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June 18, 2024

LEGAL SUMMARY[1]

ORAL HEARINGS Milieudefensie et al. vs SHELL

From the 2nd until the 12th of April 2024 the hearings in the groundbreaking climate case of Milieudefensie et al.[2] against Shell took place. Milieudefensie et al. (Friends of the Earth – Netherlands) asked the Court of Appeal to uphold the judgment in first instance in which the District Court of The Hague ordered Shell to reduce it's scope 1, 2 and 3 emissions by 45% in 2030 relative to 2019 levels.

It has become clear in these proceedings that Shell will not meet its climate responsibility without a court order.

False narratives

Shell, together with the oil and gas industry, has determined the political and public narrative in recent decades, and we have collectively come to believe in that narrative. In that narrative, the climate problem is the citizen's fault, politicians must solve it, companies have no influence, the climate approach is at the expense of energy security and the affordability of energy, it would be economically destructive and more one-liners like that.

In court Milieudefensie et al. debunked all these narratives. This document unlocks and summarizes the oral pleading notes of Milieudefensie to give you an overview of the main legal arguments used.[3] Among the many topics addressed are; separation of powers, scope 3 responsibility, applicability of soft-law (a.o. OECD and UNGPs), gas is not a transition fuel, effectiveness of the reduction obligation (a.o. perfect substitution), emissions reduction pathways and CBDR, Carbon Pricing and CDR.

Asset selling

Another relevant topic is asset-selling. Shell expressed the view that under the Judgment it would be allowed to undermine the climate effect of the verdict by simply selling its oil and gas assets. According to Shell this means emissions would be transferred to another company instead of being reduced.But the verdict is clear; in accordance with Milieudefensie's demand in first instance[4], the court ordered Shell to limit or cause to be limited the aggregate annual volume of all CO_2 emissions into the atmosphere (Scope

[1] Disclaimer: All rights are reserved. This document is **based on unofficial machine translations**. This summary is **non-exhaustive** and does not aim to be complete in its references or in all relevant aspects of the case. The official documents contain more references and footnotes. Whenever possible the number of the corresponding paragraph is included to help you find these references and footnotes in the original text of the corresponding pleading note.

[2] Co-plaintiffs in this case are: Greenpeace Netherlands, Fossielvrij Foundation, Vereniging tot behoud van de Waddenzee, Both Ends Foundation, Milieudefensie et al. Jong, ActionAid Foundation.

[3] At the time of publication of this summary, all pleading notes referred to in this document, are available here in Dutch. Part of the pleading notes are already available in English as well at the website of Milieudefensie et al. and the Milieudefensie Climate Case Tool. If you want to stay informed with regard to the publication of the translations of the additional pleading notes, please fill in this form.

[4] https://en.milieudefensie.nl/news/statement-on-the-record-of.docx

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1, 2 and 3)[5]. Shell has a legal obligation to use its control and influence in such a way as to ensure that the actual CO_2 emissions into the atmosphere are reduced by 45% in 2030. The essence of the case and the purpose of the court is the actual prevention of dangerous climate change. Asset selling without limitation and without clause, in a manner that allows emissions to be transferred to other companies, is clearly the opposite. This while Shell has the control and capacity to comply to the verdict in an alternative and effective way, e.g. by ceasing investments in new oil and gas projects. Milieudefensie et al. asked the Court of Appeal to clarify the Judgment in first instance in this respect.

Expert reports

On the 5th of March, following the exhibits of Shell, Milieudefensie et al. filed five expert reports of:

1. Professor Joeri Rogelj a.o. on the limitations of IAMs, IPCC scenario assessment and vetting process, CDR, regional emissions distribution and equity
2. Dr.Lisette Van beek on the limitations of Integrated Assessment Models (IAMs)
3. Peter Erickson and Dr. Fergus Green on effectiveness (substitution) Carbon pricing, ETS, supply side vs. demand side economics
4. Prof.dr.Sweder Van Wijnbergen and Prof. dr.Rick Van der Ploeg on effectiveness of the reduction obligation (substitution)
5. Datadesk- report on Shell's trading

Court decision

*The decision of the Court of Appeal is expected on t**he 12th of November 2024***

[5] District Court of The Hague 26th of May 2021 Milieudefensie vs Shell par 5.3 j.o. 4.4.54

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1. Preceding legal documents

The verdict of the District Court of The Hague (May 26, 2021) and all legal documents that have been filed before the hearings are unlocked in the Milieudefensie Climate Case tool [6]. Pdf's of all legal documents are also available here at the Milieudefensie Climate Case Tool and also at the website of Milieudefensie et al.

Milieudefensie et al. wants to highlight 3 important preceding legal documents.

1.1 Statement of Defence on Appeal (18th of October 2022)

In this document Milieudefensie et al. addressed Shell's main arguments with regard to:

a. Separation of powers
b. Human rights & soft law
c. Global 45% reduction order is the minimum
d. Shell's policy (incl. greenwashing and offsetting)
e. Scope 3 responsibility
f. Reduction obligation: Effectiveness
g. Reduction obligation: No encroachment or undermining of EU policy

1.2 Statement of Defence on Appeal after Joinder (10th of October 2023)

This document outlines reply of Milieudefensie et al. against the Statement of joinder of the Environment and People Foundation (Stichting Milieu & Mens: M&M). This foundation claims to stand up for the interests of concerned citizens, fearing that energy prices in the Netherlands will rise if the Judgement against Shell is upheld by the Court of Appeal. Milieudefensie et al. has shown - among other things- through a comparison between the **effects of the Judgment** and the **gas crisis resulting from the Russian invasion of Ukraine** [7] - that this concern is unjustified and also that a rapid, sustainable energy transition benefits the energy interests of Dutch citizens. **In sum, weighing the interests of Dutch citizens, does not lead to another responsibility for Shell and therefore will not affect the Judgment.** [8]

[6] Pdf's of all legal documents are also available on the Milieudefensie et al. Climate Case Tool

[7] Milieudefensie et al. Statement of reply after joinder chapter 3.4 and 3.5

[8] NB In first instance the District Court of The Hague ruled that the interest of access to reliable and affordable energy, must always be served within the context of climate targets. (par 4.4.40 - 4.4.43)

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1.3 Written pleadings (19th of March 2024)

In this document Milieudefensie et al. gave the court an:

a. **Update on Climate science** May 2021 – March 2024
b. **Update on Shell's climate policy** October 2022 - March 2024

1.3.a Update Climate Science May 2021 – March 2024

The almost unimaginable seriousness and threat posed by climate change is obviously important in determining what the duty of care of Shell is. Indeed, that duty of care must, according to Dutch tort law, be weighed in light of the severity and extent of the danger. The measures to be taken by Shell must be proportionate in relation to the severity and extent of the anticipated risks, damages and violations of law. The greater and more serious the danger, the greater the duty of care. But also: the greater and more serious the danger, the less likely a far-reaching duty of care will be deemed unreasonably onerous. (par 6)

Therefore, on page 5 -22 of the Written Pleadings, Milieudefensie et al. takes a deep dive in climate scientific developments from May 2021 until the 19th of March 2024.

3 main documents are:

a. IPCC (2023): Climate Change 2023: Synthesis Report
b. OECD (2022): Climate Tipping Points: Insights for Effective Policy Action
c. Lenton et al: The Global Tipping Points Report 2023

Based (in part) on these documents Milieudefensie et al. demonstrates the urgency of rapid and, deep and emissions reduction to limit global warming to 1.5°C. Milieudefensie et al. also shows that every effort must be made to not exceed that 1.5°C danger line - even temporarily. **Preventing an overshoot scenario is of vital importance**.[9]

Not only an accelerated energy transition is needed to prevent catastrophic consequences if tipping points in the climate system are reached, an accelerated energy transítìon is also cheaper, less disruptive and less risky than any form of postponement.[10] (par 13)

NOTE: In pleading note 1 – April 2th par 56 is referred to the legal implications of the urgency of the climate crisis proved by climate science. The almost unimaginable seriousness and threat posed by the climate problem, also for the Netherlands, is obviously important in determining what Shell's duty of care is. That duty of care must, according to the Basement Hatch (Kelderluik) criteria, be weighed in the light

[9] Written Pleadings 19 March 2024 – chapter 2.8
[10] Exhibit MD-531A, ECB 6 september 2023, 'Faster green transition would benefit firms, households and banks, ECB economy—wide climate stress test finds', p. 1—3.
See also Milieudefensie et al. Statement of Reply after joinder chapter 3.4 and 3.5

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of the seriousness and extent of the danger. The preventive and precautionary measures to be taken must therefore be proportionate in relation to the severity and extent of the foreseeable risks,

damages and legal violations. The greater and more serious the danger in question, the greater the duty of care. But also: the greater and more serious the danger, the less likely a far-reaching duty of care will be deemed unreasonably onerous.

57. In this case, given the seriousness of the climate issue and the other circumstances of the case before it, correctly ruled that a far-reaching duty of care is for Shell

1.3.b Update on Shell's conduct and (announced) policy Oct. 2022 – March 2024

In the Statement of Defence on Appeal – Chapter 6, Milieudefensie et al. demonstrated that Shell's policy is at odds with the 1.5°C danger line of the Paris Agreement.[11] The update in the written pleadings shows that Shell is (still) fully committed to a large-scale lock-in of oil and gas and is not acting in line with the verdict of 2021.

2022

- Shell achieved in 2022 the highest profit in its existence. This high profit was used to a large extent to reward its own shareholders.
- In addition to large-scale investments in existing and new oil and gas fields Shell also continues to invest heavily in the search for new, undiscovered fields.
- Shell's strategy , envisions maintaining and even growing its current oil and gas activities (with a slight shift from oil to gas).
- A large part of Shell's reported reduction in scope 1 and 2 emissions was achieved through divestments. Milieudefensie et al. notes that without recalculation this means Shell transferred emissions to other companies by selling assets instead of reducing scope 1 and 2 (and related scope 3) emissions. That hardly qualifies as sustainability, nor is it consistent with the reporting guidelines of the GHG Protocol .

2023 - Shell backtracks its climate policy

- Significant investment in oil and gas, with a focus on the growth of LNG.
- Shell withdrew the announced production reduction of 1-2% for oil
- In May 2024 research by Oil Change international ("OCI") confirmed, that Shell has approved no less than 20 new oil and gas projects since the ruling. On top of that, Shell has an interest in 813 undeveloped oil and gas projects. Even if Shell were to exploit only its existing oil and gas fields, that would still equate to 17 times Shell's annual production in 2022.

