PAULUSSEN ADVOCATEN

Unofficial translation

Court of Appeal of The Hague
Case number: 200.302.332
Session date: 4 April 2024

ORAL ARGUMENTS OF MILIEUDEFENSIE ET AL.
SHELL'S REDUCTION OBLIGATION - PART 1

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, original claimants,

Collectively called: "**Milieudefensie et al./Friends of the Earth Netherlands et al.**" (hereinafter: Milieudefensie et al.)

Legal counsel:
mr. R.H.J. Cox, *mr.* M.J. Reij, *mr.* A.J.M. van Diem

versus:

Shell plc
having its registered office in London, United Kingdom

Appellant, original defendant

Legal counsel:
mr. D.F. Lunsingh Scheurleer, *mr.* T. Drenth

and:

* Vereniging Jongeren Milieu Actief, the youth organisation of Vereniging Milieudefensie, was dissolved as of 1 September 2022. Its activities have continued within Milieudefensie.

Stichting Milieu en Mens
having its registered office in Zwolle, the Netherlands

Joined party on the part of Shell plc

Legal counsel:
mr. Dr D.J.B. Bosscher

Your Honours,

The '*bonus pater familias*' standard

1. The societal standard of care, which is found by applying the doctrine of hazardous negligence, is also called the '*bonus pater familias*' standard. In this part of the oral arguments, I would like to discuss the principle of the *bonus pater familias*. By '*bonus pater familias*', I mean the person or legal entity who participates in society in a responsible manner and who performs his societal duty of care by not creating an unnecessary danger for others in society.

2. A legal entity like Shell is obliged to act as a *bonus pater familias*, just as may be required for any natural person. Shell is equally prohibited from acting in an unlawful manner causing hazardous negligence, in the same way as any other participant in society.

3. That Shell is acting in a manner causing hazardous negligence by means of its current group policy, has been extensively covered, both at first instance and in appeal. Shell is acting in a manner causing hazardous negligence towards the broad societal interests that Milieudefensie et al. seeks to represent.

4. An important reason for this hazardous negligence is that Shell's group policy is geared to maintaining and expanding the production and sale of fossil fuels. The consequence and the problem of this group policy is that the related extent of CO_2 emissions remains far too large. This is problematic because the scope of emissions connected with Shell is equal to approx. 2.5% of total global emissions.[1] This means that a $1/40^{th}$ share of all CO_2 emissions in the world can be traced back to Shell's activities and to products that Shell sells.

5. It has already been said, but it is worth repeating, that the volume of emissions connected with Shell is so large, that there are only four countries in the world that have greater CO_2 emissions than Shell. These are the nation state superpowers the United States, China, Russia and India.[2] Shell's climate impact is therefore of a very exceptional order of magnitude. Almost no country or company in the world has control over a larger quantity of CO_2 emissions than Shell.

6. In view of the enormous extent of emissions connected with Shell and in view of the fact that Shell does not intend to reduce said extent of emissions to a sufficient degree, Milieudefensie et al. is seeking legal protection from the impact of Shell's group policy. This group policy cannot be

[1] Statement of Defence on Appeal, para. 627, with reference to footnotes 392 and 394.
[2] Ibid

reconciled with the global climate goal of preventing dangerous climate change of more than 1.5°C warming.

7. The prevention of such dangerous climate change is necessary to protect humankind, the human environment and nature. If this protection is to be provided, global carbon emissions will have to decline drastically in the period to 2030. This is an enormous task to which Shell too will have to make a contribution, acting as a *bonus pater familias*. After all, Shell has a far from negligible share in causing the climate problem.

8. There is universal consensus about the danger of global warming that exceeds 1.5°C. There is also universal consensus about the fact that the 1.5°C target can only be achieved if global carbon emissions are halved by 2030 and reach net zero in 2050.[3] As stated, an enormous task. A task that can only be performed if all important state and non-state actors make their most ambitious contribution to achieving this goal. Shell is without doubt one of the most important non-state actors in the world from whom an ambitious contribution is most necessary.

9. The emission reduction task that the world is facing is, true enough, huge, but it is a task that can be achieved. It is, moreover, a task that the world cannot allow to go unfulfilled. Even if the halving of emissions is achieved in 2030, and even if the emissions globally reach net zero in 2050, it is by no means guaranteed that the warming will also actually stabilise at 1.5°C. It does give a 50% chance this will happen.

10. At the same time, there is thus already a 50% chance that even if we perform the global reduction task, the warming will stabilise this century at a temperature that is above 1.5°C. Indeed, there is a real chance that the warming will only stabilise at a temperature above 2°C.[4] If that happens, this will have very substantial consequences for humanity and the ecosystems on which humans depend.

11. The reason why in 2024 we have ended up in the situation where achieving the task by 2030 and 2050 can nevertheless lead to a greater warming than 2°C, is that there has been too much dawdling since the UN Climate Convention was made in 1992. For over three decades action has been too slow, so that the climate problem has become much greater than was the case in 1992.

12. It is indisputable that Shell has had a share in delaying climate action.[5] For decades, Shell consequently made the collective interests of humanity subordinate to its own profit and that of its management and shareholders.

13. Well before the UN Climate Convention of 1992, Shell was already well aware of the nature and seriousness of the dangers of climate change and also knew at that time that the only way to avoid those dangers meant a reduction in greenhouse gas emissions.[6] Shell was already aware at that time that fossil fuels would have to be phased out and that society would have to switch to sustainable energy sources.[7] Shell also realised during that period that as a company it too would have to move away from fossil fuels and that it would have to become a smaller fossil fuel

[3] Statement of Defence on Appeal, para. 512.
[4] See also Judgment under 4.4.29.
[5] Milieudefensie et al.'s Opening Argument of 2 April 2024, part 2.
[6] Summons, paras. 530-574, with reference to exhibits.
[7] Summons, paras. 564-570, with reference to exhibits.

company.[8] Shell also realised at that time that it would have to help its customers become more sustainable by developing alternative energy sources.[9] Shell even conceived at that time that it would run liability risks in the future if it did not proactively contribute to the prevention of climate danger and that it could face legal action in this respect in the future.[10] All of this has been demonstrated by Milieudefensie et al. in these proceedings and is not disputed by Shell.

14. Shell was therefore not only aware decades ago of the seriousness of climate danger, but also knew full well that there was an alternative course of action that it could follow to avoid this danger, i.e. in any event become a smaller oil and gas company and in addition possibly follow a strategy to help its customers switch to alternative energy sources. However, in the past decade Shell did not become a smaller oil and gas company, but became an even bigger oil and gas company. Shell's current and intended concern policy remains geared to maintaining said position.

15. Shell thus had an alternative course of action, but chose not to take it. Instead it spent several decades continuing to expanded the demand for fossil fuels. In addition, Shell actively counteracted the implementation of solutions to the climate danger over the past decades through, inter alia, political lobbying.

16. Milieudefensie et al. is not seeking an order regarding Shell's actions in the past decades. The court has been asked to draw a clear line and to tell Shell: Up to here and no further.

