WGII, p. 312.

measures and make financial sacrifices to reduce CO2 emissions in order to combat dangerous climate change (paras. 4.4.53 and 4.4.54). All of this must be understood in the light of Shell's duty of care to contribute to avoiding great dangers and risks to the human rights of Dutch residents.

811. It is now clear that Shell has a completely different realisation in mind in relation to the proportional contribution which it must make according to the District Court. In the first place, Shell is refusing to incorporate as a guideline in its policy that Scope 3 emissions of the Shell Group will also be reduced in an absolute sense, which form 95% of the total emissions of the Shell Group. In the second place, by means of its Powering Progress policy Shell is making it clear that in reality it is aiming for as few emissions reductions as possible, inter alia by relying heavily on the option of carbon offsetting. This despite the fact that Shell itself admits that this is not a substitute for actual emissions reductions. As Shell puts it:

"*CO2 compensation does not imply that there is no environmental impact from the production and use of the product as associated emissions remain in the atmosphere. CO2 compensation is not a substitute for switching to lower emission energy.*"[609]

812. Shell therefore understands that this approach will not prevent the danger that the District Court has determined it is required to help prevent.

813. Milieudefensie et al. asks the Court of Appeal to affirm the Judgement in this appeal, if necessary with supplementation and/or improvement of grounds. In this specific case Milieudefensie et al. believes that such a supplementation of the Judgement is in any event appropriate with regard to the net component of the order.

814. In view of the above-outlined risks, objections and limitations connected with the use of carbon offsetting, Milieudefensie et al. asks the Court of Appeal to indicate in greater detail how Shell should handle its carbon offsetting when performing its reduction obligation. Milieudefensie et al. believes in this respect that in any event Shell is subject to a significant best-efforts obligation to make as little use as possible of carbon offsetting. This is also to prevent that Shell realises the order in a manner that is at odds with the nature and background of the legal duty assumed by the District Court to make a proportional contribution to preventing dangerous climate change.

6.5 Conclusion

815. In this chapter Milieudefensie et al. explained that Shell, with its Powering Progress policy, does not have a reduction target for 95% of the total CO2 emissions of the Shell Group. Shell's plans also make it clear that it will continue making large-scale investments in its oil and gas activities, including in new oil and gas fields. This is despite the fact that it is clear that there is no room for such investments within the remaining carbon budget to retain a 50% chance of preventing dangerous climate change. In addition, Shell is fully focusing on CO2 offsetting in order to avoid actual reductions as much as possible, even though this form of use of CO2 offsetting cannot be reconciled with climate science, nor with the legal duty to which Shell is subject. For that reason Milieudefensie et al. was forced to pay special attention to this specific part of Shell's policy.

816. Analyses of Shell's policy show that the CO2 emissions of the Shell Group will not or virtually not decrease by 2030 and may even increase. With this Shell is contributing to an ongoing fossil

[609] Exhibit MD-380, Shell Energy Transition Progress Report 2021, p. 36.

dependency of society and is thereby hindering the necessary climate action and energy transition.

817. Shell has managed, through clever methods, to keep the above hidden from public and political decision makers by spending astronomical amounts of money on PR and lobby activities. This allows Shell to avoid or delay political intervention as much as possible and turn things to its advantage and sway public opinion. Shell profiles itself in the market as a driver of the renewable energy transition and does not hesitate to do so in a way that has repeatedly been qualified as misleading by advertising standards bodies. Shell does all of this via hundreds of industry organisations worldwide, of which Shell and its colleagues in the industry are a member. This is an important reason why not enough is being done worldwide to address the climate problem. It is unimaginable to achieve society-wide, accelerated climate action and energy transition, if Shell is not forced by means of an emissions reduction order to phase out its interests in oil and gas. Only then will Shell's interest in continuing to focus its PR and lobby activities on maintaining a fossil business model decline. This removes an important obstacle and blockade of Shell to climate action. Only then will Shell do 'its part'.

818. The Powering Progress policy is, however, still at odds with the legal duty to which Shell is subject. This makes the (imminent) violation of said legal duty a fact. With this Milieudefensie et al. has thereby demonstrated that Shell is not "*doing its part and continuing to do its part with regard to the challenges of the energy transition and the global need to reduce emissions*"[610] and that the threat of the violation of the legal duty is not only a "*theoretical possibility*",[611] but a very concrete and very real threat, which is in fact a certainty.

7. Shell's specific objections regarding its responsibility for Scope 3 emissions, also in light of the method for measuring and reporting Scope 3 emissions

7.1 Introduction

819. In Chapter 8 of the Appeal, Shell argues that a legal duty cannot extend to Scope 3 emissions, which form 95% of the total emissions of the Shell Group.

820. Shell concentrates in this respect to a great extent on the way in which Scope 3 emissions are reported. Milieudefensie et al. will refute those arguments of Shell below in Chapter 7.2 of the Defence on Appeal.

821. In Chapter 7.3 of the Defence on Appeal, Milieudefensie et al. will go into Shell's other defences with regard to its responsibility for Scope 3 emissions. It is once again explained in short, inter alia, that Shell has full control over the Scope 3 emissions of the Shell Group and Shell is thus also able to reduce those emissions by 2030 by 45% net. In view of this, Milieudefensie et al. discusses in Chapter 7.4 of the Defence on Appeal that Shell's legal duty for the Scope 3 emissions of the Shell Group can be an obligation of result.

[610] Para. 9.2.8 Appeal.
[611] Para. 9.2.7 Appeal.

7.2 The reduction obligation is based on the emissions that Shell measures and reports in accordance with the global standard

822. In paras. 8.3.6 through 8.3.19 of the Appeal, Shell argues that there is no consensus on the measuring and reporting of Scope 3 emissions, which would result in a lack of legal certainty. For example, an obligation relating to Scope 3 emissions is supposedly arbitrary because it would lead to double counts.

823. Shell's arguments fail. Shell asserts that the way in which companies report on their emissions can differ and that the reported emissions therefore do not lend themselves well for a comparison between different companies. However, this matter does not concern a comparison between companies, but a comparison between the emissions of the Shell Group in 2019 (the base year) and the emissions of the Shell Group in 2030.

824. Shell has been measuring and reporting the emissions of the Shell Group for many years on the basis of the GHG Protocol, which is the global standard for measuring and reporting emissions. The GHG Protocol is explicitly intended to compare the emissions of one company over the years: "*Use of this standard is intended to enable comparisons of a company's GHG emissions over time.*"[612] Shell uses these data itself precisely for this purpose, i.e. to monitor the progress of the climate ambitions that Shell set itself. Shell also reports on this annually on its website, in its sustainability report and in its annual report. The GHG Protocol is therefore equally suitable for monitoring the progress of Shell's emissions reductions in relation to the reduction order.

825. It is furthermore correct that double counts take place when reporting Scope 3 emissions, so that within a value chain, various companies report on the same emissions several times. This is inherent in the system and according to the GHG Protocol is not a problem, or even a necessity. According to the GHG Protocol it encourages the necessary action of several entities to reduce emissions.[613] Shell is trying to create obstacles that do not exist and cites in paras. 8.3.18 and 8.3.19 Appeal considerations that do not apply, or that have been interpreted incorrectly.

826. Precisely the fact that the Scope 3 emissions of the Shell Group are the Scope 1 and 2 emissions of other parties, is what gives Shell such great responsibility. After all, those other parties cannot reduce their Scope 1 and 2 emissions if the biggest energy companies in the world, including Shell, continue supplying them virtually only with fossil fuels.[614] This is also the reason why it ensues from the GHG Protocol and the company protocols discussed in Chapter 5 Defence on Appeal, viewed together, that the greatest responsibility for emissions reductions lies with those companies who account for the majority of the Scope 3 CO2 emissions. These are the companies in the world which provide the current energy supply; other parties are dependent on the choices these companies make.

827. Milieudefensie et al. will explain these points below, starting with a brief background on the relevant reporting standard.

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[612] See the Scope 3 Standard belonging with the GHG Protocol (Exhibit RK-19), p. 6.

[613] Exhibit RK-19, p. 108.

[614] See, inter alia, Milieudefensie et al.'s Notes on oral arguments 9, paras. 1 et seq.

The GHG Protocol and the Scope 3 Standard

828. The GHG Protocol Initiative was launched in 1998, with as its mission to develop internationally accepted accounting and reporting standards for greenhouse gases for companies and to promote the broad acceptance thereof. The most recent version dates from 2004 (Shell's Exhibit RK-15). The GHG Protocol is globally the most commonly used standard for reporting (Scope 1, 2 and 3) emissions by companies. Within the GHG Protocol companies can make a choice for the way in which they demarcate their organisation for reporting purposes. This occurs on the basis of organisational boundaries (equity share or (operational or financial) control)[615] and on the basis of operational boundaries (Scope 1, 2 and 3 emissions).[616] The method of demarcating organisational boundaries must align with the economic reality of the company and its business relations, and is thus dependent on, inter alia, the characteristics and the structure of the company.[617] One aspect of this is that the choice is made for the criterion that best represents the de facto power of the business.[618]

829. Since 2011, under the GHG Protocol there has been the Scope 3 Standard, which contains a further elaboration of the way in which Scope 3 emissions are reported.[619] The Scope 3 Standard is the internationally accepted method for companies to account for emissions in the value chain.[620] Besides, Shell itself had a seat on the 25-member steering group which contributed to the establishing of the first concept of the Scope 3 Standard.[621] The standard was also subject to a very extensive process in which stakeholders from industry, government, science and the non-profit sector were involved.[622]

830. The Scope 3 Standard defines Scope 3 emissions as: "*All indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.*"[623]

831. The standard enables companies to chart the impact of their emissions on the full value chain in a consistent and transparent manner, partly to determine a climate strategy. This is from the perspective that companies also have a role to play in preventing dangerous climate change, as could be read back in 2011 in the introduction to the Scope 3 Standard:

"*the need to accelerate efforts to reduce anthropogenic GHG emissions is increasingly urgent. Existing government policies will not sufficiently solve the problem. Leadership and innovation from business is vital to making progress.*"[624]

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[615] Exhibit RK-15, pp. 16 - 23.

[616] Exhibit RK-15, p. 24 et seq.

[617] Exhibit RK-15, p. 8 (under 'Relevance').

[618] Exhibit RK-15, p. 17: "*the choice of control criterion in the oil and gas industry can have substantial consequences for a company's GHG inventory. In making this choice, companies should take into account how GHG emissions accounting and reporting can best be geared to the requirements of emissions reporting and trading schemes, how it can be aligned with financial and environmental reporting, and which criterion best reflects the company's actual power of control*."

[619] Exhibit RK-19, Corporate Value Chain (Scope 3) Accounting and Reporting Standard: Supplement to the GHG Protocol Corporate Accounting and Reporting Standard.

[620] See the website of the GHG Protocol: "*Released in 2011, the Scope 3 Standard is the only internationally accepted method for companies to account for these types of value chain emissions*." Available on https://ghgprotocol.org/standards/scope-3-standard.

[621] Exhibit RK-19, p. 2 and 7.

[622] Exhibit RK-19, p. 4 and 7.

[623] Exhibit RK-19, p. 140.

[624] Exhibit RK-19, p. 3.

832. The primary goal of the Scope 3 Standard is therefore: "*to provide a standardized step-by-step approach to help companies understand their full value chain emissions impact in order to focus company efforts on the greatest GHG reduction opportunities, leading to more sustainable decisions about companies' activities and the products they buy, sell, and produce.*"[625]

833. Reporting emissions in Scope 1, 2 and 3 is based on five key principles: (i) relevance, (ii) completeness, (iii) consistency, (iv) transparency and (v) accuracy. These principles are partially derived from commonly accepted principles for financial accounting and reporting.[626]

834. This entails, inter alia, that companies must report in a consistent manner on the basis of the methodologies provided for in the GHG Protocol, partly to enable stakeholders to continue following the company's progress. If changes arise in the reporting method, this must be transparently documented and justified, so that comparison is at all times possible (note: this concerns a comparison in the performance of the company and not a comparison between companies).[627]

Shell reports its Scope 1, 2 and 3 emissions on the basis of the GHG Protocol and will (have to) continue to do so in a consistent manner

835. Shell measures and reports its Scope 1, 2 and 3 emissions on the basis of the GHG Protocol (including the Scope 3 Standard). It has been doing so since before the GHG Protocol was published for the first time. On the basis of the applicable principles, Shell must report its emissions in an honest and transparent method and it cannot simply make changes.[628] This is derived from the requirement of the principle of systematic reporting that is internationally used in legislation concerning financial statements and applies as such to every annual report of Shell.[629] This allows for comparisons to be made between the emissions that Shell reports over the years on the basis of the method that Shell itself selected as most suitable for its organisation. On the basis thereof it can be established whether Shell is fulfilling its reduction obligation.

836. At first instance Shell explained in what way it reports on emissions. Shell uses both a demarcation based on operational control and equity share.[630] The District Court recognised this in paras. 2.5.3 – 2.5.5. of the Judgement. Shell in fact uses a combination: Scope 1 and 2 are reported both on the basis of operational control and on the basis of equity share, but its target for Scope 1 and 2 emissions is based on a demarcation on the basis of operational control.[631] For Scope 3 emissions, reporting primarily takes place under the equity share approach.[632]

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[625] Exhibit RK-19, p. 4. The Scope 3 Standard contains 15 categories, of which the burning of products sold (category 11) is the most important for Shell, followed by emissions which are related to production of products purchased (category 1) and electricity purchased and traded by Shell (category 3).

[626] Exhibit RK-15, pp. 6 - 7.

[627] Exhibit RK-19, Chapter 4, in which the 'Accounting and Reporting Principles' are explained, including the principle of 'consistency' of reporting.

[628] Ibid.

[629] See, e.g., the requirement of uniformity in Article 2:362(2) in conjunction with 2:363(4) and 2:384(6) DCC. This also includes successive uniformity, entailing that valuation and presentation must be equal to each other as much as possible from year to year.

[630] Shell's Statement of Defence, paras. 96 - 98.

[631] **Exhibit MD-465**, Shell.com, Greenhouse Gas Emissions, GHG Emissions Reporting. See also paras. 3.3.12 and 9.2.8(b)(ii) Appeal.

[632] **Exhibit MD-466**, Shell.com, Estimated 2020 Scope 3 Indirect GHG Emissions according to GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard.

837. Milieudefensie et al. is basing its position in this case on the emissions reported by Shell. It is not clear why this should be problematic from the perspective of legal certainty or implementability, nor has Shell explained such. In the Appeal, Shell only mentions the fact that the existing reporting frameworks do not lend themselves well for comparisons between different companies, because within the GHG Protocol there are different methodologies for reporting on emissions. However, this is not relevant because this case is not about a comparison between companies, but about a comparison between the emissions which Shell has reported over the years on the basis of the method which Shell itself selected as the method most suitable for its organisation. That is precisely what the standard is intended for: "*Use of this standard is intended to enable comparisons of a company's GHG emissions over time.*"[633] See in this respect also Adam Hawkes' statement on behalf of Shell, which states "*It* [the GHG Protocol, added by counsel] *was originally intended to create an inventory for a company, recording sources of emissions and identifying hotspots, which can then be tracked over time to monitor progress in reducing emissions.*"[634]

It is irrelevant that some emissions are reported by several companies

838. Shell furthermore makes it a separate point that various companies count the same emissions twice, so that the total of the emissions that companies report is not the same as the actual emissions which end up in the atmosphere.

839. This is correct, but it makes no difference. The entire point is precisely that companies report honestly and transparently about the emissions within their value chain and that in that respect they opt for a suitable demarcation.

840. The Scope 3 Standard acknowledges that double counts are an inherent part of reporting Scope 3 emissions and that this is not seen as a problem. Indeed, it encourages the necessary action of several entities to reduce emissions:

"*Double counting within scope 3 occurs when two entities in the same value chain account for the scope 3 emissions from a single emissions source. […] This type of double counting is an inherent part of scope 3 accounting. Each entity in the value chain has some degree of influence over emissions and reductions. Scope 3 accounting facilitates the simultaneous action of multiple entities to reduce emissions throughout society.*"[635]

841. The above means that if one entity reduce emissions, this can help various entities to reduce emissions in their turn.

842. The Scope 3 Standard only sets out that Scope 3 emissions may not be used for this reason to determine the total emissions at country level,[636] but this is not happening in this case.[637]

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[633] Exhibit RK-19, p. 6.

[634] Exhibit S-22, para. 9.2.

[635] Exhibit RK-19, p. 108. See also p. 28: "*By allowing for GHG accounting of direct and indirect emissions by multiple companies in a value chain, scope 1, scope 2, and scope 3 accounting facilitates the simultaneous action of multiple entities to reduce emissions throughout society*."

[636] Exhibit RK-19, p. 28.

[637] Exhibit RK-15, p. 32: "*Double counting needs to be avoided when compiling national (country) inventories under the Kyoto Protocol, but these are usually compiled via a top-down exercise using national economic data, rather than aggregation of bottom-up company data.*"

843. Shell thus wrongly asserts that it ensues from the GHG Protocol and the related Scope 3 Standard that double counts of Scope 3 emissions are problematic. Shell even speaks of "*the problem of double counting, that is acknowledged in the GHGP Scope 3 Standard and is prominently discussed*".[638] In view of the above this is completely incorrect. In any event, Shell does not provide any further explanation for its position and in its explanation of this point does not refer to passages of the Scope 3 Standard which supposedly shows this.

844. In para. 8.3.16 Appeal, Shell also asserts that double counts of Scope 3 emissions can take place with the same company. This too is incorrect. The Scope 3 Standard has 15 separate categories of Scope 3 emissions "*designed to be mutually exclusive, such that, for any one reporting company, there is no double counting of emissions between categories*."[639]

845. Lastly, the Scope 3 Standard of 2011 precisely recognises the importance of reporting on Scope 3 emissions, in particular because this is often the bulk of the emissions.[640]

Scope 3 emissions encompass (inter alia) all emissions arising from the burning of products that Shell sells, regardless of whether Shell produced those products itself

846. In para. 8.3.7(c) Appeal, Shell refers to "the problem" connected with the report on products which are sold by Shell but are not produced by Shell.

847. The only thing that Shell remarks in this respect is that these are supposedly emissions which also arise without the involvement of the Shell Group. In other words: if Shell does not sell those products, someone else will. First, this assumption is not correct and it wrongly marginalises Shell's role as an international and vertically integrated system player in the oil and gas industry, with activities at all levels of the value chain. These points will be explained in detail in Chapter 8 Defence on Appeal. Second, it ensues from the Scope 3 Standard that the basic principle is that companies must report Scope 3 emissions over all categories ("*Companies should strive for completeness*"), which applies in particular to Scope 3 emissions that are material to the total of Scope 3 emissions:

"*Companies should ensure that the scope 3 inventory appropriately reflects the GHG emissions of the company, and serves the decision-making needs of users, both internal and external to the company. In particular, companies should not exclude any activity that is expected to contribute significantly to the company's total scope 3 emissions.*"[641]

848. The Scope 3 Standard also recognises that there are many ways for companies to exert influence on the amount of its Scope 3 emissions. With regard to emissions from products sold this is, inter alia "*Develop new low- or zero-emitting products*" and "*Shift away from products that contain or emit GHGs*"[642]

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[638] Para. 8.3.7 Appeal.

[639] Exhibit RK-19, p. 31. See also Exhibit RK-15, p. 65 from which it ensues that when following the standard, double counts between various Scopes within the company are prevented.

[640] Exhibit RK-19, pp. 2 - 3.

[641] Exhibit RK-19, p. 60. See also the table on p. 61 with criteria for identifying relevant Scope 3 activities, including 'Size' (They contribute significantly to the company's total anticipated scope 3 emissions), 'Influence' ('There are potential emissions reductions that could be undertaken or influenced by the company (see box 6.2)' en 'Risk' (They contribute to the company's risk exposure). In Shell's case there can be no doubt that emissions that are related to the burning of products sold by Shell (regardless of whether those products were produced by Shell) are material.

[642] Exhibit RK-19, p. 110.

849. The Scope 3 Standard does not make any distinction between products produced by a company itself (upstream) or that have been purchased in another part of the value chain and were then put on the market (whether or not after further processing). It concerns reporting on the emissions relating to "*companies' activities and the products they buy, sell, and produce.*"[643]

850. This also aligns with the goal of the Scope 3 Standard (which dates from 2011) and the categories covered by it, to provide insight into the climate impact of companies in their value chain, to identify "*emission hotspots*" and to enable companies to make specific plans for emissions reductions.[644]

851. Shell has full control and influence regarding how many fossil products it puts on the market, whether it produces said products itself or purchases them from other producers and then puts them on the market via its worldwide refinery, transport, distribution and/or marketing network. Under the Scope 3 Standard, the emissions that are the result of the burning of all traded products all belong to Shell's Scope 3 emissions. This is not a problem, that is the essence of Scope 3 reporting.

852. The conclusion of the above is that Shell's grounds of appeal in relation to the measuring and reporting of Scope 3 emissions are unfounded.

7.3 Shell has full control over its Scope 3 emissions

853. At first instance it was explained in detail why Shell's legal duty must cover Scope 3 emissions and that Shell has full control and influence over its Scope 3 emissions and that those emissions are attributable to it.[645] The District Court has also established that Shell has control and influence over the Scope 3 emissions of the Shell Group (as well).[646] Shell did not present a ground of appeal against this point. Milieudefensie et al. notes that Shell also explicitly acknowledges that it has control and influence over this. In para. 8.4 Appeal, Shell asserts that it can reduce the Scope 3 emissions reported by it by selling fewer fossil fuels. Shell did not assert in this respect that it is bound by any limitations in this respect.

854. At first instance, Milieudefensie et al.'s notes on oral arguments 3 and 7 also discussed that the control of companies like Shell in that respect is bigger and more direct than the control that states have over the national emissions of citizens and companies, and that companies, in view of this bigger and more direct control can act faster than many national states. Companies are consequently the best and able to be the fastest to generate a flywheel effect relating to climate action, as is foreseen and deemed necessary under the UN climate regime.[647] This is also the reason why there has been consensus under the UN climate regime since 2012 that dangerous climate change cannot be prevented without proactive action of private sector.[648] As stated above, this was also already acknowledged by the drafters of the Scope 3 Standard in 2011: "*the need to accelerate efforts to reduce anthropogenic GHG emissions is increasingly urgent.*

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[643] Exhibit RK-19, p. 4. See also: Exhibit MD-377, p. 90, that provides insight into the Shell value chain, including all fossil fuels that it purchases, sells and produces and for which it reports the emissions.

[644] Exhibit RK-19, p. 4.

[645] See, inter alia, Summons, paras. 612 and 613; Milieudefensie et al.'s Notes on oral arguments 1, paras. 31 through 68 - RDS determines the climate and transition policy of the Shell group; Milieudefensie et al.'s Notes on oral arguments 7, paras. 1 through 40 – Chapter 1a. The degree of attribution of Scope 1, 2 and 3 emissions.

[646] Para. 4.4.25 Judgement.

[647] Milieudefensie et al.'s Notes on oral arguments 7, paras. 1 through 40 – Chapter 1a. The degree of attribution of Scope 1, 2 and 3 emissions and Milieudefensie et al.'s Notes on oral arguments 3, para. 48 et seq.

[648] Para. 4.4.26 Judgement.

Existing government policies will not sufficiently solve the problem. Leadership and innovation from business is vital to making progress."[649]

855. As stated, Shell's control and influence over Scope 3 emissions is established. Shell does assert that it does not have any control over the behaviour of others (including end users), but that is not a defence against the determination that Shell does have control over its own actions and that Shell – and Shell alone – determines how many fossil fuels the Shell Group puts on the market. Shell's reduction obligation is an individual independent obligation of Shell, and not a derivative obligation of that of individual consumers/end users. In that respect Shell's defence that it cannot be liable for the actions of consumers if they are not acting unlawfully themselves is therefore irrelevant.[650] There is consequently evidently no question of risk liability for the actions of consumers as asserted by Shell.

856. Shell barely presented any further arguments against the responsibility for Scope 3 emissions established by the District Court. In addition to its incorrect objections with regard to the measuring and reporting of emissions (see above) Shell only presented two arguments: (i) the Oxford report is supposedly not an authoritative source and therefore the Oxford Report is not a representation of the internationally broadly supported consensus that companies bear responsible for Scope 3 emissions and (ii) the *Principles on Climate Obligations of Enterprises* supposedly showed that there is no unwritten standard with regard to Scope 3 emissions.

857. The Oxford Report was established in the framework of the global Race to Zero Initiative that operates under UN auspices. This report formed the basis in the development of the criteria for participation in this UN initiative. The consensus noted by Oxford University in its report regarding the responsibility for Scope 3 emissions appears from the fact that said Scope 3 responsibility has actually been taken over in that criteria of Race to Zero. Moreover, Oxford University – one of the most renowned universities in the world - plays a key role in this UN initiative, inter alia as chairman of the Expert Peer Review Group which reviews the climate plans of companies against the Race to Zero criteria (see also Chapter 5 Defence on Appeal).

858. The UN initiative Race to Zero is a corollary of the Climate Ambition Alliance established under the UN Climate Convention and the Paris Agreement (initiated by the High Level Climate Action Champions appointed during COP21),[651] in which, in addition to states, non-state actors modify their policy to achieve the goals of the Paris Agreement.[652] This as a further establishment of the importance of climate action of the private sector as acknowledged in the Paris Agreement.

859. The fact that the findings of the Oxford Report have been taken over in this important UN initiative should adequately show that said findings also have authority.

860. Moreover, Shell is wrongly making it appear as if the Oxford Report were the sole source on which the responsibility for Scope 3 emissions is based. This is incorrect. Many sources, certainly seen in conjunction, refer to the need for Shell to bear responsibility for Scope 3 emissions. In addition to the Oxford Report, this ensues, inter alia, from: (i) the elaboration of the UNGP by the UN Special Rapporteur on Human Rights and the Environment, (ii) the Science Based Target Initiative, (iii) the UN Race to Zero initiative, (iv) the fact that Shell and other oil and gas

[649] Exhibit RK-19, p. 3.

[650] Appeal, paras. 8.3.1 – 8.3.5.

[651] Para. 121 of decision 1/CP.21 with the adopting of the Paris Agreement (Exhibit MD-146).

[652] Milieudefensie et al.'s Notes on oral arguments 7, para. 12 et seq. in conjunction with Milieudefensie et al.'s Notes on oral arguments 1, para. 130 et seq.

companies have goals for reducing their Scope 3 emissions, (v) the Production Gap Report of UNEP et al. (vi) the report of the Tyndall Center and (vii) the Scope 3 Standard of the GHG Protocol. These points can be read in, inter alia, Milieudefensie et al.'s notes on oral arguments 7 and in Chapter 5 of this Defence on Appeal.

861. Accepting this Scope 3 responsibility is also fully logical, as the prevention of dangerous climate change would be an illusion if the biggest polluting companies in the world can continue selling fossil fuels without limit, with all discussed consequences this causes for the delay of tackling the climate task and energy transition worldwide. This ignores Shell's influence on the system and would mean that Shell does not have to use its control and influence. It also has something absurd, because it actually means that Shell, without legal responsibility for Scope 3, could continue with its fossil business model on the same footing, as long as it – as it were – put a couple of solar panels on its drilling platforms, thereby reducing its Scope 1 and 2 emissions. Simply producing oil and gas in a 'greener' manner is obviously not a solution to the climate problem. Responsibility for only Scope 1 and 2 emissions is therefore completely insufficient. Without Scope 3 responsibility for fossil companies – which with the sale of their fuels together generate 80% of the global CO2 emissions[653] – achieving 45% emissions reductions in the most critical decade will be impossible. This makes preventing dangerous climate change impossible. There is a good reason why the climate protocols discussed in Chapter 5 and this chapter indicate that specifically business enterprises with a lot of Scope 3 emissions have the greatest responsibility for reducing those Scope 3 emissions in line with the temperature goal of the Paris Agreement.