2024 – Update Shell's Energy Transition Strategy.

[11] Statement of Defence on appeal – chapter 6 par. 632

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- The average intensity reduction of Shell's energy products by 20% by 2030 has been revised downward, to 15-20%.
- The target of reducing that intensity by 45% by 2035 has been abandoned entirely.
- Shell announced a Scope 3 15-20% emission reduction *ambition* for oil products in 2030. Not a target.
- Shell's policy anticipates growth in the global use of natural gas (including LNG) that does not even compare with the IEA's highest emissions scenarios, let alone a scenario in which global warming is still limited to 1.5°C. Any decrease in scope-3 emissions associated with the use of oil products will be offset by growth in CO_2 emissions from gas production and sales

It is this destructive course, which stands in the way of the global climate approach, and which Milieudefensie et al. et al. are asking protection against.

2. Day 1 - Oral hearings - Opening

2.1 Pleading note 1 - Opening plea

2.1.1 Shell cannot hide behind politics - Separation of Powers [12]

According to Shell, the primacy of climate action lies with politicians and politicians alone.

Milieudefensie et al. substantiated that, the primacy of politics Shell insists on, can never have the implication that politicians have a monopoly on promoting and protecting the public interest. Even more, this cannot be concluded because Shell undermines political decision-making on climate action worldwide (66). A.o. Milieudefensie et al. referred to the Smith vs Fonterra ruling of the Supreme Court of New Zealand (7th of February 2024) to argue that in contradiction of Shell's arguments, the mere existence of legislation on the climate subject does not mean that tort law then no longer has a role to play. This could only be different if legislation explicitly and unmistakably contemplates and decides that liability law is rendered inapplicable. This is not the case, neither in national legislation nor in EU law (71).

The Smith vs Fonterra-case also demonstrates that in a democratic rule of law the separation of powers essentially involves a balance of power. That balance of power means, among other things, that where politics is at fault by legal standards, the courts can intervene to restore the balance. It also means that if the judge goes too far in his rulings according to politicians, the politicians can intervene to restore the balance, for example, by amending legislation. The judge, in turn, then explains that new legislation in the case before him and asses that new legislation against higher law such as the ECHR. After all, political

[12] - Preceding legal documents on the Separation of Powers: https://climatecase.Milieudefensie et al..nl/defending-the-danger-line/the-relationship-between-courts-and-politics
-One week after this opening plea the ECtHR Klimaseniorinnen ruling was delivered. Milieudefensie et al. referred to this ruling with regard to the separation of powers on the final day in court in it's Answer to Court Questions see. Par. 5.2 in this summary

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freedom is limited by fundamental and human rights. In this way, state powers keep each other in balance. That is the balancing effect of the democratic rule of law (75).

2.1.2 Shell cannot hide behind the global South

Shell has been using the argument in these proceedings and also publicly for years that continuing to invest in oil and gas is necessary to help the poorest people in the world (115). Shell wants to give the impression that certain countries would not be able to develop further if Shell is held to the verdict (77). Based on statements made by UN Secretary General Guterres, UN-documents, the UAE Consensus and a speech of former Vice President Osinbanjo of Nigeria, Milieudefensie et al. substantiates in Pleading Note 1 that in practice and history there is no evidence of that (77-117).

This argument is evidently yet another narrative that Shell and its industry peers have put out into the world to make their highly profitable but destructive fossil business model appear pious.

2.2. Pleading note 2 - The governance gap

Shell's influence extends far beyond its own policies and related investment decisions.[13] Indeed, for decades Shell has been influencing and delaying political decision-making around climate action and energy transition, in front of and behind the scenes, directly and through hundreds of interest groups. But also through lobbying firms and consultants, and through media and PR activities. In these and many other ways, Shell has been stimulating global demand for oil and gas for decades.

The extraordinary influence that Shell has on both causing and prevention of dangerous climate change, is relevant to the fulfillment of the duty of care that rests on it. After all, whoever has a greater influence on the danger, also has a greater duty of care to help mitigate that danger (par 7)

2.2.1 Inhibiting influence on climate action

Based on a.o. IPCC AR6 report, UNEP Production Gap report, reports of UN-rapporteurs, and more than 100 pieces of evidence Milieudefensie et al. demonstrated, that the fossil fuel industry, including Shell, has an inhibiting influence on climate action. (par 9)

2.2.1.a Carbon Lock-in

This inhibitory influence stems from what is also known in science as the carbon lock-in. Carbon lock-in is the umbrella term for a range of obstacles that impede the necessary societal transformation from a fossil to a sustainable energy system. The term has several dimensions that reinforce each other and create collective inaction (par 10). The *Infrastructural lock-in* is created by the ongoing investments in fossil fuel

[13] Preceeding legal documents on the Governance Gap and Shell's lobbying activities can be found here: https://climatecase.Milieudefensie et al..nl/defending-the-danger-line/the-governance-gap

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infrastructure. The emissions associated with this will greatly exceed the still available carbon budget for limiting warming to 1.5˚C. Another important type of lock-in is the *Institutional lock-in.* This form of lock-in refers to the various ways in which the incumbent industry protects its own position. This lock-in keeps society dependent on fossil fuels for the time being and thus stands in the way of the transformation to a sustainable energy system

Breaking the carbon lock-in requires a radical change in the balance of power between the fossil industry and governments, according to the IPCC (par.17).

"Overcoming the carbon lock-in is not simply a matter of the right policies or switching to low-carbon technologies. Indeed, it would mean a radical change in the existing power relations between fossil fuel industries and their governments"

2.2.1.b Global Climate Coalition

For a better understanding of the structural and coordinated resistance of Shell and other carbon majors against climate action, Milieudefensie et al. dives into the history of the Global Climate Coalition.

> 33 The Global Climate Coalition was a collaboration between dozens of companies and their advocacy groups, including Shell, ExxonMobil, Chevron, BP and the American Petroleum Institute. The Global Climate Coalition was formed in the late 1980s in response to growing knowledge about the dangers of climate change and the call of the international community's on fossil companies to act with urgency.
>
> 34 Through the Global Climate Coalition, industry joined forces to thwart climate action by governments and to confuse the public about the seriousness of the problem.
>
> 43 This collaboration between Shell and other large industrial companies has been described by former U.S. Vice President Al Gore as *"the moral equivalent of a war crime"*.
>
> 44 In 1998 Shell withdrew from the Global Climate Coalition, but remained a member of the American Petroleum Institute. This trade association then continued the campaign against climate regulation also on behalf of Shell.
>
> 45 Shell's inhibiting influence on climate action did not diminish. The strategy simply shifted to other forms of obstruction to protect the fossil business model. Among the many so-called "discourses of climate delay" are; shifting responsibility to consumers, calling out that action makes no sense because other companies and countries are not yet taking sufficient action, stressing the need for perfect regulation, emphasizing the importance of fossil fuels for economic development, and positioning gas as a climate solution.

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2.2.1.c International Gas Union - “Gas as a transition fuel” advocacy

With regard to this last mentioned narrative, Milieudefensie et al. illustrated the scale and intensity of the “gas is a transition fuel” advocacy, by unveiling the the role of Shell and the International Gas Union (IGU) and the way they influence the public and political discourse on climate change. It’s good to realise it is only the tip of the iceberg. IGU is just one of hundreds of organizations in which Shell and its industry peers participate.

> 48 The International Gas Union (IGU), is a global advocacy organization for the gas industry. It calls itself "the Global Voice of Gas" and represents about 95% of the global gas industry. Of course, Shell is also part of it, as a Premium Associate Member.
>
> 52 The published papers of the IGU, provide a detailed description of how the gas industry is pursuing an intensive and coordinated global strategy to perpetuate the role of natural gas as a fuel for the future. (46)The working of the IGU shows how government policy is influenced, but also the market demand for fossil fuels.
>
> 55 The gas industry realized all too well at the time that natural gas would not simply become an integral part of the energy system of the future. As a result of growing concerns about climate change, increasing pressure from environmental organizations and increasing political attention to climate action, IGU knew that an effective and consistent communications strategy was necessary to convince policymakers that natural gas had to become part of the solution.
>
> 76 The published papers of the IGU demonstrate a very comprehensive and coordinated strategy through which the commercial interests of IGU's constituency are to be protected. The “gas is a transition fuel” slogan, is part of this strategy and nothing more than a coordinated slogan within the gas industry in order to be able to continue to sell gas; nota bene to be able to sell gas in the future in an ever-increasing amount (52). The IGU strategy sees climate change not so much as an existential problem for humanity, but primarily as an existential problem for the gas industry.
>
> **ACCR- Report**
>
> 80/81 Milieudefensie et al. filed a research report of the Australasian Centre for Corporate Responsibility (ACCR). ACCR identifies in addition to 101 organisations already known to have Shell’s involvement, another 80 interest groups about which no information at all is provided by Shell. In contrast to the organisations already known, half of the newly identified organisations are located in emerging economies. And in as many as 53 of them Shell has a board position or another important role. ACCR charted how Shell is pursuing a growth strategy for LNG today, based on its own LNG outlook that exceeds even the IEA’s highest demand scenario’s. Lobbying activities are aimed at ensuring that that growing demand for LNG predicted by Shell itself actually materializes.

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2.2.2. Conclusion

94 This public influence by Shell and other oil and gas companies is as much a part of the governance gap as the fact that national states cannot get a grip on international corporations, or as the fact that there is no global legislator to regulate international corporations

95 The existence of the governance gap in all its facets and the existence of the carbon lock-in in all its facets, are just two of the reasons why a great individual duty of care rests on Shell and why the judgment rendered by the court is a proper fulfillment of that duty of care.

3. Day 2 - Oral hearings - Shell & M&M

At the second day in court Shell elaborated the arguments of which it had given an overview on day one. Shell's main arguments are:

- It’s up to governments, not courts
- No legal obligation in general
- Incompatibility with the legal system
- No legal obligation to reduce scope 3
- Reduction order infringes EU-law
- Reduction order is not effective
- Milieudefensie et al. has no interest

The Environment and Man foundation (M&M) elaborated on their main argument that the reduction obligation is an infringement of the interests of Dutch citizens[14]. More in particular the interest in energy security and accessibility. M&M states that a reduction obligation for Shell will make energy prices in the Netherlands to increase.

Shell's and M&M’s pleading notes are available here on the website of Milieudefensie et al.

