

**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 2  
CLIMATE PROTOCOLS AND GUIDELINES**

*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 Fossielvrijbeweging**  
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. Lusingh Scheurleer, mr. T. Drenth*

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

*and:*

**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,

## Introduction

1. In the Statement of Defence on Appeal, Milieudéfensie et al. formulated the following two essential legal questions that are central to this case.

*1. Does a company in Shell's position have its own independent responsibility and legal obligation to proportionally and adequately contribute to preventing dangerous climate change?*

*2. What does this proportional and adequate contribution specifically mean for Shell?*<sup>1</sup>

2. Based on everything Milieudéfensie et al. has argued in these proceedings, as far as Milieudéfensie et al. is concerned there can be no doubt regarding the first question, whether Shell is subject to a legal obligation. Shell itself acknowledges in these proceedings that there is consensus that *"doing nothing is unacceptable and that companies have to take measures to reduce their emissions."*<sup>2</sup>

3. This part of the oral arguments particularly concern the question as to precisely what Shell should do.

4. It is not a matter of discussion between the parties that global CO<sub>2</sub> emissions must have fallen by a minimum of 45% by 2030 to still have a 50% chance of limiting warming to 1.5°C.<sup>3</sup> Milieudéfensie et al. explained in this appeal that the task has in the meantime grown, as in the past few years too little action has been taken worldwide to reduce CO<sub>2</sub> emissions. Consequently, cumulative emissions have increased, and the remaining carbon budget has decreased.

5. Milieudéfensie et al. explained in its written arguments that the latest estimate is that the carbon budget was only some 250 GtCO<sub>2</sub> at the beginning of 2023.<sup>4</sup> Based on the current level of CO<sub>2</sub> emissions, this means that as of the beginning of 2024 only 5 ¼ years remains until the carbon budget for 1.5°C has been used up.

6. This makes it clear that the need for maximum efforts to reduce CO<sub>2</sub> emissions is more urgent than ever. There is simply no other option than to limit the all-encompassing dangers of climate change, including the risks of crossing tipping points, as much as possible. The risks were once again explained in detail in the written arguments on the basis of the latest insights of climate science.

7. It was also explained that exceeding the aforementioned carbon budget leads to a greater warming of the earth than 1.5°C. Science refers to this exceeding of 1.5°C as overshoot.

8. Various insurmountable risks are attached to such an overshoot scenario.

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<sup>1</sup> Milieudéfensie et al.'s Statement of Defence on Appeal, para. 162.

<sup>2</sup> Shell's Statement of Appeal, para. 7.2.3(a)(iii). See also paras. 2.2.9, 2.3.10, 3.2.17 and 5.2.3.b.

<sup>3</sup> Shell's Statement of 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.

<sup>4</sup> Milieudéfensie et al.'s Written Arguments, para. 35, based on Exhibit MD-518, p. 2312 and p. 2316 (Figure 7).

9. First of all, every fraction of further warming exposes people all around the world to significant additional dangers. Among other things, a temperature increase of more than 1.5°C increases the risk of crossing tipping points, which, moreover, can set processes in motion that cause further CO<sub>2</sub> emissions. For the discussion of all these substantial risks, I refer to the written arguments.
10. Secondly, an overshoot means that every effort must be made to bring the temperature back to 1.5°C. To do this, large amounts of CO<sub>2</sub> will have to be removed from the atmosphere. We call these negative emissions. We call the techniques for removing CO<sub>2</sub> from the atmosphere *Carbon Dioxide Removal*, in short “**CDR**”. However, the possibilities provided by CDR are subject to significant limitations.
11. A large overshoot of the 1.5°C target cannot be reversed. Whether a small overshoot can be reversed is highly uncertain. At present CDR is not available at scale. There is also a great deal of uncertainty regarding whether CDR will be available at scale. This too is explained in the written arguments. A recent scientific publication put this as follows:

*“The world’s ability to bring temperature down after exceeding 1.5°C warming [...] depends on removing more CO<sub>2</sub> from the atmosphere than is emitted [...]. There are significant unresolved questions regarding the feasibility, risks and effectiveness of CDR at scale, so achieving net-negative emissions is far from a given.”*<sup>5</sup>
12. It is therefore crystal clear that every effort must be taken to remain within the carbon budget and limit any overshoot as much as possible. During COP28 the international community of states confirmed the need to achieve the 1.5°C target. The international community also recognised the need to prevent overshoot and in any event to limit it to an absolute minimum.<sup>6</sup>
13. Partly bearing in mind the prevention and limiting of an overshoot of 1.5°C, countries have acknowledged that immediate action is necessary to achieve substantial and permanent emission reductions and to call upon each other to do so.<sup>7</sup>
14. Shell has a duty of care to proportionally contribute to these rapid and far-reaching emission reductions. The next question is what this means for Shell.
15. Milieudefensie et al. already explained in detail at first instance and in appeal that a reduction of the Scope 1, 2 and 3 CO<sub>2</sub> emissions by (net) 45% in 2030, is the absolute lower limit of what Shell must do.<sup>8</sup> This is partly based on the application of the doctrine of hazardous negligence, human rights law and international legal principles such as the precautionary principle and the CBDR principle.
16. Milieudefensie et al. has also pointed out that the reduction obligation of 45% in 2030 is supported by climate protocols for companies and by international guidelines on the obligations of companies to protect human rights.

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<sup>5</sup> Exhibit MD-576, p. 15.

<sup>6</sup> Exhibit MD-569B, paras. 23 to 28.

<sup>7</sup> Exhibit MD-569B, paras. 23 to 28.

<sup>8</sup> Inter alia: Milieudefensie et al.’s Statement of Defence on Appeal, section 5.2, Milieudefensie et al.’s Defence Brief of 19 December 2023, paras. 12 to 20 and paras. 40 and 41 to 45.

17. In addition to the 2020 Oxford report, in the appeal proceedings *Milieudéfense et al.* referred to the Race to Zero criteria that was developed under the auspices of the UN. These criteria make it clear that every actor must use “*maximum effort*” to contribute their “*fair share*” to the globally necessary emission reduction of (in the meantime) almost 50% in 2030. All companies must reduce their Scope 1, 2 and 3 emissions as quickly as possible.<sup>9</sup> With the exception of specific limitations, many companies must reduce their emissions faster than the global average.<sup>10</sup> According to the criteria, this particularly applies to influential Western companies with substantial emissions and a large historical responsibility for the climate problem. The UN Race to Zero explicitly refers in this framework to the preamble and Articles 2 and 4 of the Paris Agreement, in which the CBDR principle is laid down.<sup>11</sup> The UN applies the CBDR principle to the Race to Zero initiative and this CBDR principle consequently also applies to companies. The CBDR principle particularly applies to Shell. Shell has both a significant historical responsibility and control over and influence on a very substantial quantity of emissions. Shell also achieves the bulk of its turnover in rich and mostly Western countries. Meaning, the countries that must take the lead in the climate approach and therefore have to phase out fossil fuels the quickest to bring their emissions down.<sup>12</sup>
18. The consensus on the action that may be expected of companies and other non-state actors has only become more robust since the submission of the Statement of Defence on Appeal. For example, the International Organization for Standardization (the “ISO”) published the Net Zero Guidelines<sup>13</sup> and the Exponential Roadmap Initiative published the 1.5°C Business Playbook.<sup>14</sup> I will come back to these two new protocols shortly.
19. A very important other development is the work of the *United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities*. I will hereafter refer to this committee of UN experts as the “UN expert panel” for short. On the request of the UN Secretary General, this UN expert panel made ten important recommendations regarding what credible net zero goals of companies should look like. These recommendations are highly necessary, as more and more companies commit themselves in words to a net zero goal, but the integrity of those promises is often of little value. The goal was thus to develop stronger and clearer standards for net zero goals to prevent greenwashing by companies and a further delay of meaningful climate action.
20. The recommendations of the UN expert panel are laid down in the report *Integrity Matters*.<sup>15</sup> For the rest of these oral arguments I will refer to this report as the “UN Expert Report”.
21. The UN Expert Report is rooted in and expands on existing initiatives like the UN Race to Zero initiative. The UN Expert Report confirms the crucial importance of credible and ambitious climate action of companies and other non-state actors. The recommendations in the UN Expert Report

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<sup>9</sup> *Milieudéfense et al.*'s Defence Brief of 19 December 2023, paras. 41 to 45.

<sup>10</sup> *Milieudéfense et al.*'s Statement of Defence on Appeal, paras. 500 to 507 and *Milieudéfense et al.*'s Defence Brief of 19 December 2023, paras. 41 to 45.