862. Shell furthermore referred to the *Principles on Climate Obligations of Enterprises,* asserting that these supposedly entail that there cannot be any Scope 3 responsibility.[654] The basis for these principles is apparently that emissions by definition can supposedly be attributed to only one party in the value chain.[655] This is not in line with the global reporting standard of the GHG Protocol, which is based on the need that every actor reports on emissions in the full value chain, based on the thought that every actor in the value chain has influence on emissions reductions and that this thus contributes to the reduction of emissions "*throughout society*".[656] The idea behind the principles is apparently that when every individual actor in the world reduces its own Scope 1 emissions, this will resolve the climate problem. In line with the narrative so carefully crafted by Shell and other oil companies, this places responsibility with the consumer.

863. This vision fails to understand the role of system players and the difference in responsibility of actors in the world when tackling the climate problem, as explained in detail in this case by Milieudefensie et al. The gist of this case is that certain actors have a bigger influence on both the climate problem and the solution thereof, with responsibilities and legal duties ensuing therefrom for those actors. Without a proportional contribution of those specific actors (system players), the climate problem cannot be solved. For that reason alone the premise of the principles cannot be followed.

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[653] See Chapter 5.2 Defence on Appeal.

[654] Appeal, para. 8.3.21 et seq.

[655] Exhibit S-96, p. 61: "*emissions from oil exploration, extraction and refining are attributed to the responsible oil company, whereas emissions from combustion in an airplane are attributed to the airline.*" Under the Scope 3 Standard, these emissions are deemed Scope 1 emissions of the airline company and Scope 3 emissions of the fuel producer.

[656] See in this respect also Notes on oral arguments 9, paras. 1 - 7.

864. In addition, the principles are based on the incorrect assumption that there is a constant demand for fossil fuels which does not respond to changes in supply or price:

"That would mean that, at least in the long-term, such an enterprise would have to reduce its sales of oil. That would, if oil demand is assumed to remain constant and not adjust to supply or price, create a gap in supply that would likely be filled by other enterprises active in countries where these principles are unlikely to be enforceable."[657]

865. The principles thus assume that there is no point in making an oil producer responsible for Scope 3 emissions, because the reduced sales could be perfectly substituted by another producer. The inaccuracy of this argument will be demonstrated by Milieudefensie et al. in Chapter 8 Defence on Appeal (and was already demonstrated at first instance). This can in any event not be an argument to reject the responsibility for Scope 3.

866. The principles do not appear to reject responsibility for Scope 3 in an absolute sense, as a need is indeed seen for fossil companies to stop investing in new oil and gas inventories (and thus also to stop the sale of those new inventories):

"Although not explicitly mentioned in these Principles we do believe the exploration of new oil and gas fields is an issue. There should be no room for such exploration. Burning the existing reserves would exceed the carbon budget several times over."[658]

7.4 The reduction obligation can be an obligation of result

867. The foregoing shows that Shell's objections to Shell's responsibility for the Scope 3 emissions of the Shell Group cannot succeed. In view of Shell's undisputed control over its Scope 1, 2 and 3 emissions, it is in addition clear that Shell's legal duty can be an obligation of result. Shell – and Shell alone – determines how many CO2 emissions it causes with the activities of the Shell Group and it is thus Shell – and Shell alone – which can ensure that the Scope 1, 2 and 3 emissions of the Shell Group are reduced by at least (net) 45% by 2030. It is therefore not necessary that a part of the legal duty is qualified as a significant best-efforts obligation, like the District Court did.

868. Milieudefensie et al. points out a priori that in principle it does not have any problems with the decision of the District Court on this point. The Judgement clearly shows that a significant best-efforts obligation entails that Shell's efforts must be geared to achieving at least a (net) 45% CO2 emissions reduction in Scope 1, 2 and 3,[659] and that far-reaching measures and financial sacrifices may be demanded of Shell in order to comply with the reduction order.[660] The considerations of the District Court – just like the qualification of the obligation as a significant best-efforts obligation – make it clear that a great deal must be expected of Shell, partly in view of the serious risk for the human rights of residents of the Netherlands. In short, Shell must do everything reasonably possible to reduce its total Scope 1, 2 and 3 emissions by (net) 45%. The District Court also explicitly mentions in this respect that a consequence of the significant obligation can be that Shell might refrain from making new investments in extracting fossil fuels

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[657] **Exhibit MD-467**, Climate Principles, p. 63 (selected pages 63 – 66). In any event, in the principles in footnote 156 it was remarked that it is very much the question whether this principle of perfect substitution exists.
[658] Ibid, p. 66.
[659] Paras. 4.4.32 and 4.4.39 Judgement.
[660] Paras. 4.4.53 and 4.4.54 Judgement.

and/or limits its production of fossil commodities.[661] This makes it clear that the District Court is demanding of Shell that it independently uses its control and influence to put fewer fossil fuels on the market. The obligation to reduce the Scope 3 emissions of the Shell Group therefore lies explicitly with Shell and not with end users of Shell's fossil fuels. In addition, the District Court established that Shell has control over the energy package of the Shell Group and via that route has control and influence over the Scope 3 emissions of the Shell Group.[662]

869. The District Court appears to have based the choice for a significant best-efforts obligation, instead of an obligation of result, on the assumption that an obligation of result would suggest for Shell that others do not have their own responsibility.[663] That this assumption is incorrect, appears from what has been discussed above in this Chapter 7, but Milieudefensie et al. will come back to this further on in this chapter.

870. Shell has opted to de facto use the significant best-efforts obligation as an escape route to be able to place responsibility for Scope 3 emissions not with itself, but with the end users of its fossil fuels. The responsibility of end users is also the basis for Shell's *Powering Progress* policy. Shell then publicly (wrongly) makes it appear as if the District Court only ordered it to implement its own *Powering Progress* policy and to inform customers of possible sustainable alternatives. Shell fully fails to recognise in this respect that the District Court instructed Shell to take its own responsibility.

871. This misplaced response of Shell to the Judgement has been explained in detail in the previously mentioned letter of Milieudefensie et al. to the directors of Shell.[664] Said letter refers, inter alia, to a statement by Shell's CEO Ben van Beurden, who in July 2021 compared the *Powering Progress* policy to the Judgement and said: "*directionally, it is not any different*. *You could argue a little bit, is a 45 percent correct? But the point is that our strategy is to purposefully and to profitably decarbonise our customers on their road to net zero, which is exactly what the court asked us to do with significant best efforts*" (emphasis added by counsel).[665]

872. In October 2021 the CEO even said during a press conference with regard to the results of the third quarter of 2021 that the District Court had in essence ordered Shell to implement its new policy, that had been announced in February 2021. Putting it bluntly, the CEO is apparently of the opinion that the implementation of the *Powering Progress* policy, combined with openly challenging certain policy positions, should be sufficient to comply with the Judgement with regard to Scope 3 emissions as well (emphasis added by counsel):

Ben van Beurden (CEO): "*Now what we interpret to be significant best efforts is actually our strategy. So in a way you could argue the District Court convicted us to executing our strategy that's not a bad place to be I would say. Now practically speaking that does mean that we have to do significant clear things to show that we are working as best as we can to help our customers reduce and that's not just offering products and if they don't take it, well, you know, that's their issue. No, it's working with our customers to understand how the policy frameworks in place at this point in time need to be updated to make sure that the energy transition happens*.

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[661] Para. 4.4.39 Judgement.

[662] Para. 4.4.25 Judgement.

[663] Para. 4.4.52 Judgement.

[664] Exhibit MD-387, see in particular pp. 1 through 3 of Annex 1.

[665] Ibid, p. 1. See also **Exhibit MD-468**, The Guardian 29 July 2021: 'Shell boss: we have no plans to change strategy despite emissions ruling': "*Our strategy is very much aligned with what the plaintiffs would want us to do, which is working on our own emissions reduction, and also helping customers reduce emissions.*" The same article also points out that Shell was increasing dividend payments to shareholders and buying back extra shares after positive results.

So again, what you have seen today we've put out a very clear set of policy principles that we will be advocating very actively for, in some cases even campaigning for, to make sure that indeed we help our customers get to net zero with our products and our value chains. That's how we interpret significant best efforts, and again, our shareholders will have a chance, every year, to give an advisory vote on that."[666]

873. In the 2021 annual report, with references to the Judgement, Shell only mentions its Scope 1 emissions, as if these are the sole emissions which must actually have been reduced by 2030:

"*in May 2021, the District Court in The Hague, Netherlands, ruled that, by 2030, Shell must reduce, from its consolidated subsidiaries, its net Scope 1 emissions by 45% and use it[s] best efforts to reduce its net Scope 2 and net Scope 3 emissions by 45%, compared with 2019 levels. In 2019, our Scope 1 emissions from our consolidated subsidiaries were 86 million tonnes of carbon dioxide equivalent (CO_2e) (rounded) (financial control basis).*"[667]

874. Shell also called its additional targets for Scope 1 and 2 (that relate to 5% of the total emissions of the Shell Group) an important step toward compliance with the Judgement (emphasis added by counsel): "*The Board announced an additional target to reduce Scope 1 and Scope 2 absolute emissions, under Shell's operational control, by 50% by 2030 compared with 2016 levels on a net basis. It was announced that this formed part of the Powering Progress strategy, alongside the goals to generate shareholder value, respect nature and power lives. The Board regarded this as an important step as we rise to meet the challenge of the Dutch court's ruling in the Milieudefensie case against Shell*."[668]

875. All in all, Shell's interpretation of the significant best-efforts obligation is at odds with Shell's legal duty to reduce total CO2 emissions in Scope 1, 2 and 3 by (net) 45%, or to take substantial measures in this respect, to make financial sacrifices and in general do everything to achieve that result. However, Shell continues to frame the Judgement as if Shell is being held responsible for changing the demand for fossil energy products: "*The court's ruling effectively holds Shell accountable for a wider global issue – reducing consumer demand for carbon-based fuels – something we cannot do alone and that requires action from all quarters*."[669] This also appears clearly from the Appeal, in which Shell keeps asserting that it is being held responsible for the conduct of others.

876. Although it is clear what is expected of Shell on the basis of the Judgement, in view of Shell's response to the Judgement, it is relevant that when affirming the Judgement (i) the Court of Appeal stipulate that Shell is subject to an obligation of result with regard to reducing the Scope 1, 2 and 3 emissions, or (ii) that the Court of Appeal establish in specific detail what the significant best-efforts obligation means for Shell, so that Shell (publicly) can no longer present an excuse to evade its own responsibility.

877. In this respect Milieudefensie et al. points out that imposing an obligation of result on Shell does not detract from the responsibility (legally or otherwise) of its business relations for their own CO2 emissions. These responsibilities can exist side by side, as also ensues from the Scope 3 Standard discussed above. That Shell cannot prevent dangerous climate change on its own, does

[666] Shell's third quarter 2021 results Q&A webcast for media | Media Relations, from 35m:14s, can be viewed via the Shell YouTube channel on https://www.youtube.com/watch?v=kYUtLi853xc.

[667] Exhibit MD-377, Shell plc Annual Report 2021, p. 81. See also p. 23.

[668] Exhibit MD-377, Shell plc Annual Report 2021, p. 19.

[669] See also Exhibit MD-387, Annex 1, p. 3.

not entail that it cannot be demanded of Shell to make an individual contribution to preventing serious danger. Making Shell subject to an obligation of result does not mean that others can just sit back. It simply means that Shell is going to make its necessary contribution and perform its legal duty.

878. The bottom line is that Shell should sell fewer fossil products immediately, so that the global emissions of the Shell Group in Scope 1, 2 and 3 will have fallen by (net) 45% by the end of 2030 relative to 2019. Shell, whether or not in cooperation with others, can replace a part of its supply of energy products with renewable alternatives. Shell can also opt to only reduce the sale of fossil products. The choice is Shell's.

879. The District Court acknowledged this in so many words by considering that Shell via (the composition of) the energy package sold by it, can exercise control and influence on the Scope 3 emissions of the Shell Group.[670] The District Court considered in this respect that Shell has the option of not making any new investments in explorations.[671] The significant best-efforts obligation also requires of Shell that if necessary it must refrain from making new investments in fossil fuels and/or limit its production of fossil fuels.[672]

880. In this framework, without any substantiation, Shell referred at first instance to contractual obligations and obligations under long-term concessions, which can limit its options with regard to the energy package of the Shell Group. According to the District Court, this limitation does not detract from the fact that Shell ultimately determines the energy package – and consequently the supply of energy products – of the Shell Group.[673] Shell asserted neither at first instance, nor in appeal that that contractual obligations and obligations under long-term concessions actually stand in the way of compliance with the reduction obligation. For that reason too an obligation of result can be imposed on Shell with no objection. In any event, in accordance with objective criteria, a professional party like Shell may be expected to have made provision in its contracts for the possibility that at some point in time, due to government regulations or otherwise, it may have to deliver fewer fossil fuels (e.g. via force majeure clauses). This applies all the more because these risks of (accelerated) regulations and lost climate lawsuits have been foreseen by Shell for years, and have also been mentioned in its annual reports.[674]

881. Shell will have to use its control and influence to reduce the Scope 1, 2 and 3 emissions of the Shell Group up to and including 2030 by at least 45% net. That the burning of Shell's products takes place at end user level, does not detract from this. One way or another, reducing Shell's CO2 emissions requires the Shell Group to sell less fossil energy. This is the appropriate action that belongs with making a proportional contribution, with regard to which Shell does not dispute that it is capable of taking such action.

882. The above shows that nothing stands in the way of a clarification that Shell is subject to an obligation of result with regard to Scope 2[675] and 3 emissions – and consequently the total in Scope 1, 2 and 3 emissions – to reduce those emissions by 45% net. This is an individual partial

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[670] Para. 4.4.25 Judgement.

[671] Ibid.

[672] Para. 4.4.39 Judgement.

[673] Para. 4.4.25 Judgement.

[674] Milieudefensie et al.'s Notes on oral arguments 1, paras. 71 through 78.

[675] There can be no discussion with regard to Shell's Scope 2 emissions, because Shell itself has already indicated that it is able to halve the Scope 1 and 2 emissions by 2030 relative to 2016.

responsibility to make a contribution to the global task of keeping the temperature goal of the Paris Agreement within reach this decade.

883. Milieudefensie et al. therefore asks the Court of Appeal to consider in its judgement that Shell's legal duty must be deemed an obligation of result, or to clarify, by supplementation of the considerations of the District Court, that the significant best-efforts obligation does not entail that Shell may make the necessary proactive action to reduce its Scope 1, 2 and 3 emissions dependent on the action of customers.

8. The effectiveness of Shell's reduction obligation

8.1 Introduction

884. In the preceding chapters, bearing in mind the grounds of appeal presented by Shell, it was explained that for Shell there is an individual, independent responsibility and legal duty to proportionally and adequately contribute to preventing dangerous climate change.[676] In addition, it has been explained that the District Court rightly imposed a reduction percentage of at least 45% for the realisation of this legal duty.[677] Furthermore, on the basis of Shell's policy it was explained that there is an imminent violation of this legal duty: Shell demonstrably does not intend to 'do its part' to prevent dangerous climate change.[678]

885. Shell adds to all of this that an order can only be imposed, if this order is also effective. According to Shell, the reduction order will not have any effect or may even be counter-productive, because its emissions will be substituted by emissions of other parties. Shell appears to present its argument in various legal capacities. For example, Shell argues that its perfect substitution defence stands in the way of holding that there is a legal duty,[679] it believes that there is conflict with European law[680] and it appears to imply that the alleged lack of effectiveness leads to a lack of sufficient interest within the meaning of Article 3:303 DCC.[681] Regardless of the context in which Shell presents its argument: this argument cannot succeed in any of the aforementioned cases.

886. Milieudefensie et al. already went into the effectiveness of the order claimed in great detail at first instance. The only two sources submitted by Shell in this respect, the report and the notes of Prof. Dr. M. Mulder,[682] were refuted. Milieudefensie et al. refers in this respect to, inter alia, its Notes on oral arguments 8, paras. 43 - 72, to its 'statement on the record relating to Exhibit RK-37' of 30 December 2020 and to the exhibits referred to in these documents, in particular Exhibit 337,[683] Exhibit 338[684] and Exhibit 339.[685] In its grounds of appeal, Shell did not respond

[676] Chapters 3 and 4 Defence on Appeal.
[677] Chapter 5 Defence on Appeal.
[678] Chapter 6 Defence on Appeal.
[679] Appeal, paras. 3.2.20, 8.4 and 9.2.10 - 9.2.17.
[680] Appeal, paras. 6.4.14 - 6.4.20.
[681] Appeal, paras. 9.2.10 - 9.2.17. See, e.g., note 468 in para. 9.2.16, in which reference is made to paragraph 20 'The meaning of the term "sufficient interest"' in: J.J. van der Helm, *Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk no. 19)*, Deventer: Wolters Kluwer 2019, p. 25.
[682] Exhibits RK-35 and RK-37.
[683] A review of the report of Prof. Mulder by Peter Erickson of the Stockholm Environment Institute.
[684] A response of Prof.Dr. Ir. Jan Rotmans, Professor of Transitions & Sustainability at Erasmus University, Rotterdam.
[685] An additional response of Peter Erickson to Exhibit RK-37.

to the exhibits submitted by Milieudefensie et al. and merely repeated its position at first instance, with reference to the same, already refuted, substantiation.

887. Milieudefensie et al. will nevertheless again pay attention to this topic and explain that the only question at issue is whether the order will be successful in reducing the emissions of Shell and the Shell Group itself, thereby preventing violation by Shell of its legal duty. Milieudefensie et al. will then explain that the substitution defence cannot substantively succeed in a 'strictly' economic sense and that in addition many broader effects arise from the Judgement due to the influence that the Judgement has on climate action and the global energy transition.

8.2 The reduction order is effective: Shell's emissions will be reduced

888. Shell asserts that the District Court incorrectly applied the statutory framework, because according to Shell the District Court should have included the issue of the effectiveness in answering the question whether there is a legal duty.[686] The District Court did so. The District Court explicitly discussed the effectiveness of the reduction order in relation to the elaboration of the unwritten standard of care[687] and, in addition, in the framework of the question whether Milieudefensie et al. has sufficient interest in the awarding of the reduction order.[688]

889. Shell furthermore fails to understand that the District Court's assessment was substantively correct. The District Court rightly considered that, even if the substitution defence were substantively correct, this would not benefit Shell.[689] This case concerns Shell's individual partial responsibility to do its part with regard to the emissions of the Shell Group over which it has control and influence. It is not a matter of discussion between the parties that the reduction order is effective in bringing about the reduction of these emissions of the Shell Group. The question whether other fossil companies will (partly) replace the reduced production and the reduced supply of fossil products by Shell and the circumstance that Shell cannot solve the problem on a global scale on its own, are not relevant in this respect. Milieudefensie et al. refers in this respect to the reasons presented by the Netherlands Supreme Court in the Urgenda case with regard to the partial responsibility of states:

"*Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest.*"

890. This opinion of the Netherlands Supreme Court aligns with the judgement of the US Supreme Court in the case of Massachusetts v. the EPA.[690] This also aligns with the opinion of the German Constitutional Court in the case of Neubauer et al. v. Germany of 24 March 2021:

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[686] Appeal, para. 3.2.21 and para. 9.2.15.

[687] See Judgement, paras. 4.4.2 and 4.4.49 - 4.4.50.

[688] See Judgement, para. 4.5.5.

[689] See Judgement, para. 4.4.49.

[690] See in this respect Notes on oral arguments 2, paras. 115 and 116 and Notes on oral arguments 8, paras. 44 - 48.

> *"The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. On the contrary, the particular reliance on the international community here gives rise to the constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation."*[691]

891. The German Constitutional Court thus emphasises that an individual responsibility for adequate climate action is also necessary, so that other parties cannot hide behind a lack of climate action on the part of, in this case, Germany.

892. The considerations of the Netherlands Supreme Court, of the US Supreme Court and of the German Constitutional Court relating to the partial responsibility of states, apply just as much to Shell's partial responsibility. Shell cannot hide behind the argument that other fossil companies are not 'doing their part' to prevent dangerous climate change, nor behind the argument that (consequently) the reduction of its emissions would be (partly) cancelled out by other companies and that the effect of the reduction order on the total global emissions will be slight. The reduction order will be effective in preventing a violation of the legal duty by Shell and that is sufficient. The District Court recognised this and presented reasoning in para. 4.4.49 which shows great similarities with the above-cited reasoning of the Netherlands Supreme Court.

893. Like the Netherlands Supreme Court in the Urgenda case, the District Court deemed it relevant that because of the limited remaining carbon budget, any reduction of greenhouse gas emissions will have a positive effect on combating dangerous climate change. Any reduction means, after all, that more space is left in the carbon budget.[692] No single reduction, not even a temporary one which is then (partly) substituted by other parties, is negligible.[693]

894. Assuming a partial responsibility that is separate from the actions of the other parties, is also the only way in which there can be liability for dangerous climate change. This is inherent in the character of climate change (and also applies to some other forms of environmental damage). As P-G Langemeijer and A-G Wissink consider in their opinion for the Urgenda case, this concerns damage which arises gradually, due to a complex of factors, as a result of pollution that crosses over country borders. Just like the District Court in the Judgement, Langemeijer and Wissink referred in this respect to the Kalimijnen case and they assert that the solution is to hold every polluter liable for his unlawful part in the pollution.[694] Against this background, Langemeijer and Wissink therefore conclude that with regard to a claimed prohibition and order it can be assumed that the claimant has a sufficient interest in this respect, if this "*can contribute to the prevention of the asserted threatened damage to interests".*[695]

895. This is also the review that the District Court presented in para. 4.5.5. Shell's argument that this is an incorrect test, because the assessment should be whether the claimed order will make a meaningful difference to the claimant,[696] thus cannot succeed. That the order can contribute to preventing the threatened damage to interests is undeniably the case, as due to the order, the

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[691] Exhibit MD-381, p. 3, under 2 a).

[692] Judgement, para. 4.4.49 and the judgement of the Netherlands Supreme Court in the Urgenda case, para. 5.7.8.

[693] In the paragraphs below it will appear that Shell's substitution defence will not succeed.

[694] Opinion of P-G Langemeijer and A-G Wissink for the Urgenda case, ECLI:NL:PHR:2019:887, paras. 2.10 - 2.13.

[695] Opinion of P-G Langemeijer and A-G Wissink for the Urgenda case (ECLI:NL:PHR:2019:887), para. 2.13.

[696] Appeal, para. 9.2.16.

CO2 emissions of one of the biggest emitters in the world will fall. This makes the interest of Milieudefensie et al. in the imposing of the order on Shell a given.

896. In essence, Shell's substitution defence entails that the claim could only be awarded, if (all) other (relevant) fossil companies were involved in the proceedings. Such a requirement finds no support in European or national legislation.[697] As already explained in Chapter 3, a natural person or legal person in a state based on the rule of law is free to turn to the civil courts in the event of a violation or imminent violation of the rights to which they are entitled and, if several parties can be accused of such violation, to determine whether they wish to bring legal action against all these alleged violators of standards or only (whether or not at first instance) one or a few of them. It is not clear why Milieudefensie et al. should not have an interest to be respected in court, starting with holding Shell liable, as one of the biggest emitters of CO2 in the world.[698]

897. See in this respect (by analogy) the judgement of the Netherlands Supreme Court of 13 November 2015 (ECLI:NL:HR:2015:3307), paras. 4.2.2 - 4.2.3. In this case Stichting Brein sought an order against two internet providers to block the website 'The Pirate Bay', a 'torrent site' which infringed copyright by illegally making software available. The internet providers presented the defence, inter alia, that the order was not effective, because even though there were reduced visits to The Pirate Bay, this did not result in fewer copyright infringements, because of the existence of other torrent sites. This defence, that is very similar to Shell's defence, was dismissed by the Netherlands Supreme Court.

898. Milieudefensie et al. also refers in this respect to the opinion of A-G Van Peursem (which was followed by the Netherlands Supreme Court) in the above-mentioned judgement, in which the A-G considered:

"What the court is doing in the framework of the effectiveness test is to demand a blockade measure from TPB that (the underlying end goal of Brein's actions is realised, i.e. that) there is an overall reduction in infringements of IP rights of the relevant rightholders via BitTorrent. This cannot be the intention."[699]

899. Nor is it decisive in this case in what degree the total global emissions fall due to Shell's reduction order. The issue is that the imminent violation (unlawful act) is prevented by Shell and that Shell, on the basis of its own (partial) responsibility contributes a proportional and adequate contribution to the prevention of dangerous climate change.

900. In the above-cited opinion of A-G Van Peursem reference is furthermore made to a response of the British High Court to the earlier (incorrect) effectiveness decision of the court of appeal:

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[697] See in this respect (by analogy) the judgement to be discussed below of the Netherlands Supreme Court of 13 November 2015 (ECLI:NL:HR:2015:3307), para. 4.4.3. In this case a very similar effectiveness defence in a copyright case was dismissed by the Netherlands Supreme Court. See also the final judgement of the Court of Appeal in this case of 2 June 2020 (ECLI:NL:GHAMS:2020:1421), para. 3.8.9.

[698] See in this respect the judgement of the Court of Appeal in the Urgenda case of 9 October 2018 (ECLI:NL:GHDHA:2018:2591), para. 64: *"On top of that, if we were to follow the State's interpretation, an effective remedy against a global issue such as this one would be lacking. After all, every State that is held to account could then argue that it does not have to take any measures if other States do not do so either. Such a consequence is unacceptable, the more so as Urgenda cannot take all of the relevant States to a Dutch court."*

[699] Opinion of A-G Van Peursem (ECLI:NL:PHR:2019:887), para. 2.3.10.

> *"In my judgement it is wrong in principle to interpret Article 3(2) of the Enforcement Directive as requiring rightholders to establish that the relief they seek is likely to reduce the overall level of infringement of their rights. If trade mark owners like Richmont apply for a final injunction to restrain further infringements against a market trader who has been caught selling counterfeit watches, they do not have to show that the injunction is likely to reduce the overall level of infringement of their trade Marks. Nor would it be a defence to such an application for the market trader to say "If consumers can't buy counterfeit goods from me, they will simply buy them from other market traders". Nor would the market trader improve his position by pointing to five other traders selling counterfeits in the same market whom the trade mark owner had not yet sued (but intended to sue in due course). To allow such a defence would not only undermine intellectual property rights, it would also be inimical to the rule of law.* [Emphasis added by counsel]*"*[700]

901. The considerations of the Netherlands Supreme Court, the A-G and the British High Court apply just as much to this case. Shell's argument that it cannot be held liable for its (impending) unlawful act, because other parties continue to commit similar acts, can never succeed and is contrary to the core principles of (liability) law.

902. Lastly, the alleged lack of effectiveness – contrary to what Shell asserts – also does not conflict with European law. In the framework of the review against European law, it is sufficient that the order *can* contribute to preventing the threatened damage to interests. A guarantee that the order will prevent the harm is not required.[701] Milieudefensie et al. will discuss Shell's invoking of European law in Chapter 9.

903. It ensues from the above that the District Court correctly assessed and dealt with Shell's substitution defence. Shell's argument that the District Court applied an incorrect test, cannot succeed. Not only because of the special nature of the danger of climate change, but also because this defence is contrary to general principles of law.

904. Without prejudice to the above, on the basis of two new expert reports Milieudefensie et al. will provide further explanation that Shell's substitution defence is not substantively correct either and that the Judgement and the reduction order entail both direct and indirect effects, which will result in a reduction in global CO2 emissions.