A summary of Shell’s pleading notes is available here on the website of Shell.

[14] See this summary par. 4.1.3

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4. Day 3 - Oral hearings - Milieudefensie et al.

4.1 Pleading note 3 - Reduction obligation & National Tort Law

4.1.1 National Tort law

18 All facts and circumstances presented in these proceedings indicate that all factors of the doctrine of hazardous negligence [15] have been met and a tort or a threatened tort by Shell can be concluded. There is also no reason not to impose a 45% reduction obligation on Shell because:

a. Shell can handle the verdict
b. The world can handle the verdict
c. Highest ambition principle in national tort law
d. Highest ambition principle in national law
e. Doctrine of pure Negligence in national tort law

4.1.2 Shell can handle the Verdict - Onerousness

19 There is no evidence that it would be too onerous for Shell to comply with the court imposed order of a 45% reduction by 2030. Nor has Shell presented any evidence to suggest that it would be unable to cope with the implementation of the Judgment.

24 Shell is in the 5th place of the top 100 largest oil and gas companies in the world.[16]

28 Even if Shell were 45% smaller today, it would still be among the top 10 largest oil and gas companies in the world. That also explains why there is no evidence available that implementing the verdict would be too onerous for Shell.

4.1.3 The world can handle the Verdict - Balancing interests

36 What both Shell and M&M argue is that the court should not apply the law in this case. This is because this case would not only require a balancing between the collective climate interest on the one hand and Shell's commercial private interest on the other, but would also require a balancing between the collective climate interest and other collective interests. According to Shell and M&M, because of the separation of powers, this consideration should be made by politicians. And if it were up to the courts at all, a weighing of those public interests should lead to a different outcome. These views of Shell and M&M cannot succeed?

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[15] For a better understanding of the Dutch legal context you can find a short summary on the Milieudefensie et al. Climate Case Tool.

[16] Looking at sales over a 12-month period beginning in Q4 of 2022 and ending after Q3 of 2023. To give an impression: On the 6th place are France's Total Energies and BP, both 33% smaller than Shell in terms of revenue.

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37 The defense of separation of powers cannot succeed anyway as far as Milieudefensie et al. et al. are concerned. This has already been sufficiently explained in these proceedings. [17] Many reasons have been given, but perhaps it is important to reiterate one of them here. And that is that all the countries in the world have long since weighed up, each for themselves and collectively, the balance of interests between the climate action to be taken on the one hand and looking after the other collective interests on the other.

38. The outcome of that balancing of interests was enshrined in the Paris Agreement and subsequent COP decisions, in which states recognized that tightening the temperature target was intended and necessary to advance the 17 Sustainable Development Goals, to eradicate poverty and hunger from the world, and to ensure global food security. So the trade-off between all the major social issues was made by states, and the outcome was unanimously that the temperature target in the Paris Agreement needed to be tightened. This one argument alone, of the many arguments given by Milieudefensie et al. et al, indicates that the defense of separation of powers raised by Shell and M&M cannot stand in the way of ratification of the Judgment.[18]

50 The world will hardly be able to handle dangerous climate change, if at all, but it will certainly be able to handle the Verdict, and will also the energy transition as such.

52 the Judgment is precisely in line with all the major societal challenges facing the global community and in line with the desire of all countries to serve the broad Sustainable Development Goals by limiting global warming to 1.5°C. The Verdict thus serves not only climate action but also other important public interests.

69 Neither Shell's position nor the collective interests of others - if they should be included in the consideration at all - oppose ratification of the Judgment.

4.1.4 National Tort law and the 45% reduction obligation

4.1.4.a National tort law - The Highest Ambition principle

70 Shell argues it would be nonsensical to require Shell to make a 45% reduction by 2030. The reason for this assertion is that model calculations show that the coal sector would have to reduce much more than 45% by 2030. As a result, the oil and gas sector would have to contribute less to very much less than a 45% reduction by 2030. The court should therefore not look at the global target of 45% by 2030 but at these sectoral averages for the oil and gas sector.

[17] See, inter alia, MvA, Chapter 3. See also Opening Plea, Part 1 of April 2, 2024 and the Milieudefensie Climate Case Tool

[18] In addition: For an extensive elaboration on the the fact that affordability of energy for the coming decades is precisely served by the Judgment 's contribution to the sustainable energy transition. See Statement of Reply after joinder

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74 The more technical discussion of sectoral pathways or global pathways could actually be disregarded as well, now that it can be established that the world urgently needs rapid and far-reaching emission reductions, and that application criteria of doctrine of hazardous negligence shows that it is reasonably possible for Shell to achieve a 45% reduction by 2030.

75 The essence of the doctrine of hazardous negligence is that everything reasonably possible can be required of the endangerer to help prevent a serious and real danger.

76 If more is needed and more is possible, the doctrine of hazardous negligence assumes that the endangerer will do everything reasonably possible to mitigate the danger.

77 In short, this means: those who can do a lot must also do a lot to mitigate the hazard. We call this the "**highest ambition" principle** for the sake of convenience, and so this "highest ambition" principle is actually embedded in the doctrine of hazardous negligence.

79 Because a 45% reduction in 2030 has proven to be feasible for Shell, Shell is therefore obliged, on the basis of the 'highest ambition' principle, to make at least that 45% reduction contribution.

4.1.4.b International law - The Highest Ambition principle

81. The "highest ambition" principle is not only embedded in Dutch national liability law but it has has several international law variants as well.

80. The "highest ambition" principle, is also the basis of the Paris Agreement. Indeed, Article 4.3 of the Paris Agreement requires member countries to always take the highest possible ambition as the standard when setting their reduction targets. As we will see later, the "highest ambition" principle is also a central tenet of the international climate protocols for companies.[19]

4.1.5. Shell cannot hide behind other Oil & Gas companies

4.1.5.a National tort law - The doctrine of pure negligence

87. Because of Shell's awareness of the climate hazard, its awareness of the role that other companies play in it, and because of Shell's special relationship with these hazard aspects, Based on the doctrine of pure negligence, Shell also has a responsibility of its own in relation to the hazards that are co-created by other Oil and Gas companies.

88. This means, among other things, that Shell must hold the other oil and gas companies accountable for their dangerous actions wherever it can, and that it will have to use its influence as much as possible to encourage them to act Paris-aligned.

[19] See this Summary chapter 4.2

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90. But, there is of course another important measure Shell can and should take. After all, Shell can help reduce the danger that the others help create by at least reducing CO_2 emissions itself as much as possible. This can be required of it anyway on the basis of the doctrine of hazardous negligence. But application of the liability rules for pure negligence lead to the same result.

Conclusion: national tort law and 45% emission reduction obligation

The bottom line is that in addressing climate change, based on the doctrine of hazardous negligence, Shell must do everything possible both to mitigate the consequences of its own hazardous negligence actions. And based on the doctrine of pure negligence Shell must do everything possible to mitigate the consequences of the hazardous negligence actions of other oil and gas companies. Both doctrines lead to the same outcome in this case, which is at least a 45% reduction in Shell's emissions by 2030

4.1.5.b No level playing field

In the last part of this pleading note Milieudefensie et al. addressed Shell's argument that a reduction obligation on Shell would distort the level playing field.

100 The heavy and targeted influence of politics and the public of Shell and a small group of Carbon Majors and their business associations, going back at least as far as 1928[20] . And as already discussed in the opening arguments, this has prevented climate policy from getting off the ground sufficiently, which is why we are far from on course to prevent dangerous warming.

102 It is no exaggeration to say that this lawsuit against Shell is one of the last chances to break the monopoly of power of the oil and gas sector of which Shell is such an integral part, and thereby break down the barriers that these companies are - also according to the IPCC - to climate action.

106 The fact that other oil and gas companies are not acting Paris- aligned is not a reason for Shell to take less responsibility. On the contrary, it is a reason for Shell to take more responsibility.

109 -119 Next to that, sectoral customary conduct is not decisive in determining the care to be exercised. As also showed in Asbestos and other case law: If the risk of collective sector behavior is too great, that risk must be contained. Customary conduct in the oil and gas sector does not exonerate Shell but rather increases Shell's duty of care. The unwritten civil duty of care can extend beyond what is laid down in public law regulations or codes of conduct.

[20] In 1928 on the initiative of Shell's legal predecessor, a the Achnacarry cartel agreement is concluded with other oil companies. The Achnacarry cartel then dominated the global oil market for more than 40 years until the cartel's strength was broken in the 1970s as OPEC countries took a stand against the cartel and asserted their countervailing power during the 1973 oil crisis in the 1970s. 96 Because of this decades-long cartel and its success, Shell and the other oil companies were able to grow into the so-called super majors, or super giants in the oil industry. The seven companies (The seven sisters) eventually merged into four remaining super majors, namely Shell, ExxonMobil, Chevron and BP.

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122 In the Urgenda-case the court held that if the state has a legal duty to achieve a certain reduction target, the government is not free to disregard that duty in the context of negotiations in the international context. In other words, the need to observe the social norm at all times cannot be set aside with the level playing field argument.

123 -126. However, there are more reasons why Shell cannot use the level playing field argument to avoid its responsibility. Simply because, there is no level playing field in the energy sector, nor is there a level playing field within the oil and gas sector.

- Due to the historically built up dominant position of the oil and gas companies in the energy sector, they have a dominant position that is still much larger than the position that sustainable companies have in the energy sector.
- Fossil fuel subsidies have further distorted the playing field in favor of the fossil sector. That too means there is no level playing field in the energy market
- There is no level playing field even within the oil and gas market, given the dominant position that Shell has in this sector along with a handful of other companies. Shell has much greater value chain power than most other oil and gas companies because of that dominant position.

4.2 Pleading note 4 - International climate protocols and guidelines

4.2.1 Introduction

Based on everything that Milieudefensie et al. et al. have argued in these proceedings, it is clear that Shell has its own independent responsibility and legal duty to contribute proportionately and adequately to the prevention of dangerous climate change.

In this part of the plea the following question is discussed:

What does that proportionate and adequate contribution entail specifically for Shell?

According to Milieudefensie et al. at least a **45% emission reduction in scope 1,2 and 3 by 2030** is the absolute and lowest limit of what Shell must do.[21] This is partly based on the application of the doctrine of hazardous negligence, human rights law and international legal principles such as the precautionary and CBDR principle.

The 45% reduction obligation -is also supported by corporate climate protocols and international guidelines on corporate obligations to protect human rights.