17. It was highly necessary that words of similar purport were pronounced in court against Shell, as the District Court of The Hague did in 2021 in its Judgment. It is also highly necessary that the order that the District Court issued against Shell remains in effect. Every year that Shell does not assist in cleaning up the mess that it has helped to cause in the past decades, the chance increases that the world will be facing a warming of more than 2°C, or even move in the direction of a 2.5°C to 3°C warming, which is the course the world is now heading toward.[11]

18. That Shell's behaviour is not the behaviour of a *bonus pater familias*, has been explained in great detail in these proceedings. All facts and circumstances presented in these proceedings indicate that all factors set out in the *Kelderluik* case have been satisfied and that the conclusion can be drawn that Shell has committed an unlawful act, or is at risk of committing an unlawful act.

The Judgment is not too onerous for Shell

19. Nor has it appeared that it would be too onerous for Shell to comply with the order imposed by the District Court of achieving a 45% reduction in 2030. Nor has Shell submitted any evidence which shows that it would not be able to handle the enforcement of the Judgment. In the context of the assertion that the order is onerous, Shell only pointed out that the Judgment is not effective, and the order would consequently be disproportional. I will return to the effectiveness of the Judgment comprehensively at the end of the day, when this point will be refuted. For the remainder, Shell – just as at first instance[12] - did not present a concrete argument as to why its competitive position possibly being affected would be too onerous for it. As the District Court has

[8] Ibid
[9] Summons, paras. 565-568, with reference to Exhibit MD-187, pp. 8 and 9.
[10] Summons, para. 566, with reference to Exhibit MD-188, p. 3.
[11] Milieudefensie et al.'s Written arguments, section 2.3.
[12] Judgment, para. 4.4.53.

already established, this assertion fails to note that other companies will also have to make a contribution.[13] In supplementation of what has already been said in this respect at first instance and in the Statement of Defence on Appeal, I will now show that the order is not onerous or excessively onerous.

20. Milieudefensie et al. already indicated at first instance that Shell can still be a profitable company if as an oil and gas company in 2030 it is only half its current size.[14]

21. In that respect it was indicated at first instance that Shell is one of the most dominant oil and gas companies in the world and that Shell will still be so even if it is only half as big in 2030.[15]

22. I will explain Shell's dominance once again according to the latest state of affairs, i.e. by looking at the revenue figures of the 12-month period starting in Q4 of 2022 and ending after Q3 of 2023. After all, all listed oil and gas companies reported on those quarterly figures.

23. Based on revenue realised in the last 12 months, the website companiesmarketcap.com kept a top 100 of the biggest listed oil and gas companies. This shows the following.[16]

24. Looking at the revenue over the aforementioned 12-month period, Shell has a revenue of 339 billion dollars.[17] This puts Shell at 5th place of the top 100 biggest oil and gas companies in the world over this period. First place is taken by the Saudi company Saudi Aramco. Saudi Aramco is followed by the two Chinese oil and gas companies, Sinopec and PetroChina. Exxon Mobil is in 4th place, one place higher than Shell, with a few billion more in revenue than Shell.

25. Things only get really interesting when looking at the oil and gas companies that come immediately behind Shell and that take places 6 to 15 on the world ranking list over the aforementioned 12-month period. I will review them:[18]

    - On 6: the French TotalEnergies, that with regard to revenue is 33% smaller than Shell
    - On 7: the English BP, 33% smaller than Shell
    - On 8: the American Chevron, 40% smaller than Shell
    - On 9: the American Marathon Petroleum, 55% smaller than Shell
    - On 10: the American Valero Energy, 55% smaller than Shell
    - On 11: the American Phillips 66, 57% smaller than Shell
    - On 12: the Norwegian Equinor, 68% smaller than Shell
    - On 13: the Italian Eni, 68% smaller than Shell
    - On 14: the Brazilian Petrobas, 70% smaller than Shell
    - On 15: the Japanese Eneos, 72% smaller than Shell.

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[13] Ibid

[14] Milieudefensie et al.'s Notes on Oral Arguments 8, paras. 73-107, Milieudefensie et al.'s Summons, paras. 619-633 and Statement of Defence on Appeal, paras. 257-265.

[15] Notes on Oral Arguments 8, paras. 77-82, with reference to Exhibit MD-281.

[16] https://companiesmarketcap.com/oil-gas/largest-oil-and-gas-companies-by-revenue/ last accessed on 4 March 2024. At that time, all companies had only reported up to and including Q3 2023. An information icon available behind each company's turnover; clicking on the icon shows on what last four quarters the revenue is based.

[17] https://companiesmarketcap.com/oil-gas/largest-oil-and-gas-companies-by-revenue/ last accessed on 4 March 2024.

[18] Ibid.

26. Other well-known names are, for instance, at 19 the Spanish Repsol, 77% smaller than Shell; at 25, the American ConocoPhillips, 84% smaller than Shell; and at 44, the American Occidental Petroleum, 92% smaller than Shell.

27. So the 44th biggest oil and gas company in the world, Occidental Petroleum, has a revenue that is only 8% of Shell's revenue. Nevertheless, Occidental Petroleum, just like all other companies mentioned, is a listed company that provides returns for its shareholders.

28. What all of this shows is that even if Shell were 45% smaller today, the company would still be among the top 10 biggest oil and gas companies in the world. This explains why there is no evidence available that the implementation of the Judgment is too onerous for Shell. That is because it isn't.

29. It must be assumed that Shell should have no problem in implementing the Judgment. If Shell were unable to be a profitable company in 2030 as a top 10 oil and gas company in the world, this will not be the result of an imposed judicial order, but of poor policy and poor management.

30. All other top 100 listed oil and gas companies are profitable and are often only a fraction of Shell's size. Most oil and gas companies are dwarfs compared to the giant that is Shell. Shell will remain a top 10 giant oil and gas company, even if it has been reduced to half its current size in 2030.

31. For Shell an alternative course of action was and is therefore definitely available, an alternative course of action by means of which it can help avoid the danger of a hazardous warming of the earth. This course of action is not too onerous for Shell, while at the same time, as one of the biggest oil and gas companies in the world, it can make a positive contribution to climate action.

32. If such a not too onerous course of alternative action is available to Shell, the principle of the *bonus pater familias* entails that this alternative approach should be chosen. This is also crucial for the collective societal interest. The greatest danger that humankind has ever been confronted with desperately requires the emission reductions requested of Shell, while Shell's private commercial interest will not consequently be affected in an unreasonable or excessively unreasonable manner.

33. Shell can and will therefore still be a profitable company in 2030 if the Judgment is upheld by the Court of Appeal. But even if the onerousness of the climate measures to be taken by Shell is considerable, it is still justified to demand those measures of Shell. This is due to the seriousness and scope of the danger that is to be avoided. In any event, as previously stated, following implementation of the Judgment Shell can easily continue as a profitable listed company.

34. In the weighing of the collective interest and the commercial interest, the District Court's Judgment therefore definitely does not cross any boundaries. Indeed, the Judgment indicates in a good manner what can be demanded of a *bonus pater familias*, bearing in mind the facts and circumstances applicable to Shell. The consideration made by the District Court of the collective interest on the one part and Shell's private interest on the other is therefore correct and deserves to be affirmed.

The world can handle the Judgment

35. This brings me to a following point. In the same way that it has not been shown that Shell cannot handle the Judgment, it has not been shown that the world cannot handle the Judgment. Shell and M&M have not given any reasoning, let alone any convincing reasoning, that shows that the world will not make it if Shell is a smaller oil and gas company in 2030.