8.3 The reduction order is effective: the (direct) effects on the supply and the price of oil and gas

905. Milieudefensie et al. asked four renowned experts to give their opinion by means of an expert report on the effect of the reduction order imposed by the District Court on global oil and gas production and greenhouse gas emissions. It concerns the following experts: Peter Erickson (senior scientist U.S. Center of the Stockholm Environment Institute); Dr Fergus Green (Lecturer Political Theory & Public Policy, University College London); Dr Cathrine Hagem (Head of Research, Statistics Norway) and Dr Steve Pye (Associate Professor in energy systems and Deputy Director UCL Energy Institute, University College London).[702] All four experts have many peer-reviewed articles to their name, published in the most important scientific journals in the

[700] Opinion of A-G Van Peursem (ECLI:NL:PHR:2019:887), para. 2.3.11.

[701] Cf. Opinion of P-G Langemeijer and A-G Wissink for the Urgenda case (ECLI:NL:PHR:2019:887), paras. 4.216 and 4.217 and Chapter 9.4.2 Defence on Appeal.

[702] **Exhibit MD-469** Expert letter: The likely effect of Shell's Reduction Obligation on oil and gas markets and greenhouse gas emissions, 16 September 2022.

world, including 'Science', 'Nature' and 'Nature Climate Change'. Three of the experts are involved as author in the Production Gap Report of UNEP et al. For further details on the expertise of the four experts, reference is made to the short biographies in the appendix with the expert report.

906. These experts (hereinafter called: "**Erickson et al.**") jointly refuse the defences presented by Shell with regard to the point of the effectiveness of the Judgement and conclude that it is plausible that the reduction order will reduce global greenhouse gas emissions. The following serves by way of explanation.

907. Shell's reasoning in essence comes down to, succinctly, that regardless of the reduction order, the persistent (static) demand for oil and gas will have to be satisfied and that if Shell does not supply this oil and gas, other market parties will.

908. According to Erickson et al., this argument disregards the most basic economic principle, i.e. the principle that supply and demand are connected with each other via price. Changes in supply of a product affect the price of that product, which in turn changes the demand for that product. Milieudefensie et al. already explained this at first instance on the basis of the Production Gap Report of UNEP et al. and referred to case law in which this basic principle was decisive in a legal discussion on the defence of perfect substitution.[703]

909. According to Erickson et al., there could be no serious discussion on this economic basic principle:

"This relationship between supply and demand, via price, is so basic, so widely understood (including by Shell's own experts)[704], that the burden of proof for claiming otherwise should rest firmly with anyone wishing to assert the contrary. Namely, in this case, the burden of proof should be on Shell to demonstrate that the oil and gas markets are characterised by demand that is completely unresponsive to price and, therefore, to changes in supply. We cannot fathom how they could hope to substantiate this claim. In fact, we are aware of no study that shows demand in oil and gas markets to be perfectly inelastic."[705]

910. Shell asserts de facto that, where as a result of the reduction order it will have to decrease its supply of oil and gas, this will not lead to a decrease in the global supply of oil and gas. This is illogical and untrue. This would mean that there would be a seamless transition from a production reduction at Shell to a production increase of exactly the same size with other oil and gas companies. This assertion of Shell has been disproved by Erickson et al.

911. With regard to the production of oil and gas, according to Erickson et al. it is not a given that other market parties will or can seamlessly take over Shell's production. It is very much the question whether other companies, without delay, can replace Shell's supply on the market at the same capacity, speed, cost price, efficiency and effectiveness as Shell. It was explained in Notes on oral arguments 8 at first instance that this is in fact highly unlikely, as according to data of Rystad Energy, Shell can operate at a cost price which is below the market average.[706] If

[703] See Notes on oral arguments 8, paras. 54 - 58.

[704] RK-35 (the Mulder report) describes how a decrease in supply leads to an increase in the prices and a decrease in use if other producers are not able to compensate the entire avoided supply.

[705] Exhibit MD-469, Expert letter, p. 3.

[706] Notes on oral arguments 8, para. 70.

a market party is not able to produce with the same efficiency as Shell or even if there is only a delay in taking over the production, the total supply of oil and gas on the market will decrease.[707]

912. In addition, Erickson et al. indicated that "*other suppliers may be limited in their capacity (e.g. labor or capital) to extract as much oil or gas from the licenses [as Shell]*".[708] It is therefore not a given that other companies can extract as much oil or gas from a field as Shell can. For that reason it is not likely that there will be no change in the global supply of oil and gas, if Shell reduces its supply of oil and gas.

913. Nor is it a given that governments will re-issue permits that have been returned by Shell, or that companies will be interested in taking over such permits. These points have already been explained in Notes on oral arguments 8, paras. 68 - 72. Said notes provide examples of countries which no longer issue new permits and oil and gas companies that independently choose to limit their production.[709] In the meantime, Denmark, Costa Rica, France, Greenland, Ireland, Quebec, Sweden, Wales, California, New Zealand, Portugal, Italy, Finland and Luxembourg are united in the 'Beyond Oil and Gas Alliance', whose goal is to facilitate the phasing out of oil and gas production.[710] One of the ways it seeks to achieve this is by no longer issuing new oil and gas permits, by reducing existing oil and gas production, no longer subsidising the production of oil and gas and by working together when taking other significant measures that contribute to reducing the supply of oil and gas on the global market. For this reason too it is not likely that there will be no change in the global supply of oil and gas, if Shell reduces its supply of oil and gas and in this framework returns permits to governments.

914. In any event, it is very much the question whether as a result of the reduction order Shell will have to return permits to governments or in some other way hive off oil or gas fields to other parties. In Chapter 6 Defence on Appeal it is explained on the basis of a report by Oil Change International that Shell can to a great extent bring its production activities in line with the reduction order by no longer taking any new oil and gas fields into production as of 2022. The production of its current oil and gas fields would in such case decrease by 43%. With regard to its production reduction, Shell can consequently comply with the reduction order to a great degree without transferring oil and gas fields to other parties or returning permits to governments. The Judgement particularly has an effect on Shell's future investments and to a far lesser degree on investments in exploitation. The Judgement is extraordinarily effective in preventing these future investments.

915. In view of the above it is likely that the reduction order and the ensuing decrease in the supply of oil and gas by Shell, also leads to a global reduction in the supply of oil and gas.

916. Every (temporary or otherwise) limitation in the supply of oil or gas, either due to a reduction in production, or due to a reduction in sales, will cause the price of that fuel to rise for the consumer.[711]

917. According to Erickson et al., Shell fails to understand that the demand for oil and gas is not static. If the prices (and the expectations on future prices) increase, consumers will change their behaviour, even if only a little bit, to alleviate the price increase. They will drive less or more

[707] Exhibit MD-469, Expert Letter, p. 2.

[708] Exhibit MD-469, Expert Letter, p. 2.

[709] See Notes on oral arguments 8, paras. 68 - 72 and for other examples Chapter XI.5.2 of the Summons.

[710] See https://beyondoilandgasalliance.com/who-we-are/.

[711] Exhibit MD-469, Expert Letter, p. 2.

slowly (with lower fuel consumption), they will drive in more efficient cars they already own or will buy new, more efficient cars when they replace a vehicle.[712] As Shell itself asserts "*[the consumers] would continue making choices based on the costs, the availability and the continuity of the supply*".[713] However, Shell wrongly assumes that those choices only relate to fossil fuels and not to behaviour modification and choices for reduced energy use and/or renewable alternatives. That is why Shell wrongly asserts that the demand for oil or gas will not change if Shell decreases its fossil fuels, according to Erickson et al.[714]

918. Erickson et al. believes that Shell contradicts itself in this respect:

"Shell distinguishes between "easy-to-abate" and "hard-to-abate" sectors. Notably, the "ease of abatement" refers in this context to the ease with which consumers can switch away from oil and gas. One of the "easy-to-abate" sectors Shell identifies is "[p]assenger vehicles" (Shell SOA, para 2.5.3). By acknowledging that there are "easy to abate" sectors to which Shell supplies oil and gas, Shell has undercut its own implausible assertion that the entire oil and gas market is characterised by purely inelastic demand."[715]

919. Shell thus acknowledges that there are sectors, such as the sector 'passenger vehicles', within which consumers, when they are confronted with a price increase, can (and will) more easily transfer to renewable alternatives or will modify their behaviour.[716]

920. In view of the above, there can be no misunderstanding about the fact that a reduction in production or sales of Shell has an influence on the price of oil and gas and will consequently result in a reduction in demand. Shell fails to understand this with its substitution defence.

921. It also ensues from the above that Shell's response to para. 4.4.50 of the Judgement[717] cannot succeed. In this consideration, with reference to the Production Gap Report, the District Court takes into consideration that every barrel of oil not produced will lead to 0.2 to 0.6 of unconsumed barrels in the long term. According to Shell, this reference to the Production Gap Report fails, because the cited example relates to oil production which is not developed in one region due to a government measure and not to a lower production by one individual company. According to Erickson et al., the difference mentioned by Shell does not lead to another conclusion relating to the effect of the reduction order on the oil and gas prices, and consequently on the demand for oil and gas. If a government limits extraction permits, companies must extract oil and gas elsewhere, which presumably will lead to higher extraction costs and to higher prices.[718] This applies equally when a limitation at company level entails that the production is taken over by an oil company that cannot produce at the same costs or at the same speed as Shell. The end conclusion therefore remains the same, according to Erickson et al.

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[712] Exhibit MD-469, Expert Letter, pp. 2 and 3.

[713] Appeal, para. 2.5.8.

[714] Exhibit MD-469, Expert Letter, pp. 2.

[715] Exhibit MD-469, Expert Letter, pp. 2, footnote 2. The abbreviation SOA used by Erickson et al. stands for 'Statement of Appeal'.

[716] Exhibit MD-469, Expert Letter, pp. 2.

[717] Appeal, para. 3.2.20(d).

[718] Exhibit MD-469, Expert Letter, pp. 4, footnote 6. According to Erickson et al. this is a reasonable assumption because producers prefer to produce in fields with the lowest possible extraction costs. If further extraction in such a field is no longer possible due to government measures, the relevant producers will have to relocate their production to fields with higher extraction costs.

922. Erickson et al. furthermore show that Shell's argument that harder-to-abate sectors will still need oil and gas, cannot detract from the above. Although there are indeed certain sectors where the demand for oil and gas will persist in the short term, according to Erickson et al., all these sectors have alternatives.[719] In addition, what is defined as 'harder-to-abate' can change over time. Five years ago steel was deemed a hard-to-abate sector, but thanks to innovation and investments in the sector, according to Erickson et al., clear pathways to a low-carbon transition can arise.

923. According to Erickson et al. it is therefore probable that many of the harder-to-abate sectors will develop alternatives and will become easier-to-abate. The result is that the remaining demand for oil and gas will respond ever stronger to changes in the price. Renewable alternatives will further reduce the market for fossil fuels, so that demand will only remain in the very hard-to-abate sectors.

924. Milieudefensie et al. addressed Shell's argument that it supplies to hard-to-abate sectors for the rest in Chapter 5.4 of this Defence on Appeal. Milieudefensie et al. explained in this respect, inter alia, that Shell can continue serving the hard-to-abate sectors with application of the reduction order within its customer portfolio, that nevertheless these sectors too are not static and are busy reducing their CO2 emissions and that no matter what, according to the IEA, no sector in society requires investments in new oil and gas fields.

925. Shell furthermore takes the position that the reduction order could even lead to an increase in global emissions, because this could delay the transition from coal to gas for electricity generation.[720] According to Erickson et al., this argument cannot succeed either.

926. Erickson et al. first of all assert that Shell's argument in any event does not relate to the effectiveness of the reduction order with regard to the supply of oil. This is logical as oil is not a substitute for coal in the context of electricity generation. Oil is not used or is hardly used for this purpose.[721]

927. Erickson et al. furthermore point out in this respect that with this argument relating to the alleged delayed transition from coal to gas, Shell, in the event of higher gas prices due to a reduced gas supply, is undermining its own position. With this Shell de facto acknowledges that a reduction of its gas supply has an impact on the international gas prices, to which end users will respond. Due to an increasing gas price because of a restriction of Shell's production, it would be less attractive for end users in China and India to switch from coal to gas, according to Shell. With this Shell acknowledges that a global effect on price and (therefore) demand will emanate from limiting its supply of gas, as a result of the reduction order.[722] Shell is (again) contradicting itself.

928. According to Erickson et al., Shell nevertheless fails to understand that, in addition to gas, renewable energy is also a substitute for coal, that, moreover, does not entail any CO2 emissions. In view of the strong support of governments for renewable energy and the decreasing support for coal,[723] the circumstance that according to the IEA the additions to the

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[719] Exhibit MD-469, Expert Letter, pp. 4 and 5.

[720] Appeal, para. 9.2.13(b).

[721] Exhibit MD-469, Expert Letter, pp. 6.

[722] Exhibit MD-469, Expert Letter, pp. 5.

[723] Exhibit MD-348, Glasgow Climate Pact, para. 36: *"Calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by*

global electricity supply will be dominated by renewable energy, as well as signals in this respect (such as the REPowerEU plan), it is plausible according to Erickson et al. that end users will switch to renewable energy.[724] As also explained in Chapter 5.3 of this Defence on Appeal, gas is, moreover, not a transition fuel and continuing to invest in new gas projects cannot be reconciled with the 1.5°C goal of the Paris Agreement.

929. The IEA concluded back in 2020 that renewable electricity production is very competitive with regard to cost price in comparison to fossil electricity production.[725] According to the IEA, specifically with regard to the countries India and China mentioned by Shell in this respect, renewable energy sources have the lowest costs. For these countries electricity generation by means of solar panels and 'onshore' windmills is the cheapest option. The IEA therefore concludes that both countries have promising options for the transition from their current still very carbon-intensive electricity generation to renewable electricity generation.[726] In view of this, 'leapfrogging' to renewable energy will only become more attractive.

930. Bearing in mind all of the above, according to Erickson et al. it is likely that the reduction order will reduce global greenhouse emissions.

8.4 The reduction order is effective: Shell's influence on the energy transition and the oil and gas market

931. Erickson et al. then explained that Shell can have a big influence on the acceleration of the energy transition. According to Erickson et al., Shell is able to influence fossil fuels in the long term by means of investments in low-emission alternatives and making these alternatives attractive for its customers by means of its marketing and distribution channels:

"Shell has the technical know-how, financial clout and marketing channels to help drive change in key sectors, influencing how quickly those sectors transition."[727]

932. For the time being, Shell's investments in sustainable alternatives lag far behind its investments in oil and gas.[728] According to Erickson et al. it is plausible, however, that the reduction order will entail that Shell will not only produce and sell less oil and gas, but will also invest more in renewable alternatives, so that the demand for oil and gas will be influenced:

"This commitment by Shell to clean technology investment could be strengthened, and it is our view that the judicial imposition of the RO [Reduction Obligation, added by counsel] would likely induce greater commitments of this kind by Shell. […] If alternatives are supplied and marketed, prices will fall over time, and demand will grow. Whatever specific business decisions Shell makes pursuant to the RO, our more general point is simply that the Court should take account of Shell's role not only as a supplier of oil and gas, but as a potential supplier of low-emissions substitutes, which can influence the evolution of oil and gas demand over the longer term."[729]

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rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phase-out of unabated coal power and inefficient fossil fuel subsidies, recognizing the need for support towards a just transition [emphasis added by counsel]."

[724] Exhibit MD-469, Expert Letter, pp. 6.

[725] **Exhibit MD-470**, IEA Executive Summary 'Projected costs of generating electricity, 2020 edition'. See page 15.

[726] IEA 'Projected costs of generating electricity, 2020 edition', p. 15.

[727] Exhibit MD-469, Expert Letter, pp. 7.

[728] Milieudefensie et al. explained this topic in Chapter 6.

[729] Exhibit MD-469, Expert Letter, pp. 7.

933. In this manner too it is also plausible that the reduction order will be effective, that this will influence the demand for oil and gas, resulting in a decrease in global emissions.

934. Lastly, it is important in this respect that Shell not only sells oil and gas it produces itself. Shell purchases part of the oil and gas it sells from other producers. Shell is thus also a big buyer of oil and gas. Erickson et al. indicated that many independent oil and gas producers, of which there are hundreds, are dependent on a small number of integrated companies like Shell, to be able to put their products on the market. In addition, Erickson et al. have indicated that Shell itself asserts that it promotes the production by other oil and gas producers by financing them and guaranteeing the purchase and procurement of the produced oil and gas.[730] The reduction order thus also influences Shell's volume of purchases and consequently the production of other oil and gas producers.

935. According to Erickson et al. this leads to an additional way in which Shell has an influence on the oil and gas market:

> *"[T]his is an additional channel through which Shell's business decisions influence the wider market for oil and gas, both in the short and longer term. For example, it is reasonable to assume that if Shell shifted its business model more decisively toward low-emissions solutions, this would (i) depress consumer demand not only for the oil and gas produced by Shell but also the oil and gas produced by independent producers that is on-supplied by Shell (e.g., due to an associated shift in Shell's marketing and distribution strategy), (ii) reduce the supply of oil and gas supplied by those independent producers (due to those independent producers facing higher costs for marketing and distribution), or both (i) and (ii)."*[731]

936. Shell therefore not only has an influence on its own production and sales, but also on the production and sales of other oil and gas products that use Shell for their 'road to market'.

937. This fact brings us to Shell's argument that the taking of measures that affect the supply – like the reduction order – are not effective if measures are not simultaneously taken on the demand side.[732] According to Erickson et al. this argument cannot succeed. In order to achieve the global climate goals, it is not the case that one entity at one time should reduce both the supply and the demand. It is merely the case that *globally* it is preferable to reduce both the supply and the demand more or less simultaneously, because this can be more cost effective. For every *individual* entity it is however useful to concentrate on supply, on demand or on both. Shell in particular finds itself in the special position that it can take actions to influence both demand and supply:

> *"Shell's capacity to influence demand over the longer term (as discussed above) underscores the fact that Shell is capable of taking both supply actions and demand-influencing actions. Accordingly, the global imperative to tackle both the demand for and supply of fossil fuels is not a valid reason to reject the imposition of the RO [reduction obligation, added by counsel] on Shell."*[733]

938. On the basis of all of the above, it must be concluded that the reduction order will result is substantial (direct) effects and that Shell's substitution defence cannot succeed.

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[730] Exhibit MD-469, Expert Letter, pp. 8.

[731] Exhibit MD-469, Expert Letter, pp. 8.

[732] Appeal, para. 2.5.9.

[733] Exhibit MD-469, Expert Letter, pp. 8.

8.5 The reduction order is effective: the indirect influence on the energy transition

939. In addition to the above-described direct effects, there are substantial indirect effects resulting from the Judgement and the reduction order, which not only have influence on Shell, but on the energy transition as such and which may lead to an additional reduction in the global CO2 emissions. Erickson et al. mention in this respect three potential effects:[734]
    1. A decrease in the oil and gas supply due to higher capital costs for investments in oil and gas, because there is an increased risk perception on the part of investors;[735]
    2. A decrease in the supply of fossil fuels because other courts impose similar limitations on other business enterprises that produce fossil fuels, as a result of the precedent created by the Judgement; and,
    3. A reduction in the supply of fossil fuels because governments impose similar limitations on other companies that produce fossil fuels, because globally it is becoming more common to limit the supply of fossil fuels.

940. At first instance, to substantiate the plausibility of such indirect effects, Milieudefensie et al. made use of an expert report of Prof. Dr. Ir. Jan Rotmans, Professor of Transitions & Sustainability at Erasmus University and an international authority in that area. Milieudefensie et al. hereby submits an additional expert report of Rotmans into the proceedings, that he drew up together with Prof. Dr. Derk Loorbach. Loorbach is director of the Dutch Research Institute for Transitions (DRIFT) and Professor of Social-Economic Transitions at Erasmus University.[736] The expert report of Rotmans and Loorbach confirms the indirect effects signalled by Erickson et al. and provides further substantiation and explanation for the existence of such effects.

941. In their export report, Rotmans and Loorbach first provide and explanation about what transitions are and how they take place:

    "*Social transitions are defined as non-linear, fundamental changes in a social sub-system. (…) social transitions are greatly influenced by human factors like power, conduct, expectation, strategy, innovation, emotion and interests. Together people develop collective routines, views and structures ('regime'). By investing money, time and energy, we develop infrastructures, markets and institutions, which together lead to 'path dependency': it is most appealing to continue on the path already taken and that is also in the interests of most parties. This 'lock-in' entails that we are often primarily focused on improving what already exists with controlled innovation, which in practice leads to a decreasing capacity to structurally adapt to changing circumstances. A transition (a regime out of equilibrium) arises when this optimising of what exists hits a boundary, the social environment changes significantly and alternatives arise (Loorbach et al., 2017). […] the historical legitimacy is that in this context all kinds of processes arise that self-accelerate: exponential growth of alternatives, a shifting social consensus, a turnaround in strategy of business enterprises (Loorbach, 2014).*"[737]

942. According to Rotmans and Loorbach, with regard to the energy transition, the untenability of the current, fossil fuel-based system, is scientifically undisputed. The combination of pressure from the environment, limits of optimisation of the existing system and the increasing feasibility

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[734] Exhibit MD-469, Expert Letter, pp. 9.

[735] See in this respect also Exhibit MD-339.

[736] **Exhibit MD-471**, Expert report of Prof. Dr. Ir. Rotmans and Prof. Dr. Loorbach, Systeemdynamiek van de energietransitie, 9 September 2022. See p. 9 for a further explanation of the expertise of Rotmans and Loorbach.

[737] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 1 and 2.

of alternatives, is slowly but surely upsetting the equilibrium of this fossil system. The current political and social unrest are signals of instability that, combined with the need and willingness to intervene, can lead to rapid changes and feedback loops, according to Rotmans and Loorbach:

"the shifts in markets force companies to reposition, so that historical sector structures become unstable and companies are forced to reposition again; in the event the desired changes do not occur, governments must ultimately take fundamental actions, so that institutional structures become more unstable and large-scale policy modification is necessary; citizens orient themselves on other values, so that new behaviour patterns arise that others will follow, causing a change in standards. These movements within the market, government and society then reinforce each other."[738]

943. Rotmans and Loorbach mention as examples in this respect the changing political, social and financial context: the rise of global protest movements that argue for the phasing out of and divestment of fossil energy sources, big investors like the ABP pension fund that heed this request, global policy initiatives like the Beyond Oil and Gas Alliance, in which countries agree to phase out the production and use of oil and gas, and the ever-more stringent climate action, such as recently in the US, the second biggest emitter in the world.[739]

944. According to Rotmans and Loorbach the Judgement should be viewed in the context of this turbulent system dynamics. Predictions which at first instance were made in the framework of the transition perspective with regard to the substantial indirect system effects of the reduction order,[740] have now become reality. Rotmans and Loorbach mention in this respect the contribution of the Judgement to an increased financial risk profile for the fossil industry, as already mentioned above by Erickson et al., waking up numerous other companies in all kinds of sectors domestically and abroad and the inspiration that the Judgement provides for a growing number of lawsuits, in which companies and governments are summoned to combat dangerous climate change and protect human rights.[741]

945. The influence that lawsuits have on climate action globally, in addition to the direct consequences of the lawsuits for the parties involved, is now even acknowledged by the IPCC:

"Systemic climate litigation that seeks an increase in a country's ambition to tackle climate change has been a growing trend since the first court victories in the Urgenda case in the Netherlands […] In May 2021, the Hague District Court of the Netherlands issued a ground-breaking judgement holding energy company Royal Dutch Shell (RDS) legally responsible for greenhouse gas emissions from its entire value chain (Macchi and Zeben 2021). […] These litigation cases also impact on the financial market without directly involving specific financial institutions into the case (Solana 2020) but somehow aim to change their risk perceptions and attitude on high carbon activities (Griffin 2020). […] The outcomes of climate litigation can affect the stringency and ambitiousness of climate governance (McCormick et al. 2018; Eskander et al. 2021). […] But these cases can also have impacts outside of the legal proceedings before, during and after the case has been brought and decided (Setzer and Vanhala 2019). These impacts include changes in the behaviour of the parties (Peel and Osofsky 2015; Pals 2021), public opinion (Hilson 2019; Burgers 2020), financial and reputational consequences for involved actors

[738] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 3.
[739] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 2.
[740] Exhibit MD-338, the statement of Prof. Dr. Ir. Jan Rotmans.
[741] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 2.

(Solana 2020), and impact on further litigation (Barritt 2020). Individual cases have also attracted considerable media attention, which in turn can influence how climate policy is perceived (Nosek 2018; Barritt and Sediti 2019; Paiement 2020; Hilson 2019). While there is evidence to show the influence of some key cases on climate agenda-setting (Wonneberger and Vliegenthart 2021), it is still unclear the extent to which climate litigation actually results in new climate rules and policies (Peel and Osofsky 2018; Setzer and Vanhala 2019; Peel and Osofsky 2020) and to what degree this holds true for all cases (Jodoin et al. 2020). However, there is now increasing academic agreement that climate litigation has become a powerful force in climate governance (Bouwer 2018; Peel and Osofsky 2020; United Nations Environment Programme 2020; Burgers 2020). [underlining added by counsel.]"[742]

946. That the Judgement and the reduction order will have a (large) effect is difficult to deny in view of the above.

947. It is furthermore important in this respect that the reduction order is directed against Shell. Rotmans and Loorbach qualify Shell as a 'system player' in the energy sector. System players are players around which an entire ecosystem of parties has arisen. This makes system players pillars of social systems and they often offer predictability and stability. In transition dynamics, system players are important transition points: if they make a fundamental change in course or position, the whole system will shift, according to Rotmans and Loorbach:

"Shell is a regime system player, that has its tentacles in the whole energy chain, from production, distribution, processing to sales. Shell, as big player, is so great in size, has such a high investment budget, has so much expertise and such a network, that it can change the direction of the entire energy change."[743]

948. According to Rotmans and Loorbach, it is remarkable that Shell does not play upon its position as system player far more explicitly to accelerate the energy transition and limit dangerous climate change as much as possible. There is no true transition strategy at Shell and the investments in sustainability are very modest in proportion to the investments in fossil fuels, according to Rotmans and Loorbach. Shell is primarily concerned with making its production of fossil fuels partly sustainable and not with phasing out that production. Rotmans and Loorbach's conclusion is that for the time being Shell will therefore be busy protecting the fossil core of the business model and continuing to produce and sell fossil products for as long as possible:[744]

"Up to now Shell came up with promises and ambitions, but [Shell] has not taken serious action to shape its own transition in terms of the core of the business: extracting and selling fossil energy. From the historical logic and the own internal regime, Shell is primarily geared to improving what exists, partly due to the belief in technological innovation, but also from the conviction that [government] policy can be influenced in a sense favourable to them and that those alternatives and social pressure will not be a big problem. In that sense Shell did not take the message of the transition science very seriously: the message that transition dynamics happen to us precisely because we object to the need for change or deny or ignore it, and that by delaying that which is unavoidable, the dynamics will be more severe and the chance of undesirable outcomes is greater."[745]

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[742] **Exhibit MD-478**, IPCC AR6 WGIII, Chapter 13, para. 13.4.2, pp. 13-30 and 13-31.

[743] Exhibit MD-471, expert report of Rotmans and Loorbach, pp. 3 and 4.

[744] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 4.

[745] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 7.