[21] Among others: Statement of Defense on Appeal Milieudefensie et al., chapter 5.2 October 18, 2022, Statement of Reply
Milieudefensie et al.. December 19, 2023, paras. 12-20 and paras. 40 and 41-45.

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In first instance Milieudefensie et al. has pointed at the Oxford report and the UN Race to Zero-criteria. Those criteria make clear that companies must exercise the maximum effort to mtake a fair contribution ("fair share") to the globally necessary emission reduction of (now) almost 50% in 2030. The CBDR principle also applies to companies.

The consensus on what action should be expected from businesses and other non-state actors has only become more robust since the submission of the Statement of Defence on Appeal.

In this plea Milieudefensie et al. discusses

1. climate protocols like: the *ISO Net Zero Guidelines*, the *1,5 °C Business Playbook*, the recommendations of the *UN High-level Expert Group on the Net Zero Emissions Commitments of Non-State Entities* (UN-Expert group) laid out in the "Integrity Matters-report (UN- Expert report),
2. OECD- Guidelines 2023
3. UNGP developments

4.2.2 Climate protocols

The invariable starting point in these protocols is the halving of Scope 1, 2 and 3 emissions by 2030. Moreover, all these sources explicitly affirm that those companies that have the capacity to move faster should do so. (par 28-74)

A few other highlights:

a. Companies have to reduce their absolute emissions[22]
b. Companies have to **"***take full responsibility for reducing Scope 1, Scope 2 and Scope 3 emissions without shifting undue responsibility for GHG emissions to another organization."*[23]
c. Companies should not use carbon credits to meet short-term reduction targets. Carbon credits, and then only carbon credits with guaranteed high integrity, should only be used for *"beyond value chain mitigation".*[24]
d. Companies have to end investments in new oil & gas projects and/or the expansion of existing fossil fuel projects. [25]
e. Companies have to make an adequate transition plan, and explain how to achieve reduction targets set and align investments, R&D expenditures and lobby activities with these targets.[26]

[22] UN-Expert report p. 17
[23] ISO Net Zero Guidelines, p. 21
[24] UN- Expert report p.19
[25] UN- Expert report p. 23-24
[26] UN-expert report p. 21

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4.2.3 OECD Guidelines and UNGP developments[27]

80 The OECD guidelines were updated in 2023. In this update climate change is added to the environmental section. While the UNGPs have not been updated, a special UN working group[28] mandated by the UN Human Rights Council has issued an Information Note regarding the UNGP and the climate issue.

75 Both documents confirm - as do all climate protocols - that companies have their own independent responsibility to reduce their Scope 1, 2 and 3 emissions. Without adequate climate policies, companies contribute to human rights violations that they must prevent and remedy under the OECD Guidelines and the UNGP.

86/87 The OECD guidelines also clarify, among other things, that carbon credits should not be used to enable further lock-in of fossil infrastructure. The UN-Working group explicitly mentions that companies should phase out the use of fossil fuels and production of emissions and not use carbon offsets.

90 The OECD guidelines and the UNGP also contain due diligence obligations for companies regarding their business relationships.

91 The OECD guidelines require companies to take action when they have a stake in negative human rights and climate impacts through business relationships . When they have such identified negative impacts in business relationships, companies will need to take steps and use their influence to counter those impacts.

Relevance OECD Guidelines and UNGP

99/100 These Due Diligence obligations are relevant because they make clear once again that Shell cannot hide behind the behavior of countries and other companies. Shell has its own responsibility to respect human rights and reduce its emissions. Next to that the international due diligence obligations are consistent with respect to Dutch liability law. The dangerous conduct of others does not lead to a lesser, but rather a greater responsibility of Shell.

102 The application of Dutch liability law to Shell's responsibility is in line with what is expected of companies internationally on the basis of the OECD Guidelines and the UNGP in relation to the protection

[27]The duty of care is already found without recourse to the international guidelines and flows directly from Shell's control and influence over the Shell Group's Scope 1, 2 and 3 emissions, and to which control and influence Dutch tort law attaches consequences. But these international standards of conduct are a further confirmation and support to move to enforce the reduction obligation imposed on Shell.

[28] The working group in question is The Working Group on the issue of human rights and transnational corporations and other business enterprises.

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of human rights and the climate. So when it comes to finding the duty of care applicable to Shell, everything points in the same direction.

4.2.4 Shell's explanation of the Judgment

104 Shell is using one specific sentence from a broader consideration in the Judgment to carve out its reduction obligation. This is one specific sentence from consideration 4.4.54 of the Judgment, which states that Shell has the freedom to fulfill the reduction obligation as it sees fit.

106 The full text of consideration 4.4.54 makes clear Shell makes a farce of both the Judgment and this particular consideration.

109 According to the court, Shell's legal obligation is to use its control and influence to ensure that 45% less CO_2 is actually emitted into the atmosphere.

110 In 2019, Shell's total Scope 1, 2 and 3 emissions were 1,631 mega tonnes. Now that Shell must reduce 45% of that, it means it must ensure that 734 Mega tonnes less CO_2 is added to the atmosphere by 2030 and thus will not be at the expense of the still limited carbon budget.

112 The freedom Shell keeps pointing out does mean that, in implementing its reduction obligation, Shell may decide for itself how it will ensure that the CO_2 emissions to be reduced are not released into the atmosphere. In doing so, Shell may decide where in the world it will reduce its CO_2 emissions and within which business units. This is what the court indicated in the last sentence of consideration 4.4.54.

4.2.4.a Asset selling

109-113 Shell's explanation of the Order is thus at odds with the Order and the essence of the case. Shell cannot, for example, comply with the Judgment by selling its fossil assets to another, and letting that other person emit the CO_2 previously emitted by Shell. In any case, it is implausible that merely selling fossil assets in 2030 will lead to the necessary reduction of CO_2 emissions to the atmosphere. Shell itself acknowledges that selling assets will lead to only limited reductions in emissions, through its expert Druce. This while Shell has the control and capacity to implement the order in a more climate effective manner.

114 -115 It also follows from the OECD Guidelines, the UNGP and several other authoritative sources, like UN Race to Zero, UN Expert report, IEA, GHG Protocol and Scope 3 standard, that companies cannot simply transfer assets to meet their reduction targets.[29]

[29] See also this summary 5.1.1.a

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4.2.4.b Conclusion

121.The many recent developments in the area of Climate Protocols and Guidelines reaffirm that there is broad agreement in the international community on what are important principles for a Paris-aligned climate policy. They guide what can be expected of Shell reduction task up to 2030.

122. It is clear that the highest ambition may be required of companies to reduce their Scope 1, 2 and 3 emissions in absolute terms. This is an individual responsibility, 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 products it puts on the market, and whether it increases or decreases that amount. **Shell is held responsible for its own behavior.**

123. For 2030 Shell's reduction task has to be a fair share of the global minimum halving of CO_2 emissions. This means Shell has to do more than the global average. In light of Shell's great responsibility for the climate problem, Shell's large emissions volume and the fact that Shell achieves the vast majority of its turnover in the richest countries, there can be no doubt about that. Also, Shell undeniably has the capacity to change so quickly.

124. All of this shows that Milieudefensie et al. is not overreaching in connecting to the necessary global CO_2 reduction of 45% by 2030.

4.3. Pleading note 5 - The reduction obligation – IAMs limitations

4.3.1 Shell cannot hide behind a sectoral path way approach

2. Shell believes that the oil and gas sector has little or no need to contribute to the necessary halving of global CO_2 emissions by 2030.- In short, the oil and gas sector, which along with the coal sector is the biggest contributor to the climate problem, would bear the smallest responsibility this decade, according to Shell.

3. Shell bases this curious assertion on modeled reduction scenarios.

4. Shell argues that it is wrong to impose a reduction obligation on a specific company based on the global average required reduction of 45%. According to Shell it follows from the Model calculations that coal has the largest reduction task and that emissions from oil and gas therefore do not have to decline as fast.

5 In its earlier litigation[30], Milieudefensie et al. c.s. has already explained in detail that Shell cannot hide behind these different sectoral paths for coal, oil and gas. The larger modeled reduction task of the coal sector is not an argument for Shell itself to have to do less than the requested 45%, Milieudefensie et al.

[30] a.o. Statement of Defence on Appeal , Chapter 5.3 and Statement of Reply on Exhibits Milieudefensie et al. Dec. 19, 2023, pp. 4-5, 14-15 and 26-27.

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c.s. has shown. That many model calculations lead to a faster phasing out of the coal production than of oil and gas production, has to do with specific (purely) theoretical assumptions, with regard to which the IPCC and others openly acknowledge that these assumptions are somewhat at odds with the principle ofCommon But Differentiated Responsibilities, the precautionary principle and other aspects related to the international conventions and social contracts in societies. .

In scientific terms, the models used to calculate reduction pathways are called Integrated Assessment Models (IAMs).

In Chapter 5.3 of the Statement of Defence on Appeal, Milieudefensie et al. has explained how these IAMs work and elaborated on their limitations. The modeling results are at odds with:

- The CBDR principle, because IAMs result in an unrealistically high and unfair contribution of the coal sector, and thus developing countries[31].
- The precautionary principle and the principle of inter generational justice, because IAMs have several properties that make deep emission reductions in the short term less attractive, while in the real world deep emission reductions in the shortest possible term are highly necessary.
- The 'real world' division of the reduction task by industrial sector. The theoretical model outcomes are therefore only usable to a limited degree and are certainly not the best guideline for determining what an honest, proportional and adequate contribution must be for an individual business. Last but not least, there is no coordination between the oil, coal and gas sectors regarding which sector will make which contribution to tackling the climate problem. Yet one more reason why the model outcomes are not translated into practice

11. Adopting an approach that is in line with treaty agreements and international legal principles leads to both a greater reduction task for developed countries and a greater reduction task for the oil and gas sector than follows from the model results.

13. This case is about what can be asked of Shell in the real world. The case is not about what can be asked of Shell according to the modeling world.

4.3.2 Developments after the submission of the Statement of Defence on Appeal

18 UNEP and IPCC[32] have confirmed that modeled scenarios do not adequately take into account the CBDR principle. This while compliance with this principle is important for meeting the Paris Agreement temperature target, UNEP said. [33]

[31]The "Developing and developed countries" terminologie is used in the Paris Agreement. Therefore Milieudefensie et al. uses this terminologie as an exception here. Normally using the "global North/South" terminology.
[32] IPCC AR6, WGIII, Chapter 3 under 3.2.2, p. 304 to 305.
[33] UNEP Emissions Gap Report 2023 p. 36

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Compared to IPCC scenario's, the IEA is taking the CBDR principle partially more into account, in its updated NZE scenario. This leads to a less rapid decline in emissions from coal and a faster decline in emissions from oil and gas in 2030 in the NZE scenario, compared to (the median of) the scenarios included by the IPCC in AR6.