<sup>11</sup> *Milieudéfense et al.*'s Defence Brief of 19 December 2023, paras. 44 (footnote 51).

<sup>12</sup> *Milieudéfense et al.*'s Defence Brief of 19 December 2023, paras. 44 (footnote 51).

<sup>13</sup> Exhibit MD-488.

<sup>14</sup> Exhibit MD-490.

<sup>15</sup> Exhibit MD-487.

form a very important yardstick for assessing net zero goals. This is also confirmed by a recent report of Oxford University (the “**Oxford Report**”).<sup>16</sup>

22. At first instance, the District Court attached value to the 2020 findings of Oxford University, because of its research into climate protocols for companies. Oxford University now reports annually on the developments in this area. In its most recent report Oxford University confirms the special status of the report of the UN expert panel. It says the following:

*“the crucial aspect about the UN panel is that it is a UN panel: as Mr. Guterres has said, its recommendations will now frame all discussions of net zero within the UN system. The recommendations provide everyone a universal yardstick to assess their own net zero targets and those of others. No company, city or region can any longer claim not to know what a credible target looks like.”*<sup>17</sup>

23. In short, the recommendations of the UN expert panel have a special and universal status. As Oxford rightly indicated, no company can claim not to know what a credible climate goal is.
24. A further discussion of the UN Expert Report will again make it clear that Shell’s policy cannot in any way be deemed “*net-zero aligned*”, as Shell itself claims. Shell’s policy is the definition of greenwashing and of empty promises that the UN Expert Report seeks to combat. There is a good reason the report is called *Integrity Matters*.
25. In the words of the UN expert panel: “*Deceptive or misleading net zero claims by non-state actors not only erode confidence in net zero pledges overall, they undermine sovereign state commitments and understate the work required to achieve global net zero.*”<sup>18</sup>
26. We can therefore conclude that the determination of the District Court that there is broad international consensus that “*each company must independently work towards the goal of net zero emissions by 2050*”<sup>19</sup>, has been confirmed in many additional and authoritative sources. These sources give very clear leads regarding what may be expected of a company in Shell’s position up to 2030. What is clear is that these sources point in the same direction to an important degree.
27. In addition to all these new developments in the area of climate protocols, the OECD Guidelines for Multinational Enterprises have been updated in the past year.<sup>20</sup> Lastly, important developments have taken place under the UN Guiding Principles for Business and Human Rights (the “**UNGP**”). Those guidelines also point in the same direction as the aforementioned climate protocols. I will first discuss the developments in the area of the climate protocols for companies. I will discuss the OECD Guidelines and the UNGP after that.

### **Climate protocols for companies**

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<sup>16</sup> Exhibit MD-489, p. 10. See also pp. 3 and 5.

<sup>17</sup> Exhibit MD-489, p. 10.

<sup>18</sup> Exhibit MD-487, p. 12.

<sup>19</sup> Judgment, para. 4.34.

<sup>20</sup> Exhibit MD-492.

28. It is worth calling to mind first that the climate protocols for companies have arisen due to the acknowledgement of the need for non-state action when limiting global warming. This need was already put into words in 2011 in the Scope 3 Standard.<sup>21</sup> The District Court has already determined that since 2012 there has been broad international consensus regarding the need for non-state action, because states cannot take climate action on their own.<sup>22</sup> The District Court also referred to the acknowledgement of the importance of non-state action in the decision of the Paris Agreement.<sup>23</sup> Lastly, the District Court established that the UN Race to Zero initiative was developed for this reason, providing protocols for emission reductions for non-state parties.<sup>24</sup> All of this is to scale up non-state action as quickly as possible in order to close the emissions gap to 2030. None of these determinations are in dispute between the parties.
29. This is important, because Shell argues, referring to Dutch and European regulations, that climate policy and the realisation of the energy transition, must only be left up to governments. According to Shell, a reduction order imposed on Shell would interfere with or undermine government regulations.
30. The contrary is true. All parties to the Paris Agreement in fact acknowledged how important proactive action of companies and other organisations is. This is because, inter alia, ambitious climate action of companies causes a flywheel effect in broader climate action as discussed at first instance.<sup>25</sup> The UN Race to Zero speaks in this context of activating an '*ambition loop*'. This means the following. If non-state actors make firm commitments and engage in ambitious climate action, this gives states the confidence to take faster and farther-reaching climate action. This more ambitious policy of states helps non-state actors in accelerating their own action to keep the 1.5°C target within reach.<sup>26</sup> The interplay between state and non-state climate action is consequently the essential basis for positive transformation toward the 1.5°C target. All of this was also confirmed in the UNEP Emissions Gap Report.<sup>27</sup>
31. I would also like to recall the Chatham House report of 2018, in which the unmissable action of companies was emphasised: "*Sub-state/non-state climate action can boost the confidence, resources and political will of governments to raise their own ambition, strengthening the Paris process.*"<sup>28</sup>
32. In this respect it was also explained at first instance that it is important to realise that companies have a far more direct and greater control over their policy and their CO<sub>2</sub> emissions than states have control over the CO<sub>2</sub> emissions of citizens and companies.<sup>29</sup> Companies like Shell can consequently be more ambitious and act faster than many national states, thereby creating a flywheel effect more quickly as soon as they proceed to take their responsibility.<sup>30</sup>

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<sup>21</sup> Milieudéfensie et al.'s Statement of Defence on Appeal, paras. 831-832.

<sup>22</sup> Judgment, para. 4.4.26.

<sup>23</sup> Judgment, para. 2.4.7.

<sup>24</sup> Judgment, para. 2.4.8.

<sup>25</sup> Milieudéfensie et al.'s Opening Argument, paras. 130 to 149: 'The important role of non-state parties under the UN climate regime'.

<sup>26</sup> Exhibit MD-491, pp. 74-75.

<sup>27</sup> See Milieudéfensie et al.'s Defence Brief of 19 December 2023, paras. 72 to 78, with reference to Exhibit MD-368, p. 1 and p. 28.

<sup>28</sup> Exhibit MD-272, pp. 4-5. See also p. 1 (summary).

<sup>29</sup> Summons, paras. 609-618, Milieudéfensie et al.'s Notes on Oral Arguments 3 (IPR section), paras. 50-53.

<sup>30</sup> Summons, paras. 609-618, Milieudéfensie et al.'s Notes on Oral Arguments 3 (IPR section), paras. 50-53, with

33. The lack of adequate climate action by the private sector means that this important flywheel effect is also lacking.

34. Unfortunately it is not only the flywheel effect that is missing. Just as important is that the lack of climate action on the part of companies undermines and underplays the implementation of government policy. This was already evident from the quote from the UN Expert Report that I just cited. It is also evident from the Oxford Report. I quote:

*“In countries with national targets, the lack of corresponding sub-national and private sector targets creates a significant barrier to implementation of national climate policies and undercuts the credibility of national pledges”<sup>31</sup>*

35. In short, the background of these protocols and initiatives shows precisely how important it is that the private sector too makes its proportional climate contribution. States, as an international community, have been calling for this for more than ten years.

36. As mentioned, the UN Race to Zero and other important initiatives provide important insights into the climate action that may be expected of companies.

37. Just like the UN Race to Zero, the UN Expert Report, the ISO Net Zero Guidelines and the 1.5°C Business Playbook determine that all companies must use maximum efforts to reduce emissions in line with the 1.5°C target.<sup>32</sup> In the words of the UN expert panel: *“All non-state actors must reduce emissions as fast as possible.”<sup>33</sup>* It is the highest climate ambition that is asked of parties and is also appropriate in light of the urgency of the climate problem and the scope of the danger.

38. A standard basic principle in these protocols is the halving of Scope 1, 2 and 3 emissions in 2030.<sup>34</sup> All these sources also explicitly confirm that companies that have the capacity to move faster should do so.<sup>35</sup> I will explain these points on the basis of the most relevant recommendations of the UN Expert Report.

39. The first recommendation relates to the net zero goal of a company. That goal must provide for achieving net zero emissions in 2050 or earlier, must reflect the maximum ambition and must, as the basic principle, provide for an absolute emission reduction of 50% by 2030.<sup>36</sup> There may be an exception for companies in developing countries. I quote the UN Expert Report:

*“Those that have the capacity to move faster than a 50% reduction by 2030 and net zero by 2050 should do so, while some developing country non-state actors may require more support on their path to net zero.”<sup>37</sup>*

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reference to Exhibit MD-272, p. 4. See further Milieudefensie et al.’s Notes on Oral Arguments 7, paras. 27 to 40.