949. Rotmans and Loorbach draw a parallel with the nitrogen crisis in this respect:

> *"Here too science has been clear for decades on the consequences of excessive nitrogen deposits. In response, the focus was primarily on technological innovation, efficiency and improvement of the existing system, so that the underlying structure of the agricultural industrial complex remained standing. In combination with this, political decision makers kept kicking the can down the road: every time there seemed to be consensus to intervene, political, economic and social interests came into play, resulting in so much resistance, that postponement and watering down was chosen instead. Now that the agricultural system has truly hit the ecological limits and intervention has become unavoidable from a legal perspective, political decision makers can no longer avoid structural changes. The transition pressure is mounting to a maximum, with unrest, chaos and crisis inside and outside of the sector. This degree of social crisis could have been prevented if political decision makers, farmer (organisations), agricultural industry and banks had taken the evident need for structural change serious at an earlier stage and had anticipated and acted on this."*[746]

950. It ensues from the above that the energy transition can only accelerate if system players like Shell go through an internal transition, whereby the organisation, culture and practice are geared to phasing out fossil and expanding renewable, and whereby the focus is on societal impact in addition to financial impact, according to Rotmans and Loorbach. By definition there is a limit on how optimally or efficiently fossil technology can be made: a fossil car or refinery will always have emissions.[747] This is one of the reasons why Milieudefensie et al. believes Shell should be held responsible for Scope 3 emissions. This is the only way in which Shell can be incentivised to not only optimise its own processes, but to actually focus on a fundamentally different approach.[748]

951. As long as Shell does not change its approach and does not make serious work of the energy transition, it contributes to a fossil lock-in, according to Rotmans and Loorbach: *"because [Shell] continues to invest in fossil energy, other big players in the energy field will also continue to do so and the fossil infrastructure will remain standing for longer".* In this manner the fossil industry creates its own resistance to the transition. Consequently significant political and economic interests will remain large to maintain the fossil business model for as long as possible. Due to the knock-on effect of the fossil lock-in on other chain players, according to Rotmans and Loorbach it will be virtually impossible to achieve the climate goals.[749]

952. According to Rotmans and Loorbach the reverse equally applies: Shell can use its position as a system player for the good:

> *"if Shell were to be aiming at long-term returns, it would invest more money and more quickly in renewable energy, so that the fossil production can decrease more quickly, so that the fossil infrastructure is brought down more quickly, so that the transition costs decrease, so that the political and economic interests in defending the fossil business model for longer will decrease even more, so that the climate goals remain within reach.*[750] *[…] In transition dynamics these*

[746] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 7.
[747] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 6.
[748] See in the framework of the responsibility for Scope 3 emissions Chapter 7 Defence on Appeal.
[749] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 5.
[750] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 5.

system players can be important transition points: if they, forced or otherwise, fundamentally change course, the whole system shifts."[751]

953. According to Rotmans and Loorbach, a reduction order to reduce the CO2 emissions would help significantly in achieving the necessary internal transition at Shell and in addition give the wider energy market a push in the same direction.[752] This is offset by the fact that objection to the Judgement can only buy Shell time, but it cannot avoid transition. The Judgement can thus in fact help Shell in moving forward in its own transition. What according to Rotmans and Loorbach in any event *"will undeniably happen, including on the basis of the effects of the judgement at first instance, is that the initiated social transition will further accelerate."*[753]

954. Milieudefensie et al. finds further support in the expert report of Rotmans and Loorbach and the expert report of Erickson et al. that the reduction order and the Judgement will have both direct and indirect effects, not only on the CO2 emissions of the Shell Group, but on the energy transition in a broader sense. As explained above, such broader effects already exist on the basis of the Judgement. These effects will furthermore increase in size should the Court of Appeal affirm the Judgement. The consequence is a global CO2 emissions reduction which will be even bigger than the (already substantial) emissions reduction of the Shell Group itself. According to Milieudefensie et al. there can be no discussion regarding the effectiveness of the reduction order.

955. Aside from the effectiveness of the order disputed by Shell in connection with the substitution by other oil and gas companies suggested by it, the causal link between the impending harm to interests and the impending unlawful acts of Shell in this case is not up for discussion.[754]

8.6 Milieudefensie et al.'s interest in the reduction order is established

956. The above has established that Milieudefensie et al. has sufficient interest in imposing the reduction order. It is sufficiently clear that the reduction order can contribute to preventing the asserted threatened harm to interests, as it will cause Shell's CO2 emissions to fall. This is in itself enough to assume interest and effectiveness. Insofar as relevant, Milieudefensie furthermore demonstrated with the above that Shell's (substitution) defence cannot succeed and that this order will even result in important (other) direct and indirect effects, which in addition to Shell's internal transition will also accelerate the global energy transition, resulting in a further reduction of global CO2 emissions.

957. Now that the interest has been established, on the basis of Article 3:296 DCC, the circumstance that (i) there is an independent responsibility and legal duty for Shell, in combination with (ii) the circumstance that Shell is on the verge of violating this legal duty, the Judgement can be affirmed.[755]

9. At European level there has been no encroachment or undermining, nor conflict with the free movement of goods

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[751] Exhibit MD-471, expert report of Rotmans and Loorbach, p. 7.

[752] Exhibit MD-471, expert report of Rotmans and Loorbach, pp. 6 and 7.

[753] Exhibit MD-471, expert report of Rotmans and Loorbach, pp. 7.

[754] See paras. 4.4.5, 4.4.16 and 4.4.37 of the Judgement. See also para. 643 of Milieudefensie et al.'s Summons. See also Milieudefensie et al.'s Notes on oral arguments 8, paras. 43 - 72.

[755] See Judgement, paras. 4.5.5. A requested court order can, pursuant to Article 3:296 DCC, only be left out if this ensues from the law, the nature of the obligation or from a legal action. As explained above in para. 3.2, Shell did not invoke the exceptions referred to in Article 3:296 DCC.

9.1 Introduction

958. The preceding chapters discussed, inter alia, Shell's grounds of appeal which primarily dispute (i) the existence of the legal duty which entails a 45% reduction of CO2 emissions in an absolute sense, (ii) the effectiveness of the reduction obligation and – partly in connection with this – (iii) Milieudefensie et al.'s interest in the reduction order that was imposed. Milieudefensie et al. has explained why these grounds of appeal of Shell must be dismissed in this respect.

959. In addition, in Chapter 3 of this Defence on Appeal it was argued, inter alia, that it is most definitely the (constitutional) task of the civil courts to answer the legal question at issue and that the Judgement does not encroach on the freedom of governments to determine their own climate policy. The reduction obligation is an independent legal duty on the part of Shell to bring about emissions reductions globally via its corporate policy. In this respect Shell's many assertions have been refuted, assertions entailing that the court is to a significant degree limited, "*not equipped*",[756] "*[must] show the greatest possible restraint when awarding the claim*",[757] lacks legitimacy to decide[758] or is otherwise not properly able to discuss the matter.

960. In Chapter 6 of the Appeal, Shell sought additional points of reference in European law or European policy to marginalise the role of the Dutch courts in the application of Article 6:162(2) DCC and the legal protection sought by Milieudefensie et al.

961. First, Shell argued that the reduction obligation is a prohibited measure equivalent to a quantitative import restriction, which can only be justified on the basis of Article 36 TFEU or other reasons of public interest if, inter alia, *"it is "guarantee[d] that only the imposing of reductions on Shell will solve the problem [read: the global climate problem, addition by counsel]."*[759]

962. Second, (also further explanation of the first point) Shell asserts that by issuing a reduction order the Dutch court is acting in contravention of the loyalty principle of Article 4(3) TEU, because the Judgement supposedly encroaches on or undermines the climate and energy policy and the internal market goals of the EU.

963. One could ask a priori why Shell places the emphasis on European law and policy. The reduction obligation does not relate to European interstate commercial transactions at all, but requires that Shell, via its corporate policy, reduce the global emissions of the Shell Group, in line with the temperature goals of the Paris Agreement (the danger threshold). The reduction obligation thus applies in an equal manner within all EU member states and beyond and Shell – with activities in almost all countries in the world[760] – has the freedom to decide where and how to realise the obligation. This alone shows that there cannot be encroachment or undermining of policy.

964. In the Appeal Shell furthermore applies an incorrect interpretation of European law and European policy and of selectively selected citations from policy documents to make its point.

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[756] Paras. 3.4.5, 3.4.6 and 10.9.2 Appeal.
[757] See, inter alia, para. 10.8.8 Appeal.
[758] Paras. 1.3.5, 2.3.6 Appeal.
[759] Paras. 6.3.15(b) – (d) Appeal.
[760] Para. 10.5.7 Appeal.

965. An example: in para. 6.4.12 Appeal, Shell asserts that it supposedly ensues from Exhibit S-90 that unilateral action of member states constitutes a risk that coordinated EU policy will be undermined. Shell cites in this respect a paragraph from a policy document on the intended tightening of the European emissions trading system (EU ETS), in which reference is made to the possible disadvantages of smaller, fragmented carbon markets. However, this paragraph only concerns the justification and added value of action in EU context in the framework of the subsidiarity principle and does not constitute a restriction for Member States, as can be read in the sentence directly preceding it, which Shell left out:

"Climate change is a trans-boundary problem and both international and EU action can effectively complement and reinforce regional, national and local action."[761]

966. Coordination at international and EU level is thus justified, and is explicitly intended to supplement and reinforce regional, national and local action.

967. The European Union acknowledges, of course, the great dangers of climate change and knows that the consequences of further warming will be so serious, that they cannot be expressed in mere numbers. The European Commission put this strikingly when it presented the proposed package of measures in the framework of 'Fit for 55', which is intended to implement the goal of the Union of an emissions reduction of at least 55% by 2030 relative to 1990:

"*We are at a pivotal moment in the world's response to climate and biodiversity emergencies and we are the last generation that can still act in time. This decade is a make-or-break moment for delivering on our commitments under the Paris Agreement, in the interest of the health, wellbeing and prosperity for all. […] While the cost of non-action is clearly higher than the cost of fulfilling our climate ambitions, sterile numbers cannot capture the stark consequences of continuing business-as-usual. […] What we achieve in the next decade, will determine our children's future. [...] However, EU action alone is not enough […] This is why the EU is working with the G7, the G20 and other international partners to show that increased climate ambition, economic prosperity and sustainable growth can go hand in hand."*[762]

968. The EU acknowledges that ambitious climate action in this critical decade is an absolute prerequisite to retain a habitable earth and to achieve sustainable development on behalf of future generations, but also knows that its action alone is not sufficient. The EU therefore tries to persuade other actors to take significant action.

969. The goal that the EU has set for itself under the European Climate Law and Fit for 55 must be implemented by the Member States. The contribution that every Member State must deliver as a minimum to the Union goal is laid down in the *Effort Sharing Regulation*,[763] but the Member States are free as to the way in which they achieve the minimum emissions reductions prescribed by EU law.[764] In addition to this freedom, Member States also have the freedom to

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[761] See Exhibit S-90. That is an *inception impact assessment* belonging with the proposal to modify the ETS system.

[762] See Shell's Exhibit S-89, pp. 1 and 2.

[763] See Article 1 of Regulation 2018/842 "*This Regulation lays down obligations on Member States with respect to their minimum contributions for the period from 2021 to 2030 to fulfilling the Union's target […].*" See also HR 19 December 2019, ECLI:NL:HR:2019:2006, para. 7.3.3.

[764] See, e.g., **Exhibit MD-472**, Commission Staff Working Document, Subsidiarity Grid accompanying the document Regulation of the European Parliament and the Council amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, SWD(2021) 553 final, p. 4 (emphasis added by counsel): "*Reducing GHG emissions is fundamentally a trans-boundary issue that requires effective action at the largest possible scale. The EU, as a supranational organisation is*

do more than these minimum reductions, as is explicitly confirmed in the preamble of the Effort Sharing Regulation: "*This Regulation is without prejudice to more stringent national objectives*."[765] In this respect too it is not clear why individual action of Member States supposedly 'encroaches on' or 'undermines' EU policy.

970. Milieudefensie et al. will provide a further explanation of these points below on the basis of the European policy goals and policy documents cited by Shell. This shows that the limitations ensuing from an EU context in relation to the Dutch court's ability to decide on Shell's legal duty, as favoured by Shell, do not exist (Chapter 9.2). It will then be explained that Article 34 TFEU does not apply to the court order at issue here (Chapter 9.3). The reduction obligation therefore does not have to be justified on the basis of Article 36 TFEU or other public interest reasons. Even if this were the case, it can also easily pass this test (Chapter 9.4).

9.2 No encroachment on or undermining of EU policy

9.2.1 A priori: the European reduction goal of 55% is insufficient

971. Shell characterises the EU policy as a policy that is geared towards achieving "*the most ambitious realistic reductions of emissions of greenhouse gases in the world*".[766] Shell positions this as if the EU policy, by means of carefully elaborated policy measures, exhaustively prescribes what must occur within the EU and that additional measures of Member States must be applied with restraint.

972. It was already briefly discussed above that this positioning is not a representation of the true relationship between European climate policy and other necessary action at international, national, regional and local level.

973. However, before this is explained in further detail, it is important to point out that it is not plausible that the European goal of a 55% emissions reduction by 2030 relative to 1990 can be deemed a proportional contribution of the Union to the temperature goal of the Paris Agreement, inter alia for the following reasons:

(i) Fit for 55 is a political compromise and the result of lengthy and intensive negotiations. A political compromise that was reached two years after the European Parliament had declared there was a climate emergency and had called upon the Commission, the Member States and "*all global actors*" to take the necessary urgent action to limit the warming of the earth to 1.5°C before it is too late.[767] Neither the text of the European Green Deal nor the Proposal of the European Commission for a European Climate Law, explains what considerations were made to achieve the percentage of 55% and why this would be a 'fair share' of the global reduction task. The European Green Deal increased the EU's old ambition for 2050 from at least 80% emissions reduction to climate neutrality in 2050. In line with this it was decided that the target for 2030 (previously 40%) also had to be increased, in order to keep following a linear path to 2050. The impact assessment only

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well-placed to establish effective climate policy in the EU. Member States do not lose competencies on which measures should be taken in order to reduce greenhouse gas emissions, the initiative updates the minimum level of emission reductions foreseen in the Regulation, leaving to Member States, local and regional authorities the choice of the best means to achieve it."

[765] Recital 32 of the preamble of Regulation 2018/842.

[766] Para. 6.1.5 Appeal.

[767] **Exhibit MD-473**, Resolution of the European Parliament of 28 November 2019 concerning the emergency situation in the area of climate and environment (2019/2930(RSP)).

looked at a reduction percentage of 50-55%.[768] There was thus no assessment of what the options would be to strive for a higher reduction percentage on the basis of the principle of *Common But Differentiated responsibilities* or what the "*highest possible ambition*" could be, while developed countries and regions should take the lead in global climate action.[769] The impact assessment shows that insufficient account was taken of these 'equity' perspectives and that the chosen reduction path is based on cost effectiveness.[770] The fact that modelling on the basis of cost effectiveness is problematic and entails serious limitations has already been explained in Chapter 5;

(ii) In the base year 1990 chosen by the EU (the base year on the basis of the Kyoto Protocol), the emissions of the EU were 18.4% higher than in 2010. If 2010 is taken as the starting point (the base year of the IPCC and the basis of the global task), this means that the EU's plan is to reduce its emissions by 47% relative to 2010. In essence this is only very slightly more than the global average of 45% relative to 2010;[771]

(iii) Based on the principle of *Common But Differentiated responsibilities*, a greater effort may be expected of one of the wealthiest regions in the world (see also Chapter 5 Defence on Appeal). There is a good reason why countries like Germany, the United Kingdom, Denmark and Finland apply a reduction percentage for 2030 of at least 65 % or higher;[772]

(iv) The European Parliament warned in 2020 that the 55% target is not in line with the best available climate science and findings of the UNEP: "*As the UNEP Emissions Gap Report 2019 makes clear, global emissions need to be cut by 7.6 percent per year, starting now, in order to limit global warming to 1.5°C. For the EU – even without taking into account equity-related issues such as per capita emissions or responsibility for historical emissions – this would mean a cut of 68 percent by 2030 relative to 1990 levels.*"[773]

974. Naturally Milieudefensie et al. is not asking the Court of Appeal in this case to present an opinion on the adequacy of the European reduction target, nor is this necessary to make a decision on this case. However, it is important to place the European plans in perspective, as Shell attributes great weight to the European climate plans, as if this would detract from the independent responsibility to which Shell is subject to reduce the emissions of the Shell Group. This is not the case.

9.2.2 Shell presents an incomplete and incorrect picture of the European policy framework

975. In para. 6.4.2 Appeal, Shell asserts that "*the purpose of the EU is to establish an internal market*". This assertion is incomplete, but Shell's interpretation of that purpose is also incorrect.

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[768] Exhibit S-87, p. 24: "*The options on 2030 GHG target follow the mandate that the Commission has established in its Political Guidelines and the European Green Deal Communication.*"

[769] As is necessary pursuant to Article 4(3) of the Paris Agreement.

[770] Exhibit S-86, p. 194 et seq.

[771] UNFCCC, European Union, 2021 National Inventory Report (NIR), Table ES.6, available on https://unfccc.int/documents/275968. In 1990 the EU had 5,662 Mt of emissions, in 2010 this number was 4,782 Mt (emitted by 27 Member States + the United Kingdom). On the basis of the European Climate Law, the EU's target must lead to an emissions level of 2,548 Mt in 2030. Compared to 2010 this is an emissions reduction of 47%.

[772] See Chapter 4.5.3 Defence on Appeal. Milieudefensie et al. is not suggesting that the policy of these countries is in line with the Paris Agreement.

[773] Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – C9-0077/2020 – 2020/0036(COD).

976. According to Article 3 TEU, the key objectives of the European Union include, in addition to establishing an internal market, realising a sustainable development of Europe, providing a high level of protection and improving the quality of the environment[774] and promoting peace and wellbeing, all in the light of the key values of the Union, which consist of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Article 2 TEU). Pursuant to Article 6 TEU, the rights as laid down in the ECHR and the fundamental rights ensuing from the constitutional traditions of the Member States are deemed general principles of Union law.[775]

977. The establishing of the internal market – a space without internal borders – is thus one of the objectives of the EU, which is partly realised on the basis of the four freedoms of movement.[776] On the basis of Article 26(1) in conjunction with 114(1) TFEU, the Union establishes the measures which are intended to establish the internal market and assure the working thereof, in accordance with the provisions of the TFEU and TEU. The treaty provisions, as well as secondary (harmonisation) legislation and case law on the establishing of the internal market focus on the prohibition of (direct or covert) discrimination on the basis of origin or nationality.[777]

978. However, where there is no prohibited hindrance to free movement (or other internal market provisions, but these are not at issue here), there is no conflict with the "policy framework" for the internal market or the principle of an open market economy with free competition.[778] In this respect Shell does not mention a single relevant rule of European law which would stand in the way of the reduction order and which could serve as justification for an unlawful act, contrary to Article 34 TFEU. That Shell's invoking of Article 34 TFEU cannot succeed will be explained in Chapters 9.3 and 9.4 Defence on Appeal.

> Note: Shell cites the only recital point from Protocol 27 with the TFEU (see para. 6.4.2 Appeal), but that recital does not have independent meaning. In Protocol 27 the Member States agreed that the Union, with an eye on the assuring of the internal market regime, if necessary, will take (further) measures in accordance with the provisions of the Treaties, including Article 352 TFEU. This provision provides for a procedure to establish new powers under the Treaties if this is necessary to realise the objectives, as a catch-all legal ground.[779]

979. The question is whether, pursuant to Article 6:162(2) DCC, Shell has a legal duty to reduce the

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[774] See also Article 37 of the Charter of Fundamental Rights of the European Union.

[775] Article 6(3) TEU: The fundamental rights as safeguarded by the European Convention on the protection of Human Rights and Fundamental Freedoms and as these ensue from the constitutional traditions that the Member States have in common, are general principles that form part of Union law.

[776] This concerns the free movement of people, goods, services and capital.

[777] F. Amtenbrink, H.H.B. Vedder, European Union Law, A Textbook, Eleven International Publishing 2021, p. 349: "*The prohibition of discrimination, or unequal treatment, on the grounds of origin or nationality is a central feature of the Treaty provisions and all secondary legislation and case law concerning the establishment of the internal market.*"

[778] Shell's reference to Articles 119, 120, 127, 170 and 173 TFEU does not add anything in this respect. These are authority grounds, additional prerequisites and/or tasks of the Union and the Member States for the establishing of economic and monetary policy, the establishing and developing of trans-European networks and the establishing of industry policy. Reference is made therein to the principle of an open market economy with free competition and/or to the importance of open and competitive markets as the starting point that the Member States and/or the (institutions of the) Union take into account in their actions within these areas, but these are not rights on which Shell can base a claim in this context.

[779] Article 352(1) TFEU: If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

emissions of the Shell Group via its corporate policy, and whether Shell is therefore acting unlawfully if it fails to perform that legal duty. Along the line defended by Shell, potentially every prohibition or order imposed on an individual business enterprise on the basis of national civil liability law could be seen as a hindrance to trade or as conflicting with internal market objectives, because that business enterprise would be disadvantaged compared to its competition. This is an incorrect interpretation of European law and Dutch liability law.

980. Shell asserts in para. 6.4.3 Appeal that the alleged competition disadvantage supposedly ensues from the fact that the reduction obligation only applies to Shell and not to competitors inside or outside of the EU. This is irrelevant. That such a legal duty has not yet been established in other cases does not mean that competitors cannot be subject to the same or a similar legal duty.[780] This is not, however, the question at issue in this case. Nor has the District Court issued a general rule, it made a determination applicable to Shell, in view of all relevant facts and circumstances of the case.

981. What is more, Shell contradicts itself here, as in para. 6.3.14 Appeal, Shell itself asserts that unwritten law should be applied in a comparable way to Shell as to all business enterprises active in the Netherlands and that the District Court should have included those potentially very far-reaching consequences in its considerations. In view of the foregoing this is incorrect.

9.2.3 Combating climate change is a key objective of European environmental policy and is intended to supplement other international, regional, national and local action

982. As pointed out above, providing a high level of protection and improving the quality of the environment is one of the key objectives of the European Union (Article 3(3) TFEU). The powers of the Union in the area of environmental policy and the principles taken into account in this respect are laid down in Title XX TFEU. This title forms the basis for European climate policy.

983. Article 191(1) TFEU stipulates that Union policy must contribute to the aim of, inter alia (i) preserving, protecting and improving the quality of the environment, (ii) protecting human health, (iii) prudent and rational utilisation of natural resources and (iv) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The last sub-section was added in the Treaty of Lisbon in 2007 and confirms that combating climate change falls among the main objectives of European environmental policy.

984. Article 191(2) then lays down the basic principles which are observed in European environmental policy, i.e. that the EU aims at a "*high level of protection*" and that the policy is based on *"the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*[781]

985. The legal basis for environmental policy is Article 192 TFEU, which in principle prescribes the ordinary legislative procedure. The European legislature established regulations for tackling

[780] Within Europe several such cases have been brought against other big polluters, such as against TotalEnergies in France, against car manufacturers in Germany, against Holcim in Switzerland and against Wintershall in Germany. Foreign business enterprises can also be summoned in the Netherlands because of the climate damage that they cause in the Netherlands.

[781] The precautionary principle is one of the cornerstones of the EU's goal of a high level of environmental protection. Union legislation relating to environmental protection must be interpreted in the light of the precautionary principle. See, e.g., Order of the Vice-President of 21 May 2021 of the CJEU in case C-121/21 R, ECLI:EU:C:2021:420, para. 71 regarding a conflict about an environmental impact assessment relating to lignite mining.

climate change in Europe in the past decades on the basis of this article.

986. Shell's argument in essence entails that the European climate policy has exclusive effect, so that Member States in principle cannot take any farther-reaching measures. It was already discussed above that this argument fails. The European Union explicitly leaves room for more stringent measures on the part of the Member States. European climate action is geared towards implementing the European Union's own obligations under the UN Climate Convention and the Paris Agreement, to which the European Union – in addition to the individual Member States – is a party. Recital 1 of the European Climate Law emphasises that the existential threat of climate change requires more ambition and climate action from both the Union and the Member States, and reflects that coordinated action at Union level is necessary to effectively supplement and reinforce national policy instruments.[782]

987. The Effort Sharing Regulation lays down the contribution that individual Member States must make towards the Union's reduction target. The Regulation explicitly states that the contributions of the Member States are minimum contributions toward achieving the Union target and that the Regulation does not affect more stringent national targets.[783]

988. This was also confirmed in the Urgenda case, when the State of the Netherlands tried to hide behind the reduction agreements made in EU context. This argument was explicitly rejected by the District Court, the Court of Appeal and the Netherlands Supreme Court, with reference to the individual Member States' own obligations.[784]

989. The Member States' own responsibility is also expressed in the preamble of the Dutch Climate Act.[785]

990. In short, there cannot be encroachment because European climate action, naturally, does not exclude farther-reaching action of Member States. Member States can conduct a more stringent policy and indeed do so (as was also established in the Urgenda case).[786]

991. Shell's suggestion that (only) the "*EU institutions possess the necessary resources, expertise and supervision to develop carefully elaborated policy measures […]*"[787] and according to Shell, the Member States apparently do not, has been plucked out of thin air. It has already been pointed out above that the Member States also have complete discretion with regard to the way in which they will realise their reduction obligation under the *Effort Sharing Regulation*.

> Note: Shell refers a number of times to the "*core scenarios*" that are laid down in the EU impact assessment to substantiate the increased European reduction target. Shell makes it appear as if the Member States are bound by these scenarios. Pursuant to the above, this is explicitly not the case. For a further substantive refutation as to why a sub-sector or portfolio approach will fail, Milieudefensie refers to Chapter 5 Defence on Appeal.

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[782] See Recitals 1 and 40 of the preamble to the European Climate Law.

[783] Regulation 2018/842 on binding annual greenhouse gas emissions reductions by Member States from 2021 through 2030. See, inter alia, para. 32 of the preamble and Article 1.

[784] HR, 20 December 2019, ECLI:NL:HR:2019:2006, with notes by 7.3.3.

[785] The preamble refers to the "*independent responsibility that the Netherlands has to curb the global increase in temperature and the change in the climate*"

[786] The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2591, para. 56: "*[…] in comparison to Member States like Germany, the United Kingdom, Denmark, Sweden and France, Dutch reduction efforts are lagging far behind.*"

[787] Appeal, para. 6.4.10.

992. If there is one conclusion that can be drawn from the EU's policy documents, it is that the need for climate action is acknowledged and that the primary policy target of the EU is geared towards reducing emissions and helping to prevent dangerous climate change. Just like the Shell reduction obligation, EU policy is geared towards making a necessary contribution to the temperature goal of the Paris Agreement. The Union also calls on others to take further action. In view of all of the foregoing, it is clear that the Judgement does not encroach on or undermine EU policy.

993. The two specific examples that Shell presents in vain in para. 6.4.12 et seq. of alleged encroachment are discussed below.

994. First, it is supposedly acknowledged in the statutory and policy framework of the EU that "*the goals thereof can best be achieved in a coordinated manner, and that a unilateral action of the Member States, without a careful weighing of interests and a weighing of the consequences of their decision, entails the risk that such a coordinated policy will be undermined*." It has been explained above that to substantiate this assertion, Shell only cites an incomplete piece of text from Exhibit S-90, which in fact shows that action at Union level is an addition to the action of Member States.

995. Moreover, that document relates to the tightening of the EU ETS system. It is logical that the Commission specifically considers with regard to the ETS system that EU action is important, because smaller, fragmented carbon markets may come with disadvantages, whereby countries set up their own emissions trade systems. But this is of course not what Shell's reduction obligation encompasses and it does not in any way stand in the way of the working of the ETS system.[788] It is therefore a mystery to Milieudefensie et al. what Shell means with the remark that the District Court should have investigated whether the reduction obligation would lead to smaller, fragmented carbon markets. Furthermore, the ETS Directive is an instrument of the Union to reduce emissions, and is intended to serve the end goal of protecting the environment.[789] It is also the case that Member States do indeed have the freedom of creating regulations which affect the ETS sectors. [790]

996. The second element of alleged encroachment on EU policy, according to Shell, was to be found in the avoiding of carbon leakage, that refers to the situation in which business enterprises (such as Shell) relocate their (production) activities to other countries that apply less stringent

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[788] In Notes on oral arguments 4, as of para. 69, Milieudefensie explained that the EU ETS system does not have exhaustive effect and that Member States can in fact take additional measures which affect the ETS sectors. See also Milieudefensie et al.'s response to Ground of Appeal I(f), Appeal (Chapter 10.4 Defence on Appeal).