36. What both Shell and M&M are arguing, is that the court should not be allowed to apply the law in this case. This is based on the position that this case should not only consider the collective climate interest on the one part and Shell's commercial private interest on the other, but a consideration must also be made between the collective climate interest on the one part and other collective interests. Shell and M&M believe that in connection with the separation of powers, this consideration must be made by political representatives. To the degree the court does come into it, a weighing of those public interests should lead to another outcome. These arguments of Shell and M&M cannot succeed.

37. As far as Milieudefensie et al. is concerned, the defence of the separation of powers cannot succeed in any event. This has already been adequately explained in these proceedings.[19] Many reasons have been given for this, but it might be worthwhile to repeat one of them here. The fact is that all countries in the world, individually and collectively, long ago weighed the interests of the climate action that was to be taken on the one part and the protection of the other collective interests on the other.

38. The outcome of that weighing of interests is recorded in the Paris Agreement and the later COP decisions, in which the countries took account of the fact that tightening the temperature target is intended and necessary to promote the 17 Sustainable Development Goals, to eliminate poverty and hunger from the world and guarantee food security in the world.[20] States have thus already weighed all the major societal issues and the outcome of this was that the temperature target in the Paris Agreement was to be tightened. This one argument alone, of the many arguments presented by Milieudefensie et al., shows that the defence presented by Shell and M&M regarding the separation of powers cannot stand in the way of upholding the Judgment.

39. If the defence of the separation of powers does not succeed, the question then arises as to what role the other public interests that Shell and M&M refer to play when weighing the various interests to determine Shell's legal obligation.

40. With regard to Shell and M&M, outside of the separation of powers defence, there appears to be little scope for a claim based on the public interest to set aside Shell's legal obligation.

41. I shall give an example by way of illustration. It is evident that providing the 1 billion poorest people on earth with affordable modern energy is not one of Shell's corporate goals. Why should Shell then be allowed to suggest that the continuation of its current operations would be in the interest of the poorest of the world? There is nothing to indicate that the interests of the world's poorest will be served if Shell gets off scot-free and is no longer bound by the Judgment. Shell should at the least have presented sound reasoning to make it clear that the 1 billion poorest people in the world are dependent on Shell, and that the poorest will genuinely benefit to an important degree from the Judgment being set aside. However, Shell failed to make this clear, if

[19] See, inter alia, Statement Defence on Appeal, section 3. See also Opening Argument, part 1 of 2 April 2024.
[20] Notes on Oral Arguments 5 at first instance, section 1B (The alignment between UN Resolution 70/1 and the Paris Agreement).

only because Shell has taken the position that the Judgment will not have any consequence whatsoever in the world because others will simply take over the role that Shell previously played.

42. If according to Shell the Judgment does not have any consequence in the world, Shell naturally cannot then claim other societal interests will come under pressure due to the Judgment. After all, if there is no consequence, other interests cannot be affected.

43. In addition, obviously Shell did not present concrete points regarding that, how and in what degree other societal interests would come under pressure simply due to the Judgment. Shell does speak about the consequences of the energy transition in general, but not about the consequences of the Judgment as such. The only thing that it says about the Judgment, is that it is not effective. But the effectiveness of the Judgment is a different matter, that I will come back to later today. In short, it is not clear how on the basis of Shell's position, other collective interests could stand in the way of the Judgment being upheld.

44. M&M too fails to demonstrate how the interest of concerned energy users will be affected by the Judgment in a manner that is relevant under the law. M&M has not demonstrated that there is a right to affordable energy. Nor does such right exist, neither on the basis of the ECHR, nor on the basis of Dutch law.[21] M&M has also failed to demonstrate that an adequate standard of living is at risk due to the Judgment. Nor has it been demonstrated that other rights of Dutch citizens would be violated due to the Judgment. Let alone that it has been demonstrated that these rights must weigh more heavily than the human rights of the Dutch citizens that are threatened by dangerous climate change.

45. Even if rights of other persons are at risk, this does not mean that Shell does not have an obligation to reduce carbon emissions. In that case it will still have to be reviewed what degree of emission reduction can be demanded of Shell in order to find the right balance and weighing of interests between the various rights and interests at stake. As already stated, neither Shell nor M&M has shown that the world would not be able to handle the Judgment and that the Judgment would result in unacceptable consequences.

46. What is more, Milieudefensie et al. already explained in detail in its Statement of Defence after Joinder why the affordability of energy will in fact be served in the coming decades by the contribution that the Judgment makes to the sustainable energy transition. Assuming that M&M's supporters want affordable energy not only today, but in 10 and 20 years as well, it is not clear why decade-long interests of concerned Dutch energy users will be served by setting aside the Judgment.

47. Because of all the above, Milieudefensie et al. therefore cannot see why the assertions of Shell and M&M about other public interests could supposedly stand in the way of determining that Shell has a legal obligation and must perform that legal obligation.

48. The defence of Shell and M&M regarding other collective interests is in this case particularly a defence at the level of the separation of powers between the political powers and the judiciary.

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[21] See the collection Recht & Energie – *Loopt het recht achter de feiten aan?*, 2023, Chapter 3, *Energiearmoede, staatssteun en de energietransitie*, A.A. al Katib, T. Barkhuysen & Z. Bassi.

The reasons why this defence cannot succeed, as previously stated, has already been explained in detail in these proceedings.[22]

49. There is furthermore nothing in the assertions of both parties that indicate that the Judgment will have consequences that the global community will find unacceptable from a treaty perspective or otherwise. Nor has it been shown that the Judgment would give rise to challenges that the world cannot handle or that cannot be resolved. Lastly, it has not been shown that the world cannot handle an accelerated energy transition. This applies all the more because it is evident that the world – and in particular the richest countries in the world – can handle lower energy use, while retaining a good standard of living. However, the world cannot handle too many carbon emissions, as this leads to unacceptable and irreversible dangers and losses.

50. Any challenges in the energy transition can always be solved. Indeed, experience teaches that problems have to actually occur before solutions are sought. The bigger the problems, the greater the pressure and urgency to find solutions. Pressure leads to results; this is an element that the energy transition needs to achieve accelerated solutions.[23] Exceeding planetary limits and passing tipping points in the climate system are, on the other hand, irresolvable problems and will lead to significant human rights violations globally, including in the Netherlands. In other words: the world will not be able to handle dangerous climate change or it will struggle to do so, but will certainly be able to handle the Judgment, and will also be able to handle the energy transition as such.

51. The conclusion on the basis of what I have discussed up to now must therefore be the following according to Milieudefensie et al.: against the background of the seriousness and scope of the climate problem and the need to prevent dangerous climate change, it can be determined that the Judgment is not too onerous for Shell and does not constitute an unreasonable breach of its private commercial interests. This determination is sufficient to establish liability on the part of Shell, as all other factors of the '*Kelderluik*' case have been satisfied. It has furthermore not been demonstrated that other collective interests stand in the way of upholding the Judgment. Nor has it been shown that the world cannot handle the Judgment.

52. I will once again add to this conclusion the statement that the Judgment is in fact in line with all significant societal tasks the global community is facing and is in line with the wish of all countries to serve the broad Sustainable Development Goals, by limiting the warming of the earth to 1.5°C.[24] The Judgment consequently not only serves the climate approach, but other important public interests as well.