<sup>31</sup> Exhibit MD-489, p. 38.

<sup>32</sup> Exhibit MD-487, p. 16, Exhibit MD-488, p. 16 (under 8.2.6), Exhibit MD-490, p. 5.

<sup>33</sup> Exhibit MD-487, p. 16.

<sup>34</sup> Exhibit MD-487, pp. 16-17, Exhibit MD-488, p. 19 (under 8.2.6), Exhibit MD-490, p. 12.

<sup>35</sup> Exhibit MD-487, pp. 16-17, Exhibit MD-488, p. 19 (under 8.2.6), Exhibit MD-490, p. 12.

<sup>36</sup> Exhibit MD-487, pp. 15 and 16.

<sup>37</sup> Exhibit MD-487, p. 16.

40. The ISO Net Zero Guidelines also stipulate that the goals towards 2050 must be based on science and the maximum possible effort of companies. There too the basic principle is a “*minimum target to halve all types of GHG emissions every decade, if possible*”.<sup>38</sup> Add to this that organisations with a high capacity, a large historical responsibility or a large emissions scope, must take rapid climate action in order to achieve net zero “*well before the global average*”. Companies with a large responsibility and a large emissions scope must therefore reduce their emissions more rapidly than the global average.<sup>39</sup> Shell satisfies all these criteria and acknowledged through its former CEO that it must move faster than the global average.<sup>40</sup>
41. The 1.5°C Business Playbook is based on the basic principle that companies will as a minimum halve their Scope 1, 2 and 3 emissions every decade, whereby the richest companies will have to move much more quickly and should strive to achieve net zero in 2040.<sup>41</sup>
42. The importance of the quickest possible climate action by companies is emphasised even more in the second recommendation of the UN Expert Report: “*It is crucial that non-state actors have short-term targets that prioritise immediate reductions aligned with pathways that keep 1.5 °C in sight across their value chain to avoid crossing dangerous climate tipping points.*”<sup>42</sup>
43. In view of the rapidly shrinking carbon budget, it is also evident that companies cannot postpone their action until later this decade, as Shell is trying to make it appear.<sup>43</sup> The UN Expert Report emphasises the crucial importance that companies set immediate short-term goals, as this helps governments with the implementation of their own goals and because it can create a flywheel effect for tightening existing goals.<sup>44</sup>
44. The UN Expert Report explicitly emphasises that companies have to reduce their emissions in an absolute sense. The reduction target must relate to all emissions of the company: the Scope 1 and 2 emissions, and the Scope 3 emissions. The Oxford Report also establishes in its analysis of this and other climate protocols that reduction targets must relate to all emission scopes.<sup>45</sup> The ISO Net Zero Guidelines again emphasise in this respect that it is necessary that companies “*take full responsibility for reducing Scope 1, Scope 2 and Scope 3 emissions without shifting undue responsibility for GHG emissions to another organization.*”<sup>46</sup>
45. The third recommendation of the UN Expert Report is that carbon credits may not be used to achieve short-term reduction targets. Carbon credits, and even then only carbon credits with a guaranteed high integrity, may only be used for “*beyond value chain mitigation*”. This means that carbon credits may only be used in addition to the own reduction targets, and not instead of actual own emission reductions.<sup>47</sup>

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<sup>38</sup> Exhibit MD-488, p. 19 (under 8.2.6).

<sup>39</sup> Exhibit MD-488, p. 9 (under 5.3 and 5.4) and p. 28 (under 12.2).

<sup>40</sup> Milieudefensie et al.’s Statement of Defence on Appeal, paras. 491.

<sup>41</sup> Exhibit MD-490, p. 5.

<sup>42</sup> Exhibit MD-487, p. 17.

<sup>43</sup> Written Arguments, para. 35.

<sup>44</sup> Exhibit MD-487, p. 17.

<sup>45</sup> Exhibit MD-489, p. 30.

<sup>46</sup> Exhibit MD-488, p. 21 (9.1.2 under I).

<sup>47</sup> Exhibit MD-487, p. 19.

46. The scandals about carbon credits projects are stacking up month after month, as recent research makes clear. 26 projects were reviewed. It is estimated that only 6% of these projects really resulted in lower carbon emissions.<sup>48</sup> This confirms once again that the bulk of the carbon credits has insufficient integrity. This also explains why the UN Expert Report does not want companies to use carbon credits to satisfy their own reduction targets.
47. It is therefore not surprising that the other climate protocols also exclude the use of carbon credits, or emphasise that they must be used with great reserve.<sup>49</sup>
48. I would like to call to mind here that Shell sells complete LNG shipments in combination with carbon credits as CO<sub>2</sub>-neutral gas.<sup>50</sup> Shell is also still selling carbon credits to car drivers in at least 21 countries, even though the Advertising Code Committee has already assessed on several occasions that Shell's advertising in this respect is misleading.<sup>51</sup> In essence, through these methods Shell is promoting fossil fuel activities as sustainable activities, which undermines climate action.<sup>52</sup> Shell also uses carbon credits to satisfy its own reduction targets. Indeed, in 2023 Shell deployed no fewer than 20 million carbon credits.<sup>53</sup> This makes Shell one of the major users of carbon credits worldwide. The way in which Shell deals with carbon credits is clearly not in line with the common guidelines. And this is an understatement.
49. The fourth recommendation of the UN Expert Report specifies that companies must draw up an adequate transition plan, in which it is explained what action will be taken to achieve the established reduction targets. It must also be clarified how, inter alia, capital investments, R&D expenditure and lobby activities are brought in line with the claimed reduction targets.<sup>54</sup> Shell does not have adequate targets, nor does it have an adequate transition plan.
50. Recommendation 5 relates to a specific goal to phase out fossil fuels. According to the UN Expert Report it is clear that existing fossil fuel infrastructure well exceeds the remaining carbon budget for 1.5°C.<sup>55</sup> The UN Expert Report therefore determines that: "*there is no room for new investment in fossil fuel supply and [there is] a need to decommission existing assets.*"<sup>56</sup>
51. According to the UN Expert Report, companies therefore have to end the exploration for new oil and gas fields. They must also end the expansions of oil and gas reserves and oil and gas production.<sup>57</sup> Every investment in new oil and gas projects contributes to the further lock-in that delays the energy transition and results in considerable new obstacles to climate action. That has already been discussed in detail in these proceedings. The IEA shows in its NZE scenario that it is, moreover, possible to shape the transition within a 1.5°C path without adding new fossil fuel projects to the existing oil and gas fields. This is also evident from the mitigation potential identified by the IPCC. We will come back to this later.

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<sup>48</sup> Exhibit MD-513B, pp. 3-4. See also Exhibit MD-513C, pp. 1-4 (the NOS news item on this study).

<sup>49</sup> Exhibit MD-488, pp. 23-24 (under 10.1), Exhibit MD-489, pp. 22 and 37, Exhibit MD-490, p. 33.

<sup>50</sup> Milieudefensie et al.'s Statement of Defence on Appeal, section 6.4. 6. See also Shell's Sustainability Report, Exhibit S-172, p. 30.

<sup>51</sup> Ibid

<sup>52</sup> See also Opening Argument, part 2, para. 30, with reference to Exhibit MD-544, p. 6.

<sup>53</sup> Shell Energy Transition Strategy 2024, p. 41.

<sup>54</sup> Exhibit MD-487, p. 21.

<sup>55</sup> Exhibit MD-487. See also Exhibit MD-523, p. 35, Exhibit MD-525, p. 150.

<sup>56</sup> Exhibit MD-487, p. 23.

<sup>57</sup> Exhibit MD-487, pp. 23-24.