[789] See recently the judgement of the CJEU of 16 December 2021 in case C-575/20 (Apollo Tyres), point 24: "*As a preliminary point, it must be recalled that Directive 2003/87 has the purpose of establishing an emission allowance trading system which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (judgement of 11 November 2021, Energieversorgungscenter Dresden-Wilschdorf, C-938/19, EU:C:2021:908, paragraph 67 and the case-law cited).*"

[790] See in this respect also the judgement of the District Court in the Urgenda case, under para. 4.80, which presents examples of the fact that national measures can 'encroach on' EU policy: "*Urgenda was right in arguing that regardless of the [established by the EU, addition by counsel] ceiling [for the ETS sector, addition by counsel], Member States have the option to influence (directly or indirectly) the greenhouse gas emissions of national ETS businesses by taking own, national measures. In its argument, Urgenda has named several of such measures taken in other Member States, such as increasing the share of sustainable energy in the national electricity network in Denmark and the introduction of the carbon price floor tax in the United Kingdom, with which the price of CO2 emission has been increased. In response to Urgenda's argument, the State acknowledged in a more general sense that it is legally and practically possible to develop a national ETS sector policy that is more far-reaching than the EU's policy. It is the opinion of the court that the European legislation discussed here does not prevent the State from pursuing a higher reduction for 2020*." See also Milieudefensie et al.'s Notes on oral arguments 4, para. 69 et seq.

emission reductions obligations.[791] This thus shows that the EU deems itself restricted with regard to taking further action, due to the pressure exerted by companies. The problem of carbon leakage cannot arise in this case, because pursuant to the Judgement, Shell is subject to an obligation to reduce the global emissions of the Shell Group. This makes the relocating of activities abroad in order to escape more stringent climate regulations pointless. The reduction obligation therefore takes care of one of the most important limitations that stops countries from taking farther-reaching climate action.

997. The risk of carbon leakage was in fact the reason that in 2009 the EU, when issuing the last ETS Directive 2009/29, announced that it would continue to work toward a global agreement on (top-down) climate action.[792]

998. Later that year the annual climate conference of the parties to the UN Climate Convention was on the programme. During COP15 in Copenhagen there were negotiations on an international climate agreement to replace the Kyoto Protocol, but those negotiations failed. As we know, in the end it would take another 6 years before a (bottom-up) agreement was reached, whereby no consensus was reached on the division of the still remaining carbon budget, but countries had to set their own targets.

999. In order to reduce the risk of the CO2 leakage effect feared by the EU, certain industry branches were allocated specific numbers of emission rights under the EU ETS system. The fear of carbon leakage shows how internationally operating business enterprises continually keep countries under pressure by threatening to leave if new climate regulations are proposed. As a result, regulations are watered down or withdrawn. Shell referred to this itself in para. 6.4.15 Appeal.

1000. The assertion that the District Court should have examined whether a reduction obligation imposed on Shell would cause this kind of carbon leakage, which the EU is trying to prevent with its policy framework, is incorrect, but aside from this it is remarkable. It is evident that executing the reduction obligation cannot cause carbon leakage, as the obligation applies worldwide. This means that precisely what the EU sees as the biggest limitation for itself in terms of taking farther-reaching action, does not constitute a risk when imposing a reduction obligation on Shell. In para. 6.4.17 Appeal it becomes clear that Shell in essence is referring to another kind of alleged 'leakage', in the form of perfect substitution. That this cannot be the case here has been explained in detail in Chapter 8.

9.2.4 The European energy union: far-reaching integration of climate policy, serving the transition to a carbon-free European economy

1001. Shell then dedicated two more paragraphs to the assertion that the Judgement supposedly jeopardises the goals of the European energy policy. This assertion is not substantiated, but here too Shell presents an incorrect picture of the European energy policy.

1002. The energy policy of the Union is to a significant degree integrated with the climate policy and is precisely marked by the goal of converting Europe into a carbon-free economy and the implementation of the commitments made by the Union in the framework of the Paris

[791] See the website of the European Commission: "*Carbon leakage refers to the situation that may occur if, for reasons of costs related to climate policies, businesses were to transfer production to other countries with laxer emission restraints*." https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/free-allocation/carbon-leakage_en.
[792] Directive 2009/29/EC, recital 24.

Agreement.[793]

1003. The policy document cited by Shell – the first publication of the energy union strategy – in fact says that the primary policy goal is to effect a resilient energy union with as key element an ambitious climate policy. Indeed, the sentence quoted by Shell ("*The goal of a resilient Energy Union with an ambitious climate policy at its core is to give EU consumers - households and businesses - secure, sustainable, competitive and affordable energy*") is immediately followed by: "*Achieving this goal will require a fundamental transformation of Europe's energy system*." And further, on that same page: "*To reach our goal, we have to move away from an economy driven by fossil fuels, an economy where energy is based on a centralised, supply-side approach and which relies on old technologies and outdated business models.*[794] The aim of affordability, certainty and competition (ability) can therefore not be seen separately from the primary goal and the policy of the Union that is geared to moving away from the use of fossil fuels via a transition to a sustainable energy system.

9.2.5 Conclusion: EU policy does not stand in the way of Shell's reduction obligation

1004. The foregoing leads to the conclusion that EU policy is aimed at reducing the emissions of the Union, in view of the obligations of the Union under the Paris Agreement and to protecting the environment and human rights. Union policy acknowledges the need for farther-reaching climate action, as well as the disastrous consequences of climate change for current and future generations. With its climate policy the Union has made use of the policy instruments at its disposal to supplement international, regional, national and local action. The Member States are free in the choice as to how they will make the minimum contribution to be realised to the reduction target of the Union and the Union leaves the Member States explicitly free to take farther-reaching measures.

1005. Shell's reduction target is not connected to the EU's policy and does not align with it. The cited European regulations do not in any way side-line the Dutch unlawful act laws and there is nothing to indicate that the climate regulations are intended to have an exhaustive (civil law) effect. On the contrary, Member States are given a great degree of freedom when it comes to setting up protection measures themselves. Nor does Shell cite any provision of Union law which could stand in the way of imposing the reduction order or from which the useful effect would be removed by the reduction order. Consequently there can be no encroachment on EU policy. Shell's grounds of appeal in this respect can therefore be dismissed.

9.3 The Judgement is not a measure having equivalent effect within the meaning of Article 34 TFEU

1006. Furthermore, the European free movement rules do not stand in the way of the reduction obligation. Article 34 TFEU does not apply. Article 34 of the TFEU reads: "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*."

1007. On the basis of established case law, the following should be deemed as measures prohibited under Article 34 TFEU:
(i) the measures of a Member State whose purpose or consequence is to be able to bring about that products from other Member States are treated less favourably; as well as

[793] See Shell's Exhibit S-53, Chapter 3 entitled "*Energy Union – essential for decarbonisation*", pp. 8 et seq.
[794] See Shell's Exhibit S-85, p. 2.

(ii) every other measure which hinders access of products of one Member State to the market of another Member State.[795]

1008. The gist of the prohibition of Article 34 TFEU is that Member States, to realise the internal European market, may not establish restrictions which one way or another provide advantages to the own national market or other kinds of obstacles for goods which have been lawfully put on the market in other Member States.[796] In other words: the free movement rules are geared to abolishing discriminatory or otherwise protectionist or threshold-increasing measures in the national territory, unless those measures can be justified on good grounds.[797] Such a case evidently does not apply in this case.

1009. That Shell as such expected consequences for its activities in Europe, does not entail that there is a prohibited measure as referred to in Article 34 TFEU. This is aside from the fact that it is up to Shell itself to what degree it will let the order have consequences for its activities in Europe, the order in any event has a purport which applies to Shell in all of Europe (and globally). The order has no specific interstate consequences, let alone that between Member States there are discriminatory or otherwise protectionist or threshold-increasing measures. According to paras. 6.3.1 – 6.3.7 Appeal, Shell assumes an incorrect interpretation of Article 34 TFEU, which entails that every order or prohibition – or even an obligation to pay compensation – that has consequences for the activities of a company would in principle be a prohibited obstruction of trade between Member States. This is incorrect. As stated, the order has no protectionist consequences for the trade between any (two) European Member States, nor does Shell substantiate that such consequences could arise.

1010. Furthermore, the Judgement cannot fall within the scope of Article 34 TFEU, because any restrictive consequences thereof are in any event too uncertain and indirect. The order does not make any distinction as to the origin of the goods affected by this, and it does not have the aim of regulating commercial traffic with other Member States. As also considered by Advocate-General Wahl (with reference to other European jurisprudence) in his opinion with the judgement of 6 February 2019 (C-519/17; Austria v. Germany) this stands in the way of assuming an infringement of Article 34 TFEU.[798]

1011. In view of the foregoing, Shell's grounds of appeal as set out in Chapter 6.3 Appeal are unfounded.

9.4 Even if the reduction order were to entail a restriction within the meaning of Article 34 TFEU, there are a number of grounds that would justify potential restriction of the free movement of goods

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[795] See recently the judgement of the Court of Justice of 10 February 2022 in case C-499/20, ECLI:EU:C:2022:93, point 28. See also Commission Notice - Guide on Articles 34 - 36 of the Treaty on the Functioning of the European Union (TFEU), (2021/C 100/44).

[796] P. Craig and G. De Búrca, EU Law: Text, cases and materials, Oxford University Press 7th Edition (2020), p. 710: "*the Court's ruling [*in Cassis de Dijon, added by counsel*] affirmed and developed the Dassonville judgement. […] The fundamental assumption was that when goods were lawfully marketed in one Member State, they should be admitted to another state without restriction, unless the state of import could successfully invoke one of the mandatory requirements. The Cassis judgement encapsulated therefore a principle of mutual recognition, paragraph 14(4).*"

[797] See also Commission Notice - Guide on Articles 34 - 36 of the Treaty on the Functioning of the European Union (TFEU), (2021/C 100/47).

[798] See opinion of A-G Wahl of 6 February 2019 in the case C-591/17, ECLI:EU:C:2019:504 (Austria v. Germany), para. 123. See also: CJEU 11 June 2020, case C-581/18 (RB v. TÜV Rheinland & Allianz), points 55 – 56.

1012. The foregoing shows that the reduction obligation does not fall within the scope of Article 34 TFEU. But even if one were to assume that the elaboration of a context-related unwritten standard of care and the court order ensuing therefrom could fall within the scope of Article 34 TFEU, an alleged restriction can be justified, both on the basis of (i) Article 36 TFEU (the interest of protecting the health and life of persons, animals and plants), (ii) other compelling public interest requirements (the interest of environmental protection and public health) and (iii) the interest of protecting human rights. Each of these grounds individually provides more than sufficient scope for this, and certainly when viewed in conjunction. Milieudefensie et al. will explain this below, starting with the protection of human rights.

9.4.1 The protection of fundamental rights

1013. It is established case law that protection of and respect for fundamental rights can justify a national restriction of cross-border trade within the EU.[799]

1014. The protection of fundamental rights has an important place within the EU. The TEU first of all confirms that the EU is founded on the principles of freedom, democracy and respect for human rights and fundamental freedoms and the rule of law.

1015. Article 6 TEU is the key provision of the legal framework for the protection of human rights in the EU. Said provision records established jurisprudence of the CJEU regarding the effect of the ECHR in the European legal order, which entails that the rights guaranteed by the ECHR and the fundamental rights ensuing from the constitutional traditions of the Member States are general principles of Union law.[800] Article 6 TEU also explicitly stipulates that the Union acknowledges the rights, freedoms and principles laid down in the Charter of Fundamental Rights of the European Union (the "**Charter**"), that has the same legal value as the TEU and the TFEU.

1016. Since 1 December 2009 the Charter is legally binding on the institutions of the EU and on the Member States of the EU insofar as they implement EU law.[801] Article 52(3) Charter stipulates that the rights stated in the Charter have the same content and scope as the corresponding rights in the ECHR. These rights thus belong to the fundamental rights of the Union. Consequently, the jurisprudence of the ECtHR is relevant for Union law and the interpretation of the Charter. That same jurisprudence is also important for this case. In addition, the Charter explicitly stipulates that the law of the Union can offer broader protection than the ECHR.[802] Here too the protection level offered by the ECtHR is thus the lower limit.[803]

1017. The Member States are bound by the Charter in the execution / implementation of EU law. It is assumed that this also applies in situations which strictly speaking do not concern execution or

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[799] See case C-112/00, Schmidberger, ECLI:EU:C:2003:333, point 74: "*Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.*" See also P. Craig and G. De Búrca, EU Law: Text, cases and materials, Oxford University Press 7th Edition (2020), p. 445: "*It is moreover clear from Schmidberger that the protection of human rights in itself constitutes a legitimate interest that will justify a restriction on EU free movement rules.*"

[800] Article 6(3) TEU.

[801] See Article 51(1) Charter.

[802] Article 52(3), last sentence: This provision shall not prevent Union law providing more extensive protection. And Article 53 Charter: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

[803] Cf. Paragraph 4.5.3 of this Defence on Appeal.

implementation of EU law, such as when the freedoms of movement are at issue.[804]

1018. When assessing a possible restriction of the freedoms of movement due to the necessary protection of human rights, an exceptional situation will arise, in which two categories of fundamental Union rights are at odds with each other. With regard to both the freedoms of movement and Union fundamental rights, the protection they provide is (in principle) not absolute, but any restrictions must satisfy the proportionality principle. In such a case the proportionality review goes both ways, see in this respect, e.g., the opinion of A-G Trstenjak in the case of Commission v. Germany.[805]

"190. A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom."

1019. In the same case, the CJEU speaks of the need that "*a fair balance was struck in the account taken of the respective interests involved.*"[806]

1020. This balance must be achieved on the basis of a weighing of interests. National authorities, in this case the national court, has a broad assessment discretion, as ensues from, inter alia, the *Schmidberger* case of 2003.[807]

1021. In this case the Austrian government had (tacitly) permitted a 30-hour blockade of the Brenner Pass for a demonstration to draw attention to the threat to the environment and public health resulting from the constant increase in truck traffic on the Brenner motorway. Transport company Schmidberger held the Austrian state liable for the loss suffered. In that context Schmidberger argued that the government had acted in contravention of the loyalty principle of (current) Article 4(3) TEU in combination with (current) Article 34 TFEU by not having prevented the hindering of the traffic on the Brenner motorway.

1022. In this case the Member State was thus dealing with conflicting interests of, on the one part, the free movement of goods as a fundamental principle of Union law and, on the other, the necessary protection of Articles 10 and 11 ECHR (freedom of expression and freedom of assembly and association).[808]

1023. On the basis of a weighing of interests, the CJEU established that there was no infringement of the free movement provisions. The CJEU deemed it relevant, inter alia, that the demonstration

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[804] S.A. de Vries, Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, Utrecht Law Review Volume 9, Issue 1 (January) 2013, p. 184: "*the prevailing opinion in the literature appears to be that the Charter should not detract from the case law of the Court of Justice and should therefore also be applicable in situations where the Member States do not implement EU law or merely act as agents of the EU, for example, where the fundamental Treaty freedoms are at issue.*"

[805] Opinion of 14 April 2010 in case C-271/08, points 189 – 190.

[806] CJEU 15 July 2010, case C-271/08, ECLI:EU:C:2010:426, point 52.

[807] CJEU 12 June 2003, case C-112/00, ECLI:EU:C:2003:333, point 82.

[808] The CJEU emphasises that protection of the environment and of public health can also be a legitimate public interest goal which can justify a restriction of free movement, but in this case the national authorities only had Articles 10 and 11 ECHR in mind when weighing the related interests in relation to the demonstration, so that only these freedoms played a role in the weighing of interests, CJEU 12 June 2003, case C-112/00, points 65 - 69.

did not have the goal of restricting the import or passage of goods. The CJEU furthermore stated that a restriction of the place or duration of the demonstration would have deprived it of a vital part of its significance. If the demonstration could not be held on the public road and would only last a few hours, it would not be possible to draw the public's attention to the goals of the action in the same manner. This leads to the final opinion that the national authorities, in view of their broad assessment discretion, could reasonably be of the opinion that the legitimate goal that was the aim of the demonstration could not be reached in this case by means which were less restrictive of the movement of trade between the Member States.[809]

1024. A recent judgement of the ECtHR appears to go a step further. In the *Holship* case regarding a boycott of a Danish company by a Norwegian trade union, the freedom of establishment was at odds with Article 11 ECHR, in specific the right to organise a boycott protected by Article 11 ECHR.[810]

1025. The ECtHR held that it may be necessary for a boycott or strike to hinder free movement, so that the possible negative financial consequences – which are precisely the point of the boycott – may not in themselves be decisive in the proportionality review under Article 11(2) ECHR. This would affect essential elements of trade union freedom, which would make that freedom meaningless:

"*Even when implementing their obligations under EU or EEA law, the Court observes that Contracting Parties should ensure that restrictions imposed on Article 11 rights do not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance.*"[811]

1026. Contrary to the CJEU, in the context of this EEA case, the ECtHR comes to the conclusion that the freedom of establishment is not as such a fundamental right that forms a counterbalance with regard to the freedom of association of Article 11 ECHR, but merely one perspective, albeit an important one, to include in the assessment of the proportionality of the restricting of Article 11 ECHR:

"*From the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration […].*"[812]

1027. The ECtHR was critical about holding the freedom of establishment to be equivalent to the freedom of association as protected by Article 11 ECHR, as applied by the Norwegian Supreme Court.[813]

1028. The assessment of the ECtHR acknowledges a clear hierarchy, whereby the interest of protecting human rights takes priority. This is even though the CJEU in its case law, such as in the *Schmidberger* case, does not seem to assume a hierarchy. The Holship case could therefore be viewed as a signal of the ECtHR that this is not the correct approach with regard to the protection of fundamental rights:

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[809] CJEU 12 June 2003, case C-112/00, points 81 – 93.

[810] ECtHR 10 June 2021, case number 45487/17.

[811] ECtHR 10 June 2021, case number 45487/17, para. 117.

[812] ECtHR 10 June 2021, case number 45487/17, para. 118.

[813] In any event, the opinion of the national court was ultimately factually not deemed to be contrary to Article 11 ECHR due to the broad assessment discretion of the national courts.

"In Schmidberger and Omega, the ECJ held that the exercise of the fundamental rights at issue, the freedoms of expression, of assembly and respect for human dignity, did not fall outside the scope of the provisions of the Treaty. But at the same time, it considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see Schmidberger, paragraph 77, and Omega, paragraph 36). We now know that such a "reconciliation" through a balancing test is not the correct response seen from Strasbourg."[814]

1029. Even if one were to take as the basic principle that there is no hierarchy between the interest of protecting human rights and the interest of the free movement of goods, it is in any event clear that the necessary protection of fundamental rights can justify a restriction of the free movement of goods and that it is up to the national agencies (including the courts) to ensure the correct balance on the basis of the circumstances of the case.[815]

1030. In this case, serious and decisive weight will have to be attributed to the fact that the right to life and the right to an undisrupted family life are at risk due to climate change, as has also been acknowledged in the Urgenda case.[816]

9.4.2 Protection of the environment, public health and people's lives

1031. It is thus established that Member States can justify a restriction of the free movement of goods with an eye on the protection of human rights. In addition, a restriction of Article 34 TFEU can be justified on the basis of Article 36 TFEU or due to other reasons of public interest, including (i) the environment, (ii) public health and (iii) the life of persons, animals and plants.

1032. More than 20 years ago, the CJEU passed judgement in the PreussenElektra case. In this case, the question at issue was whether a statutory obligation for power stations in Germany to procure renewable energy at minimum prices, was a justified measure having equivalent effect. The CJEU confirmed that this was the case and considered that:

"*the use of renewable energy sources for producing electricity [...] is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat. Growth in that use is amongst the priority objectives which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change [...] It should be noted that that policy is also designed to protect the health and life of humans, animals and plants.*"[817]

1033. In the 2014 judgement in Ålands Vindkraft, the CJEU again confirmed that the need for emission reductions in connection with climate action is a legitimate goal to justify an alleged quantitative

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[814] See Graver, Hans Petter: The Demise of Viking and Laval: The Holship Ruling of the ECtHR and the Protection of Fundamental Rights in Europe, VerfBlog, 2021/6/16, https://verfassungsblog.de/holship/.

[815] See also Opinion of A-G Trstenjak of 14 April 2010 in case C-271/08, point 195: "*Accordingly, central to Schmidberger was the idea of equal ranking for conflicting fundamental rights and fundamental freedoms which, ultimately, by an examination of the proportionality of the opposing restrictions in question, were brought fairly into balance*."

[816] Court of Appeal of The Hague, 9 October 2018, paras. 44-45. See also Netherlands Supreme Court, 20 December 2019, para. 5.7.9.

[817] CJEU 13 March 2001, case C-379/98 (PreussenElektra), points 72 – 77.

import restriction.[818]

1034. The Union must promote a high level of protection and improvement of the quality of the environment, as well as a high level of protection of (public) health. These goals are closely connected with each other, have a fundamental and sector-crossing character and must be integrated in other areas of Union law.[819]

1035. In the past 20 years numerous national measures and goals have been acknowledged as measures which can justify a trade restriction for the protection of the environment, such as:
- national subsidy schemes for green electricity, insofar as this contributes to a reduction in the emission of greenhouse gases;
- a national system for the verification of the sustainability of liquid biomass, whereby all market parties in the supply chain are bound to fulfil specific obligations;
- protecting air quality;
- use of renewable energy sources for the production of biogas.[820]

1036. It undeniably ensues from European case law that in any case the aim of achieving emission reductions, in line with this also contributing in some other way to achieving the goals of the Paris Agreement, must be seen as a legitimate goal which can justify a restriction of the free movement of goods.

1037. Such a restriction must be proportional to the goal to be achieved. The appropriateness of and need for the measure in question is reviewed on the basis of the relevant circumstances and the Member States must substantiate the proportionality with the relevant concrete details in that specific case.

1038. In paras. 6.3.9 – 6.3.18 Appeal, Shell describes components of the relevant reference framework, but various elements of that framework are stretched too far or interpreted incorrectly.

1039. Shell's argument provides artificial reasoning, which according to Shell entails that the District Court should have provided detailed, specific and convincing evidence which shows that it is guaranteed that the reduction order that was imposed on Shell could solve the worldwide climate problem (para. 6.3.15). This surprising interpretation is evidently incorrect, is at odds with the EU policy framework and would make any additional climate measure of Member States impossible. No single contribution of the EU or a Member State will independently solve the climate problem. Nevertheless, everyone knows that without everyone's individual contribution, the climate problem is unsolvable. According to established case law of the Court of Justice, a measure will pass the proportionality test if it can contribute to the realisation of the goal to be achieved, whereby this measure need not necessarily be able to realise the entire goal. The actual test only leads to the question whether the reduction order is suitable for contributing to solving the climate problem.[821] This is the case.[822]

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[818] CJEU 1 July 2014, case C-573/12 (Ålands Vindkraft), point 77 et seq.

[819] See, inter alia, CJEU 13 March 2001, case C-379/98 (PreussenElektra), paras. 72 – 77 and CJEU 21 December 2011, case C-28/09 (Commission v. Austria), paras. 120-122.

[820] See Commission Notice - Guide on Articles 34 - 36 on the Treaty on the Functioning of the European Union (TFEU), (2021/C 100/72), para. 7.2.1.

[821] See, e.g., CJEU 13 June 2018, case C-683/16, ECLI:EU:C:2018:433 (Deutscher Naturschutzring v. Germany), para. 49.

[822] See also the conclusion drawn by P-G Langemeijer and A-G Wissink in their Opinion for the Urgenda case, ECLI:NL:PHR:2019:887, paras. 4.216 and 4.217 (emphasis added by counsel): "*The measures to be taken must be appropriate for limiting the danger or the environmental harm in question, and therefore be timely and – at least potentially – effective*

1040. Shell contradicts itself here, as in para. 6.3.9 Appeal, Shell also acknowledges that national measures that go further than the EU system in the same area can be justified. In para. 6.3.11 Appeal, Shell also refers to the plan of the Dutch government to introduce a national carbon tax, which measure, according to Shell, is permitted because it has been preceded by an extensive analysis. Aside from the fact that this analysis was not carried out in the context of a possible justification of a restriction of the free movement of goods, it shows that Member States can even take measures that can actually affect the EU ETS system.[823]

1041. Furthermore, according to Shell the District Court should have taken account of the fact that the Union already has extensive climate legislation and the reduction order should be interpreted in the light of these alleged "harmonisation provisions" (para. 6.3.12 Appeal). The fact that the EU did not individually regulate Shell (or other polluters) should entail that national courts cannot do so either.

1042. This interpretation of European law is also incorrect. The Member States must implement Union Law, that is clear. Shell is referring here to a situation in which the Union has exhaustively harmonised a specific topic. In such case national measures are reviewed against the provisions of the harmonisation measure and thus not against Articles 34 and 36 TFEU.[824] In case of lack of exhaustive harmonised European regulations – as in this case – the Member States are free to decide on the degree of protection of the legitimate interests they seek to protect. The degree of assessment discretion is naturally greater in sensitive areas:

"*Under Article 36 TFEU, the need to protect health is capable of justifying such a measure. The Court has held on numerous occasions that the health and life of humans rank foremost among the assets and interests protected by the TFEU and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved […].*"[825]

(section 2.63). The measures to be taken must therefore be able to contribute to preventing the threat of human rights being compromised. A guarantee that they will prevent such compromise is not required. […] In light of the facts on climate change established by the Court of Appeal and the rate at which the remaining carbon budget is being depleted, more far-reaching measures to limit greenhouse gas emissions are clearly appropriate for combating dangerous climate change."

[823] See in this respect also the judgement of the District Court in the Urgenda case, under para. 4.80, which presents examples of the fact that national measures can 'encroach on' the EU policy. See also Milieudefensie et al.'s Notes on oral arguments 4, para. 69 et seq.

[824] Case C-309/02, EU:C:2004:799, Radlberger Getränkegesellschaft and S. Spitz, point 53 (emphasis added): "*where a sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty […]*." See also case C-573/12 Ålands Vindkraft AB v. Energimyndigheten, paras. 57-58: "*[…] it should be noted that the Court has consistently held that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, inter alia, Radlberger Getränkegesellschaft and S. Spitz, C-309/02, EU:C:2004:799, paragraph 53 and the case-law cited). 58. In the circumstances of the present case, it is therefore necessary to determine whether the harmonisation brought about by Directive 2009/28 ought to be regarded as being of such a kind as to preclude an examination of whether legislation such as that at issue is compatible with Article 34 TFEU.*"

[825] See CJEU 8 October 2020, case C-602/19, point 40. See also Commission Notice - Guide on Articles 34 - 36 of the Treaty on the Functioning of the European Union (TFEU), (2021/C 100/75)).

9.4.3 Conclusion

1043. The above shows that – insofar as the application of Article 6:162(2) DCC in this case were to actually fall within the scope of Article 34 TFEU – an alleged restriction of the free movement of goods can be justified by the Court of Appeal on the basis of (i) the interest of protecting the health and life of persons, animals and plants, (ii) the interest of environmental protection and public health and (iii) the interest of protecting human rights. It is precisely those fundamental rights and interests which are on the line in this case and it is also precisely those fundamental rights and interests which are served by imposing a reduction obligation on Shell. Insofar as there were a restriction of the free movement of goods, this is therefore justified. In this respect the courts, moreover, have broad assessment discretion. Milieudefensie et al. has also explained that the reference framework outlined by Shell does not apply in this case or in any case has been stretched too far by Shell. The above must lead to the conclusion that Shell's ground of appeal should be dismissed.

10. Specific grounds of appeal of Shell

1044. Milieudefensie et al. will respond to Shell's specific grounds of appeal below. This response must be read in conjunction with everything discussed in the preceding chapters of this Defence on Appeal. Where below there is reference to specific chapters of the Defence on Appeal, the references are to the chapters which are most relevant to the topics in question.