53. This may well be the time to respond to Shell's assertion that oil and gas provides for such an important societal need, that for that reason, pursuant to Article 6:168 Dutch Civil Code and Article 3:296(2) Dutch Civil Code, no order can be imposed on Shell. This assertion is incorrect and this was discussed in the Statement of Defence on Appeal.[25] I would like to add the following remarks. Milieudefensie et al. does not dispute that the use of oil and gas serves a societal need, but that societal need is decreasing year on year and the world must and can keep functioning

[22] See, inter alia, Statement of Defence on Appeal, section 3. See also Opening Argument, part 1 of 2 April 2024.
[23] For some good examples, see: Exhibit MD-579I-1(pp. 1-2) and MD-569I-2(pp. 1-2). See also Statement of Defence on Appeal, section 8.5 with reference to Exhibit MD-471.
[24] See, inter alia, Opening Argument, part 1 of 2 April 2024.
[25] See also Statement of Defence on Appeal, paras. 1099 to 1102.

with ever less oil and gas because of the necessary and possible sustainable energy transition. Milieudefensie et al. is not asking Shell to eliminate itself tomorrow or that no one should be allowed to use oil and gas starting tomorrow. Milieudefensie et al. is asking Shell to join in an energy transition that is necessary and achievable. It is precisely that energy transition that the significant societal need is based on. That societal need is not based on an unlimited continuation of production and sale of oil and gas. On the contrary, that is precisely where the significant societal danger is hidden.

54. In conclusion of the argument that the world can handle the Judgment, it is worth pointing this out, so that the Dutch court may also impose an order with international effects, for the event that compliance with the order is required outside the Netherlands as well and therefore has consequences abroad. This appears, inter alia, from the '*Interlas*' case of the Dutch Supreme Court of 1989, that has also been discussed previously in these proceedings.[26]

55. The fact that the Judgment has cross-border effects in other countries therefore does not mean that no duty of care can be found and established for Shell.

The Judgment does not constitute regulations

56. Another reason why the fear of interfering with other public interests is unfounded, is that this case concerns a single judgment against a single party. In their documents, both Shell and M&M appear to argue as if the Judgment were a worldwide dictate that everyone in the world will have to comply with as of the day of the judgment. This is not true.

57. By means of the standard that has been established to apply to Shell, the court is merely determining a legal obligation to which Shell is subject. Only Shell is bound by the Judgment and the Judgment cannot be enforced against any other party than Shell. The court is not issuing a generally applicable rule by means of the Judgment, nor can the Judgment be enforced against other parties.

58. It is the case that the context-related standard that has been established for Shell is based on, inter alia, international guidelines and international climate protocols for companies, such as those of the UN initiative Race to Zero. These guidelines and protocols are in principle also relevant for other companies. Milieudefensie et al. refers other companies to these guidelines and protocols and shows what the starting point is, i.e. that companies, when setting their own reduction targets, must seek alignment with what is globally necessary in terms of emission reductions. This means cutting CO_2 emissions by almost half by 2030 and achieving net zero emissions in 2050. The guidelines and protocols furthermore call upon companies to do more than this global average if they have the possibility of doing so. This is based on the principle that whoever can contribute more to global emission reductions, must contribute more.

59. The same global guidelines and protocols naturally also play a role in finding the societal standard for Shell and therefore recur in the Judgment. Milieudefensie et al. also points this out to other companies. The guidelines and protocols show what action is required on the part of companies in order to act in conformity with the Paris Agreement. The guidelines and protocols show that any target that is less ambitious than an almost halving of emissions in 2030, requires a thorough

[26] Milieudefensie et al.'s Notes on Oral Arguments 3 of 1 December 2020, paras. 101 to 103.

explanation, as it is a deviation from what is used as the standard for acting in conformity with the Paris Agreement.

60. Deviating from the standard means that there is something that needs to be explained and that there must be good reasons for not delivering the proportional share in achieving the global ambition of a near halving of the greenhouse gas emissions in 2030. It is a form of 'comply or explain'.

61. The mere fact that these global guidelines and protocols also play a role in finding that Shell's duty of care, does not entail that the Judgment against Shell is all of a sudden no longer a context-related standard. It does not mean all of a sudden that the court has made laws or regulations. It is standard practice that when elaborating the societal duty of care, the court should look at things like international guidelines to find the applicable societal standard and to find and interpret the applicable societal standard.[27]

62. That this case concerns a context-related standard also ensues from the fact that there are 200 facts and circumstances in these proceedings, many of which apply specifically to Shell or apply to Shell to a greater degree, in view of its exceptionally dominant position in the global oil and gas market.[28]

63. The Judgment therefore does not encompass any laws or regulations of the court, but encompasses the context-related standard that applies to Shell in societal transactions.

64. The context-related character of the Judgment does not affect the fact that upholding the judgment against Shell will help provide direction to what may be expected of large companies in relation to the climate task. The court decision in this case will definitely have a ripple effect, just as many other court judgments have a ripple effect. Through this effect, the Judgment serves the further formation of the law. This is a positive development, as the Judgment deals with one of the most important legal issues of our times.

65. The Judgment has already put a law-forming process in motion at a national and international level. For example, the Judgment is being discussed at law faculties across the world. This means that upholding the Judgment - as would setting it aside - will certainly have an influence on the further development of law in the world, regarding the responsibilities of companies in the context of climate change. This development of laws will take place through, inter alia, legal science and the further national and international jurisprudence on this subject. Again, this ripple effect does not entail that the court is creating general regulations through its judgment in this case.

66. In this case, the facts and circumstances that specially apply to Shell are relevant. The specific facts and circumstances which are relevant for the standard applicable to Shell include, inter alia, the circumstance that it is not too onerous for Shell to satisfy a standard of a 45% reduction in 2030. But also that in this case it can be determined that the world can handle this judgment, or in any event that there is no evidence that this is not the case. In other cases, other specific facts and circumstances can be an issue and it is up to the courts that are adjudicating these other cases to present an opinion in this respect.

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[27] Statement of Defence on Appeal, section 3.4.
[28] Statement of Defence on Appeal, section 2 and Exhibit MD-340.

67. Several comparable cases will certainly be conducted at home and abroad, perhaps dozens, maybe even hundreds. This is not a bad thing, as the climate problems are a major issue. The number of lawsuits involved are nothing compared to the number of lawsuits that have been conducted across the world regarding the asbestos issue. In the United States alone more than 700,000 asbestos injured have litigated against more than 8,000 different companies, including both asbestos producers and companies from the asbestos-processing industry.[29]

68. That many thousands of companies have been brought to court and held liable for their role in the asbestos issue is quite understandable, in view of the injury caused to asbestos victims and their families. It is equally easy to understand that more and more lawsuits will be brought against fossil fuel companies because of the other kind of harm that they cause to humans and the environment. Just as happened with the asbestos issue, all these different climate cases will give an increasingly clear direction to the contribution that can be legally demanded of fossil fuel companies in terms of preventing dangerous climate change. One of the cases that is being looked at most worldwide is this case against Shell. The outcome of this case will definitely set the tone to a significant degree.