28 The IEA's explanation shows again that application of the CBDR principle necessitates greater reductions in emissions from oil and gas in developed countries, allowing developing countries more time to make the transition and allowing them to follow a more equitable and more feasible emissions reduction path for coal.

4.3.3. IAMs scenario's and their limitations

At the 19th of December 2023, Shell has filed an expert report of Professor Hawkes. Hawkes states a.o. that the CBDR principle is not appropriate to apply to non-state actors and that the very high reduction rates for coal based on IAMs are reasonable.

To refute this "Hawkes report" Milieudefensie et al. filed two expert statements, from Professor Rogelj [34]and Dr. Van Beek, [35]

Based on these expert statements, Milieudefensie et al. discusses in this pleading note the characteristics and limitations of IAMs and mitigation scenario's with regard to:

a. **Cost effectiveness and coal**
b. **Carbon Dioxide Removal (CDR)**
c. **Discount Rate**
d. **Climate Damage is not taken into account**

4.3.3.a IAMs - Cost effectiveness and coal

Why IAMs are no real world solution

30. The mitigation scenarios calculated by IAMs are the result of a cost-effectiveness analysis. The cost effectiveness approach results in low-income economies reducing a relatively larger share of emissions and bearing a relatively larger share of mitigation costs than developed economies.

[34]Professor Rogelj is Professor of Climate Science & Policy at Imperial College London, Director of Research at the Grantham Institute and author of more than 125 peer-reviewed articles on climate change, greenhouse gas emission reductions and climate scenarios. Among other things, he is lead author of several IPCC reports, lead author of the Emissions Gap reports and advisor to the EU on the European Union Scientific Advisory Board on Climate Change. He can rightly be called one of the world's leading and most renowned climate scientists.22

[35] Dr. Van Beek. is a postdoctoral researcher at the Copernicus Institute of Sustainable Development in Utrecht, is an expert on the use of IAMs in climate policy and holds a PhD on the subject

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38 For example; Sub-Saharan Africa - one of the world's poorest regions - has the biggest reduction task, needing to reduce its total emissions by as much as 69% by 2030 according to the IPCC AR6 C1 (1.5C with no/limited overshoot) scenarios.

39/41 These results are largely caused by model-based, cost effective and therefore non-realistic high coal reduction this decade. As also pointed out by the IPCC, UNEP and IEA, cost-effectiveness makes model results take little to no account of the principles of justice and equity that underlie and are included in the UN Climate Convention and the Paris Agreement.

Why Shell cannot rely on IAMs and hide behind the coal sector

48 These findings are highly relevant to Shell's duty of care. Adherence to the CBDR principle will necessarily mean that global emissions from the oil and gas sector will have to fall faster than follows from the modeling results. In addition, it follows from the CBDR principle that developed country emissions will have to fall much faster. This is relevant to Shell, because it is precisely the developed countries where Shell sells its products and achieves 70% of its revenue.

53. The results of IAM scenarios cannot be used as a starting point for establishing an equitable reduction task for the global oil and gas sector. And not a good measure to find Shell's duty of care.

4.3.3.b IAMs - CDR

55. IAMs rely on the hypothesis that CDR will be able to remove massive amounts of CO_2 from the atmosphere further into this century.

Milieudefensie et al. explained in chapter 2.8 of the written pleading, that leaning on CDR comes at the expense of necessary deep CO_2 reductions in the short term[36]. The availability and scalability is highly uncertain. The best available science in this field has consequences for Shell. Taking into account the risks and limits of CDR, necessarily leads to higher emissions reductions in the short term. The precautionary principle and the principle of intergenerational justice oppose pushing the reduction task forward by gambling. In line with the Neubauer-ruling the bill and consequences cannot be placed on future generations. Gambling on the CDR hypothesis, would also be enormously costly to deploy and would require close and long-term stable global cooperation.

Large scale modelling of CDR in the C1-scenario's[37] lacks any realism.

4.3.3.c IAMs - Discount rate

90 The discount rate is a percentage by which expected costs in the future are converted back to a net value in the present so that costs incurred at different points in time can be compared. Using a high

[36] Written pleading Milieudefensie et al. et al. dated March 19, 2024, section 2.8
[37] C1 scenario's are 1.5C IAMs scenarios with no or limited overshoot

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discount rate, makes mitigation measures in the future relatively cheap compared to taking mitigation measures now.

95 The consequence of adopting a high discount rate, like the 5% discount rate that is used in the IPCC AR6 scenarios, is thus that future generations will not only have to deal with greater climate impacts, but will also have the financial and actual task on top of that, to clean up the pollution of the current generation later this century. This huge task is thus required of future generations in a situation where they will face greater global warming than 1.5°C, a situation where there is also a greater likelihood of irreversible tipping points for them, and a situation where it is uncertain whether this greater warming can still be reduced to 1.5°C.

96 Applying a high discount rate thus leads to the most unreasonable inter generational relationships imaginable.

4.3.3.d IAMs - Climate damage not included

100 IAMs do not include the costs and damages associated with climate change impacts in the calculations. While in the real world climate change does cause damage. Opposed to this, costs to phase out fossil fuel infrastructure, are included. Therefore, investments in new fossil fuel infrastructure not only cause a lock-in in the real world, but also in the world of models.

4.3.4 Conclusion

113. Cost-effectiveness-based modeling results are inconsistent with treaty agreements and international legal principles, for regarding the distribution of the reduction task around the world. Such as the CBDR, the precautionary and the inter generational justice principle.

114. IAMs have several properties that make deep emission reductions in the short term model-wise less attractive, while in the real world deep emission reductions in the shortest possible term are highly necessary.

115. In sum, it can rightly be concluded that Shell cannot hide behind the low modeled reduction rates for the oil and gas sector. These sectoral outcomes do not do justice to a fair and legitimate distribution of the climate challenge and have insufficient connection to the real world. These model calculations can therefore not serve as a starting point for fulfilling Shell's duty of care and the determination of a fair proportionate and adequate contribution for Shell.

4.4 Pleading note 6 - The reduction obligation - Sectoral pathways

Even a sectoral approach leads to 45% in 2030 Emissions Reduction obligation for Shell

Introduction

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As demonstrated in pleading note 5, there are important limitations to the way IAMs calculate sectoral reduction pathways. These limitations de facto all work for the benefit of the oil and gas sector. The limitations connected with IAMs by definition thus lead to excessively low emissions reductions in this sector.

Shell therefore cannot hide behind the low reduction percentages from the models. These sectoral outcomes do not do justice to a fair and legitimate division of the climate task and are not sufficiently rooted in the real world.

Nevertheless, Shell believes that none of these limitations need to be taken into account. Indeed, Shell believes that the existence of a bandwidth in model-based scenario outcomes means that it would not even be possible to find a specific reduction percentage, for the purposes of fulfilling its duty of care.

In this plea Milieudefensie et al. demonstrates that even an approach based on sectoral pathways for Shell should lead to a 45% reduction commitment by 2030.

4.4.1 Tyndall report

The Tyndall report is a study of equitable and CBDR-based reduction pathways for phasing out oil and gas. [38]

11. The Tyndall report shows what it would take to stay within the carbon budget and avoid an overshoot. It calculated what would need to happen if CDR were not used to facilitate the continued use of oil and gas and artificially increase the carbon budget. It takes into account the precautionary principle.

12. The Tyndall report shows that in that case the CO_2 reduction task for oil and gas comes to a 45% reduction in 2030, compared to 2021.

On pages 2-4 Based on an expert statement of Professor K.Anderson, Milieudefensie et al. counters arguments of Shell's expert professor Hawkes against the Tyndall report.

4.4.2 Shell's Hawkes-reports

Shell filed 2 reports of Professor Hawkes.

1. March 17, 2022: Hawkes arrived at a reduction of 32% for oil and 18% for gas in 2030.
2. December 19, 2023: Hawkes arrived at a reduction of 5% for oil and 15% for gas in 2030.

24 Thus, where globally there has to be a CO_2 reduction of at least 45%, Professor Hawkes believes that one of the biggest contributors of the climate problem, the oil and gas sector, barely has to make a contribution to that global reduction up to 2030. This is despite the fact that oil and gas forms two-thirds of

[38] Calverley, D., & Anderson, K. (2022). Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets.

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the fossil fuels used in the world.[39] This raises questions. How could a global reduction of 45% be achieved, while two-thirds of the fossil fuels used stay virtually unaffected?

25 On pages 4 - 7 By the expert report of prof. Rogelj, Milieudefensie et al. shows that Professor Hawkes' scenario calculations in both reports contain major calculation errors. Professor Rogelj concluded that Professor Hawkes selected the scenarios in a non-transparant and extremely selective way. A way that is scientifically incorrect and possibly even misleading

44 The low reduction rates for oil and gas presented by Professor Hawkes must, or at least can, be ignored.

4.4.3 Other Sectoral Pathways

Next to Tyndall and Professor Hawkes scenario's, Milieudefensie et al. compares also 3 other sectoral pathways of the IPCC, IISD and IEA NZE 2023 scenario.

The IPCC Low Demand scenario arrives at 47% reduction for oil and gas. This is comparable with the Tyndall report. If the precautionary principle and the principle of intergenerational equity are taken into account, based on NZE-scenario it becomes clear that a 45% reduction can be achieved globally within the oil and gas sector in a time frame of about a decade.

73 Therefore even in the hypothetical situation that a Verdict against all oil and gas companies had been pronounced in 2021, the world could probably handle this too. Regardless, the findings discussed show that the world can handle far more emissions reductions in the oil and gas sector than perhaps thought. These emission reductions are also highly necessary.All of this shows once again that this Court can uphold the Judgment and that a reduction order of at least 45% is appropriate for Shell.

4.4.4 Other grounds for upholding the Judgment

Furthermore Milieudefensie et al. demonstrates in this pleading note that political consensus has emerged on key tenets of the IEA's NZE scenario by COP28 and the IEA Ministerial Meeting (February 2024).

103 The IEA indicates that little or no investment in new oil and gas fields is needed and that some already existing fields should be closed, before the end of their (technical) lifespan.[40]

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[39] Statement of Defence on Appeal, para. 528.