10.1 Response to Grounds of Appeal I(a) through I(c): the reduction obligation of at least (net) 45%

1045. With Grounds of Appeal I(a) through (I)(c) Shell disputes – with reference to all earlier chapters of the Appeal – the existence of a legal duty for Shell to reduce the absolute emissions of the Shell Group by 2030 by at least (net) 45%, or by another percentage.

1046. Milieudefensie et al. has noted that Shell's objections are directed to a significant degree to the reasoning given by the District Court. According to Shell the opinion "*is neither legally nor analytically sufficiently substantiated*",[826] the District Court set aside difficult policy questions "*without any meaningful analysis*",[827] the established percentage lacks "*any proper analytical basis*"[828] and according to Shell the absolute reduction obligation has been established "*without sufficient scientific and practical analysis.*"[829]

1047. These objections are remarkable, in view of the extensive reasoning of the Judgement and the substantial debate that took place at first instance. The Judgement provides more than sufficient insight into the thought process which forms the basis of the decision. Shell acknowledges in para. 10.2.8 Appeal that the District Court, on the basis of fourteen specific circumstances, which are often specifically geared to Shell, provides a context-related elaboration of what the societal duty of care means for Shell in this case. That Shell does not agree with this, does not entail that the Judgement is insufficiently substantiated. Shell's complaints cannot be reconciled with the Judgement. For example, Shell asserts in para. 10.2.9 Appeal that the District Court in para. 4.4.40 of the Judgement simply ignored important policy questions in relation to affordable energy and supply certainty, even though the District Court explained in paras. 4.4.41 – 4.4.43 of the Judgement as to why what Shell argued at first instance

[826] Para. 10.2.6 Appeal.
[827] Para. 10.2.9 Appeal.
[828] Para. 10.2.10 Appeal.
[829] Para. 10.2.12 Appeal.

in this context cannot succeed. The District Court explained in these considerations that the interest of access to affordable and reliable energy must be served within the framework of the climate goal of the Paris Agreement and therefore does not have any influence on Shell's reduction obligation. Shell has not presented a ground of appeal against these specific considerations.

1048. In the introduction of this Defence on Appeal, Milieudefensie et al. furthermore clarified, in addition to this, that achieving the 17 Sustainable Development Goals is dependent on achieving the climate goal of the Paris Agreement and the phasing out of fossil fuels. It has also been explained there that states, in times of crisis, still fully adhere to the importance of achieving the goals of the Paris Agreement and the Sustainable Development Goals.

1049. In this Defence on Appeal, Milieudefensie et al., in response to Shell's grounds of appeal, and in addition to what Milieudefensie et al. argued at first instance, again explained:

(i) that in this case there are no political policy considerations at issue, nor is the Court of Appeal being asked to shape the global energy transition, nor is the Court of Appeal being asked to create a general rule or a regulatory system (Chapters 1, 3 and 4 Defence on Appeal);

(ii) that the Judgement is not 'encroaching on' any state or interstate (EU) policy (Chapters 1, 3, 4 and 9 Defence on Appeal);

(iii) that tort law (unlawful act) does not contain the limitations claimed by Shell, entailing that the reduction obligation cannot be found in unwritten law but requires a specific standard laid down in the law (para. 10.2.2 Appeal). Shell asserts with this that the most important of the three unlawful act grounds, being the societal standard of care, by definition does not apply to it. This is incorrect. On the contrary, Milieudefensie et al. has shown that the societal standard of care is most definitely appropriate to answer the legal question at issue relating to Shell's responsibility, taking account of all objective reference points and relevant facts and circumstances of the case (Chapters 2, 3 and 4 Defence on Appeal);

(iv) that the Court of Appeal, partly in view of points (i) through (iii) above, does not have to take a restrained position in this case when affirming the Judgement and affirming the reduction obligation imposed on Shell. On the contrary, in Article 3:296 DCC and Article 6:162(2) DCC the legislature gave the judiciary both the power and the instruction to assess per case what in a specific case the unwritten social standard of care under the given facts and circumstances constitutes and to attach an order to a legal duty that has been determined to exist. In this case this instruction is all the more important, because there is an imminent violation of human rights, and liability law, as part of the constitutional tapestry of a state based on the rule of law, is intended to offer effective legal protection against imminent violation of fundamental human rights (Chapters 3 and 4 Defence on Appeal);

(v) that the reduction percentage of (net) 45% by 2030 must be seen as the minimum proportional contribution that Shell must make to help prevent dangerous climate change and that the reduction order imposed by the District Court is thus correct and can be affirmed by the Court of Appeal (Chapter 5 Defence on Appeal); and,

(vi) that Shell's argument that the given reduction order cannot be imposed because of "*the degree of specificity in terms of scope and time*" (para. 10.2.2 Appeal), fails to note the

reason for Article 3:296(2) DCC. That article stipulates that an order can be imposed subject to a time stipulation and/or other conditions (Chapters 3 and 4 Defence on Appeal).

1050. That only absolute emissions reductions are enough also follows from all of the aforementioned chapters. That a goal to merely reduce carbon intensity is not sufficient, is discussed in detail in Chapter 6.2 Defence on Appeal.

1051. For all these reasons, Shell's Grounds of Appeal I(a) through I(c) cannot succeed.

10.2 Response to Ground of Appeal I(d): the responsibility for Scope 3 emissions

1052. Ground of Appeal (I)(d) concerns the responsibility for Scope 3 emissions disputed by Shell. Throughout this Defence on Appeal it has been discussed why Shell's legal duty must also extend to Scope 3 emissions. Chapter 7 Defence on Appeal explains in particular that the specific arguments that Shell has presented in this respect cannot succeed.

1053. The District Court rightly established that Shell, inter alia, via the composition of the energy package of the Shell Group, has control over and influence on the Scope 3 emissions of the Shell Group. For that reason the District Court concluded that the imposed reduction obligation requires a change in course (in the policy) of Shell, whereby Shell will have to adjust the energy package of the Shell Group.[830] The District Court also considered in this respect that one consequence of performing the reduction obligation can be that Shell refrains from making new investments in the extraction of fossil fuels and/or limits its production of fossil commodities.[831] This makes it clear that the District Court is demanding of Shell that Shell independently uses its control and influence to (via the Shell Group) put fewer fossil fuels on the market. This conclusion of the District Court is, in view of everything discussed in this Defence on Appeal, correct.

1054. That Shell, because of its control over and influence on the energy package of the Shell Group was also able to reduce the Scope 3 emissions of the Shell Group at the end of 2030 in this manner by at least 45% net, is not in dispute. In view of this, and partly in the light of Shell's response to the Judgement, Milieudefensie et al. asked the Court of Appeal in Chapter 7.4 Defence on Appeal to note Shell's reduction obligation for the Scope 2 and 3 emissions of the Shell Group, as an obligation of result, or to further clarify the significant best-efforts obligation to which Shell is subject.

1055. Milieudefensie et al. has also explained that comparing the scope of the CO2 emissions of the Shell Group in 2030, relative to that of the reference year 2019, is quite possible. The Scope 3 Standard of the GHG Protocol is precisely intended to compare the emissions of one company over the years. Contrary to what Shell asserts, this comparison does not in any way require "*an unprecedented system of judicial supervision*".[832] Insofar as the reduction obligation remains a significant best-efforts obligation, and it were to turn out after 2030 that the imposed reduction target of (net) 45% was not achieved by Shell, it will have to be reviewed whether Shell has used sufficient efforts. This review will have to take place at that time in light of the considerations of the court with regard to the significant best-efforts which may be expected of Shell. This too does not require an "*unprecedented system of judicial supervision.*"

[830] Paras. 4.4.25 and 4.4.53 Judgement.
[831] Para. 4.4.39 Judgement.
[832] Paras. 9.2.24 – 9.2.26 Appeal.

1056. Shell furthermore asserts, without substantiation, that the Judgement should be set aside, because section 5.3 of the operative part of the Judgement does not express that the reduction obligation must partly be deemed a significant best-efforts obligation. This is incorrect. It is established case law of the Netherlands Supreme Court that the operative part of a judgement must be interpreted in the light of the considerations forming the basis thereof.[833]

10.3 Response to Ground of Appeal I(e): the reduction obligation is geared to the organisational boundaries chosen by Shell

1057. Milieudefensie et al. can – just like Shell – be very brief about Ground of Appeal I(e). Shell measures and reports its Scope 1, 2 and 3 emissions on the basis of the GHG Protocol. At first instance it was explicitly discussed in what manner Shell reports on the global emissions of the Shell Group. Shell uses both a demarcation based on operational control and on the basis of its equity share. The District Court recognised this in paras. 2.5.3 – 2.5.5. of the Judgement.[834]

1058. It has been explained in Chapter 7 Defence on Appeal that Shell, on the basis of, inter alia, the GHG Protocol, will also have to consistently keep reporting on the basis of the method chosen by Shell. This basic principle of the GHG Protocol is a derivative of the requirement of the principle of systematic reporting, a principle that is internationally used in legislation concerning financial statements and applies as such to every Shell annual report.[835] This allows for comparisons to be made between the emissions that Shell reports over the years on the basis of the method that Shell itself selected as most suitable for its organisation. On the basis thereof it can be established whether Shell is fulfilling its reduction obligation.

1059. On the basis of the above it is clear that the order does not compel Shell to measure and report on – and then reduce – emissions on the basis of financial control, which method Shell no (longer) uses. If necessary the Court of Appeal can clarify this in the considerations of the judgement to be passed. Shell's ground of appeal fails.

10.4 Response to Ground of Appeal I(f): no indemnifying effect of regulations

Shell's general indemnification defence

1060. With Ground of Appeal I(f) Shell argues that the Judgement does not take sufficient account of the regulatory mechanisms for emissions reductions in the jurisdictions where the Shell Group is active. In that respect Shell asserts that the District Court interpreted the "indemnifying effect" of the ETS (and similar non-EU mechanisms) too narrowly, because such mechanisms form part of a broader package of measures with which governments want to combat climate change, including non-market-based emissions reduction mechanisms. Shell refers to EU measures in this respect such as goals for renewable energy and CO2 emissions standards for passenger vehicles and delivery vans.

1061. According to Shell, the fact that specific emissions do not fall under the ETS indicate that they form an "*integral and well-considered part of the government's response in the area of*

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[833] See, inter alia, HR 13 March 2020, ECLI:NL:HR:2020:425, NJ 2021/255, para. 3.2.

[834] See also para. 4.4.20 Judgement: "*RDS also knows the amount of CO2 emissions of the Shell group; it has reported on the volume of CO2 emissions (see 2.5.3).*"

[835] See, e.g., the requirement of uniformity in Article 2:362(2) in conjunction with 2:363(4) and 2:384(6) DCC. This also includes successive uniformity, entailing that valuation and presentation must be equal to each other as much as possible from year to year.

emissions reductions for the entire economy."[836] The fact that the legislature has opted not to regulate certain emissions, would then mean that the legislature did not want to regulate those emissions and that therefore Shell cannot be subject to any obligation.

1062. Along the line defended by Shell, all climate regulations worldwide apparently always have a civil law exhaustive, indemnifying effect: both the existence and the lack of measures leads to the conclusion that Shell would be indemnified, because this must in any event have been a conscious choice, whereby – Milieudefensie et al. must assume this, as Shell does not substantiate this – all interests to be taken into account, that also play a role in these proceedings, have been exhaustively weighed. That it is clear that states globally are not doing enough to combat dangerous climate change, apparently does not detract from this position according to Shell. Shell does not present any legal or factual substantiation for its position, nor can this substantiation be found in the case law on the doctrine of the indemnifying effect of permits.

1063. Milieudefensie et al. refers in this respect by way of explanation to Notes on oral arguments 4 of the proceedings at first instance. In this respect, Milieudefensie et al. has already explained that by using such an argument, Shell shows it does not understand the doctrine of unlawful act.[837] In essence, Shell's argument in appeal is not (any longer) a defence presented on the basis of the reference framework of Vermeulen v. Lekkerkerker[838] and Ludlage v. Van Paradijs[839]. It does not present sufficient facts to make a successful claim on this jurisprudence.

1064. Shell's argument now only comes down to its general defence that only states have a responsibility relating to the (method of) reduction of greenhouse gas emissions and that every state statute or even the lack thereof, has an indemnifying effect. This is regardless of whether this legislation is effective and makes a proportional contribution to preventing dangerous climate change, whether measures are taken or not and whether the interests at issue in these proceedings have been weighed in the making of this legislation. Shell thus believes that it is not subject to any own, independent legal duty and that it can only act unlawfully if it acts in contravention of the law. That this general defence of Shell cannot succeed has already been explained in detail in, inter alia, Chapters 3, 4 and 9 of this Defence on Appeal.

<u>The ETS</u>

1065. With regard to Shell's invoking of the ETS, Milieudefensie et al. has substantiated that this emissions trading system only relates to a very small part of the total (Scope 1) emissions of Shell and that this defence can thus, no matter what, play only a very limited role.[840] As it has in the meantime turned out that Shell's Scope 3 emissions are even higher than thought at first instance and even form 95% of Shell's total emissions, the share of Shell's emissions that falls under the ETS is even less than thought. Despite a question in this respect of the District Court during the session at first instance, Shell failed to indicate what share of its Scope 3 emissions is to be deemed Scope 1 emissions of other companies falling under the ETS. Shell has not substantiated for what share of its emissions the alleged indemnifying effect should apply. Perhaps Shell does not think this is important, because it believes that there is an indemnifying effect for all its emissions, as discussed above.

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[836] Appeal, para. 10.2.19.

[837] Milieudefensie et al.'s Notes on oral arguments 4, see paras. 4 through 20.

[838] HR 10 March 1972, NJ 1972, 278 (Vermeulen v. Lekkerkerker), ECLI:NL:HR:1972:AC1311.

[839] HR 21 October 2005, NJ 2006, 418 (Ludlage v. Van Paradijs), ECLI:NL:HR:2005:AT8823.

[840] Milieudefensie et al.'s Notes on oral arguments 4, see para. 28.

1066. In Notes on oral arguments 4, Milieudefensie et al. discussed in detail that the (individual) permits which are granted under the ETS and the ETS regulations as such cannot have an indemnifying or civil law exhaustive effect.[841]

1067. Neither at first instance nor in appeal did Shell present further substantiation for its argument regarding the alleged indemnifying effect of other government regulations or permits, including in response to the District Court's consideration in para. 4.4.48 of the Judgement.

1068. It goes no further than general reflections on the way in which various countries in the world take measures, to a greater or lesser extent, to achieve the Paris goal. These reflections cannot lead to assuming the existence of an indemnifying effect.

1069. In view of the foregoing, Shell's Ground of Appeal I(f) fails.

The District Court's considerations on the indemnifying effect of the ETS and other regulations

1070. Milieudefensie et al. does believe it is important to briefly go into the considerations of the District Court that form the basis of the assumption of an "indemnifying effect" of the EU ETS, as these considerations are somewhat vaguely formulated. In this light it would be helpful if the Court of Appeal would supplement or improve those considerations. As the considerations of the District Court did not have an effect in the operative part of the Judgement on this point and it is also clear that Shell cannot claim the indemnifying effect, insofar as the reduction goal of the ETS is lower than the reduction obligation which was imposed on Shell in the Judgement, Milieudefensie et al. did not see cause to file a cross-appeal on this point. Insofar, there is no undesirable indemnifying effect for Milieudefensie et al. According to Milieudefensie et al., there also is no 'real' indemnifying effect.

1071. On the basis of the Vermeulen v. Lekkerkerker judgement of the Netherlands Supreme Court, for the assessment of the indemnifying effect of a permit one must look at (1) the nature of the permit in question, (2) the interest to be protected by the regulation on which the permit is based and (3) other matters in connection with the circumstances of the case. In essence, this legal doctrine entails that the indemnifying effect of a permit is more likely, the more the weighing of interests which was carried out in relation to the granting of the permit, shows more alignment with the weighing of interests that the civil court must make when assessing the claim. The weighing to be made must actually have already (exhaustively) taken place in the framework of the granting of the permit, whereby the civil court may not 'do it over'. It logically ensues from this reference framework that in the jurisprudence, permits granted by public authorities will not quickly have an indemnifying effect, as in most cases the weighing of interests to be made under private law are not exactly the same as the weighing of interests which are carried out in the public law process.[842]

1072. In the light of this jurisprudence regarding the indemnifying effect of permits, a number of considerations of the District Court are not completely clear.

1073. For example, the District Court made the following consideration in the first sentence of para. 4.4.46:

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[841] Milieudefensie et al.'s Notes on oral arguments 4, paras. 21 through 88.

[842] Cf. the test in HR 21 October 2005, NJ 2006, 418 (Ludlage v. Van Paradijs), ECLI:NL:HR:2005:AT8823.

"Given the emissions reduction targets of the ETS system, RDS can rest assured that the interests to be taken into account, which are also at issue in these proceedings, were fully and correctly weighed by the issuing body/bodies when the emission allowances were issued."

1074. The 'assurance' that the District Court cites in the first sentence above, relates to an application of a legal rule formulated by the Netherlands Supreme Court in (inter alia) Ludlage v. Van Paradijs.[843] In Ludlag v. Van Paradijs (para. 3.5.1) the Netherlands Supreme Court formulated this rule as follows:

"In general, the permit holder may rely on the permit having been granted in accordance with the law and that the permit granting agency fully and correctly weighed the interests to be taken into account, and that he is entitled to make use of that permit"

1075. It is odd that the District Court cites and applies this legal rule in this manner. After all, as ensues from the above citation from Ludlage v. Van Paradijs, this legal rule relates to the reliance that a permit holder may have that the government, when granting a permit within the framework provided therefore by law, has correctly and fully observed the interests to be taken into account. Specifically when it comes to the *"granting of emissions rights by the issuing agency"* as cited by the District Court, there is no discretionary power at all within which interests can be weighed. This was also explained during the session on the basis of Notes on oral arguments 4. Because there is a decision applicable to an individual party, there was no weighing of interests and consequently there cannot have been a weighing of interests from which an indemnifying effect can be derived. Because of the lack of a weighing of interests, contrary to what the District Court considered, there cannot be any reliance on the part of Shell that when granting the emissions rights, the interests were fully and correctly weighed.[844]

1076. Furthermore, in this case there could be a consideration of the question whether the ETS is meant to be exhaustive and whether, when establishing the ETS, the weighing of interests that is at issue in this case had already been made. In para. 4.4.46 the District Court goes into the ETS and attaches the 'indemnifying effect' to this. The second and third sentence of para. 4.4.46 make this clear: *"It concerns the reduction target strived for with the ETS system. To that extent, the ETS system has an indemnifying effect."*

1077. The District Court did not present a clear and substantiated assessment of the interests aimed to be achieved by the ETS and a comparison of these interests with the interests that are at issue in this case. The District Court sufficed with a description of the ETS in para. 4.4.45 and the conclusion in the first sentence of para. 4.4.46 that the same *"interests to be taken into account" "are also at issue in these proceedings"*. The District Court did not consider the arguments presented by Milieudefensie et al. in this respect in Notes on oral arguments 4. It is also clear that the District Court did not look at the weighing of interests in the same (in-depth) manner, as this is normal in the jurisprudence, such as the Ludlage v. Van Paradijs case. There was no factual basis for such an in-depth substantive review, now that Shell has not substantiated its invoking of the ETS and has not provided support that would show that the ETS was intended to have an exhaustive effect under civil law and what weighing of interests was to form the basis thereof. According to Milieudefensie et al. there cannot be such exhaustive and indemnifying effect.

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[843] HR 21 October 2005, NJ 2006, 418 (Ludlage v. Van Paradijs), ECLI:NL:HR:2005:AT8823.

[844] Shell can in any event not derive any assurance from the emissions permits granted to it on the basis of the ETS (nor from any other permit granted to it). In Notes on oral arguments 4 (paras. 78-88) Milieudefensie et al. explained that in various circumstances, the societal duty of care can stand in the way of deriving an indemnifying effect from a permit.

1078. Insofar as the judgement of the District Court must be read in such way that (Shell was allowed to have the reliance that) when establishing the ETS (and thus not only upon the issue of emissions rights) all interests to be taken into account were weighed in full and correctly, this cannot be reconciled with the rest of the District Court's judgement. Milieudefensie et al. presented to the District Court, inter alia, that the European legislature itself indicated that the reduction target of the ETS is insufficient to achieve the goals of the Paris Agreement and the District Court appears to be aware of this, as the District Court went into the new target figure for the ETS for 2030 that is still to be implemented. At the same time, the District Court speaks in the rest of the Judgement about the global consensus that the warming of the earth must remain limited to 1.5°C (to which the ETS insufficiently contributes) and this global consensus, by way of Article 6:162(2) DCC, elaborated on the basis of, inter alia, human rights, leads to an individual reduction obligation for Shell, which goes beyond the ETS reduction target. Apparently the District Court weighs 'the interests to be taken into account' which 'are also at issue in these proceedings' differently than the European legislature. This is also correct.

1079. Ultimately the District Court reaches the conclusion that there is an indemnifying effect, but that this does not stand in the way of having to comply with the imposed reduction order. Milieudefensie et al. has no problem with this outcome and the intention of the District Court.

1080. The District Court has indicated that when the individual reduction obligation under the judgement extends further than the objective of the ETS, the judgement must nevertheless be followed:

> *"Insofar as RDS' reduction obligation extends beyond the reduction target of the ETS system, RDS will have to fulfil its individual obligation. RDS cannot rely on the indemnifying effect of the ETS system insofar as this system entails a less far-reaching reduction target than a net reduction of the CO2 emissions (Scope 1 through to 3), relative to 2019, for the Shell group."*[845]

1081. The District Court repeated this opinion for other 'cap and trade' emissions arrangements:

> *"Up to the level of the reduction target these schemes aim to achieve, they have an indemnifying effect insofar as the interests to be taken into account, which are also at issue in these proceedings, were fully and correctly weighed by the issuing body/bodies when the emission allowances were issued. Just like for the ETS system, RDS has no additional obligations for emissions already regulated under these systems. The indemnifying effect of these systems applies up to the reduction percentage they aim to achieve. If it is lower than the obligation of RDS, RDS has to do more."*[846]

1082. In essence these considerations of the District Court come down to the argument presented by Milieudefensie et al. Namely that the ETS (and other similar regulations) can help Shell to (partly) achieve the reduction imposed on it. This allows Shell to move along with the linear reduction of the ETS. This circumstance also shows that there was no form of encroachment. The District Court therefore rightly rejected the argument that there was encroachment.[847] By moving along with the reduction intended by systems like the ETS, Shell can comply with the Judgement in part. Milieudefensie et al. would not call this an indemnifying effect within the meaning of the judgement in the Vermeulen v. Lekkerkerker case.

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[845] Para. 4.4.46 Judgement.

[846] Para. 4.4.47 Judgement.

[847] Para. 4.4.47 Judgement.

1083. In view of the above, the indemnifying effect assumed by the District Court does not affect the independent legal duty to which Shell is subject and rightly so. As the reduction order must be followed if it goes further than the reduction target of the ETS, Shell cannot use the ETS in a way which enables it to avoid its obligations or use it to make fewer reductions than necessary.

1084. In order to prevent Shell from attempting to do so, by explaining passages of the Judgement out of context, a number of passages from the Judgement deserve clarification. This concerns the passages from the Judgement that Shell *"does not have an additional obligation with respect to Scope 1 and 2 emissions in the EU that fall under the system"*[848] and *"Just like for the ETS system, RDS has no additional obligations for emissions already regulated under these systems."*[849]

1085. In view of the above, Milieudefensie et al. asks the Court of Appeal to clarify that there is in no way an indemnifying effect or to affirm and uphold the interpretation of the District Court, that any indemnifying effect cannot detract from the following of the reduction order.

10.5 Response to Ground of Appeal II: the concrete and real threat of unlawful act and sufficient interest pursuant to Article 3:303 Dutch Civil Code

1086. In Ground of Appeal II (in combination with Chapter 9.2 Appeal) Shell objects to the determination of the District Court that there is an imminent violation of the reduction obligation by Shell and that the order therefore must be awarded without a further weighing of interests (paras. 9.2.1 – 9.2.3 Appeal, para. 4.5.3 Judgement). In paras. 9.2.4 – 9.2.9 Appeal, Shell adds to this that Milieudefensie et al. (also) lacks sufficient interest pursuant to Article 3:303 DCC.

1087. Milieudefensie et al. will discuss both of Shell's arguments in conjunction with each other below. Milieudefensie et al. will then respond to Shell's remark that the order should be dismissed because at the end of 2030 there will still be significant societal interests in the activities of the Shell Group. Lastly, Milieudefensie et al. will explain that the plans announced by Shell for the reduction of the Scope 1 and 2 emissions of the Shell Group, do not detract from Milieudefensie et al.'s interest in upholding of the Judgement.

1088. In Chapter 9.2 Appeal, Shell also argues that the imposed order is not effective (and therefore there is insufficient interest in the claim) and that the relativity requirement had not been satisfied. Shell placed its arguments on those topics in Ground of Appeal III and Ground of Appeal VII, so that Milieudefensie et al. will discuss this in further detail in separate chapters (10.6 and 10.7 Defence on Appeal).

Milieudefensie's interest in the claim for an order and the (imminent) violation of the reduction obligation

1089. In general, it may be assumed that the claimant has sufficient interest in his claim for an order.[850] If there is a legal duty, Milieudefensie et al. is justified in claiming performance thereof on the basis of Article 3:296 DCC, if Shell violates this legal duty or if such violation is imminent. Only in exceptional situations – which do not apply here – will there be insufficient interest in

[848] Para. 4.4.46 Judgement.

[849] Para. 4.4.47 Judgement.

[850] J.J. van der Helm, Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk no. 19), Deventer: Wolters Kluwer 2019/22.

an order.

1090. As explained in detail in Chapter 6 Defence on Appeal (concerning Shell's policy), Shell's Powering Progress policy is at odds with the legal duty to which Shell is subject. Shell's current policy is not geared to the reduction in an absolute sense of the CO2 emissions of the Shell Group, let alone to the reduction of these CO2 emissions in an absolute sense by the reduction percentage of at least (net) 45% by 2030 imposed by the District Court. This makes the (imminent) violation of said legal duty a fact. Milieudefensie et al. has thereby demonstrated that Shell is not "*doing its part and continuing to do its part with regard to the challenges of the energy transition and the global need to reduce emissions*"[851] and that the threat of the violation of the legal duty is not only a "*theoretical possibility*",[852] but a very concrete and very real threat, which is in fact a certainty.

1091. Indeed, there is also sufficient cause for the determination that Shell is violating its reduction obligation at this time.[853] Shell is refusing – including after a judgement which has been declared to be immediately enforceable – to align its corporate policy with the obligation to which it is subject, even though this is required by the Judgement (paras. 4.4.32 and 4.4.39 Judgement). Shell takes investment decisions which are not in line with its reduction obligation (see Chapter 6 Defence on Appeal) and has not turned out to be willing to take the measures required by the District Court to perform its reduction obligation (para. 4.4.53), knowing that the occurrence of dangerous climate change stands or falls with the curbing of the total cumulative emissions (para. 2.3.4 Judgement). The Judgement leaves no room for doubt that performance of the order requires immediate action (see also para. 4.5.7), but Shell calls the order unrealistic and unreasonable[854] and has rolled out a large-scale PR campaign since the Judgement, but has hardly taken any action.[855] This objectionable attitude of Shell has been discussed in detail in Chapters 6 and 7.4 Defence on Appeal.

1092. In short, there is a(n) (imminent) violation of Shell's reduction obligation, making Milieudefensie et al.'s interest in the claim for an order a fact.