69. Now back to where we left off. I was discussing the fact that the Judgment contains a context-related standard for Shell and that it can be determined that Shell can handle a 45% reduction and that at the same time it can be determined that the world can also handle the consequences of the Judgment, or in any event there is nothing that demands that the contrary applies. Neither Shell's position nor the collective interests of others, to the extent they should be included in the consideration, therefore stand in the way of the Judgment being upheld.

Dutch liability law and the legal obligation to achieve a 45% reduction

70. This brings me to a brief review of the assertion of Shell and several of its experts that it would be nonsensical to oblige Shell to achieve a 45% reduction in 2030. The reason for this assertion of Shell and its experts is that model calculations show that the coal sector must have achieved far greater reductions in 2030 than 45%. Consequently the oil and gas sector would have to contribute less to very much less than a 45% reduction in 2030. The court should therefore not look at the global ambition of 45% in 2030, but at the sector averages for the oil and gas sector, that show much lower percentages for 2030.

71. We will come back to this defence of Shell in greater detail and show that adhering to the global average should indeed be the basis for Shell's actions. We will also demonstrate that even when applying only the sector perspective, the Judgment and the order encompassed therein can be affirmed.

72. We will even show that if the Judgment in May 2021 had not only been pronounced against Shell but against all oil and gas companies in the world, the world too would be able to handle that emission reduction task in the oil and gas sector. The International Energy Agency shows that a reduction the magnitude of 45% in a time period of 10 years can be achieved in the oil and gas sector, without this having to lead to unacceptable problems.

[29] https://assets.lloyds.com/assets/pdf-stranded-assets/1/pdf_stranded-assets.pdf, p. 15.

73. Not only can the world handle the Judgment. The world can also handle many, many similar judgments. As I mentioned, this will be made clear later on today.

74. What I am concerned with now is to establish that this more technical discussion on sectoral pathways or global pathways can in fact be disregarded, now that it can be determined that the world urgently needs rapid and far-reaching emission reductions, and that application of the hazardous negligence criteria shows that it is reasonably possible for Shell to effect a 45% reduction in 2030.

75. One could perhaps formulate things differently. After all, is the core of the doctrine of hazardous negligence not that the endangering party can be asked to do all that is reasonably possible to help prevent a serious and real danger? If in the '*Kelderluik*' case the endangering party were by coincidence to have been carrying a movable gate with him, he would not have been able to suffice with a less clear barricading of the trapdoor. The doctrine of hazardous negligence does not accept, as it were, that less is done than is necessary to prevent the danger and than is reasonably possible to prevent the danger.

76. If more is necessary and more is possible, the doctrine of hazardous negligence presumes that the endangering party will do everything possible to mitigate the danger. This is also the reason that application of the doctrine of hazardous negligence results in the discussed 45% reduction. It is a weighing of the danger on the one part and the possibilities available to the endangering party to mitigate the danger on the other. The endangering party must, as it were, have the greatest possible ambition to help prevent the danger. Everything within his available possibilities, he must do as well.

77. In short, this means: whoever can do a great deal, must do a great deal to mitigate the danger. For the sake of convenience, I will call this the 'highest ambition' principle and this 'highest ambition' principle is thus in fact encompassed in the doctrine of hazardous negligence.

78. The 'highest ambition' principle is a principle that Shell itself supports and by which it deems itself bound. Shell too believes that whoever can do more, must do more. Shell believes that it belongs to that part of global society that can reduce emissions faster than average and must therefore indeed reduce emissions faster than average.[30]

79. As a 45% reduction by 2030 has turned out to be doable for Shell, Shell is therefore bound on the basis of the 'highest ambition' principle to at least provide that 45% reduction contribution. Shell may be able to do far more, but as Milieudefensie et al. has not asked for such, this cannot be awarded either. The discussion therefore need not continue on this point.

80. The Paris Agreement is based on the same 'highest ambition' principle. Article 4(3) of the Paris Agreement demands of affiliated countries that when determining their reduction targets they always take the highest possible ambition as the standard. As we will see later, the 'highest ambition' principle is also a key principle in the international climate protocols for companies.

81. The 'highest ambition' principle is thus not only encompassed in our national liability law, but also has various international law variants. All of this shows that the doctrine of hazardous negligence

[30] Statement of Defence on Appeal, para. 491, statement of former CEO Ben van Beurden.

under Dutch law has the same approach that can also be found in international law and in international soft law company protocols. In every case these international perspectives give further substance to the Dutch doctrine of hazardous negligence in relation to the climate issue.

82. But the 'highest ambition' principle as encompassed in the doctrine of hazardous negligence is not the only reason why Shell can be required to demand a contribution of at least a 45% reduction. Dutch liability law has another doctrine that entails that the maximum can be demanded of Shell. This is the doctrine deriving from a judgment of the Dutch Supreme Court of 1974, that just like the '*Kelderluik*' ('Cellar Trapdoor') case has a name that is easy to remember. This is the case of the '*Struikelende Broodbezorger*' ('The Bread Delivery Boy who Tripped').[31]

83. The doctrine that derives from the judgment in the '*Struikelende Broodbezorger*' is also referred to as the doctrine of the liability for pure omission. Pure omission concerns risks that have not necessarily been created by the person being held liable, but by someone else.[32]

84. This pure omission can be unlawful if the person who is being held liable is aware of the danger caused by the other party. This particularly applies if the person who has been held liable has a special relationship with the danger, the party causing the danger, or the interest harmed by the danger.[33] In other words, if there is a special relationship with the aforementioned danger aspects, this can further elaborate Shell's duty of care.

85. Despite the fact that this case does not concern pure omission, as Shell itself very actively contributes to the danger, it is nevertheless interesting to have a look at this doctrine. This is because in these proceedings Shell is making it a habit to refer to the climate-unfriendly behaviour of others. The doctrine of pure omission makes it clear, however, that the behaviour of others under certain circumstances in fact leads to more responsibility on the part of Shell, rather than less.

86. It turns out that application of this doctrine to this case provides the same outcome as the application of the doctrine of hazardous negligence. Shell has a reduction obligation because of its own endangering actions, but also because of its special relationship with climate danger, with the other causers of climate danger and with the interest harmed by climate danger. I will explain:

    - First, it can be stated that Shell is well aware of climate danger and that it has a special relationship to that danger, because it is one of the biggest causers of this danger;

    - Second, it can be stated that Shell is well aware of the fact that other oil and gas companies are not acting in conformity with the Paris Agreement and that other parties are also continuing to increase climate danger and are continuing with their endangering actions;

    - Third, Shell has a special relationship with the other oil and gas companies as damage causers, inter alia because Shell has been collaborating worldwide with these companies for many decades in many dozens of industry associations and lobby organisations; and because these companies help each other to continue their endangering actions through these kinds of collaboration. In other words: one helps and the other supports in the continuation of its risky behaviour and is rewarded for this with reciprocity;

[31] Dutch Supreme Court 22 November 1974, NJ 1975/149 (Struikelende broodbezorger), ECLI:NL:HR:1974:AC5503.
[32] Van Dam, 214-1 et seq.
[33] Ibid

- Fourth, Shell also has a special relationship with the interest harmed by climate change, being the interest of humans and the environment. This special relationship is the reason why Shell has committed itself to the UNGP and to the OECD Guidelines for Multinational Enterprises. Shell is showing with this commitment that it has a special relationship with the protection of human rights and the environment and thus with the concomitant responsibilities.