[40] IEA NZE report MD- 528 p.61 + this also follows from the UNEP Emissions Gap Report 2023 that- the supply of fossil fuels must be reduced as quickly as possible and that there is no room at all for new fields. Investments in new oil and gas fields should be stopped as soon as possible.

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112 The production decline that naturally occurs in existing fields sets the world on a path toward the 1.5°C scenario. That is the central idea behind the NZE scenario.

113. So this effectively means that in the NZE scenario, no oil and gas producers are ~~still~~ developing new fields. However, many oil and gas producers make arguments as to why exactly they should be allowed to continue with new production.

114 These, according to the IEA, are the following arguments:

> i) new production should still be allowed to take place in low-income countries, because this stimulates the economic growth of these poorer countries;
>
> ii) priority should be given to low-emission-intensity production because it would be better for the climate;
>
> iii) producers who can produce at low cost should be given priority over others;
>
> iv) energy security calls for increased domestic production of oil and gas or increased production by geopolitical allies.

115 The IEA discusses and refutes these four narratives in detail. In doing so, the IEA shows that following these arguments involves major disadvantages and risks for oil and gas producers, for energy markets and for the energy transition as such. [41] On pages 21-24 Milieudefensie et al. summarizes the IAE's arguments.

124 What Shell keeps working toward, and for which it presents all these opportunistic arguments, is to remain an oil and gas company as large as possible. The IEA explicitly warns against such a business strategy. The IEA states: *"Many producers say they will be the ones to keep producing throughout transitions and beyond. They cannot all be right".* Because all companies adopt the same strategy and want to be so-called *"the last man standing,"* we are at the point of massive over investment, and that is exactly where the problem lies".

125 The IEA also negates another common narrative of the oil and gas industry, namely that it is up to society to reduce demand for oil and gas before the oil and gas industry can come into action. Our earlier discussion of the industry's political influence, the lock-in effect and the impact of production on demand, shows that it may already be clear that this argument cannot succeed. But the IEA again makes this emphatically clear. I quote:

"A productive debate about the oil and gas industry in transitions needs to avoid two common misconceptions.The first is that transitions can only be led by changes in demand. "When the energy world changes, so will we" is not an adequate response to the immense challenges at hand. [...] In practice, no one committed to change should wait for someone else to move first."

[41] Exhibit MD 528 p.47-59

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4.5 Pleading note 7- The Reduction obligation - Effectiveness

4.5.1 Introduction

2. One of Shell's defenses to its reduction obligation is that the Judgment would be ineffective or even counterproductive. According to Shell, the global climate approach would gain nothing by reducing its CO_2 emissions. Shell referred a.o. to perfect substitution arguments.

In the preceding procedure Milieudefensie et al. argued[42]:

1. The effectiveness argument is irrelevant

   Milieudefensie et al. demonstrated that the conduct of others is irrelevant in assessing Shell's legal obligation[43]. A recent ruling of the Court of The Hague confirmed that the conduct of others does not preclude the granting of an injunction when there is an imminent breach of a legal duty[44]

2. Direct effects - No perfect substitution

   The Judgment is effective in reducing the CO_2 emissions of the Shell group itself. That is already sufficient for ratification of the Judgment. In addition, in response to Shell's defense, Milieudefensie et al. has shown that the reduction in CO_2 emissions to be achieved by Shell will not be perfectly substituted by others in the oil and gas sector.[45]

3. Indirect effects - Flywheel effect

   There are many other kinds of flywheel and indirect effects of the Judgment; effects that advance the climate approach and energy transition.[46]

On December 19, 2023, Shell has filed an extensive report of NERA-consultant, Richard Druce on the effectiveness of the Reduction Obligation. Druce explains what he would do if he were Shell and had to implement the judgment. Shell, through Druce, apparently wants to show how it might behave as an economic actor and asks Druce to tell that story for it. Druce does so without regard to Shell's underlying legal duty or heed to the considerations that led to the dictum, which make it clear that Shell must make efforts to help actually prevent dangerous climate change. Druce limits himself only to a simple financial analysis, as if there were no other issues for Shell's board to consider. (13)

Milieudefensie et al. refutes the Druce report a.o. by the following expert-reports of:

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[42] https://climatecase.Milieudefensie.nl/defending-the-danger-line/the-effectiveness-of-emission-reduction-orders
[43] Statement of Defence, Chapter 8, as well as Statement of Reply after Joinder, Chapter 5, especially paras. 79 to 106.
[44] The Hague Court of Appeal Feb. 12, 2024, ECLI:NL:GHDHA:2024:191, r.o. 5.45
[45] Statement of Defence on Appeal, Chapter 8, as well as Statement of Reply after Joinder, Chapter 5, especially paras. 79 to 106.
[46] https://climatecase.Milieudefensie.nl/defending-the-danger-line/the-effectiveness-of-emission-reduction-orders

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1. Pete Erickson and Fergus Green
2. Van Wijnbergen and Van der Ploeg
3. Datadesk on Shell's trading

52. It can be concluded that Druce's report structurally ignores the alternative ways in which Shell's production factors such as capital goods, people and land can be deployed differently and how a climate beneficial impact could result. Nor does Druce account for what positive climate impacts Shell could generate with the sales proceeds. Nor does he adequately account for the market signal emanating from the Judgment and how that might impact the oil and gas sector. Druce has also failed to justify why Shell's trading activities could shrink without any market effect, which is completely implausible based on everything Milieudefensie et al. has demonstrated in this procedure. Druce's analysis also fails to take into account the frictions, restrictions, and delays that will result in the chain as a result of Shell's implementation of the Judgment, each of which could in turn give rise to price effects.

4.5.2 Supply-side intervention

53-58 Druces also tries to refute the considered peer reviewed relation between less production and less consumption in the UNEP Production Gap Report[47]. UNEP indicates that every barrel of oil not produced will lead to 0.2 to 0.6 barrels unconsumed in the long term. The District Court adopted these findings in the Judgment. Druce estimates demand elasticity at -0.16, but disregards to estimate supply elasticity. Erickson and Green argue that supply elasticity will be in the same order of magnitude. And based on countless economic textbooks, this applies that the reduction of 1 barrel of oil, results in half the reduction in consumption. Therefore the demand elasticities cited by Druce confirm UNEP's findings.[48]

4.5.3 ETS and carbon pricing

According to Erickson and Green intervening on the supply side, as the Judgment does, helps the climate approach. This supply-side intervention is important because it counterbalances the leakage effects of climate measures that only reduce demand for oil and gas

85 According to Druce it is preferable to work with market-driven incentives to bring supply and demand down, such as emissions trading and carbon taxes.

ETS

86 As Erickson and Green note, efficiencies could certainly be achieved if there were a global market approach to CO_2 emissions, but there is no such global approach. In fact, globally only 17% of global emissions are currently covered by any form of emissions trading system. In other words, **83% of global emissions are not covered by any emissions trading scheme.** Shell may dwell on the EU ETS, but

[47] This consideration in the UNEP production gap report, is among others based on peer reviewed studies of Erickson
[48] See Answer of Milieudefensie et al. on Court Question 15 as well.

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the vast majority of its emissions are not covered by it. For that reason alone, the discussion surrounding the EU ETS is of only very limited relevance to this case. [49]

Carbon Pricing

88 Druce's argument about the claimed relative efficiency of carbon pricing or other market instruments to reduce emissions is a diversionary tactic, according to Erickson and Green. It has been one of the established talking points of the oil and gas industry for decades, but it has not moved the world forward. No single actor - this Court, Shell, any country or region - is capable of implementing a global "efficient" climate policy on its own. But that does not diminish everyone's own responsibility and the effectiveness of the reduction order, because of the direct and indirect effects it can be expected to have in accelerating climate action

92 Big changes always begin with individual steps. Steps to which your Court hopefully obligates Shell as well. Back in 2007, the U.S. Supreme Court ruled in the EPA climate case that solving major problems begins with each person taking responsibility and not hiding behind the behavior of others. Our Supreme Court also came to the same conclusion in the Urgenda case. And also the German Constitutional Court has emphasized in the Neubauer case that one cannot avoid responsibility by pointing to the emissions of others. All these cases have rejected the argument that it would be pointless to make one's own contribution when others do not. Shell too must stop looking for excuses for not making an adequate contribution to the climate challenge. It has gotten away with these excuses for three decades now, and the serious consequences are already being experienced daily by the world.

5. Day 4 – Final pleadings

On the 12th of April Mileudefensie, Shell and M&M answered 16 Questions of the Court, And also reacted on each others pleadings of the first 3 days of the hearings in their Pleadings in Reply (Shell and M&M) and Rejoinder (Milieudefensie et al.).[50]

A selection of the main topics:

5.1 Milieudefensie et al.’s demand for clarification of Shell's legal obligation

5.1.1 The demand for clarification

Shell's behavior from the 2021 Judgment, makes it clear that there is a strong interest to explicit, once again, the action Shell can be expected to take in implementing the reduction order.

[49] See this summary chapter 5.3 and 5.4 as well

[50] At this moment all pleading notes referred to in this document are available here in Dutch. English translations will be available in a few weeks on the website of Milieudefensie et al. and the Milieudefensie et al. Climate Case Tool. If you want to stay informed, please fill in this form.

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The essence of the case is that Shell has a legal duty to make a proportionate and adequate contribution to help prevent dangerous climate change.

In its deed dated Oct. 15, 2020, Milieudefensie et al. has clarified the claim for relief in the summons, that Shell was being asked to limit or cause the limitation of CO_2 emissions to the atmosphere. With this addition, Milieudefensie et al. wanted to express explicitly what could be asked of Shell, namely that Shell would use its control and influence in such a way as to ensure that CO_2 emissions into the atmosphere are actually reduced. That is how it ended up in the dictum. It also follows from the court's considerations that the court understood this well.

5.1.1.a Asset selling

In accordance with Milieudefensies demand, the court ordered Shell to limit or cause to be limited the aggregate annual volume of all CO_2 emissions into the atmosphere (Scope 1, 2 and 3). The Courts purpose with the Verdict was to have Shell make the most effective contribution possible to limiting global warming to 1.5˚C. The free pass that Shell believes it has been given by the court to sell property without limitation and without clause, has not been given by the court.