1093. Shell's reference to the judgements in the Kernwapens case and the Kraaiende Hanen case does not detract from the above. The Kernwapens judgement concerned a claim for a declaratory judgement that the State was allegedly prohibited from cooperating in any way with the use of nuclear weapons, including preparatory actions. There was no evidence that the use of nuclear weapons had actually been considered. Under those circumstances there was no concrete and real threat and the Vereniging van Juristen voor de vrede et al. was declared to not have standing due to the lack of sufficient interest pursuant to Article 3:303 DCC. "*The court does not have the task of prohibiting all kinds of things for legal subjects in abstracto. The court room is not intended as a forum for general discussion*", according to the Netherlands Supreme Court. It will be clear that this judgement relates to an essentially different situation than the situation which is at issue in this case against Shell.

1094. The comparison with the Kraaiende Hanen case of 1993 also fails. A priori, a prohibition or order

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[851] Para. 9.2.8 Appeal.

[852] Para. 9.2.7 Appeal.

[853] See in the same sense the verdict of the District Court in the Urgenda case of 24 June 2015, ECLI:NL:RBDHA:2015:7145, para. 4.93.

[854] See, e.g., Exhibit MD-392, Shell Notice of Annual General Meeting 2022, p. 7.

[855] See also **Exhibit MD-474**, Oil Change International, Big Oil Reality Check: updated assessment of oil and gas company climate plans, May 2022, pp. 21-22.

can be immediately awarded if the (imminent) unlawful act has been established, as ensues from Article 3:296 DCC.[856] To this extent, contrary to what Shell asserts, the court has no discretionary power in case of a(n) (imminent) violation of a legal duty. The judgement in the Kraaiende Hanen case only entails that a prohibition or order may be dismissed – or that the court may award a less far-reaching provision within the limits of the relief sought – if there are alternative possibilities to prevent or eliminate (impending) unlawfulness. In this case, the nuisance caused by the crowing roosters could have been eliminated by means of other measures than by means of removal of those roosters, so that the claimed order was too broad.

1095. This case also cannot be compared with the case against Shell. It is evident that emissions reductions form the only solution to prevent dangerous climate change. There is simply no alternative. Milieudefensie et al. refers in this respect to Chapter 4.5.3 Defence on Appeal. In Chapter 5, Milieudefensie et al. furthermore explained that the claimed (net) 45% must be seen as an absolute lower threshold, in view of what may be expected of Shell. Shell's policy does not provide for such emissions reductions, so that the order can be upheld.

Shell's argument that its CO2 emissions should be tolerated and are not unlawful in all cases

1096. In paras. 9.2.3(c) and 9.2.9 Appeal, Shell asserts that the order could not be given because the actions to which the order relates are not, or not under all circumstances, unlawful, partly in view of the societal interest involved with Shell's activities. In this context Shell also asserted at various places in its Appeal that the order could not be awarded because the order is static in nature and can thus not move in line with changing insights and circumstances.[857]

1097. First, and above all, no changing insights and circumstances will arise in the period up to 2030 which entail that on a global level, less than (net) 45% in CO2 emissions will have to be reduced. The only change which will have arisen on that point is that this reduction percentage will keep increasing. The more, the necessary and very urgent climate action is not taken. This has also turned out to be the case during these proceedings because, as explained in Chapter 5 Defence on Appeal, in the meantime global CO2 emissions must fall by at least 48% by 2030. As Shell's reduction obligation is connected with this global scenario, it is not clear that over the years up to and including 2030, Shell's duty of care will encompass less than the reduction obligation of at least (net) 45%.

1098. In addition, no changing insights and circumstances are to be expected which would entail that the goals of the Paris Agreement and the Sustainable Development Goals will be abandoned by the global community. As already demonstrated in the Defence on Appeal, even in times of geopolitical tensions and crisis, the global community will fully adhere to these goals (Chapter 1 Defence on Appeal).

1099. In view of the above it is also not clear why in 2030 there would be significant societal interests which entail that excessive CO2 emissions of Shell would have to be tolerated. Shell appears in this respect to invoke Article 6:168 DCC, but does not substantiate why this article could form a basis to decide in advance that Shell's oil and gas activities in the period up to and including 2030 must at all times be permitted. Shell furthermore fails to note in this respect that it is not claimed that Shell cease all its oil and gas activities in full by 2030, but that the matter concerns the phasing out of those activities in line with the universally recognised danger threshold as laid down in the Paris Agreement. This means, as explained in Chapter 5.4 Defence on Appeal,

[856] Asser/Hartkamp & Sieburgh 6-IV 2019/161.

[857] See, inter alia, paras. 1.2.2, 2.3.2, 2.5.19 and 9.2.9 Appeal.

that with the reduction order of (net) 45% by 2030, Shell in 2030 can still continue selling a volume in oil and gas that is equal to at least 55% of the volume in oil and gas sales of 2019.

1100. Aside from this it is not clear that a claim based on Article 6:168 DCC could succeed.[858] In that case the Court of Appeal should come to the conclusion that there is a significant societal interest, that weighs more heavily than the interest of preventing dangerous climate change.[859] Against the background of everything discussed in this case, this is hard to imagine. This is particularly the case now the societal interests mentioned by Shell – including energy certainty, affordability of energy and economic development – are in fact served by preventing dangerous climate change.

1101. Application of Article 6:168 DCC does not alter the unlawful act, so that the injured party will retain his right to compensation. For that reason it is not clear how Shell would benefit from basing a claim on Article 6:168 DCC.

1102. Lastly, Shell appears to hint at the possibility of a(n) (emergency) situation in the future, on the basis of which in 2030 its (excessive) CO2 emissions should be tolerated. It has already been explained in the introduction to this Defence on Appeal that even in the current crisis in connection with the situation in Ukraine, states qualify the achieving of the Paris goals once again as top priority. The situation suggested by Shell is therefore not to be expected, contrary to the emergency situations which will be the result of dangerous climate change due to insufficient emissions reductions (see also Chapter 5.5 Defence on Appeal). However, insofar as this were ever the case, a change in circumstances or the arising of a justification ground might give rise to the cancellation of a court order.[860] To this extent the, particularly improbable, situation favoured by Shell could be resolved via that route, and in any case not by means of dismissal of an order in advance.

Milieudefensie's interest after Shell's "commitment" with regard to Scope 1 and 2 emissions

1103. In para. 9.2.18 Appeal, Shell asserts that sufficient interest is lacking with regard to Scope 1 and 2 emissions, because of its own plans to reduce those emissions in an absolute sense by 50% compared to the 2016 level. This assertion also fails.

1104. The claimed order relates to the total of Scope 1, 2 and 3 emissions. A reduction intention in Scope 1 and 2 – together 5% of the total CO2 emissions of the Shell Group – does not detract from the interest of Milieudefensie et al. in the reduction order that is claimed to reduce the entirety in CO2 emissions in Scope 1, 2 and 3 by at least (net) 45%. The claim does not relate to the individual Scopes, but to the total of the emissions connected with the Shell Group. Shell thus has the freedom to determine in what manner it divides the emissions reductions between those different Scopes, provided the total in reductions comes down to at least (net) 45% over all Scopes together. For that reason it does not matter that Shell itself chose to place the emphasis on its Scope 1 and 2 emissions at this time. What does matter, is that with only a reduction in Scope 1 and 2, Shell is ignoring 95% of the reduction order.

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[858] In any event, environmental interests must be deemed part of the significant societal interests within the meaning of Article 6:168 DCC, see C.J.J.C. van Nispen in Groene Serie Onrechtmatige daad, art. 6:168 BW, note 15 (current up to and including 18 November 2021).

[859] Asser/Hartkamp & Sieburgh 6-IV 2019/162.

[860] J.J. van der Helm, Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk no. 19), Deventer: Wolters Kluwer 2019/57. The burden of proof in this case lies with Shell.

1105. The foregoing establishes that the reduction order will not be performed, making Milieudefensie et al.'s interest in upholding of the order a given. This applies all the more because of the following additional reasons.

1106. First, a "commitment" of an opposing party does not prevent the court from imposing an order.[861]

1107. Second, Shell continues to dispute the (impending) unlawfulness of its actions. Shell disputes that it has a legal duty, and thus also denies any legal responsibility with regard to Scope 1 and 2 emissions.

1108. Third, Shell's conduct does not provide reason to take Shell at its word. In para. 9.2.9 Appeal, Shell characterises its own policy goals as "forecasts". It was explained in Chapter 6.2.9 Defence on Appeal that Shell's policy comes with all kinds of reservations. There is therefore no guarantee that Shell will perform its own plans relating to Scope 1 and 2 emissions.

1109. The foregoing means that Milieudefensie et al.'s interest in upholding of the Judgement continues and Shell's grounds of appeal must be declared unfounded in this respect.

10.6 Response to Ground of Appeal III: the reduction order is effective

1110. Milieudefensie et al. explained in detail in Chapter 8 Defence on Appeal why this ground of appeal of Shell relating to the alleged ineffectiveness of the reduction order cannot succeed.

1111. In connection with this ground of appeal Shell furthermore refers to the jurisprudence discussed by it in para. 4.2.18 Appeal. Milieudefensie et al. showed in Chapter 4.5.3.3 Defence on Appeal that Shell cannot derive the arguments from those judgements that it thinks it can.

10.7 Response to Ground of Appeal IV: the District Court rightly established that only Dutch law applies

1112. With Ground of Appeal IV Shell complains that the District Court incorrectly established the applicable law.

1113. Shell gives two reasons for this. Primarily, Shell argues that the extra-contractual liability asserted by Milieudefensie et al. does not relate to environmental damage, but to liability for a policy that entails that the companies of the Shell Group are acting unlawfully. For that reason, Article 4 Rome II should apply, not Article 7 Rome II (paras. 10.5.3 and 10.5.4 Appeal). Alternatively, if Article 7 Rome II were to apply, both the *Handlungsort* and the *Erfolgsort* should lead to applicability of the law of all countries where the Shell Group is active and/or sells products and according to Shell this is almost all countries in the world.[862] This ground of appeal of Shell is refuted below. Shell's arguments relating to Article 17 Rome II will then be discussed separately.

Article 7 Rome II applies

1114. Milieudefensie et al. notes that Shell does not cite literature or case law to substantiate its primary position that Article 7 Rome II supposedly does not apply. Shell asserts in a general

[861] J.J. van der Helm, Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk no. 19), Deventer: Wolters Kluwer 2019/23.
[862] Appeal, para. 10.5.7, para. 10.5.12.

sense that "the determination of policy" by Shell is not related to environmental damage. This is remarkable. Shell has not directed a ground of appeal to the District Court's opinion that (dangerous) climate change as a result of CO2 emissions is environmental damage within the meaning of Article 7 Rome II (para. 4.3.2 Judgement). This means there can be no misunderstanding that Article 7 Rome II applies and the discussion between the parties can only focus on the concrete application of this article in this case.

1115. It is then of importance that Shell has not directed a ground of appeal against the determination that Shell has policy determining influence over (the CO2 emissions of) the Shell Group (paras. 4.3.6 and 4.4.4 Judgement). Shell fails to note that it is being held accountable for its own policy. As has also been explained at first instance, it is not required that the discussion descends to the level of the 1,100 group companies. None of those group companies control the corporate policy that is being denounced here as unlawful and they simply do not have the position to do so in the concern relationship. As stated, Shell did not dispute this. It is therefore completely pointless to reproach the group companies regarding corporate policy. Whether and to what degree unlawful acts are carried out at a lower level within the Shell Group is therefore irrelevant for the unlawful acts of the parent company itself. It is Shell itself that causes (impending) environmental damage with the adoption of corporate policy that is at odds with the danger threshold established by the global community and recognised by Shell. This part of Shell's ground of appeal must therefore fail.

Shell misunderstands the protective concept forming the basis of the options provided by Article 7 Rome II

1116. The second part of Shell's ground of appeal contains nothing new compared to the arguments that Shell already presented at first instance and which were rightly rejected by the District Court. Indeed, Shell wrongly makes it appear as if in the determining of the *Handlungsort,* alignment had been sought with Shell's registered office and fails to in any way go into the gist of the decision of the District Court, i.e. that the adoption of corporate policy by Shell is to be deemed an independent cause of damage. The District Court rightly made this determination, on the basis of the detailed substantiation provided by Milieudefensie et al. on that point.[863]

1117. This outcome is also appropriate in the light of the protective idea underlying the options provided by Article 7 Rome II, which is justified with a reference to Article 191 TFEU (Article 174 EC Treaty), in which a high level of protection is prescribed (paras. 4.3.3 and 4.3.6 Judgement).[864]

1118. To this extent the ground of appeal must fail, because Shell has not addressed the most important substantiation of the decision of the District Court, and the interpretation of Article 7 Rome II favoured by Shell clearly cannot be reconciled with the key principles on which Article 7 Rome II is based, including the precautionary principle, the principle of preventive action and

[863] See Milieudefensie et al.'s Notes on oral arguments 3, paras. 41 through 60 (The corporate policy is a(n) (impending) damage-causing incident and leads to (impending) damage) and paras. 64 through 70 (Jurisprudence shows that the term 'damage-causing incident' can also encompass policy) and paras. 71 through 75 (RDS' corporate policy is public policy and has external effect). See also para. 79: *"The reproach levelled against RDS is not that it does not intervene in the subsidiaries; the reproach against RDS is that it does not intervene when it comes to RDS itself. This is an important difference."* And para. 83: *"It has already been mentioned, this case is purely and alone concerned with RDS' own liability for its own actions, without the issue of liability of the individual subsidiaries being relevant."*

[864] Regarding the protective idea, see Milieudefensie et al.'s Notes on oral arguments 3, paras. 27 through 35 (The goal of prevention and a high degree of environmental protection under the Rome II Regulation) and paras. 61 through 63 (The principle that the law most favourable to the claimant shall apply cannot be made meaningless).

the principle that environmental harm must, with priority, be combated at source.[865] In the interpretation favoured by Shell, it would be de facto impossible to take action against (impending) climate damage which is caused by large multinationals.[866]

1119. Milieudefensie et al. also refers in this respect to Magnus / Mankowski / Bogdan / Hellner, who point out that the option of Article 7 Rome II, in addition to the concept of protection, also benefits procedural expediency (emphasis added by counsel):

"*Since environmental damage may be scattered in several countries, the possibility to choose the law of the event giving rise to the damage allows the plaintiff, or plaintiffs, to facilitate proceedings by applying one and the same law to all damage. This is particularly advantageous if the persons seeking compensation do so in the form of a collective action, in which the application of several laws in parallel might prove particularly difficult.*"[867]

1120. This citation also makes it clear that when opting for the *Handlungsort* there cannot be an application of the mosaic principle, because this is contrary to the protective idea and procedural expedience.

1121. Milieudefensie et al. believes it is important in this respect to once again emphasise that noting the corporate policy as damage-causing incident is in this case both de facto and de jure the only correct and logical outcome. With this policy Shell – and Shell alone – determines how much oil, gas and other energy products the Shell Group puts on the market worldwide and consequently how much harmful CO2 emissions the Shell Group will yet cause.[868] This influence of Shell on the energy package of the Shell Group has – as has been cited above – also been established by the District Court and Shell has not presented a ground of appeal against it.

1122. Milieudefensie et al. explained this at first instance on the basis of an example. In short, if Shell on the basis of its policy wants to make a *final investment decision* today for the construction of a new oil platform with an economic life of 30 years, the process will be started tomorrow to organise and finance that construction, so that oil can actually be pumped up in a few years. All parties involved (Shell, its board of directors, shareholders, banks, insurers and group companies), after taking that oil platform into use, have a great interest in the platform actually being exploited for its entire economic life. They will also want to defend that interest because they will have to earn back their capital investments. In most cases the matter concerns pre-investments of many billions per project. It is thus Shell's policy that determines the future and that assures a lock-in of CO2 emissions. It is thus Shell's policy that causes and/or threatens to cause large climate damage.

1123. It is these specific circumstances that the District Court rightly included in the qualification of the damage-causing event. The ratio of Article 7 Rome II was discussed above. But in a general sense, the preamble emphasises that Rome II is based on the requirement of legal certainty and the need to do justice in individual cases as essential components of a judicial discretion.[869] Rome II therefore creates "*a flexible framework of collision rules*" which courts before which

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[865] See para. 25 of the recital of Rome II.

[866] Milieudefensie et al.'s Notes on oral arguments 3, paras. 54 - 58.

[867] Magnus / Mankowski / Bogdan / Hellner, Rome II Regulation (2019), Art. 7, para. I, note 3, with the addition in note 15 that it is evident that Article 7 Rome II also applies to claims for orders to prevent environmental damage.

[868] See also Milieudefensie et al.'s Notes on oral arguments 3, paras. 41 - 60 (The corporate policy is a(n) (impending) damage-causing event and leads to (impending) damage).

[869] See point 14 of the preamble.

individual disputes have been brought can determine "*in an appropriate manner*".[870] It shows that the judicial body may look at the facts of the specific case and on the basis thereof may assess what in the given circumstances is most reasonable to be deemed the (impending) damage-causing event, partly in view of the principle that the law to apply is that which is most beneficial to the claimant.[871]

1124. Shell furthermore only refers to an incomplete citation from Von Hein's handbook from which it should be deduced that only the incident that is closest to the damage – or the "*ultimate damage-causing event*" – will be decisive for determining the *Handlungsort*. Von Hein's full reasoning is included as a citation in the Judgement.[872] In that full citation Von Hein in fact says that the principle of the law most beneficial for the claimant argues for a broad interpretation of Article 7 Rome II. This is also logical: the referral rule of Article 7 Rome II is intended to offer the claimant options with regard to the applicable law, to effect an outcome which is most favourable for him.[873] What Von Hein says in the above-mentioned citation, is that the injured party's right to choose the *Handlungsort* in the case of environmental damage can also extend to an earlier event in the causal chain and that this "*would fit the favor naturae underlying Article 7."* I.e.: this option of opting for the law that is connected with an earlier event in the causal chain, aligns with the protective idea that forms the basis of Article 7 Rome II, according to Von Hein.

1125. On the basis of the circumstances of the case, the District Court made a correct analysis relating to the applicable law, as is also confirmed in Asser / Kramer & Verhagen 10-III 2022/1054a (emphasis added by counsel):

"*In [933] it was indicated that the damage-causing incident is defined as the (impending) incident (acts or omissions) which the loss suffering party invokes to support his claim based on unlawful act. […] The determination of the corporate policy of the Shell group is seen as independent cause of damage which can contribute to the (impending) climate damage of residents of the Netherlands and is thus to be deemed a damage-causing incident within the meaning of Art. 7. The District Court adds to this that Art. 4(1) could lead to Dutch law insofar as the interests of Dutch residents are concerned. Partly in view of the protective goal of Art. 7 Rome II – which has also been cited by the District Court – this judgement appears to be correct. The character of this type of environmental damage and particularly insofar as it has not yet (fully) manifested itself, entails that policy that leads to this damage arising, can best be characterised as (a contribution to) the damage-causing incident. This judgement also aligns with liabilities under corporate responsibility where companies can also be held liable for their policy and preparatory actions which (may) lead to damage (elsewhere).*"

1126. In the light of the foregoing Shell's ground of appeal fails.

Shell did not present a ground of appeal against the decisions in para. 4.3.7 of the Judgement.

1127. Shell has not presented any clear ground of appeal against the 'redundant' consideration of the District Court that the primary rule of Article 4(1) Rome II also leads to application of Dutch law insofar as the collective actions seek to protect the interests of Dutch residents (para. 4.3.7

[870] See point 14 of the preamble.

[871] See also Milieudefensie et al.'s Notes on oral arguments 3, para. 66.

[872] Para. 4.3.3 Judgement.

[873] Asser/Vonken 10-I 2018/277, in which it is also argued that the court should correct the choice *ex officio* if the claimant were to choose a 'less favourable' option.

Judgement). Shell does cite the relevant consideration, but then does not get back to this in the explanation of the ground of appeal. The mere assertion in para. 10.5.12 Appeal that the *Erfolgsort* also leads to the conclusion that the laws of all countries of the world could apply, is insufficient in this respect. This thus cannot be deemed an independent complaint.

1128. Nor has Shell presented a ground of appeal against the determination of the District Court that Milieudefensie et al. made a conditional choice of law and that this also aligns with the protective idea forming the basis of Article 7 Rome II.

1129. At first instance Milieudefensie et al. presented detailed substantiation as to why Dutch law applies to its claims, whether based on the *Handlungsort* or the *Erfolgsort*.[874] Milieudefensie et al. has chosen Dutch law, or in any event made the conditional choice[875] for the *Handlungsort* provided that, according to the District Court, this would also lead to application of Dutch law. This conditional choice still applies in appeal. Aside from this, if the applicable law were determined on the basis of Article 4(1) Rome II, this will also lead to application of Dutch law, as Milieudefensie et al. is acting in the interests of Dutch residents.[876]

Shell's arguments in relation to the application of Article 17 Rome II

1130. In paras. 10.5.13 through 10.5.18 Appeal, Shell argues that even if only Dutch law were to apply, on the basis of Article 17 Rome II, the District Court should have applied all applicable regulations of all countries where the Shell Group is active and where all its end users are based.

1131. This is an incorrect interpretation of Article 17 Rome II. First, there is in any event never an obligation to apply the rules referred to in Article 17 Rome II.[877] Article 17 prescribes that the court factually and to a suitable degree must take account of safety regulations and conduct rules which are in effect at the time and place of the event causing the liability (the *Handlungsort*). The court thus has considerable assessment discretion with regard to the degree in which account is taken of local safety rules, partly depending on the circumstances of the case.

1132. Second, Article 17 Rome II is only relevant in the situation in which another legal system than the law of the *Handlungsort* applies: "*Art. 17 should not be extended to cover those rules of safety and conduct in force at the place where the damage occurred.*"[878] As this case is being

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[874] Summons, Chapter II.2 Application of Dutch law, Milieudefensie et al.'s Notes on oral arguments 3 (IPR), Transcripts of the session of 3 December 2020, paras. 3 – 12, Transcripts of the session of 15 December 2020, paras. 20 – 23.

[875] A choice of law can be made without specific formalities, and thus also conditionally, see Tekst & Commentaar Burgerlijk Wetboek, Rechtskeuze bij: Burgerlijk Wetboek Boek 10, Artikel 10, note c: "*Special attention should go to the fact that a choice of law in the area of (most) international contractual and non-contractual obligations which are covered by Rome I or Rome II in principle can be free of prescribed form*." See also Asser/Vonken 10-I 2018/279. With an eye on the principle that the law most beneficial to the claimant should apply, the adjudicating body can amend the choice for *Handlungsort* or *Erfolgsort ex officio*, according to Asser/Vonken 10-I 2018/277.

[876] Milieudefensie et al.'s Notes on oral arguments 3, paras. 14 - 16 (The damage is taking place in the Netherlands (*Erfolgsort*)). In that case, in the material review of the unlawful act and the requested order, full account must still be taken of all global emissions that Shell causes with the Shell Group. It is the global emissions that cause this damage in the Netherlands, see para. 63 of Milieudefensie et al.'s Notes on oral arguments 3.

[877] Magnus / Mankowski / Bogdan / Hellner, Rome II Regulation (2019), Art. 7 note 23: "*Article 17 gives the court a substantial amount of discretion. Taking into account "as a matter of fact" of the rules of safety and conduct is not the same thing as applying them.*" This also appears from para. 34 of the preamble of Rome II, which states that Article 17 is intended to achieve a fair balance between the parties.

[878] Magnus / Mankowski / Bogdan / Hellner, Rome II Regulation (2019), Art. 7 note 21. See also Asser/Kramer & Verhagen 10-III 2022/1117.

litigated on the basis of the *Handlungsort,* Article 17 does not apply.

1133. Thirdly, neither at first instance nor in appeal did Shell invoke any specific foreign (safety) regulations which, according to Shell, should be taken into account in this respect, let alone that such regulations would have a complete indemnifying effect. Shell therefore has not presented sufficient facts and Milieudefensie et al. cannot present a defence on this point. Shell therefore wrongly asserts in para. 10.5.16 Appeal, that Milieudefensie et al. did not dispute that Shell would adhere to the rules in countries where it is active. It is first up to Shell to make these rules and its compliance therewith clear and to present sufficient facts in this respect (e.g. on the basis of the reference framework of an indemnifying effect defence), and only after this is it up to Milieudefensie et al. to dispute this. This was already discussed above under the response to Ground of Appeal I(f). In any event, there cannot be any indemnifying effect from the mere fact that the countries where Shell is active have climate regulations (or not).[879]

1134. In addition, it is explicitly not the intention of Article 17 Rome II that companies can hide behind the lack of adequate safety regulations. It is relevant in this respect that large enterprises often have more knowledge with regard to the impact and dangers of their activities: "*A big enterprise may possess greater knowledge about the environmental risks and dangers caused by its activities than the authorities of the countries concerned, especially in the case of developing countries, and it would be inappropriate to exonerate the enterprise from liability for the consequences of its activities on the ground that it did abide by the local rules of safety and conduct which it knew (or should have known) were inadequate.*"[880]

1135. Fifth, according to para. 4.4.48 of the Judgement the District Court did indeed take account of the fact that Shell possesses permits and concessions for a part of its activities. The District Court held, however, that this does not have an indemnifying effect and this therefore does not detract from Shell's reduction obligation. Shell has not made any further statements about this consideration.

1136. In view of the foregoing Shell's grounds of appeal fail, including Shell's objections in para. 10.5.18 Appeal that Milieudefensie et al. has supposedly not satisfied its duty to present facts to substantiate its claims in accordance with the law of every country in the world.

10.8 Response to Ground of Appeal V: Shell is being held to account for its own actions

1137. With Ground of Appeal V Shell asserts that the Judgement cannot be upheld because the District Court did not adequately explain why Shell can be liable under the heading of unlawful act for legitimate actions of its more than 1,000 group companies and its end users. This is not a clear ground of appeal. In essence, the entire Judgement forms the District Court's explanation of the opinion that Shell is subject to the reduction obligation. This relates to the gist of Milieudefensie et al.'s claim and was discussed in detail at first instance.

1138. As already remarked above, Shell fails to note in its grounds of appeal that it is not being held liable for acts of its group companies and end users, but for its own acts (see, inter alia, the response to Ground of Appeal IV above). As already discussed several times, Shell – and Shell alone – determines the corporate policy of the Shell Group, which gives it control and influence over the CO2 emissions of the Shell Group. It is this control and influence that Shell must use to

[879] See in this respect also Milieudefensie et al.'s Notes on oral arguments 4, in particular paras. 89 through 94.

[880] Magnus / Mankowski / Bogdan / Hellner, Rome II Regulation (2019), Art. 7 note 23. See also Milieudefensie et al.'s Notes on oral arguments 4, paras. 78 - 88.

reduce the CO2 emissions of the Shell Group (including the Scope 3 emissions) and consequently its (impending) wrongful act and to put an end to the related (impending) human rights violations.[881]

1139. In para. 10.6.8 Appeal, Shell asserts that the District Court's approach is irreconcilable with Dutch liability law, because (legal) persons can only be held liable for the acts and omissions of other (legal) persons in an exclusive list of cases which have an explicit statutory basis. This too is incorrect.

1140. Article 6:162 DCC does not have the limitation suggested by Shell. Shell only substantiates its position with a reference to Articles 6:169 DCC up to and including 6:172 DCC. These specific provisions do indeed exhaustively designate the persons who can be held liable for the unlawful act of others (aside from similar liability ensuing from other legal provisions). But those cases are not concerned with the party's *own* unlawful act, but with risk liability for (impending) damage which is caused by persons for whom they are responsible.

1141. Shell's liability on the basis of Article 6:162(2) DCC is based on an independent duty of care of Shell as parent company and as head of the international Shell Group. It is not relevant in this respect whether its group companies are (also) acting unlawfully. Shell's own liability is "*appropriate for a parent company with a complex conglomerate of legal persons created by the parent in the interest of the concern and over which it has decisive control in that same interest of the concern*",[882] according to Van Dam in his analysis of the Judgement.