87. Because of Shell's awareness about climate danger, its awareness about the role that other companies play in this respect, and because of the special relationship that Shell has with these danger aspects, Shell also has its own responsibility in relation to the hazardous negligence that is in part caused by these other parties. In the framework of its duty of care, Shell will have to take all these danger aspects, of which it is aware, into account.

88. This means, inter alia, that Shell, where it can, must hold the other oil and gas companies to account for their endangering actions, and that it will have to use its influence as much as possible to encourage them to act in accordance with the Paris Agreement.

89. These are the kinds of measures that Shell can reasonably take to mitigate the danger that the other oil and gas companies create and that they are aware of.

90. There is, of course, another important measure that Shell can and must take. Shell can help limit the danger that others create by in any event reducing CO_2 emissions itself as much as possible. This can be demanded of Shell simply on the basis of the doctrine of hazardous negligence. But application of the liability rules for pure omission will lead to the same result. It comes down to Shell, in its approach to climate change, having to do everything possible to mitigate both the consequences of its own endangering actions, and to mitigate the consequences of the endangering actions of other oil and gas companies. Both lead in this case to the same outcome, i.e. at least a 45% reduction in Shell's emissions in 2030.

Shell and the level playing field

91. I would like to take this opportunity to zoom in a little further on the special relationship that Shell has with other oil and gas companies, as this shows once again why the conclusion that was just drawn about the scope of Shell's duty of care is correct.

92. In order to provide more insight into the special relationship between Shell and other oil and gas companies, I will first have to take a step back in time. Let us go back in time to the year 1928, some one hundred years ago, because 1928 is the year in which, on the initiative of Shell's predecessor, a cartel agreement was made with other oil companies. In the first instance, this agreement was made with the legal predecessor of ExxonMobil and the legal predecessor of BP. Fairly quickly 4 more American oil companies were admitted to the cartel agreements. The cartel consequently consisted of seven Western oil companies, five of which were based in the United States, one in the United Kingdom and one in the Netherlands. The cartel was called the Achnacarry cartel, named after the Scottish castle Achnacarry Castle, where the agreement was made.[34]

93. The Achnacarry cartel then dominated the global oil market for more than 40 years, until the power of the cartel was broken in the 1970s when the OPEC countries stood together against the cartel and in the 1970s showed the power they held during the 1973 oil crisis.[35]

[34] Exhibit MD-551A, pp. 95-105. See also Exhibit MD-536D, Big Oil's Secret World of Trading, pp. 7-8.
[35] Exhibit MD-551A, pp. 95-105.

94. In the cartel agreement it was agreed, inter alia, that Shell and the other six companies would stop competing with each other and start working together. They divided the market so that they could demand higher prices for oil.[36] The seven companies stated in the agreement that they would respect each other's share and that the existing relationships in the market division agreed between the parties would remain in force. They agreed that other parties would be excluded from the cartel and they divided the world into regions that they divided among themselves. The seven companies furthermore made agreements to combat an overcapacity of oil and made agreements on the use of each other's pipelines. The cartel of these seven Western companies then dominated the world oil market for decades and the group was given the nickname 'the Seven Sisters'.

95. Part of the cartel agreements was also to work together as companies on oil projects and to participate in collaborations. The NAM, Nederlandse Aardoliemaatschappij, founded in 1947 by Shell and ExxonMobil, is one of the many examples of this.

96. Because of this long-lasting cartel and its success, Shell and the other oil companies grew into the supermajors in the oil industry. Due to mergers and acquisitions in the past two decades, the seven companies ultimately became the four remaining supermajors, being Shell, ExxonMobil, Chevron and BP. To this day these companies still work together frequently in joint ventures. Shell refers to this in a number of its documents.

97. ExxonMobil, Chevron, Shell and BP therefore have a history of collaboration behind them that has lasted almost 100 years. Together with a handful of other, primarily US companies, they are the dominant parties in the many dozens of industry associations and lobby organisations of which they form part worldwide and in which they join forces to influence politicians and the public. The key goal is to protect the own business model and to ensure that oil and gas remain an important part of the future. As I said, companies help and support each other through all these kinds of joint ventures to be able to continue their endangering business model at full force.

98. This long-term and structural collaboration between Shell and other big oil and gas companies justifies the conclusion that there is a special relationship between Shell and these companies and that Shell contributed to creating the continuing endangering actions of the other companies and continues to support and facilitate that to this day through all these joint ventures.

99. Shell and the other companies have also contributed to the climate problem not having been dealt with in the Western countries, as it should have done on the basis of the UN Climate Convention of 1992. The convention includes the firm agreement that the Western countries will take the lead in tackling climate change.

100. Due to the substantial and specific influencing of politicians and public by these companies and their industrial associations discussed in the opening argument, the climate policy was not able to sufficiently get off the ground, which is why we are far from being on course to prevent dangerous warming of the earth.

101. Because of the joint efforts of Shell and the other companies to put their very profitable business model over the most important collective interests of humankind, the risk is ever greater that dangerous climate change can no longer be prevented.

[36] Ibid.

102. Without exaggeration it can be asserted that this lawsuit against Shell is one of the last opportunities to break through the monopoly on power of the oil and gas sector of which Shell forms such an integral part, at the same time breaking down the barriers that these companies form - including according to the IPCC – in relation to climate action.

103. It is also because of this history of the Seven Sisters and their dominant position that the names of Shell, Chevron, ExxonMobil and BP can be found on virtually all summonses of climate cases in the United States. More and more cities and states in the US accuse these companies of being guilty of decades of public deception relating to the climate problem and the role of oil and gas in the climate problem. Cities and states in the US are therefore more and more often going to court, claiming financial compensation for the damage that these companies have caused to the climate and for the adaptation costs that this entails for cities and states.

104. Milieudefensie et al. is not seeking damages in this case, but is asking that Shell be obliged to cease this completely destructive behaviour and to act in accordance with the Paris Agreement.

105. What I have just discussed demonstrates that the conclusion must be that Shell is bound to reduce its CO_2 emissions by at least 45% in 2030 because the doctrine of hazardous negligence demands such, and the doctrine of liability for pure omission supports this finding.

106. What has been discussed shows that the fact that other oil and gas companies are not acting in conformity with the Paris Agreement, is not a reason for Shell to take less responsibility. It is in fact a reason for Shell to take on more responsibility. It is a reason for Shell, acting as a *bonus pater familias*, to aim toward the highest possible ambition to in any event reduce as many CO_2 emissions as possible itself.

107. The fact that in the oil and gas sector it is likely that there is no single company that is acting in accordance with the Paris Agreement and that it is customary within the sector to sell as much oil and gas as possible, does not exculpate Shell. What is customary within the sector is no reason for Shell not to do its bit and not have the highest possible ambition. On the contrary, the behaviour in the oil and gas sector is an extra reason for Shell to show the greatest possible caution in its own actions and to hold others to account with regard to their endangering actions.

108. Shell therefore cannot hide behind the sectoral behaviour of the oil and gas sector as a whole. Milieudefensie et al. has already remarked in its Statement of Defence on Appeal in this respect that an existing general and wide-spread use in a specific sector or professional group, can nevertheless be negligent from a societal perspective. In such a case a standard that has been breached reads completely differently than the sector itself suspects; the standard is diametrically opposed to what is generally customary.[37]

109. The extent of the duty of care is determined to a significant degree by the scope of the risk that is created by the sector. If the risk of the collective sector behaviour is too great, that risk must be curtailed. That is why custom and use are not decisive in determining the care to be taken.