52. Shell's policy and investments are at odds with this important condition to halt new fossil fuel projects. With the Judgment, the District Court acknowledged that a consequence of the reduction order could be that Shell does not make new investments in extracting fossil fuel resources and/or limits its production of fossil fuel resources.<sup>58</sup> The developments after the Judgment show that the District Court was correct with its conclusion that new fossil fuel projects cannot be reconciled with the 1.5°C target. In the words of the chairman of the UN expert panel: "*Non-state actors cannot claim to be net zero while continuing to build or invest in new fossil fuel supply.*"<sup>59</sup>
53. However, since the Judgment alone Shell has already approved at least 20 new oil and gas projects. This appears from research of Oil Change International, based on Rystad data.<sup>60</sup> If these projects are all exploited, it is estimated that Shell will emit more than five times the additional emissions of all citizens and companies in the Netherlands with those 20 new projects alone.<sup>61</sup> Just taking the new projects that Shell has put into development since the Judgment thus results in five times the annual quantity of emissions in the Netherlands. Enormous quantities of emissions are concerned.
54. Shell is also estimated to have some 14.7 billion barrels of oil equivalent in undeveloped oil and gas reserves, which could correlate to extra emissions of no less than 38 times the Dutch emissions.<sup>62</sup> At present Shell has no plans to reduce its oil and gas production and its course for the coming years is, indeed, an increase in production. Shell itself confirmed yesterday that it wishes to keep the production of oil at the same level this decade, and in addition wants the production of gas to increase considerably. Nor has Shell disputed the Rystad data that was used by Oil Change International.<sup>63</sup> Oil Change International has assessed that Shell's CO<sub>2</sub> emissions from its own production would fall considerably, by 44% compared to 2019, if Shell had stopped approving new oil and gas production at the beginning of 2023 and had stopped the construction of fields still under construction.<sup>64</sup> Two-thirds of the fields under construction are fields for which Shell only made the decision to invest in 2021 or later.<sup>65</sup>
55. The last recommendation of the UN Expert Report that I would like to mention here is recommendation 6. This recommendation calls on companies to use their lobbying power for positive system change: "*non-state actor leaders need to ensure that their full influence is working as part of the solution, not undermining it.*"<sup>66</sup>
56. Companies must bring their lobbying, including lobbying via interest groups, in line with the global ambition of reducing emissions by at least half in 2030. The UN Expert Report also mentions the need for companies to be transparent about their memberships of interest groups and must be

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<sup>58</sup> Judgment, para. 4.4.39.

<sup>59</sup> Exhibit MD-487, p. 7.

<sup>60</sup> Exhibit MD-573A, p. 4.

<sup>61</sup> Exhibit MD-573A, p. 17.

<sup>62</sup> Exhibit MD-573A, p. 17.

<sup>63</sup> Exhibit MD-573A, p. 19, Figure 7.

<sup>64</sup> Exhibit MD-573A, pp. 20-22.

<sup>65</sup> Exhibit MD-573A, p. 22.

<sup>66</sup> Exhibit MD-487, p. 25.

willing to leave those groups if the necessary changes are not made.<sup>67</sup> The UN expert panel is thus also aware that companies stand in the way of ambitious climate action via their direct and indirect lobby activities.

57. The Race to Zero, the ISO Net Zero Guidelines and the 1.5°C Business Playbook emphasise the importance of the broadest possible use of positive forces for change by companies, including through their interest groups.<sup>68</sup> Once again, Shell is doing precisely the opposite, and is continuing to lobby, directly and indirectly, to increase the supply and demand for fossil fuels.<sup>69</sup>
58. Shell refers to the Science Based Targets Initiative (“SBTi”), that is currently engaged in developing specific criteria for oil and gas companies. First, this does not detract from all preceding findings. Those findings show that existing protocols point in the same direction to a significant degree when it comes to the action that can be expected of all companies, including oil and gas companies. The SBTi is also a partner of the UN Race to Zero and thus also subscribes to the basic principles of the UN Race to Zero.<sup>70</sup> For example, the SBTi states that companies must make use of the most ambitious scenarios that lead to the quickest possible reductions and the fewest cumulative emissions.<sup>71</sup> The SBTi has developed reduction pathways for and with the private sector, whereby companies can, if so desired, also align with a sectoral pathway. *mr. Van Diem* will come back to these sectoral pathways that the SBTi also applies, and to which Shell and its expert Hawkes referred later.
59. However, for the time being it is relevant that the SBTi is equally calling upon companies to show the highest possible ambition and that the SBTi’s reduction pathways in all cases provide for rapid and far-reaching emission reductions.<sup>72</sup> I quote:

*“Rapid, deep cuts to direct and indirect value-chain emissions must be the overarching priority for companies. Companies must set near-term science-based targets to roughly halve emissions before 2030.”*<sup>73</sup>
60. Oil and gas companies cannot have their goals validated by the SBTi at present. Nor is there a sectoral pathway within the SBTi for the oil and gas sector. There is a background to this.
61. The development of specific criteria for oil and gas companies has been underway within the SBTi for a number of years. The SBTi’s basic principle is to involve companies in the making of a reduction pathway. This is in the hope that as many companies as possible will participate in the SBTi protocols.<sup>74</sup> This is particularly challenging in the case of the oil and gas sector. Contrary to other sectors, the oil and gas sector will by necessity have to shrink and end up in a situation in which companies will have to be split up into viable and non-viable parts to a certain extent. It is difficult to get oil and gas companies on board and voluntarily submit to guidelines. As one of the

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<sup>67</sup> Exhibit MD-487, p. 25.

<sup>68</sup> Exhibit MD-353, p. 3, Exhibit MD-354, p. 14, Exhibit MD-488, p. 13 (7.2), p. 14 (7.3(k)), Exhibit MD-490, p. 26.

<sup>69</sup> See Milieudefensie et al.’s Opening Argument part 2 of 2 April 2024.

<sup>70</sup> With regard to SBTi, see Milieudefensie et al.’s Notes on Oral Arguments 7 of 15 December 2020, paras. 30 to 34, with reference to Exhibit MD-322, pp. 5-6.

<sup>71</sup> <https://sciencebasedtargets.org/resources/files/SBTi-Corporate-Manual.pdf>, p. 13.

<sup>72</sup> See, for example, Exhibit S-141, p. 8.

<sup>73</sup> <https://sciencebasedtargets.org/net-zero> (‘Key components of the Corporate Net-Zero Standard’).

<sup>74</sup> Exhibit MD-572B, p. 2.

NGOs involved rightly remarked: “Fossil fuel companies are not going to design their own demise”.<sup>75</sup> This is an important conclusion, as the oil and gas companies themselves sit at the table with the SBTi and the development of the standard. This is a reason why the establishing of specific SBTi guidelines for oil and gas companies is very difficult.<sup>76</sup> *mr. Drenth* mentioned yesterday that the SBTi has remarked that the oil and gas industry is complex and that this makes the need for an oil and gas standard clear. However, *mr. Drenth* does not mention the words that followed immediately after his cited words, i.e. that it is important to develop a standard for oil and gas companies, because their products are the most important cause of climate change. One paragraph further, the SBTi emphasises that this standard is so important, because the IPCC has determined that the emissions from existing and planned fossil fuel infrastructure will exceed the still available carbon budget.<sup>77</sup> Indeed, the SBTi refers to the judgment of the District Court of The Hague against Shell to make clear what the Dutch court believes what Shell’s approach should be, to be in conformity with the Paris Agreement.<sup>78</sup> Against this background it is clear that the point that Shell wishes to make, that as long as there is no methodology, there cannot be a legal obligation, must fail. The passages not cited by *mr. Drenth* are important objective points for presuming the existence of a legal obligation.

62. The current state of affairs in any event clearly shows that the SBTi will also demand that oil and gas companies achieve absolute emission reductions.<sup>79</sup> Intensity goals too will have to lead to absolute emission reductions.<sup>80</sup> This aligns with the existing protocols of the SBTi.<sup>81</sup>

63. In addition, the condition to have companies stop developing new oil and gas projects is explicitly on the table, as well as to phase out existing production at an accelerated rate. The Expert Advisory Group of the SBTi made a positive recommendation about this in January 2023.<sup>82</sup>

64. In short, the SBTi too assumes the same important basic principles that must now be translated to an adequate standard. In the words of the SBTi:

*“We must phase out fossil fuels at the societal level - and that starts with individual O&G companies cutting emissions across scopes 1, 2, and 3 in line with science.”*<sup>83</sup>

65. The conclusion of all of the above must be that authoritative climate protocols provide important starting points for companies for determining reduction targets by non-state actors. Companies have to use maximum efforts to reduce their Scope 1, 2 and 3 emissions in an absolute sense. That contribution must be a fair share of the global task and will mean for many companies that they have to do more than the global average. Shell too is subject to the requirement that it must do more than the global average. In light of Shell’s significant responsibility for the climate problem, Shell’s large emissions scope and the fact that Shell achieves the bulk of its revenue in the richest countries, there can be no doubt about this. Shell also undeniably has the capacity to change

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<sup>75</sup> Exhibit MD-572B, p. 3.

<sup>76</sup> Exhibit MD-489, p. 25 (footnote 14). See also Exhibit MD-572B, pp. 1 to 3.

<sup>77</sup> Exhibit S-141, p. 8.

<sup>78</sup> Ibid.

<sup>79</sup> Exhibit S-141, p. 14. See also Exhibit MD-572A, pp. 10-11.