1142. It ensues from the foregoing that individual actions of group companies of Shell or individual transactions with consumers need not be unlawful either, in order to come to a reduction order.

1143. Shell's responsibility and legal duty ensues (inter alia) from the large contribution it makes to the climate problem, due to the scope of the CO2 emissions over which it has control and influence (approx. 2.5% of global emissions). The scope of the CO2 emissions of individual group companies and individual consumers of Shell will in most cases be (far) too small to have legal relevance. By analogy with the Kalimijnen case, the conclusion must be that the contribution to the climate problem must be sufficiently substantial (read: not negligibly small), to have legal (causal) relevance.[883] Shell's actions decided that legal relevance; the actions of an individual consumer definitely does not have that legal relevance. This is precisely the reason that in transition science Shell is qualified as a system player (which can cause the energy system to change direction), while an individual consumer is not a system player. Great control and influence comes with great responsibility. This is simply how the law works.

1144. Shell's remark in para. 10.6.7 Appeal that the Judgement cannot be upheld because it is supposedly contradictory to base the applicable law on policymaking, and then impose an order to curb actual emissions, is not a clear ground of appeal. The basis for the applicable law is

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[881] For the importance of control and influence in relation to the law of unlawful act, see, inter alia, Chapters 4.3 and 4.4 Defence on Appeal, as well as Chapters 7.3 and 7.4 Defence on Appeal. See at first instance, inter alia, Milieudefensie et al.'s Notes on oral arguments 1, paras. 31 - 82 and Milieudefensie et al.'s Notes on oral arguments 3.

[882] See C.C. van Dam, *Doorbraak in de aansprakelijkheid van moedervennootschappen: Over drie Shell-nederlagen, het einde van een tijdperk en nieuwe paradigma's* in: J. van Bekkum e.a. (ed.), *Geschriften vanwege de Vereniging Corporate Litigation* 2020-2021 (Serie Van der Heijden Instituut no. 172), Deventer: Wolters Kluwer 2021, p. 206. See also pp. 199 – 201 about the de facto authority relationship between Shell and its subsidiaries, in which it is remarked that Shell rightly did not dispute its influence on the group. "*After the revelations in the other Shell cases as to how closely RDS intervened in the operations of its subsidiaries, a denial by it would no longer have been credible*", according to Van Dam.

[883] HR 23 September 1988, ECLI:NL:HR:1988:AD5713, para. 3.5.1.

Shell's policy and the order leads to a (forced) policy change.

1145. This ground of appeal of Shell's thus also fails.

10.9 Response to Ground of Appeal VI: the *in pari delicto* defence

1146. With Ground of Appeal VI (and the explanation thereof in paras. 9.2.19 – 9.2.23 Appeal) Shell argues that the District Court wrongly ignored the relativity requirement as this is encompassed in Articles 3:296 DCC and 6:162 DCC, or that the District Court had wrongly assessed that requirement.

1147. In the first place, Milieudefensie et al. has concluded that in appeal Shell rightly no longer disputes that Article 6:163 DCC does not apply in the framework of a claim for an order.

1148. Shell furthermore also rightly does not assert that Article 6:162 DCC as such cannot offer protection against the interests that Milieudefensie et al. is protecting (the relativity requirement in a classical sense),[884] but Shell is claiming a special version of the relativity, i.e. the defence that Milieudefensie et al. is '*in pari delicto*' and has therefore allegedly withdrawn from the protection of the standard.

1149. The *in pari delicto* defence is based on the Latin saying *'in pari delicto potior est condicio defendentis'*, which can be translated as *'where the parties are equally at fault, the defendant holds the stronger position'*.[885] A successful claim of the lack of relativity due to being *in pari delicto* thus supposedly requires an equal violation of the standard.[886] The injured party must not only have violated the same standard, but also to the same degree.[887,888] In view of the enormous difference in control and influence on the climate problem between Shell and individual consumers/citizens, this principle does not apply in any way (as is also made clear in the last paragraphs of the response to Ground of Appeal V).[889] Nor has Shell asserted that on the part of Milieudefensie et al. there has been a violation of the same legal standard in the same degree as that of Shell.[890] Shell's mere assertion that end users are themselves responsible for their own CO2 emissions is not sufficient for this.

1150. Moreover, there is no place in these proceedings for such a defence. In this collective action Milieudefensie et al. is acting on behalf of the public interest of current and future generations of residents of the Netherlands in combating dangerous climate change by reducing CO2 emissions. When answering the question whether Shell, through its corporate policy, is acting

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[884] This is what Milieudefensie et al. established in Notes on oral arguments 6, para. 100. Shell has not disputed this.

[885] Asser/Sieburgh 6-IV 2019/88.

[886] See, inter alia: T.F.E. Tjong Tjin Tai, Vuile handen en relativiteit, Bb 2007, pp. 71-74 and D.F.H. Stein, 'Relativiteit, eigen schuld en de collectieve actie', MvV 2016, no. 10, para. 3.2, in particular the references in footnote 32: "*Cf. Lindenbergh 2009, p. 577 and Haazen 2009, pp. 827-836. (...)".*

[887] See, e.g., I. Haazen, 'Schade is een niet-rechtmatig belang', *WPNR* 2009/6816, p. 831, note 43: *"It can be deduced from various sources that in order to be able to speak of in pari delicto, the parties must not only have violated the same standard, but that also the degree in which the parties violated that standard, must be of corresponding size."* In the same sense: Van der Kooij, 'Relativiteit, causaliteit en toerekening van schade (R&P no. CA21)' 2019/14.2, no. 542.

[888] See also A.L.M. Keirse & B.M. Paijmans , 'In pari delicto; als de pot de ketel verwijt' MvV 2017, vl. 7/8, p. 209: "*where the defendant's duty of care weighs more heavily than that of the injured party; in that case the parties are not acting equally careless*."

[889] See also Milieudefensie et al.'s Notes on oral arguments 6, paras. 99 - 105.

[890] Shell's comparison with the Maas v. Willems case in para. 9.2.21 Appeal also fails. In that case Maas was held liable for violation of a statutory regulation, while claimant and competitor Willems did not comply with that same statutory regulation, that applied in the same manner for both parties.

contrary to the societal duty of care to which it is subject, the court can only abstract from individual circumstances on the part of the residents of the Netherlands. This is precisely the intention of a collective action in the public interest (see also Milieudefensie et al.'s defence to Ground of Appeal VII below).[891] As in these proceedings we cannot review the actions of the individual residents of the Netherlands, there is thus no room for an 'in pari delicto' defence.

1151. This does not mean that the District Court has ignored the relativity requirement, as Shell asserts in para. 9.2.22 Appeal. On the basis of the Judgement it is evident that the District Court factored in the judgement on relativity, as usual, in the assessment.[892] This follows explicitly from para. 4.4.3 of the Judgement, where the District Court clarifies that, where reference is made to 'the unwritten standard of care', for the sake of brevity this refers to what can be expected of Shell according to this standard with regard to the residents of the Netherlands whose interests Milieudefensie et al. seek to protect in the collective actions.[893] The District Court thus definitely had the right framework in mind and rightly assessed relativity as part of the unlawfulness opinion, without making it subject to a separate review.

1152. In view of the foregoing, Shell's ground of appeal is unfounded.

10.10 Response to Ground of Appeal VII: Milieudefensie et al.'s claims are admissible

1153. Shell's Ground of Appeal VII complains about the opinion of the District Court in para. 4.2.4. In said consideration it was decided that the interest of residents of the Netherlands that the collective action of Milieudefensie et al. seeks to protect is sufficiently similar and lends itself for collective action.[894] The other requirements of Article 3:305a DCC (old) are rightly not a topic of discussion.

1154. Shell also asserts that the claim exceeds the scope of the law relating to collective legal action, as the matter concerns a political issue and this Court of Appeal should therefore not make any statements whatsoever regarding the issue.[895] Milieudefensie et al. discussed this point in detail in Chapter 3 Defence on Appeal and will only briefly discuss it below.

1155. From what Milieudefensie et al. has already argued at first instance and from what is set out below, it is clear that these claims are most definitely appropriate for discussion within the law relating to collective legal action.

The interests that are being represented are sufficiently equivalent

1156. In response to this Ground of Appeal VII of Shell and in addition to what Milieudefensie et al. has already presented at first instance regarding the equivalency of the interests it

[891] Compare HR 27 November 2015, ECLI:NL:HR:2015:3399, para. 4.4. See also paras. 33 and 37 of the Court of Appeal, ECLI:NL:GHDHA:2014:996. In that case the Netherlands Supreme Court held in the context of a class action that any special circumstances on the part of individual investors could only be relevant with regard to questions concerning, e.g., damage (scope), causal relationship and own fault. Another opinion would unacceptably limit application of Art. 3:305a DCC, according to the Netherlands Supreme Court.

[892] See, e.g., A.J. Verheij, *Onrechtmatige daad* (Mon. Pr. no. 4) 2019/12.1, T. Hartlief e.a., *Verbintenissen uit de wet en Schadevergoeding*, Deventer: Wolters Kluwer 2018, no. 64. Cf. also C.C. van Dam, *Aansprakelijkheidsrecht*, The Hague: BJU 2020, no. 233-1.

[893] See also para. 4.5.4 Judgement.

[894] Paras. 10.8.4 - 10.8.7 Appeal.

[895] Para. 10.8.8 Appeal.

represents,[896] it is pointed out that in its ground of appeal Shell only asserts that the requisite equivalency is lacking because among Dutch residents there is supposedly not sufficient consensus as to the speed at which and the way in which the energy transition should take place and a part of the Dutch residents are of the opinion that the matters claimed will not be for the benefit of their interests (paras. 10.8.5 – 10.8.6 Appeal).

1157. It is wry that Shell uses the legitimate concerns of citizens about the increased energy prices as an argument to cast doubt on the public interest of climate action. The suggestion that phasing out emissions more slowly could be in the interests of residents of the Netherlands is misplaced. In addition, Shell fails to note that the cause of the increased energy prices is in fact to a significant extent rooted in the degree of dependency on and price volatility of fossil fuels, and that this degree of dependency will become (and would have been) less if progress is (or would have been) made with the energy transition.

1158. As a result of the current (unnecessary) degree of dependence, Shell is now in fact making the highest profits in its history. Shell is not using those profits to become more sustainable and reduce the degree of dependency on fossil fuels, but to pay out dividend to shareholders and to purchase its own shares to raise its share price.[897] Shell then seizes upon the energy crisis to further emphasise the (alleged) importance of new oil and gas investments and to consequently keep society highly dependent on oil and gas.

1159. By invoking the concerns of consumers regarding the affordability of energy, Shell is also creating an artificial contradiction: the fact that Dutch residents are concerned about high fuel prices, their income or assets, does not mean to say that they do not want (and need) protection against dangerous climate change and against societal careless action of one of the world's most polluting companies.

1160. Aside from the fact that Shell's position in relation to the review of Milieudefensie et al.'s standing is misplaced, it is, above all, legally incorrect.

1161. With its argument Shell is wrongly presuming that the equivalency requirement (also) entails that (a considerable part of) Dutch residents must support the collective action. Milieudefensie et al. does find it strange that Shell is now presenting this defence, as at first instance it was explicitly acknowledged by Shell that Article 3:305a DCC (old) does not have such a representation requirement.[898]

1162. If this were the case, this would seriously harm the effectiveness of a collective action. This was established by Advocate-General Huydecoper in his opinion for the judgement in Baas in eigen huis v. Plazacasa:

"10. Interests of the kind for which collective action was developed in case law, and was then regulated in the law, are often sufficiently of such nature that there are quite diverse views on the matter in society. It seems to me that it is common knowledge that there are a (very) wide range of views regarding issues such as environmental protection, energy policy, development of private traffic and public transport, protection of privacy, etc. A legal person who wishes to act on behalf of interests threatened with breach of law in those areas, will also virtually always

[896] Summons, Chapter III.2 The claims against Shell fall within the scope of Art. 3:305a DCC and Milieudefensie et al.'s Notes on oral arguments 2.
[897] **Exhibit MD-475**, RTL Nieuws 28 July 2022, Duizelingwekkende winst voor Shell: 18 miljard dollar.
[898] Shell's Statement of Defence of 13 November 2019, paras. 351 - 356.

experience that while a part of the stakeholders will support its actions, a bigger or smaller group of stakeholders can be designated who reject this action (and often also a very large group that is indifferent, or has difficulty making a choice). If in such cases it could be assumed that, for that reason alone, there are no "similar interests", collective actions would be subject to such limitations that the effectiveness of this instrument would be seriously affected. If the proportions were such, a collective action could only be successfully applied to (legal) questions in matters in which the position that has been presented can count on broad social support (or: broad support in the relevant circle) – and as the examples just presented illustrate, in very many cases this cannot be relied upon in our diverse but also fragmented society."[899]

1163. In other words: even assuming Shell's position that a "significant part" of the residents of the Netherlands, whose interests are to be protected by this collective action, were not to agree with the objective of the claim, this does not mean that these interests are insufficiently equivalent within the meaning of Article 3:305a(1) DCC, as evidently also appears from the legislative history (emphasis added by counsel):

"In the case of more idealistic interests, it does not matter if not every member of society attaches the same amount of value to these interests. It may even be that the interests which they wish to protect during the proceedings clash with the ideas and opinions of other groups in society. This will not in itself stand in the way of a collective action."[900]

1164. The foregoing also makes it clear that a representative organisation like Milieudefensie et al. is explicitly and democratically given legitimacy by the legislature to, via Article 3:305a DCC, present relevant questions of law to the courts in the public interest.

1165. Similar interests as referred to in Article 3:305a(1) DCC are at issue if the relevant interests lend themselves for being joined, so that efficient and effective legal protection can be promoted on behalf of the stakeholders. It is not required in this respect that the interests at issue need be precisely the same with regard to content or scope.[901]

1166. It was furthermore explained at first instance that the fact that Dutch residents cannot withdraw from the collective action is also not a ground to claim a lack of standing. On the contrary: this is precisely what the legislature had in mind with a public interest action, the essence of which is precisely that it concerns interests of such a general character that they form a facet of virtually everyone's existence.[902] This is also a crucial distinction with regard to class action, with which divisable (i.e.: individualisable) interests are collectively served, and the public interest action, which serves indivisable interests.[903]

1167. These indivisable interests by definition cannot be individualised because they belong to a (very) large group of persons, which group is diverse and undefined. In public interest actions it is

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[899] Opinion of A-G Huydecoper of 26 February 2010, ECLI:NL:PHR:2010:BK5756, para. 10. See also para. 17.

[900] Parliamentary Documents II, 1991/92, 22 486, no. 3, p. 22. On the same page it is furthermore pointed out: "*The matter need not concern the interests of a clearly demarcated group of others. It may also concern the interests of an undefinable, very large group of people.*" See further HR 9 April 2010, ECLI:NL:HR:2010:BK4549, NJ 2010/388 with notes by E.A. Alkema, the opinion of acting P-G Langemeijer and A-G Wissink 13 September 2019 for the Urgenda case, paras. 2.4 – 2.5 with reference to jurisprudence and legislative history and Stolker, Tekst & Commentaar BW, comments on Art. 3:305a, under 2(b), current up to and including 4 June 2022.

[901] Opinion A-G De Bock for ECLI:NL:HR:2022:165, 17 September 2021, ECLI:NL:PHR:2021:834, para. 5.14, with reference to case law of the Netherlands Supreme Court and literature.

[902] Jongbloed, GS Vermogensrecht, art. 3:305a BW, note 8.1 (current up to and including 19 March 2022).

[903] Milieudefensie et al.'s Notes on oral arguments 2, paras. 20 – 29.

therefore only possible to abstract from the individual circumstances of the persons whose interests are being protected.

1168. The claims of Milieudefensie et al. by definition serve the public interest, being the interest that people remain safeguarded against an atmosphere with an excessive CO2 concentration, so that the most disastrous consequences of climate change can yet be prevented. It is evident that this is a universal and indivisible public interest.[904] Nor is it up for debate in these proceedings that climate change caused by CO2 emissions has serious and irreversible consequences, with potentially very serious and irreversible risks for the residents of the Netherlands.[905]

1169. In this case it is thus evident that the risks that dangerous climate change entails are so comprehensive and disastrous, both at global and at national level, that the danger for the individual coincides with the danger for the collective. This has already been acknowledged worldwide in various climate cases, such as in the Urgenda case.[906] The Belgian climate case also serves as a good example in this context: in that case 58,000 private co-claimants were deemed to have standing in addition to the association Vzw Klimaatzaak and a violation of the law was established with regard to their rights, without their having to substantiate their individual circumstances.[907]

1170. This action can therefore be clearly distinguished from the judgement of the District Court of The Hague cited by Shell in the case of Milieudefensie and Stichting Adem against the State of the Netherlands. This specific case related to air pollution due to nitrogen dioxide and particulate matter. It was of crucial importance whether with regard to individual persons local limit values had or had not been exceeded. In relation to the CO2 problem there is no local situation in which a local limit value should be reviewed per individual claimant. In the climate problem, the danger threshold is a universal threshold.

1171. In view of the foregoing, Shell's ground of appeal cannot succeed.

1172. Milieudefensie et al. points out that from the perspective of fairness and in view of the global character of the climate problem, it could have been concluded along the same line that Milieudefensie et al. could also act on behalf of the public interest of current and future generations of other countries than the Netherlands. The universal danger threshold as laid down in the Paris Agreement precisely expresses that dangerous climate change will have serious consequences for all people on earth and it is therefore by definition in the interest of the global society to defend against that danger threshold by means of the necessary emissions reductions. It is correct that there are differences in the time and way in which the world's population will be affected at one place or another by climate change as a result of CO2 emissions, but that does not in itself detract from the fact that climate change potentially entails very serious and irreversible dangers for every person in the world. It is a fact of common knowledge that people living in countries in the global South and island states as well as people in (other) countries with relatively low incomes are (already) being affected much harder due

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[904] See also Milieudefensie et al.'s Notes on oral arguments 2, paras. 30 – 31.

[905] Para. 4.2.5 Appeal and para. 4.4.6 Judgement.

[906] HR 20 December 2019, ECLI:NL: HR:2019:2006, para. 5.9.2. *"Precisely with regard to environmental matters such as this one, legal protection by means of such a bundling of interests is particularly efficient and effective*." See also the words of the Advocate-General and the Procurator-General in their Opinion for the Urgenda case, para. 3.13: *"That the dangers of climate change cannot be translated into specific risks for individual persons, may be deemed a fact of common knowledge."*

[907] Brussels District Court, 17 June 2021, case 2015/4585/A. See also Chapter 4.5.3.3 Defence on Appeal.

to the consequences of climate change. Due to the urgency of the case Milieudefensie et al. does not, however, wish to file a cross-appeal against section 5.2 of the operative part of the Judgement, but Milieudefensie et al. is of the opinion that this aspect cannot be left entirely undiscussed.

10.11 Response to Ground of Appeal VIII: Milieudefensie et al.'s claims perfectly fall within the task and instruction of the court

1173. In Ground of Appeal VIII Shell repeats its assertion that the Court of Appeal "*is simply not equipped*" to resolve the "*large societal, technical and political issues*" in relation to this case. The inaccuracy of Shell's argument that the Court of Appeal may not and/or cannot determine this case has been extensively addressed throughout this Defence on Appeal. This occurred, inter alia, in Chapter 1, Chapter 3, as well as Chapter 10.1 Defence on Appeal.

10.12 Response to Ground of Appeal IX: Shell has not presented a ground of appeal against the facts established by the District Court

1174. In Ground of Appeal IX, Shell objects to the facts established by the District Court in para. 2 (pages 3 through 21 of the Judgement), but then fails to present any specific objections regarding said facts (see paras. 10.10.1 and 10.10.2 Appeal). These facts are thus established.

1175. Shell primarily asserts that facts and circumstances arising after the conclusion of the debate at first instance (13 January 2021) were not established and included in the considerations. This is correct. This Court of Appeal naturally can and will supplement the established facts with relevant new facts, but this does not detract from the accuracy of the facts established by the District Court.

> Indeed, the District Court established in paras. 2.3.4 and 4.4.28 that in 2018 the concentration of greenhouse gases in the atmosphere was 401 ppm. This is an apparent mistake. In 2018 the mean concentration was 407.6 ppm.[908] In 2021 the mean concentration was 414.7 ppm.[909] Milieudefensie et al. asks the Court of Appeal to correct this in the additional establishing of facts.

1176. Shell furthermore complains that the established facts and circumstances up to 13 January 2021 are incomplete and consequently are wrongly too one-sided with regard to the strategy, goals and activities of Shell and the Shell Group. This complaint is not explained and also fails to recognise that the District Court was free to mention only those facts that it felt relevant to its decision.

1177. For the rest Shell did not make it clear which established facts it objects to, even though it can be expected to do so. The general remark: "*Consequently the facts which Shell has presented in this Statement of Appeal which the District Court did not, or not clearly, establish or consider, or which are contrary to what the District Court has established as fact, must be deemed a ground of appeal against said establishing of facts*"[910] is insufficient in this respect. It is not possible to present a defence to this objection as it is incomprehensible and thus insufficiently clear.

1178. In paras. 10.10.3 and 10.10.4 Appeal, Shell mentions specific legal considerations from the Judgement which, in view of Shell's modified policy, cannot remain in effect. In Chapter 6

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[908] https://gml.noaa.gov/ccgg/trends/global.html.

[909] Ibid.

[910] Para. 10.10.2 Appeal.

Defence on Appeal, Milieudefensie et al. explained, however, that Shell's modified policy also does not align with the reduction obligation assumed by the District Court, that Shell applies the necessary reservations and disclaimers with regard to this modified policy and that Shell still bases its policy on developments in society and in that respect allots a leadership role to others, in particular to the individual consumer.

1179. Shell's Ground of Appeal IX therefore fails.

10.13 Response to Ground of Appeal X: Shell's catch-all ground of appeal has no independent significance

1180. Shell's Ground of Appeal X must be deemed an insufficiently itemised catch-all ground of appeal that adds nothing to the scope of the appeal and can (and must) therefore be set aside as incomprehensible. On the basis of this ground of appeal it is not clear to Milieudefensie et al. what point of dispute Shell thinks it is presenting in addition to the objections which were itemised by Shell.[911] Ground of Appeal X therefore fails too.

10.14 Other: Shell's request that the judgement not be declared immediately enforceable

1181. In para. 11.1.4 Appeal, Shell lastly – on the basis of the remark that this case deals with fundamental and new legal questions – asserts that a judgement of the Court of Appeal that (partly) upholds the Judgement should not be declared immediately enforceable. Shell has not explained why this could be a reason for dismissal of a request for a declaration of immediate enforceability.

1182. More importantly: Shell has not presented a ground of appeal against section 5.8 of the operative part of the Judgement and the District Court's consideration forming the basis thereof, that Milieudefensie et al.'s interest in immediate performance by Shell carries greater weight than any interest Shell may have in preserving the existing situation until a final and irrevocable decision has been made on Milieudefensie et al.'s claims.[912] The discussion regarding the declaration that the Judgement is immediately enforceable thus does not form part of the legal battle in appeal.

11. Offer to present evidence

1183. Milieudefensie et al. presents the evidence for its assertions by means of the exhibits which have been submitted into the proceedings with this Statement of Defence on Appeal, as well as by means of the exhibits already submitted at first instance. A total summary of the exhibits has been attached as an appendix to the Defence on Appeal.

1184. Milieudefensie et al. believes it has already sufficiently substantiated and proven the facts it has presented by means of all (evidentiary) documents it has submitted into the proceedings. Insofar as Milieudefensie et al. is bound to do so on the basis of Article 150 Dutch Code of Civil Procedure, it again explicitly offers, the same as it offered to present evidence at first instance, to provide further evidence for its assertions relating to matters disputed by Shell by submitting additional documents, including submitting into the proceedings additional (scientific)

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[911] See Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2009/118 en T&C Rv, commentaar op art. 347. See also HR 5 December 2003, ECLI:NL:HR:2003:AJ3242, JBPr 2004/18, with notes by M.A.J.G. Janssen (Clickly v. Spark), para. 3.4.4 and HR 1 February 2019, ECLI:NL:HR:2019:137, para. 3.3.2.

[912] See para. 4.5.7 Judgement.

evidence, including reports to be drawn up, concerning (but not limited to):

(i) the direct and indirect consequences of climate change in the Netherlands, including the Wadden region, partly in relation to the similarity of the interests which Milieudefensie et al. seeks to protect;
(ii) the accuracy, suitability, feasibility and lack of onerousness of the claimed order, partly in the light of (a) the specific characteristics of Shell and the Shell Group, (b) the role in and influence of Shell on the energy transition in general and the oil and gas market in particular and (c) the role of oil and gas in the energy transition;
(iii) the (direct and indirect) effectiveness of the claimed order in relation to the climate task and the energy transition;

1185. With regard to the effectiveness of the claimed order and the direct and indirect consequences which will arise as a result thereof on the climate task and the energy transition, Milieudefensie et al. submitted statements of two experts at first instance. This first of all relates to two statements of Peter Erickson (Senior Scientist, Stockholm Environment Institute and co-author of the Production Gap Report of UNEP et al.), submitted as Exhibits MD-337 and MD-339. In addition there is a statement from Prof. Dr. Ir. J. Rotmans (Professor in Transitions & Sustainability at Erasmus University), submitted as Exhibit MD-338. Shell did not substantively respond in appeal to the content of Exhibits MD-338 and MD-339, so that this Court of Appeal can assume the accuracy of these expert statements.

1186. Nevertheless, with regard to the topics under (ii) and (iii) above, Milieudefensie et al. submitted two more additional expert statements with this Defence on Appeal. These are first and foremost an expert statement of Erickson et al., drawn up by Peter Erickson (mentioned above), Dr Fergus Green (Lecturer Political Theory & Public Policy, University College London), Dr Cathrine Hagem (Head of Research, Statistics Norway) and Dr Steve Pye (Associate Professor in energy systems and Deputy Director UCL Energy Institute, University College London), submitted as Exhibit MD-469. In addition, Milieudefensie et al. submitted an expert statement of Prof. Dr. Ir. Jan Rotmans (mentioned above) and Prof. Dr. Derk Loorbach (director of the Dutch Research Institute for Transitions (DRIFT) and Professor of Social-Economic Transitions at Erasmus University), submitted as Exhibit MD-471.

1187. Milieudefensie et al. offers, insofar as it were to be subject to any additional burden of proof, to examine the experts who drew up the aforementioned expert reports, as expert witnesses with regard to legal facts relevant for this case, specifically (but not only) the topics referred to under 2(i through iii) above, as well as examining as expert witnesses one or more of the authors of the other (institutional) reports and scientific articles that Milieudefensie et al. has submitted.

1188. Milieudefensie et al. offers and reserves the right, should Shell dispute the arguments and position of Milieudefensie et al., to present additional evidence, by means of submitting additional evidence into the proceedings, including reports to be drawn up, or the examining of expert witnesses (Articles 19 and 22 Dutch Code of Civil Procedure).

12. Conclusion

In view of everything presented by Milieudefensie et al. in this Defence on Appeal, all grounds of appeal against the Judgement presented by Shell must fail.

Milieudefensie et al. therefore asks the Court of Appeal, with regard to the judgement of the District Court of The Hague, passed on 26 May 2021 in the case with case/filing number C/09/571932 / HA ZA 19-379, by an immediately enforceable judgement:

a) to affirm the judgement of the District Court, if necessary with supplementation and/or improvement of grounds, and to thereby pay particular attention to the requests for supplementation and/or improvement of grounds that Milieudefensie et al. made in Chapters 6.4.8, 7.4 and 10.4;

b) to order Shell to pay the costs of both instances, as well as the usual costs arising after judgement, to be increased by the statutory interest as referred to in Article 6:119 Dutch Civil Code as of fourteen days after the day when the judgement is passed, or served.

Counsel