110. Even a party that complies with what is usual or customary in its sector, can therefore nevertheless act unlawfully. We saw this quite clearly in relation to the asbestos problems.[38]

[37] Statement of Defence on Appeal, para. 176-181.

[38] For further detail on the asbestos problem and the relevance thereof to this case, see Notes on Oral Arguments 4 at first instance, paras. 10 – 20. With detailed reference to jurisprudence and legal literature.

111. The wide-spread and common use of asbestos in society and the customary behaviour of both asbestos producers and asbestos-processing companies therefore did not stand in the way of their liability for personal injury caused by exposure to asbestos. According to the Dutch Supreme Court, the asbestos companies could not hide behind custom and common use in society; nor could the asbestos companies hide behind customary behaviour in the sector; nor could they hide behind the fact that the use of asbestos was even encouraged by the government; nor could the asbestos companies hide behind the fact that regulations relating to the risk of asbestos were lacking.[39]

112. As an aside: the Dutch Supreme Court also confirmed in other jurisprudence that the unwritten civil law duty of care can extend beyond what has been laid down in public law regulations or codes of conduct.[40] According to the Dutch Supreme Court, that unwritten duty of care can, moreover, also be found when regulations are still being formulated, that will codify this duty of care.[41]

113. I will return to the asbestos cases. The reason why the defences of the asbestos companies could not succeed according to the Dutch Supreme Court, was because they could have taken precautionary measures to independently ensure that personal injury would be countered. The asbestos companies were aware of the danger, knew the risk and the seriousness of the asbestos diseases and could and should have taken precautionary measures to prevent the danger as much as possible.

114. The order of importance to be observed when applying the possible precautionary measures was, according to the Dutch Supreme Court (citation): *"restricting the use of asbestos to a minimum*, *air purification and personal protective measures*."[42]

115. According to the Dutch Supreme Court, the first and most important precautionary measure to be taken was to limit the use of the dangerous product asbestos to a minimum. This meant first of all that as much as possible use was to be made of safer alternatives to asbestos. Secondly, this meant that asbestos use that could not yet be replaced by safer alternatives to what was strictly necessary had to be reduced. According to the Dutch Supreme Court, the use of asbestos was to be kept to a minimum.

116. The equivalent of this reasoning of the Dutch Supreme Court with regard to the danger that is attached to the products oil and gas, is that as much use as possible must be made of alternative energy sources and that the remaining use of oil and gas must be reduced to a minimum. This is the only way in which the climate danger can be deflected as much as possible. This is the essence of the UN Climate Convention, the Paris Agreement and the UN Sustainable Development Goals.[43]

117. Acting as a *bonus pater familias* would, Shell must make its contribution to achieving the maximum reduction of the use of oil and gas. The Judgment forces Shell to make that contribution. Enforcement of the Judgment will reduce the use of oil and gas and it reduces Shell's commercial interest in pushing oil and gas onto society. Consequently Shell has less of an interest in actively continuing to drive and encourage the use of oil and gas by society.

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[39] Ibid.
[40] See, e.g., Dutch Supreme Court 16 June 2017, ECLI:NL:HR:2017:1107, paras. 4.2.5 – 4.2.7.
[41] Ibid.
[42] Dutch Supreme Court 2 October 1998, NJ 1999, 683 (*Cijsouw/De Schelde II*), para. 3.5.
[43] In particular when viewing the Sustainable Development Goals 13 (climate change) and 7 (sustainable energy) in conjunction.

118. The Judgment also means that Shell will not be able to keep investing in the oil and gas infrastructure in the same degree. A favourable consequence of this is that the lock-in effect is avoided as much as possible and a reduction in the imposed use of oil and gas for the future. The avoidance of this lock-in effect removes barriers and provides scope for the further scaling up of sustainable energy. This further increases society's support for the energy transition, as previously explained in detail in the court documents of Milieudefensie et al.[44]

119. In short, the customary behaviour in the oil and gas industry does not exculpate Shell, but rather increases Shell's duty of care. When determining what Shell's duty of care entails, it primarily relates to the care that is appropriate in society. It does not concern the care that is societally customary. The difference between what is appropriate and what is customary, is a large and significant difference. It is ultimately what is appropriate that prevails and rules, not what is customary.

120. What is customary for the oil and gas sector or society, is therefore not the same as what is appropriate for Shell. If what is appropriate requires a different role from Shell, a reference to the customs in the sector will therefore not constitute a defence. This is an important conclusion because it also immediately answers the question whether a defence for Shell can be derived from the argument of a level playing field.

121. The answer to the question whether Shell can derive a defence from the argument of the level playing field, is a resounding no, and that is logical. The argument of the level playing field is de facto the same argument as the argument of what is customary in the sector. The level playing field is the level playing field where the current customs of the oil and gas sector rule. As just discussed, in law it is not what is customary that rules, but what is appropriate. That what is still customary today in the oil and gas sector - the custom that maintains the status quo and is consequently decisive for how the playing field is defined - that custom cannot be a defence for Shell if it does not align with the societal standard that Shell must comply with. The argument of the level playing field can therefore not play a decisive role in determining the duty of care.

122. An example that shows why a societal standard cannot be set aside with the argument of the level playing field, can be found in the Urgenda case. The State of the Netherlands defended itself in said case with the assertion that awarding of the claim for an order would harm the State's negotiating position in international politics, and would thus adversely affect the international level playing field for the State.[45] The court held that if the State has a legal obligation to achieve a specific reduction target, the government is not free to neglect that obligation in the framework of negotiations in an international context.[46] In other words, the need to at all times comply with the societal standard cannot be set aside with the argument of the level playing field.

123. However, there are more reasons why Shell cannot use the argument of the level playing field to avoid its responsibility. I will mention a few.

124. As long as Shell and the oil and gas industry still form a great barrier to climate action and the further scaling up of sustainable energy, as the IPCC also indicated, there is no level playing field in the energy market. Because of the historically built up power position of the oil and gas companies in the energy sector, a power position that is still far bigger than the position that sustainable companies have in the energy sector, there is nothing close to a level playing field on

[44] See, inter alia, Exhibit MD-340, paras. (126) to (152), with references to the relevant court documents.
[45] District Court, paras. 3.3. and 4.100; see also Opinion of Procurator General/Advocate General under 5.7
[46] Ibid.

the energy market as a whole. At present there is thus by definition no level playing field between all different energy sources in the energy sector. What is more, oil and gas have been subsidised across the world to a far greater degree in the past decades than renewable energy. These subsidies further disrupted the playing field in favour of the fossil fuels sector. This too means that there is no level playing field in the energy market and Shell knows this.

125. Even within the oil and gas sector there is no level playing field, in view of the dominant position that Shell holds together with a handful of other companies in this sector. For example, due to this dominant position, Shell has much greater power within the chain than most other oil and gas companies. Shell will have this greater power within the chain even if it is 45% smaller than its current size. As I already discussed, even then Shell will still be among the top 10 biggest oil and gas companies in the world.