<sup>80</sup> Ibid.

<sup>81</sup> Exhibit MD-572A, p. 11.

<sup>82</sup> Exhibit MD-572A, p. 5. See also pp. 15, 45-46.

<sup>83</sup> <https://sciencebasedtargets.org/blog/oil-and-gas-next-steps-for-the-sbtis-guidance-development>.

quickly. It shows once again that Milieudefensie et al. is not asking for too much with its claim of a 45% reduction in 2030.

66. This conclusion ends my discussion on the topic of climate protocols. Before I get around to discussing important developments in the area of human rights guidelines, I would like to say the following.

67. Yesterday we heard Shell dispute its responsibility for Scope 3 emissions, because not all companies report on Scope 3.<sup>84</sup> Shell says *“it speaks volumes that the regulations about climate reporting that the US stock exchange regulator SEC published on 7 March 2024, does not even encompass the obligation to report on Scope 3”*.<sup>85</sup>

68. The fact that this SEC Climate Rule does not prescribe a report of Scope 3 emissions, is partly the result of the counter-pressure applied by Shell and other big companies in and outside of the oil and gas sector. Immediately after the SEC announced its intention to establish this Climate Rule, the Financial Times published a report with the following title: *“Fossil fuel groups step up lobbying of SEC to dilute climate reporting rules, Oil and gas industry stiffens resistance to tougher new environmental regime.”* This article says *“Lobbying reports show greater arm-twisting at the Securities and Exchange Commission, both by individual companies and industry groups”*.<sup>86</sup>

69. On the basis of public lobby data, the Financial Times and Reuters press agency<sup>87</sup> reported that this lobby was run by, inter alia, the American Petroleum Institute (API) and the US Chamber of Commerce. Influential lobby organisations in which Shell plays a prominent role. Shell sits on the board of both the American Petroleum Institute and the US Chamber of Commerce, as we previously discussed on the first day of the hearing.

70. Shell reminded us yesterday that this lobby was successful. The SEC Climate Rule was established in a stripped down form, to the detriment of good reporting on, inter alia, Scope 3 emissions. In the meantime, even this stripped down form of the SEC Climate Rule is being legally challenged by the corporate lobby, inter alia by the US Chamber of Commerce.<sup>88</sup>

71. Shell also refers to the Production Gap Report to argue that it does not mention Scope 3 emissions. This is not that strange and does not mean anything. The report only analyses the production plans

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<sup>84</sup> Shell's Speaking notes of day 2 of the session – Part 3 of 4, para. 8.4.7 under ( c ).

<sup>85</sup> Shell's Speaking notes of day 2 of the session – Part 3 of 4, para. 8.4.9.

<sup>86</sup> Financial Times, 2 August 2021, Fossil fuel groups step up lobbying of SEC to dilute climate reporting rules, Oil and gas industry stiffens resistance to tougher new environmental regime, available on <https://www.ft.com/content/cd247b42-8119-4681-afb2-2d89e109ba08>. *“The API has previously sued the SEC to stop regulations aimed at oil and gas companies. The oil and gas sector’s lobbying to dilute the SEC’s rules come as these companies are rushing to portray themselves as eco-friendly amid the boom in environmental, social and governance investing.”*

<sup>87</sup> Reuters 22 June 2022, Corporate America looks for leeway on U.S. climate disclosures, available on <https://www.reuters.com/business/environment/corporate-america-looks-leeway-us-climate-disclosures-2022-06-22/>: *“Groups including the U.S. Chamber of Commerce, the Bank Policy Institute, the National Association of Manufacturers (NAM) and the American Petroleum Institute (API)”*

<sup>88</sup> Reuters 22 March 2024, Challenges to SEC’s climate rules sent to conservative-leaning US appeals court, <https://www.reuters.com/legal/challenges-secs-climate-rules-sent-conservative-leaning-us-appeals-court-2024-03-21/>: *“The consolidated lawsuits include challenges filed by at least 25 Republican-led states, energy industry companies and business groups, including the U.S. Chamber of Commerce, the nation's largest business lobby, seeking to overturn the rules.”*

of states to chart how far they are from the 1.5°C target. It is therefore not strange that the remarks in that report are directed at states. The Production Gap Report mentions other things, however, that *mr. Lunsingh Scheurleer* did not mention yesterday. As already explained in the defence brief and in the opening argument, the Production Gap Report explicitly refers to the enormous blocking effect that emanates from the political influence of the fossil fuel sector on the success of the sustainable energy transition.<sup>89</sup> The sentence following the sentence that Shell cites regarding the responsibilities of governments: “*private-sector actors - including energy companies and financial institutions - should also move away from extracting and investing in fossil fuels.*”<sup>90</sup>

72. Shell also cites the Scope 3 Standard and, repeating its argument in the Statement of Appeal, referred to the double counting of Scope 3 emissions.<sup>91</sup> However, this double counting is the essence of the Scope 3 standard, that must make taking climate action effective. We already discussed this in detail in the Statement of Defence on Appeal, to which I refer.<sup>92</sup>

73. Last, Shell refers – in essence as the sole source – to Jaap Spier who, to put it somewhat simplistically, is supposedly of the opinion that every party should simply reduce its own Scope 1 (and/or 2) emissions and no one has responsibility, nor can they have responsibility, for Scope 3 emissions. As previously stated, this view of Jaap Spier cannot be reconciled with all the authoritative sources that Milieudéfense et al. cited about the importance of companies taking responsibility for Scope 3 emissions.<sup>93</sup> And with all due respect, nor has Jaap Spier taken any account whatsoever of all these sources. Nor has Jaap Spier realised that this actually means that solving the climate problem is largely left to the individual citizen. Nor does he take into account that there is quite a difference in the power held by a random citizen and the power held by a company like Shell. He therefore does not take into account the question of whether the problem can be solved at all if oil and gas companies only have to produce “more sustainable” oil and gas.<sup>94</sup>

74. This brings me to the developments that have occurred with regard to the guidelines for companies and human rights, being the OECD Guidelines and the UNGP.

### **OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights**

75. These developments confirm – just like all climate protocols – that companies have their own independent responsibility to reduce their Scope 1, 2 and 3 emissions. Without an adequate climate policy, companies contribute to human rights violations that they are to prevent and rectify in accordance with the OECD Guidelines and the UNGP. I will explain this.

76. I would first like to remind you that Milieudéfense et al. explained in detail in the Statement of Defence on Appeal that the responsibility for Scope 1, 2 and 3 emissions simply arises from

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<sup>89</sup> Milieudéfense et al.’s Defence Brief of 19 December 2023 commenting on Shell’s exhibits, section 8.

<sup>90</sup> Exhibit MD-357, p. 11.

<sup>91</sup> Day 2 of the session, Part 3 of 4, paras. 8.2.4-8.2.5.

<sup>92</sup> Statement of Defence on Appeal, section 7.2.

<sup>93</sup> Statement of Defence on Appeal, paras. 862 to 866. See also Milieudéfense et al.’s Defence Brief of 19 December 2023, section 38.

<sup>94</sup> Statement of Defence on Appeal, paras. 861. The following was stated: “*Assuming the existence of this Scope 3 responsibility is completely 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.*”

application of the doctrine of hazardous negligence, due to the control and influence that Shell has over all these emissions.<sup>95</sup>

77. The duty of care is established without having to make use of the international guidelines and arises directly from the control and influence that Shell has over the Scope 1, 2 and 3 emissions of the Shell Group, to which control and influence the Dutch laws regarding unlawful act attach consequences.<sup>96</sup> Having said this, these international standards of conduct are further confirmation and support in terms of upholding the order imposed on Shell. I will now discuss the international guidelines.
78. As is known, the OECD Guidelines and the UNGP make clear what the OECD countries<sup>97</sup> and the UN expect of companies in relation to protecting human rights and the climate. The responsibilities of companies under the OECD Guidelines and the UNGP correspond to a great degree, so that they can be discussed jointly.
79. The OECD Guidelines and the UNGP reflect a universal standard of conduct for companies to respect human rights. This standard applies to all companies, regardless of size, industry, operational context, ownership relationships and structure.<sup>98</sup> However, these factors can play a role in relation to the question which actions may be expected of companies. The seriousness of the impact of company activities on human rights is an important factor. The greater the size and influence of the company and the more serious the risks for human rights, the more that may be expected of a company when determining its responsibility.<sup>99</sup>
80. The OECD Guidelines were updated in 2023. Climate change has been added to the environmental paragraph.<sup>100</sup> Although the UNGP have not been updated, a special UN working group under the mandate of the UN Human Rights Council has published an *Information Note* regarding the UNGP and the climate issue. The relevant working group is *The Working Group on the issue of human rights and transnational corporations and other business enterprises*.
81. This UN working group has the UN mandate to bring about an effective implementation of the UNGP.<sup>101</sup> According to the UN working group, the Information Note is in addition to the growing number of guidelines and regulations relating to states and companies tackling climate change.<sup>102</sup> In this context this UN working group explicitly considered the following:

*“it is clear that States and business enterprises have obligations with respect to climate change, and with respect to the impacts of climate change on human rights”<sup>103</sup>*

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<sup>95</sup> Statement of Defence on Appeal, paras. 211 et seq., paras. 247 et seq. and paras. 432 et seq. See also Statement of Defence on Appeal, section 7 regarding Shell's control and influence over Scope 3 emissions.