In first instance it was also clear that the reduction order to Shell does not require Shell to sell existing oil and gas fields to third parties to comply with the reduction order, if at all. Shell could comply with the reduction order by simply ceasing its investments in new oil and gas projects

Shell has not disputed these findings either. Thus, the sale of fossil assets to comply with the reduction order was also not or hardly an issue at this time.

Only through the report of its consultant Richard Druce, submitted by Shell in December 2023, did it become clear what Shell would be planning in relation to the sale of fossil operations. One of Druce's key views is that the Judgment would allow Shell to undermine the climate impact of the Judgment as much as possible, by doing nothing more than selling existing business operations to third parties. Shell subsequently adopted Druce position in its oral argument. [51] Because of this new contention by Shell, that it should be allowed to render the Judgment ineffective as much as possible, this issue of asset sales has only now become relevant in the proceedings. It is for this reason that Milieudefensie et al. felt compelled to point out that there is much more to the Verdict than Shell makes it appear.

Shell's behavior from the 2021 Judgment, makes it clear that there is a strong interest in once again making explicit the action Shell can be expected to take in implementing the reduction order.[52]

5.1.1.b Net 45% (CDR and Carbon Credits)

In these proceedings, Milieudefensie et al. has explained many times using authoritative sources that the use of *carbon credits* to "offset" fossil CO_2 emissions should be approached with great caution.[53] More

[51] Shell pleading note dated April 3, 2024, Day 2, Part 4, para. 11.2.8.

[52] Read more about asset selling in 4.2.4a of this summary

[53] See, inter alia, Statement of Defence on Appeal, Chapter 6.4, Reply Act Dec. 19, 2023, para. 45 (Race to Zero), para. 67 (IEA), para. 78 (UNEP). Pleading Note Environmental Defense et al. day 3, part 2, para. 45 (UN Expert Report), para. 47 (ISO Net Zero Guidelines, Net Zero Stocktake, 1.5C Business Playbook), para. 85 (OECD Guidelines), para. 87 (Information Note UNGP).

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broadly, the risks of Carbon Dioxide Removal have been discussed at length. It was explained that it is very widely recognized that there are major risks associated with and questions about the use of *carbon credits* for "CO_2 offsetting." It was also explained in general terms that leaning on Carbon Dioxide *Removal* comes at the expense of profound and immediate reductions in one's own CO_2 emissions. [54]

There is reason for the Court to consider that while Shell may use negative emission technologies to meet its reduction obligation, it must ensure that *carbon credits* can only be used as a last resort when other mitigation options are not possible. The Court could also consider formulating a specific limit on the use of *carbon credits*, similar to the European Union under the European Climate Law. That sets an absolute limit on the net component of 2.2%. That could be an appropriate solution.

5.1.1.c Best efforts obligation

Milieudefensie et al. has explained that it has no problem at all with a best efforts obligation, because the Judgment makes it crystal clear that a great deal can be expected of Shell in limiting, or having limited, the total CO_2 emissions into the atmosphere. However, Shell has chosen, in defiance of its own independent legal obligation as formulated by the Court, to make its own action largely dependent on the action of customers[55]. Milieudefensie et al. believes that the Court has room to either (i) still qualify the signifcant best-efforts obligation as a result obligation, or (ii) further clarify the significant best-efforts obligation with additional considerations, the main one being that Shell must use its control and influence to reduce the Shell Group's Scope 1, 2, and 3 emissions in line with the reduction obligation. This is its own responsibility, which it can and should effect through the Shell Group's corporate policies. [56]The main thing is that Shell has to sell less oil and gas.[57] So, as I said, it is Shell's own responsibility to reduce its Scope 1, 2 and 3 emissions. So that responsibility is not a derivative responsibility of customers.

5.2 KlimaSeniorinnen

Question of the Court:

Would you please comment on the ECHR judgment of 9 April 2024 in the case of Verein Klima Seniorinnen Schweiz v. Switzerland. To what extent is this ruling relevant to the assessment of the dispute between Shell and Milieudefensie et al.?

Summary answer Milieudefensie et al.:

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[54] Statement of Defence on Appeal, Chapter 6.4, Reply Deed Dec. 19, 2023, Chapters 13, 21, 33, 35 t/, 37, Written pleading Environmental Defense et al., Chapter 2.8, Pleading Memorandum Environmental Defense et al., Day 3, Part 3 (models and their limitations).

[55] Statement of Defence on Appeal Chapter 7.4

[56] Verdict, r.ov. 4.4.52.

[57] The court saw it the same way, see r.ov. 4.4.25, 4.4.53, 4.4.54.

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The judgment in *KlimaSeniorinnen* confirms that the human rights interests are accorded special and exceptional weight. [58] This ruling shows that the District court has given proper weight to the human rights interests at stake.[59] If it was established first in *Urgenda* and now by the ECtHR that in a state under the rule of law the protection of human rights cannot be subordinated to political choices and compromises on tackling climate change. It is obvious that in these proceedings fundamental human rights should prevail over Shell's commercial interest

The ECtHR Court notes the importance the IPCC attaches to carbon budgets and also points with approval to the German Constitutional Court's decision in *Neubauer*, which rejected the German state's argument that it would not be possible to determine a carbon budget and emphasized the importance of the CBDR principle.[60] This is similar to the approach pointed out by Milieudefensie et al. et al, which is reflected in the Tyndall report and leads to a global oil and gas reduction of 45% by 2030 compared to 2021. It further demonstrates the importance of assuming a carbon budget for the reduction task and thus the importance of the Tyndall Report.

the ECtHR has sent an important message to States Parties, including national courts. The ECtHR makes it clear that there is an important role for judges in the complex debate on preventing dangerous climate change. In doing so, the ECtHR also clarifies that the role of national courts in the climate issue is far greater than the role of the ECtHR itself, which should nevertheless remain somewhat more at arm's length. To quote the Grand Chamber:

"*[D]emocracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature [...]. The relevant legal framework determining the scope of judicial review by domestic courts may be considerably wider and will depend on the nature and legal basis of the claims introduced by litigants*."[61]

The Strasbourg Court also gives national judges across Europe a positive message and mission, namely that they have a central and crucial role to play in solving the climate problem:

"[...] the Court considers it essential to emphasize the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field." [62]

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[58] *KlimaSeniorinnen*, par. 542.

[59] Statement of Defence on Appeal par 315

[60] KlimaSeniorinnen, par. 571

[61] *KlimaSeniorinnen*, para. 412. See also para. 450-451

[62] KlimaSeniorinnen , para. 639.

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It makes clear that the ECtHR sees a pre-eminent role for national judges in protecting human rights in relation to the dangers of climate change.

5.3 EU-ETS does not indemnify

The Court: Question 3

How do the parties understand the court's assessment that the EU ETS system (and other similar systems elsewhere in the world) "has a safeguarding effect" (para. 4.4.47)? In the extension, can Milieudefensie et al. further explain its request for further clarification (Statement of Defence on Appeal par 1085) in more detail?

Summarized answer Milieudefensie et al.:

P.8 In the response to Shell's Grievance I(f), Milieudefensie et al. c.s. explained that the EU ETS system and other similar systems elsewhere in the world are not exhaustive and do not indemnify against civil liability.

Milieudefensie et al. c.s. understands the judgment of the District Court to mean that Shell can "move along" with the reductions embodied in the EU ETS system and other systems, but that this does not help Shell when it has to achieve greater CO_2 reductions under the Judgment. On this basis, Milieudefensie et al. asked the Court to clarify that there is no indemnification at all or to clarify the Court's interpretation that an indemnifying effect cannot detract from following the reduction order.

5.4 Shell and ETS

The Court Question. 4

How will EU ETS2 affect Shell's emissions within Europe? To what extent after ETS2 comes into full effect - will Shell's European activities still fall outside ETS1 and ETS2? Please explain what part (percentage) of Shell's activities (broken down by Scope 1, 2 and 3) fall under ETS1, ETS2 or other cap and trade systems elsewhere in the world?

Summarized answer Milieudefensie et al.

P.10 Shell does not report how much of its Scope 3 emissions are covered by EU ETS.

Milieudefensie et al. calculated that at best estimate only a small proportion of Shell's global scope 1,2 and 3 emissions are covered by ETS1, 7.6%. After entry into force of ETS2, this is estimated to be 13.5%. The discussion of EU ETS therefore has limited relevance to this case in any case. This limited relevance is even more so because the ETS2 system will only enter into force in 2027 or 2028. So its operation will be mainly after 2030 - and thus after the critical decade.

17% of global emissions are covered by some form of emissions trading system. More than half of these have a CO_2 price of less than USD 10 per ton. According to the IPCC Meeting 1.5C would require much higher prices, ranging from USD 170 to USD 290 per ton of CO_2. Only a fraction of the 17% of global emissions covered by an ETS system has a carbon price that can assume some effectiveness.

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This means that in this critical decade, these systems will not sufficiently reduce cumulative CO_2 emissions, nor provide the necessary alternative energy sources and infrastructure[63].

5.5 Shell and EU-reduction targets

Court Question nr. 12

On p. 57 of the Shell Energy Transition Strategy Shell states in reply to the Judgement of the District Court: "The Court is also asking Shell to reduce emissions significantly faster than the EU (...)".

Can Shell explain this, in light of the EU target of a 55% reduction by 2030?

Summarized answer Milieudefensie et al.

The Court does not need to make any judgment at all on the appropriateness of EU targets or European climate policy. These policies are not up for review. EU regulations are not exhaustive, containing only minimum targets.[64] EU climate regulations also do not preclude the application of tort law and have no safeguarding effect in any way.

There is no dispute between the parties that a global reduction of at least 45% by 2030 compared to 2010 is necessary to maintain a 50% chance of limiting warming to 1.5˚C.

The European reduction target for 2030 is a 55% reduction compared to 1990. We explained in the Statement of Defence on Appeal that that amounts to 47% compared to 2010.[65]

In the Statement of Defence on Appeal, we also showed that the global task has now increased. Cumulative emissions have increased. With reference to AR6, it was shown that the global task now stands at a 48% reduction compared to 2019.[66]

If we compare the European reduction target of 55% compared to 1990 with this, it means that the EU will reduce emissions 37% compared to 2019. Thus, the EU's reduction target is well below the global average.