126. In short, there is no level playing field in the energy sector, nor is there a level playing field within the oil and gas sector.

127. There is certainly no level playing field in society as such, as the influence that a company like Shell has on the public domain is, of course, in no way to be compared to the influence that an individual citizen or another group has. The study by John Ruggie, the founder of the UNGP, was discussed in this respect at first instance. John Ruggie concluded in 2018 on the basis of more than 100 scientific and institutional publications and studies that multinational companies have such great influence on laws and regulations, that not only citizens but also trade unions and NGOs cannot fight this.[47] Ruggie points out in his study that companies collectively spend 30 times as much money on lobby practices as the expenditure of the trade unions and the NGOs put together.[48] Ruggie also points out that threatening legal proceedings and actual litigation against regulatory bodies has also become a standard lobby activity of multinationals to stop or water down regulations.[49] The IEA recognises that the fossil fuels sector also engages in this, and fights new climate regulations and other climate measures in this manner.[50] In all these ways multinational companies maintain the status quo and their own power position as much as possible, which is why there is no level playing field between them and the rest of society.

128. Shell is, moreover, the last company that should be allowed to justify its lack of socially appropriate behaviour by claiming the importance of a level playing field. After all, Shell owes the position it has built up in the oil and gas sector in the past 100 years to the successful efforts of its legal predecessor to torpedo the arising of a level playing field in the energy market by cartel forming. This allowed it to establish an economic, political and legal dominant position that only a handful of companies in the world can equal.

129. Shell likes to talk about its legacy business, by which it means the oil and gas business it built up over time. But Shell's actual legacy is one of structural global market influence. First by means of cartel forming. After that by giving market distortion a different face - i.e. by continuing to play and dominate the energy market together with other oil and gas companies in such a manner that it seriously delayed climate action and the sustainable energy transition.[51] All of this was with the intention of preventing lawmakers and public from standing in the way of Shell's goal to further expand its oil and gas business. Shell was successful in doing this and it richly benefited from this and is still richly benefiting from it.

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[47] Milieudefensie et al.'s Opening Argument of 1 December 2020, paras. 85 et seq., with reference to Exhibit MD-273, pp. 321-323.
[48] See Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance, paras. 85-87
[49] Ibid, para. 96.
[50] Exhibit MD-528, p. 117.
[51] Milieudefensie et al.'s Opening Argument, part 2 of 2 April 2024.

130. The term level playing field is nothing more to Shell than a synonym for the word status quo. What Shell has always been concerned with and is still concerned with, is to retain the status quo in the energy market. A status quo that Shell itself helped build up over the past 100 years.

131. So if there is anything that will certainly not promote a level playing field in the energy market, it's a licence for Shell to continue doing what it has been doing for 100 years. It is precisely a Shell with a smaller legacy business and with a slimmed down dominant position that will benefit a level playing field in the energy market and with that, the energy transition.

132. I will conclude this section. Everything that I have discussed up to now leads to the conclusion that Shell can handle the Judgment and that the world can handle the Judgment. It can also be concluded that the order imposed on Shell finds substantiation in the doctrine of hazardous negligence and is supported by the doctrine of pure omission. The concurrence of both doctrines shows that Shell is subject to great responsibility, even if other oil and gas companies do not take action. It can furthermore be concluded that Shell cannot hide behind custom in the sector or in society. The societal standard governs the law, not societal custom. The argument of the level playing field cannot succeed for that same reason.

133. To conclude this part of the oral arguments, I would briefly like to mention the substitution argument that Shell has presented, which entails that if Shell is forced by the Court of Appeal to do its bit, other oil and gas companies will simply take its position in the market and on balance no climate gains will be made.

134. It will be clear against the background of the conclusions that have just been drawn that this argument cannot help Shell. The substitution defence is the same as the defence that other companies are failing to implement a sound climate policy. I have just shown in this part of the oral arguments that this defence cannot succeed.[52]

135. Where Shell speaks in these proceedings of poor climate behaviour of other oil and gas companies, this once again makes it clear that Shell is aware of this poor behaviour of its peers in the sector and knows how destructive this is with regard to achieving the climate goals. This means that it must precisely take that poor conduct into account by, inter alia, doing as much as possible itself about emission reductions, by holding others to account for their poor behaviour where possible and by ensuring that it does not encourage, facilitate or otherwise support that poor behaviour of the others. The behaviour of others does not in any way indemnify Shell, nor does it stand in the way of finding that Shell has a legal obligation.

136. This brings me, briefly, to Richard Druce, a hired consultant for Shell. In the Druce report that Shell has submitted as an exhibit,[53] he asserts that other oil and gas companies will take over Shell's role, among other reasons because Shell will sell its own oil and gas assets to them. Druce's reasoning is that the Judgment will therefore do nothing for the climate crisis, as Shell can itself ensure that the Judgment is ineffective in combating climate change.

137. Druce first of all fails to note in this respect that if Shell knows that it is undermining the goal of the court order to a certain extent by selling assets to others, that Shell is then not free to act in this manner. The order must be seen in the light of the legal considerations on which it is based.[54]

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[52] This is in addition to everything stated in this respect in Milieudefensie et al.'s court documents in the main proceedings and in the joinder proceedings.
[53] Exhibit S-122.
[54] See, inter alia, Dutch Supreme Court 4 April 2016, ECLI:NL:HR:2016:369, Dutch Supreme Court 23 January 1998,

In the light of the considerations, it is evident that the court order does not stand alone, but that it's goal is to have Shell contribute to preventing dangerous climate change.

138. Shell therefore cannot choose to undermine this evident goal of the Judgment by acting in a manner that cannot be reconciled with the goal of the Judgment. Shell's own actions will therefore have to be in accordance with both the order and the goal of the order, as appears from the legal considerations. This means that it will have to act in such manner that the 45% reduction it is to achieve results in the full climate gains that Shell can attribute to it. According to the District Court, this also applies even if this requires financial sacrifice on the part of Shell. If writing off a fossil fuel asset will result in climate gains and the sale thereof will not result in climate gains or will result in fewer climate gains, Shell will have to take this into account when making its choices.

139. Secondly, Druce ignores the fact that Shell has a responsibility for another reason to generate as many climate gains as possible when complying with the court order. The reason is that on the basis of the doctrine of pure omission, Shell is not free to comply with the order in such way that it thereby encourages, facilitates or otherwise supports others in nullifying the emission reductions achieved by Shell. Shell may therefore not encourage others to nullify the climate gains that Shell itself has achieved by means of its own carbon reductions. For that reason too Shell therefore simply cannot comply with the Judgment by transferring its fossil assets to others.

140. It is one of the many reasons why the Druce report does not provide evidence that the Judgment would be ineffective. At the end of the day I will come back to the other incorrect reasoning of Shell's consultant Richard Druce. I will demonstrate, among other things, that the Judgment will be effective even if Shell sells assets.

141. For now I will conclude by announcing that after the break Mr Reij will go into, inter alia, the climate protocols for companies, the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights. Those international guidelines also elaborate the actions that may be expected of Shell and again show that the District Court's Judgment can be upheld.

ECLI:NL:HR:1998:ZC2553, Dutch Supreme Court 27 June 2014, ECLI:NL:HR:2014:1532 and Dutch Supreme Court 13 March 2020, ECLI:NL:HR:2020:425.