<sup>96</sup> Ibid

<sup>97</sup> Exhibit MD-492, p. 6. This concerns all OECD countries and 13 other countries, in total 49 countries.

<sup>98</sup> See also Judgment, para. 4.4.16.

<sup>99</sup> Judgment, para. 4.4.16. See also Exhibit MD-492, p. 18 (para. 19).

<sup>100</sup> Exhibit MD-492, p. 33. See also p. 37 (paras. 76-77).

<sup>101</sup> Regarding this mandate: <https://www.ohchr.org/en/special-procedures/wg-business/about-mandate>.

<sup>102</sup> Exhibit MD-493, p. 2 (para. 3) and p. 3 (para. 6).

<sup>103</sup> Exhibit MD-493, p. 3. See also Milieudefensie et al.'s Notes on Oral Arguments 7 of 15 December 2020, paras. 8 to 12, with reference to Exhibit MD-270, p. 32.

82. In view of the broadly acknowledged consequences of climate change for human rights worldwide, there could be no doubt in this respect. I mentioned it anyway, as Shell has nevertheless argued in these proceedings that the UNGP supposedly do not relate to climate change.<sup>104</sup>
83. The environmental paragraph of the OECD Guidelines is based on the position that companies must act proactively as quickly as possible in order to prevent a negative environmental impact.<sup>105</sup> The explanation with the OECD Guidelines states that companies must ensure that their emissions of greenhouse gases are in line with the global temperature ambition and the best available science. Toward this end they must apply “*science-based*” reduction targets, for the short, mid- and long term.<sup>106</sup>
84. This must relate to absolute reduction targets for Scope 1, 2 and 3 emissions.<sup>107</sup> The OECD Guidelines thus make it clear that companies have their own responsibility in reducing their Scope 1, 2 and 3 emissions.
85. Just like the climate protocols, the OECD Guidelines also refer to the need to exercise caution when it comes to carbon credits. I quote the OECD Guidelines: “*Enterprises should prioritise eliminating or reducing sources of emissions over offsetting [...] Carbon credits, or offsets may be considered as a means to address unabated emissions as a last resort [...] and should not contribute to locking-in greenhouse gas intensive processes and infrastructures.*”<sup>108</sup>
86. The OECD Guidelines thus make it clear, inter alia, that carbon credits may not be used to make a further lock-in of fossil fuel infrastructure possible.
87. The previously mentioned UN working group also emphasises with regard to the UNGP that companies must develop policy and action plans relating to the climate impact of their activities.<sup>109</sup> To do so they must identify all their Scope 1, 2 and 3 emissions and include these in their climate policy.<sup>110</sup> The UN working group also explicitly states that companies must phase out the use of fossil fuels and the production of emissions and may not make use of carbon offsets.<sup>111</sup>
88. Lastly, both the OECD Guidelines and the UNGP make it clear that companies must be transparent and act with integrity in their lobby activities and must ensure that these activities are consistent with their responsibilities under these guidelines.<sup>112</sup> This corresponds with the climate protocols that I discussed above.
89. Based on the foregoing, it ensues from the OECD Guidelines and the UNGP that companies have their own responsibility to reduce their Scope 1, 2 and 3 emissions in an absolute sense. This is to

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<sup>104</sup> Shell’s Brief commenting on exhibits of 19 September 2023, p. 16 (response to Exhibit MD-385).

<sup>105</sup> Exhibit MD-492, p. 37, para. 74.

<sup>106</sup> Exhibit MD-492, p. 37, paras. 76-77.

<sup>107</sup> Exhibit MD-492, p. 37, paras. 76-77.

<sup>108</sup> Exhibit MD-492, p. 37, para. 77.

<sup>109</sup> Exhibit MD-493, p. 5 (para. 17, under b)

<sup>110</sup> Exhibit MD-493, p. 6 (para. 17, under d, f and g and para. 19 under d).

<sup>111</sup> Exhibit MD-493, p. 6 (para. 19, under b).

<sup>112</sup> Exhibit MD-492, p. 14 (under 5) and p. 16 (under 6). Exhibit MD-220, UNGP Commentary Principle 16 (pp. 16-17).

protect human rights and the climate. According to these guidelines, this means reduction targets that are in line with the climate science. This aligns with the climate protocols for companies that we just discussed, which make it clear in this respect that the basic principle is that companies must cut their emissions by half by 2030. In the European context too - despite intensive lobbying from the industry - a European directive is being drawn up that will impose an independent obligation on companies to reduce Scope 1, 2 and 3 emissions in an absolute sense in line with limiting global warming to 1.5°C and in line with climate science.<sup>113</sup> This is further confirmation of the existence of the duty of care.<sup>114</sup>

90. The OECD Guidelines and the UNGP provide additional clarity on the responsibility of companies to counteract human rights violations and climate change. The OECD Guidelines and the UNGP contain due diligence obligations for companies relating to their business relationships.<sup>115</sup> Based on these due diligence obligations, companies must chart in what manner they could be involved through business relationships in negative consequences for human rights and the climate. They must then endeavour to prevent or limit those negative consequences.<sup>116</sup>
91. The guidelines demand that companies take action if they have a share in negative consequences for human rights and the climate through business relationships. If they determine such negative consequences with business relationships exist, companies will have to take steps and use their influence to counteract those consequences.
92. On the basis of the foregoing, Shell will therefore also have to set out to what degree its business relationships are following an adequate climate policy. If Shell's business relationships do not have a good climate policy, it is possible that Shell must come to the conclusion that these business relationships contribute to negative consequences for human rights and the climate. On the basis of the guidelines it has to take appropriate action in this respect.
93. Whether these business relationships are countries or companies, does not matter.<sup>117</sup> Both countries and companies have human rights responsibilities.<sup>118</sup> The OECD Guidelines and the UNGP not only relate to the human rights responsibilities of companies, but also confirm the human rights responsibilities of countries.<sup>119</sup>
94. This means that the countries and companies that belong to Shell's business relationships, also have their own climate obligations and that Shell should hold them to account in this respect. At the same time, the countries and companies in question will also have to hold Shell to account in relation to its human rights responsibility and climate obligations. In addition, the human rights responsibilities of countries and companies exist separately from each other according to both sets of guidelines. This means that every country and every company has its own responsibility. The failure of one does not detract from the obligation of the other. Nor may countries and

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<sup>113</sup> <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/EN/pdf>, pp. 94-95 (Article 15).

<sup>114</sup> Dutch Supreme Court 16 June 2017, ECLI:NL:HR:2017:1107, para. 4.2.7.

<sup>115</sup> Exhibit MD-492, OECD Guidelines, pp. 14 and 15 (paras. 11 to 13) and p. 33. Exhibit MD-220, UNGP, Principles 17 to 21 (pp. 17 to 24).

<sup>116</sup> *Ibid.*

<sup>117</sup> Exhibit MD-492, p. 18 (para. 17). Exhibit MD-220, Commentary Principle 13 (pp. 14-15).

<sup>118</sup> Exhibit MD-492, p. 25 (paras. 42 and 43). Exhibit MD-220, Commentary with Principle 1 and Principle 11 (pp. 8 and 13).

<sup>119</sup> *Ibid.*

companies undermine each other's obligations based on these guidelines.<sup>120</sup> This is what the value chain responsibility for all these parties encompasses on the basis of these guidelines. This is the human rights flywheel effect that the OECD Guidelines and the UNGP seek to achieve.