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[63] In line with Prod S-140 IPCC p. 1385

[64] See also MvA, paras. 967 to 969. See also Supreme Court December 19, 2019, ECLI:NL:HR:2019:2006, r.o. 7.3.3. See also Opinion A-G Wissink and P-G Langemeijer for Urgenda, ECLI:NL:PHR:2019:887, para. 4.105/4.106. See also Production MD-570B (Belgian climate case), para. 161: "*The fact that there is a binding framework at the European Union level is no reason for the Belgian State and the Regions to entrench themselves behind the provisions contained therein: after all, these are minimum requirements, and it cannot theoretically be ruled out that the ECHR imposes more ambitious reductions of greenhouse gases. It is therefore incorrect to say that from the mere fact that the Belgian State complies with the obligations imposed on it by the European Union, it can be concluded that Articles 2 and 8 ECHR are satisfied.*"

[65] Statement of Defence on Appeal par 973.

[66] Statement of Defence on Appeal para. 512.

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It is also important to note that the EU's 2030 target is not based on a *fair share* of the global task. The 55% target is a political compromise. Based on the CBDR principle, this makes it obvious that the EU is not doing its bit in this critical decade.

17 There are also several authoritative sources that substantiate that the EU's 55% target is insufficient. In it's answer Milieudefensie et al. refers to the European Central Bank, Professor Rogelj, as an expert in the Belgian Climate Case, Research office Climate analytics, CDP and SBTi, The Environment rapporteur of the European Parliament.

There is much evidence to suggest that the EU's 55% target is not in line with the 1.5C goal. Moreover, EU member states are not on track to meet the 55% target.The conclusion that EU policy works is not justified

5.6 Shell and CSDDD

Court Question 5

What climate related obligations would fall on Shell under CSDDD? To what extent would Shell be obliged under this (future) directive to formulate concrete and enforceable reduction plans? To what extent does the (future) directive provide that the civil court in the Netherlands could requiere Shell (or any other company) to comply with its reduction plan?

Summarized answer Milieudefensie et al.:

P.13 The CSDDD has not yet been formally adopted, nor is there any guarantee that it will indeed see the light of day. If the CSDDD is indeed adopted, it will - after implementation into national law - not be able to apply to Shell until mid-2027 at the earliest.[1] That is only a few years before the time by which Shell must have met the targets in the reduction order.

The obligations under the CSDD are not new to Shell. Those obligations have long been part of society's expectations of companies. To that extent, the CSDDD is merely a (further) codification of these in specific legislation. These social expectations are already apparent from *soft law* (such as the UNGP and OECD guidelines) to which the CSDDD explicitly refers, and to which Shell has also committed itself. They also already have a knock-on effect in civil law, including Section 6:162(1) of the Civil Code,

In the opinion of Milieudefensie et al. the application of the climate care obligation in art. 15 CSDDD to Shell, translated to its specific context, should *in concrete terms* lead to a reduction obligation that goes at least as far as the reduction order in the Judgment. It will in first instance be up to Shell to make this translation to the context of its individual business. The facts and conduct of Shell already discussed at length provide no basis for the expectation, that Shell will do that translation correctly.

On top of that, as a result of corporate lobbying, the enforceability of the transition plan has been weakened. The compromise text now formulates Article 15 CSDD as a "*best efforts*" obligation and reduction targets must be set "where appropriate". It is to be expected that Shell will surely try to use these loopholes to avoid its reduction obligation.

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So there is every interest in ensuring that even after the CSDD enters into force, civil courts can review whether a company like Shell is properly fulfilling its human rights obligations and its climate obligations, whether or not under Article 15 CSDD. That possibility will indeed be there in the Netherlands. Let me explain.

Article 1 paragraph 2 CSDDD states that the CSDDD cannot be a ground for lowering the level of protection under national law for human rights, environment and climate.[1] In line with this, Article 22 paragraph 4 CSDDD states that the CSDDD does not affect the civil liability of corporations under domestic law.

So the CSDDD does not prevent the Dutch civil court from reviewing whether Shell's transition plan and reduction targets are sufficient. And in doing so, the civil court must, according to the CSDDD, apply its own national law. In that review, *soft law* (such as the UNGP and the OECD guidelines) can continue to have full effect, and the court need not therefore limit itself to Article 15 CSDDD, should a conflict arise between the two.

Not only the CSDDD, but also national Dutch law makes it clear that, in addition to public law duties of care, there are also (more far-reaching) private law duties of care. This is evident from established case law of the Supreme Court, for example on the banking duty of care, which follows from both public and private law.[67]

Even in the light of the CSDD, there is every reason and room for the Court to rule on Shell's civil-law obligations, and to do so by upholding the reduction order. This will benefit everyone. Nothing stands in the way of such ratification. The CSDDD confirms the existence of a climate care obligation for individual companies and thus provides additional support for the ratification of the Judgment.

5.7 The reduction obligation and soft Law

Court Question nr. 6

Will Shell respond to Environmental Defense's argument about possible obligations arising from soft law instruments, for example the OECD Guidelines for Multnational enterprises (2023 version) or the report of the "United Nations's High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities" (Exhibit MD-487)? To what extent can the standards therein carry weight in the interpretation of the unwritten standard of care referred to in Art. 6:162 of the Civil Code?

Answer of Milieudefensie et al.:

[67] See Statement of Rejoinder Milieudefensie et al. 12th April 2024 par. 76 -83 with conclusion: applicable public law clearly does not offer Shell any indemnification for the civil-law duty of care also applicable to it vis-à-vis Milieudefensie et al.. Indeed, public law regulations actually offer additional starting points for a more far-reaching civil-law duty of care by virtue of article 6:162 paragraph 2 of the Dutch Civil Code. This applies to existing law, and to future law such as the CSDD and ETS2. Moreover, there is every reason to hold Shell to its obligations under this already existing civil law duty of care now. We simply cannot wait for possible future legislation

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Although this question is addressed to Shell, Milieudefensie et al. addressed this question in their rejoinder p. 11-19

54 Given national and international case law and opinions of authoritative authors, the question of whether your Court can seek affiliation with *soft law* when interpreting the unwritten standard of care cannot be disputed.

Milieudefensie et al. points at the international trend (also visible in the national context) of increasingly assigning value to *soft law* when interpreting standards of care. This is because it enables the court to provide its judgment on an open standard with objective points of reference, which serves legal certainty. Specifically in relation to corporations and human rights, moreover, the use of *soft law is* the only way to provide citizens with effective legal protection in a world in which multinational corporations exploit the *governance gap* to avoid *hard law.*

The rise of *soft law is related* to the increasing role of *non-state actors* in a globalizing world, in which the creation of traditional sources of national and international law is becoming increasingly complex[68]. In this way, therefore, *soft law* can also act as a pathfinder for *hard law*[69] and serve as a building block for the development of unwritten law.

In addition it is important to notice that:

First, the *soft law* sources to which Milieudefensie et al. refer are mostly closely affiliated with the United Nations.[70] They are prepared by renowned experts through broad consultations with stakeholders. These types of sources are therefore accorded great authority.

65 Second, there is a broad consensus that *soft law* must be respected according to its content. After all, each of the sources aims to prevent human rights violations. It follows unmistakably from the Supreme Court's Urgenda judgment and the very recent *KlimaSeniorinnen decision* of the ECHR, among others, that climate change threatens human rights.

66 That corporations must respect human rights cannot be disputed. This is especially true for large multinational corporations that wield considerable political, legal and economic power.

67 In summary, only one conclusion is possible. Both national and international law provide ample basis for giving heavy weight to *soft law* in the implementation of the social due diligence standard. Especially

[68] Alston & Goodman, *International Human Rights* (2013), p. 88; Shelton, "Soft Law," The George Washington University Law School Public Law and Legal Theory Working Paper no. 322 (2008), p. 16; Rodriguez-Garavito, "A Human Right to a Healthy Environment," in: Knox and Pejan (eds.), *The Human Right to a Healthy Environment* (2018), pp. 162-163;

[69] Opinion of P-G Langemeijer and A-G Wissink September 13, 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.32.

[70] With regard to the UNGP and the corresponding OECD guidelines and the UN Global Compact, this was also recognized in the Judgment, and Shell did not object to them. A similar degree of authority emanates from the other documents developed under the auspices of the UN to which Milieudefensie et al. refers, such as the UN Race to Zero criteria and the recommendations of the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities.

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in relation to a multinational like Shell, this is also desperately needed, all the more so now that human rights are at stake and authoritative and widely supported sources all point in the same direction.

Indeed, all of these sources provide to a large extent the same key starting points for how companies should set their reduction targets. The recurring principles here are that they should be absolute emission reductions, across Scope 1, 2 and 3 emissions, based on the best available science. The CSDD is also based on these principles.

Given the human rights framework and Article 13 ECHR, it is then up to the court to provide effective legal protection by arriving at a specific reduction rate, taking into account these principles and the circumstances of the case.

71 In this connection, Milieudefensie et al. pointed to the judgment of the court in the Belgian climate case, which similarly set the reduction rate for Belgian governments. In setting the 55% reduction rate for which an injunction was imposed, the Belgian court also relied on soft law, including the UNEP Emissions Gap reports, as well as climate science. In doing so, the court makes clear that this is the appropriate way to give substance to the governments' human rights obligations, as well as the civil law standard of care based on tort:

5.8 Milieu & Mens

Court Question 7:

Can Milieu & Mens explain what it believes would be the impact of the reduction order on the price of fossil energy in the Netherlands. In other words, what price increases do you think would be realistic in the short and medium term?

Summarized answer Milieudefensie et al.

Milieudefensie et al. c.s. points in this regard to its Statement of reply after joinder, which substantiated that M&M's fear of drastic and unacceptable price increases as a result of the Judgment is unjustified. It has also been substantiated that a rapid sustainable energy transition precisely serves the energy interests of Dutch citizens.

Milieudefensie et al also mentioned the European Central Bank's (ECB) stress test, which shows precisely that European households shall have very large benefits from a rapid sustainable energy transition.

The IEA is also very clear in its findings on the impact on energy access and affordability under the NZE scenario:

"*By 2030 in the NZE Scenario, total household energy expenditure in emerging market and developing economies decreases by 12% from today's level, and even more in advanced economies.*"

Furthermore, the Belgian court considered that the consequences of delayed climate action, requiring much more drastic emission reductions between 2030 and 2050, "*are without any doubt much more*

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harmful to the Belgian population as a whole than the limitations and restrictions that can be expected from a higher level of ambition from now until 2030."

It is also striking that M&M does not consider the consequences of dangerous climate change for Dutch citizens. For that matter, neither does Shell. In the written pleadings, the best available science was used to explain how dangerous climate change can lead to major social and economic disruption. It also explained how those consequences are probably still significantly underestimated.