95. A current example of value chain responsibility is the complaint of the UN working group together with various UN Special Rapporteurs, with which the Saudi national oil company Saudi Aramco and a large number of its financiers have each individually been held to account for their own role and responsibility relating to climate change.<sup>121</sup>
96. As stated, value chain responsibility does not stop with holding business relations to account. Companies must also attach concrete consequences to the due diligence survey. Companies will have to use all possible influence on their business relations to prevent or limit negative consequences for human rights. If there is no improvement in protecting human rights, this can mean that the business relationship must be terminated, according to the guidelines.<sup>122</sup>
97. Shell knows better than anyone of this specific obligation, because many pension funds have in the meantime ended their business relationship with Shell. Pension funds like ABP, PFZW and PME have ended their relationship with Shell, after long-term attempts to persuade Shell to follow a better climate policy had not yielded sufficient results.<sup>123</sup>
98. You may ask yourself why I am discussing these due diligence obligations. There are two reasons for this, both of which are relevant for assessing the arguments presented by Shell and Shell's interpretation of the reduction obligation and the considerations about this obligation in the Judgment.
99. The first reason is that the guidelines again make it clear along this path that Shell cannot hide behind the behaviour of countries and other companies. Shell has its own responsibility to respect human rights and reduce its emissions. This responsibility is separate from the human rights responsibilities of countries and other companies. With regard to Shell's own responsibility it does not matter whether countries or other companies have a good or a bad climate plan. Shell frequently refers to the climate policy of the Netherlands and the European Union. The foregoing makes it clear, however, that the climate policy of countries is not relevant for assessing Shell's responsibility. That climate policy of countries is not under review here, nor does it stand in the way of the review by this Court of Appeal.
100. The second reason for discussing these due diligence obligations is that they show that these guidelines correspond with what *mr. Cox* argued this morning with regard to Dutch liability law. *mr. Cox* explained in this respect that the endangering behaviour of others does not lead to less, but rather more responsibility for Shell. This responsibility entails that Shell, under Dutch law too, must hold others to account for their endangering actions. Under Dutch law too Shell must persuade others as much as possible to act in conformity with the Paris Agreement. Under Dutch

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<sup>120</sup> Exhibit MD-492, p. 12 (para. 2) and p. 25 (para. 42). Commentary with Principle 1 and Principle 11 (pp. 8 and 13). For a clear overview, see also Exhibit MD-494A, p. 9 and Exhibit MD-494B, p. 10.

<sup>121</sup> Exhibit MD-494A, p. 6 and pp. 9 to 11 and Exhibit MD-494B, pp. 6-7 and pp. 10-11.

<sup>122</sup> Exhibit MD-492, p. 26 (para. 48). Exhibit MD-220, UNGP Commentary Principle 19 (pp. 21-22).

<sup>123</sup> Exhibits MD-556B, MD-556C, MD-573B.

law, Shell must exercise all its possible influence on others, including its value chain influence and lobby influence.<sup>124</sup>

101. The foregoing shows that application of the OECD Guidelines and the UNGP leads to the same outcomes as the application of Dutch liability law. Both show Shell's responsibility in relation to the climate problem and show how Shell can realise that responsibility.
102. The application of Dutch liability law to Shell's responsibility thus corresponds with what is expected internationally from companies on the basis of the OECD Guidelines and the UNGP in relation to the protection of human rights and the climate. When it comes to finding the duty of care to which Shell is subject, everything points in the same direction.
103. It thus follows from the foregoing that Shell must hold its business relationships and value chain partners to account in relation to their human rights responsibility and climate obligations. It once again makes clear that Shell is not free to encourage, facilitate or otherwise support business relationships in behaviour that has negative consequences for human rights or the environment. Shell would not be complying with its own responsibilities with such behaviour, it would be making its business relationships a participant in this and undermining the responsibilities of the business relationships.
104. This conclusion brings me to the Judgment and Shell's interpretation of the Judgment. Shell uses one specific sentence from a broader consideration in the Judgment to pare back its reduction obligation. This concerns one specific sentence from paragraph 4.4.54 of the Judgment, which states that Shell has the freedom to perform the reduction obligation according to its own insight.<sup>125</sup>
105. Shell has seized upon this passage to ignore all other considerations of the District Court, including all other considerations in paragraph 4.4.54. Shell even goes so far as to argue in its written arguments that this specific sentence has become final and irrevocable.
106. In so doing Shell is making a farce of both the Judgment and of this specific paragraph 4.4.54. I will therefore provide a broader citation of the paragraph in which this sentence appears. The District Court considers the following (emphasis added by legal counsel):

*"A characteristic feature of dangerous climate change is that every emission of CO<sub>2</sub> and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this development. After all, each reduction means that there is more room in the carbon budget. RDS is able to effectuate a reduction by changing its energy package. This all justifies a reduction*

*obligation concerning the policy formation by RDS for the entire, globally operating Shell group. The compelling common interest that is served by complying with the reduction*

*obligation outweighs the negative consequences RDS might face due to the reduction obligation and also the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO<sub>2</sub>-generating activities. Due to the serious threats and risks to*

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<sup>124</sup> Milieudefensie et al.'s Oral Arguments of 4 April 2024, day 3, part 1, paras. 79 et seq.

<sup>125</sup> Judgment, para. 4.4.54.

*the human rights of Dutch residents and the inhabitants of the Wadden Sea region, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO<sub>2</sub> emissions to prevent dangerous climate change. RDS has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion. The court notes here that a 'global' reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units."*

107. There can be no misunderstanding that by means of this consideration the District Court meant that Shell has the legal obligation of contributing to actually preventing dangerous climate change. The District Court also makes it clear that this is only possible by a reduction of the CO<sub>2</sub> emissions, so that more space is left in the carbon budget. This is the essence of the case.
108. The essence of the Judgment is thus that Shell must ensure that a certain quantity of CO<sub>2</sub> emissions no longer ends up in the atmosphere, so that more space is left in the carbon budget. The District Court rightly held that only this action can prevent dangerous climate change. The District Court made it clear that every CO<sub>2</sub> emission avoided counts in combating dangerous climate change.
109. According to the District Court, Shell's legal obligation is therefore that it must use its control and influence to ensure that 45% less CO<sub>2</sub> is actually emitted to the atmosphere. This also makes it evident that Shell, for example, cannot comply with the Judgment by selling its fossil fuel assets to another party, and to have that other party emit the CO<sub>2</sub> which was previously emitted by Shell. It is in any event implausible that the mere sale of fossil fuel assets in 2030 will lead to the necessary reduction of CO<sub>2</sub> emissions to the atmosphere. This while Shell has the control and capacity to implement the order in a manner more effective for the climate. Shell's interpretation of the Judgment is thus at odds with the Judgment and the essence of the case. Shell's interpretation shows that Shell still continues to deny any responsibility whatsoever for the climate problem.
110. Against the background of all considerations of the Judgment, Shell has been made subject to an order to reduce its CO<sub>2</sub> emissions by 45% compared to its CO<sub>2</sub> emissions in 2019. In 2019, Shell's total Scope 1, 2 and 3 emissions was 1631 Megatons. As Shell has to reduce 45% of this amount, this means that it must ensure that in 2030, 734 Megatons less CO<sub>2</sub> is added to the atmosphere.
111. The Judgment thus encompasses that Shell must use its control over the original 1631 Megatons in such way, that 734 Megatons of this amount will no longer end up in the atmosphere in 2030 and is thus not at the expense of the still limited carbon budget. This is what para. 4.4.54 of the Judgment encompasses. This is also apparent from the words chosen by the District Court that drastic measures and financial sacrifices may be expected of Shell to realise this. This also shows that the willy-nilly selling of assets to perform the reduction obligation takes no account of the essence of the Judgment.
112. The freedom that Shell keeps referring to does entail that in the performance of its reduction obligation, Shell may itself determine how it will ensure that the CO<sub>2</sub> emissions to be reduced will not end up in the atmosphere. Shell may determine itself where in the world it reduces its CO<sub>2</sub> emissions and within what business units. This is what the District Court indicated in the last sentence of para. 4.4.54.

113. Shell even acknowledges that the sale of assets will lead to an only limited reduction of emissions, through its expert Druce. This is a further confirmation of the fact that this method of implementation of the Judgment insufficiently satisfies the legal obligation to which Shell is subject. Shell must endeavour to make an actual contribution to preventing dangerous climate change and not try to make this contribution as small as possible. Having said that: if the Court were to come to a different interpretation of the legal obligation and the Judgment than Milieudefensie et al. and believes that Shell will comply with the reduction order by the sale of assets, even this will not deprive the Judgment of its favourable climate effects. Later today *mr. Cox*, in response to Shell's expert Druce, will explain why the reduction order will be effective, even if compliance is in the form of the sale of assets.
114. In any event, it ensues from the OECD Guidelines and from the UNGP that the transfer of assets is insufficient for Shell to make its contribution to solving the climate problem. By doing so it fails to protect human rights and the climate in the way in which it should. In the first place, Shell is failing to perform its own human rights responsibilities. In the second place, the sale of fossil fuel assets to a business relationship of Shell means that Shell is consequently probably facilitating or supporting this business relationship in increasing its climate impact. The ensuing negative consequences for human rights and the climate are evident.
115. There are also various other authoritative sources that make it clear that companies cannot simply transfer assets to be able to satisfy their reduction targets:
- The UN Race to Zero emphasises the importance of phasing out fossil fuels.<sup>126</sup> It refers to the IEA NZE scenario in which no more new oil and gas fields are approved worldwide.<sup>127</sup> The UN Race to Zero refers in this respect to the need for criteria to prevent perverse results, like *"simply passing fossil fuel assets from one owner to another."*<sup>128</sup> The UN Race to Zero therefore sees simply shifting assets from one owner to another as a perverse outcome that must be prevented;
  - The previously mentioned UN Expert Report states with regard to the necessary phasing out of fossil fuels that *"the transition away from fossil fuels must [...] avoid transference of fossil fuel assets to new owners"*;<sup>129</sup>
  - The IEA too refers to the perverse outcomes of asset sales to satisfy emission reduction targets and emphasises that companies have a role in preventing that the selling off of assets leads to more emissions.<sup>130</sup> The IEA mentions as an example of actions that selling companies can take, namely that selling companies assess the climate plans of buyers as part of the due diligence process before they make a deal;<sup>131</sup>
  - The Greenhouse Gas Protocol and the Scope 3 Standard prescribe that companies must have a policy to recalculate the base year against which they report their emissions in case of structural changes due to the sale of assets. This is to prevent that emissions are merely shifted

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<sup>126</sup> Exhibit MD-354, p. 7 (para. 5(c)).

<sup>127</sup> Exhibit MD-354, p. 7 (para. 5(a) and (b)).

<sup>128</sup> Exhibit MD-354, p. 7 (para. 5(c)).

<sup>129</sup> Exhibit MD-487, p. 23.

<sup>130</sup> Exhibit MD-528, p. 123.

<sup>131</sup> Exhibit MD-528, p. 123.

from one company to another.<sup>132</sup> Shell referred to the existence of this rule yesterday, but did not discuss its background;

- The SBTi too recognises that writing off assets based on the climate perspective is better than selling assets: *“The SBTi recommends companies to decommission fossil fuel assets, instead of divesting, as this approach better reflects the need to phase-out fossil fuels in our global economy, as science indicates is necessary.”*<sup>133</sup>

116. All of this shows that clear indications have been given in the international community regarding the way in which companies must deal with the sale of assets in relation to their climate obligations. These indications from authoritative sources are also relevant for the performance of Shell's legal obligation.

117. I have almost come to the conclusion of this section. The last point I wish to discuss is Shell's claim that certain considerations of the District Court have become final and irrevocable.<sup>134</sup> According to Shell, a consideration being final and irrevocable would stand in the way of the clarifications that Milieudéfense et al. has requested of the Court of Appeal regarding specific conditions in the Judgment. This is not correct.

118. The primary rule is still that a respondent does not have to file a cross appeal if he is not seeking a change in the dictum. There is an exception to this, but that exception does not apply here. The decision cited by Shell relates to a completely different situation.<sup>135</sup>

119. The clarifications requested by Milieudéfense et al. only relate to the interpretation of considerations in the Judgment and to the interpretation of the legal obligation, which parts are simply part of the legal battle in this appeal on the basis of the devolutive effect. For example, with regard to Shell's arguments on the alleged indemnifying effect of ETS systems, Shell is again selectively citing from the Judgment, without taking account of the broader considerations of the District Court on this topic. The District Court explicitly considered that Shell *“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 CO<sub>2</sub> emissions [...] 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.”*<sup>136</sup> This makes it clear that the District Court did not consider that Shell does not have to adjust its policy for the part of its emissions that fall under ETS systems.<sup>137</sup>

120. With its arguments, Shell in essence fails to note the devolutive effect of the appeal, and consequently the freedom of the Court of Appeal to give a new opinion on Shell's legal obligation, including a supplementation of and improvement of the considerations of the District Court. It is furthermore relevant in this respect that the prohibition on increasing the burden only relates to the dictum of the Judgment, but not to the substantiation thereof. On the basis of the devolutive effect, the appeal can lead to revision of considerations of the District Court that Shell is trying to

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<sup>132</sup> Exhibit RK-15, p. 35 and Exhibit RK-19, p. 104.

<sup>133</sup> <https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf>, p. 49.

<sup>134</sup> Shell's Written arguments, para. 6.2 ( pp. 29-30).

<sup>135</sup> Dutch Supreme Court 26 May 2023, ECLI:NL:HR:2023:784, para. 3.1.5.

<sup>136</sup> Judgment, para. 4.4.46.

<sup>137</sup> See also Judgment, paras. 4.4.32 and 4.4.39.

interpret to its advantage.<sup>138</sup> Milieudefensie et al. believes that, partly in view of Shell's current policy, there is every reason to come to such a revision. It was explained in the written arguments that Shell's policy is far removed from the legal obligation to which Shell is subject.<sup>139</sup> Shell's most recent policy update also shows that its policy still comes with all kinds of reservations and is made dependent on the speed at which society moves.<sup>140</sup>

## Conclusion

121. I will now conclude this section. With this part of the oral arguments I have sought to give the Court of Appeal insight into the important international protocols and guidelines that provide guidance for what may be expected of Shell. The many recent developments in this area once again confirm that there is a great degree of agreement in the international community regarding what are important fundamental principles for a climate policy that is in conformity with the Paris Agreement and what this means for the reduction task up to 2030.
122. As I have explained, it is clear that the highest ambition may be demanded of companies to reduce their Scope 1, 2 and 3 emissions in an absolute sense. This is their own responsibility, that is separate from the obligations of business relationships and countries. Scope 3 emissions are thus Shell's own emissions, which are the direct result of Shell's own decisions. Shell and Shell alone determines how many fossil fuel products it puts on the market, and whether it will increase or decrease that quantity.<sup>141</sup> Because it is Shell's own responsibility, the argument that Shell held yesterday about risk liability for third parties must fail. It is not the case that Shell is being held responsible for the behaviour of others, it is being held responsible for its own behaviour.<sup>142</sup>
123. The reduction task will have to be a fair share of the global task. For 2030 this will have to be a fair share of the global minimum necessary halving of CO<sub>2</sub> emissions. For many companies a fair share entails that they will have to do more than the global average. This is also the case for Shell. In light of Shell's significant responsibility for the climate problem, Shell's large emissions scope and the fact that Shell achieves the bulk of its revenue in the richest countries, there can be no doubt about this. Shell also undeniably has the capacity to change quickly.
124. All of this shows that by seeking alignment with the necessary global CO<sub>2</sub> reduction of 45% in 2030, Milieudefensie et al. is not asking too much. Milieudefensie et al. believes that the above provides sufficient leads for affirming the reduction obligation as laid down in the Judgment. In legal terms this means that Shell will have to ensure that its Scope 1, 2 and 3 emissions do not violate, inter alia, the human rights that are coming under pressure due to climate change, such as those enshrined in Article 2 and 8 ECHR. Speaking in ECHR terms, this could be deemed Shell's negative obligation to refrain from violating human rights by means of its Scope 1, 2 and 3 emissions. The Court of Appeal asked a question in this regard, I hope that I have now answered that question.

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<sup>138</sup> Van Malssen and Andes in Sdu Commentaar Burgerlijk Procesrecht artikel 347 Rv, note 2 (up to date to 21 July 2023), Koerts in T&C Rv, commentaar op art. 347 Rv, note 4b (up to date to 1 January 2024). See also Ras/Hammerstein, *De grenzen van de rechtsstrijd in hoger beroep in burgerlijke zaken* (Burgerlijk Proces & Praktijk nr. 4), 2017/85, Groene Serie Burgerlijke Rechtsvordering, Art. 347M note. 10 and note 14, Opinion of A-G Verkade of 5 October 2012, ECLI:NL:PHR:2012:BY1533, para. 5.52.2.

<sup>139</sup> Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 122 et seq.

<sup>140</sup> Exhibit S-288, p. 60. See also Statement of Defence on Appeal, section 6.2.9, as well as paras. 1103 et seq.

<sup>141</sup> Statement of Defence on Appeal, section 7.3.

<sup>142</sup> Statement of Defence on Appeal, section 10.8, para. 1137.

