EXPLAINER SUPREME COURT APPEAL IN THE MILIEUDEFENSIE V. SHELL CLIMATE CASE

12 Februari 2025

WHY IS MILIEUDEFENSIE APPEALING TO THE SUPREME COURT?

On 12 November 2024, the Court of Appeal in The Hague ruled that Shell does have an obligation to reduce its CO^2 emissions and prevent dangerous climate change, but the court said it was unable to determine by what percentage. In his legal commentary of the ruling, W. Th. Douma offers a clear comparison, summarised below:

> *This is as if the company (as do other companies) discharges a dangerous toxic substance into the water, but because a judge is unable to determine how much less poison the company should discharge, then simply does not impose any reduction obligation at all. While simultaneously stipulating that the company should not be discharging poison.*[1]

This comparison reflects well why Milieudefensie[2] is appealing the Court of Appeal's ruling and also shows why we have a strong case. We believe that Shell, as a major polluter, should be imposed a clear percentage in order to genuinely protect people from dangerous climate change caused by Shell.

In this explainer, we highlight some of the key parts on which we are appealing to the Supreme Court. We show that the Court of Appeal has used too narrow a standard to determine whether a concrete percentage might be imposed on Shell and that a broader standard leads to a 45% reduction rate for Shell. We also explain why the Court of Appeal's opinion that a reduction obligation would not be effective is incorrect.

The full overview can be found in the originating document on the appeal to the Supreme Court which will be available on Milieudefensie's website from 13 February 2025.

HOW DOES APPEALING TO THE SUPREME COURT WORK?

The Supreme Court assesses whether the Court of Appeal has applied the law correctly and whether the ruling is adequately and intelligibly explained. The Supreme Court does not check whether the facts as established by the court are correct. Therefore, it is not possible to introduce new facts or evidence. The ruling is expected in 2026.

DISCLAIMER

No rights can be derived from this publication. For a complete and exhaustive overview, please refer to the originating document on appeal to the Supreme Court.

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[1] W.Th. Douma in Jurisprudentie Milieurecht, 24 January 2025 issue 1, p. 39-88.

[2] Co-plaintiffs in the case are: Greenpeace Nederland, Fossielvrij, Vereniging tot behoud van de Waddenzee, Both ENDS, Milieudefensie Jong, ActionAid.

MAIN REASONS FOR APPEALING TO THE SUPREME COURT

1. EFFECTIVE LEGAL PROTECTION

The Court of Appeal ruled that a company like Shell has a special duty to others on earth to reduce its emissions and combat dangerous climate change. At the same time, the court said that it could not determine the percentage by which Shell should reduce its emissions. As a result, the court offers no real protection against dangerous climate change. Under the right to effective measures to protect human rights,[3] Milieudefensie argues that the judge had a duty to set at least a (minimum) reduction percentage.

In the law suit that Urgenda won against the State, a choice was made for a reduction percentage within a certain bandwidth. In the recent lawsuit of the Swiss KlimaSeniorinnen, the European Court of Human Rights also stressed that the courts should intervene in case of an imminent violation of human rights.

2. BROAD STANDARD - SCIENTIFIC CONSENSUS REQUIREMENT TOO LIMITED

The Court of Appeal ruled that it could not determine what would be a correct reduction percentage for Shell, because it appears there is no consensus in climate science about the reduction percentage for a company such as Shell. This is an incorrect and **too limited** standard, because:

2.1. Doctrine of hazardous negligence

In situations where one party causes a danger to another, it is established case law that the court determines the substance of the duty of care based on all circumstances of the case. Hence, the court should have applied a broad standard instead of the narrow standard of scientific consensus it has now used. In doing so, the court has wrongly failed to include[4] important starting points from the doctrine of hazardous negligence, international legal principles, treaties, UN climate protocols and *soft-law*,[5] that lead to a reduction obligation for Shell.

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[3] The right to effective protection from climate change and the duty of the court to determine or estimate at least a minimum reduction percentage arises from, inter alia, Articles 2 and 8 ECHR (effective legal protection) and Articles 6 and 13 ECHR (effective remedy). The right to effective legal protection also stems from national law (Article 3:296 of the Dutch Civil Code).

[4] This explainer does not discuss all relevant starting points. Under 4, the legal principles are highlighted and how their application leads to a concrete reduction percentage for Shell.

[5] Such as the *Race to Zero initiative, the 2022* UN HLEG report, the UN Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines) and various other initiatives.

2.2. Common Ground

Private law context

The limited scientific consensus requirement does not apply to Shell because it concerns a private law context.[6] In that context, the doctrine of hazardous negligence and hence the broad standard of review is decisive.

Common Ground & consensus

The Court of Appeal interprets the consensus requirement too narrowly and only tries to find scientific consensus on a concrete reduction percentage for Shell. But according to the standard applied by the European Court of Human Rights (ECtHR) in the interpretation of human rights (Common Ground method) the court – as in the doctrine of hazardous endangerment – should also have considered the **widely supported perspectives of international soft law instruments that are also based on climate science** as well as **international legal principles** such as the precautionary principle, intergenerational justice, and the principle of Common But Differentiated Responsibilities (CBDR). In chapter 3, we discuss these principles in detail.

The court's consensus requirement is an impossible standard

The limited consensus standard applied by the court means that a judge might only determine a reduction percentage for a specific company when all climate scientists agree. However, science never sets a reduction standard for a specific company. If the court waits for this to happen, no reduction percentage for any company can ever be determined. The court has to take science into account and can and must set a reduction percentage based on the law.

3. BROAD STANDARD - LEGAL PRINCIPLES

As explained above, the Court of Appeal opted for a narrow standard. The court has failed to include important starting points from the doctrine of hazardous negligence and soft-law instruments, as well as legal principles, such as the precautionary principle, intergenerational justice, and CBDR. Below, we explain these principles and **how they support that Shell must reduce its emissions by 45% (or at least by a certain percentage)**.

[6] A consensus requirement may play a role in relation to the State, when, given the tension in the separation of powers, the court has more reason to exercise restraint.

Precautionary principle

In this context, the precautionary principle means that the court may not wait to impose measures until there is complete scientific certainty about which precautionary measures a company must take to limit dangerous climate change. 'When in doubt, do nothing' is contrary to the precautionary principle. The period up to 2030 is decisive for limiting global warming to 1.5°C. Too little emission reduction might result in irreversible consequences. It is crucial to prevent this. *Better safe than sorry!*

Principle of intergenerational justice

Younger generations will inevitably be hit harder by the impacts of climate change in the future than current generations. The internationally recognised principle of intergenerational justice[7] means that the current generation has a responsibility to limit the burden on younger generations and not pass the bill on to them.

Common But Differentiated Responsibilities principle (CBDR)

The principle of Common But Differentiated Responsibilities (CBDR) is an important premise of the Paris Climate Agreement.[8] It is based on fair burden-sharing based on carrying capacity. The heaviest burdens should not fall on the countries in the Global South that have little or no such carrying capacity, that have contributed little to the emergence of dangerous climate change and that are already taking the biggest hits.

Legal principles and the court

The Court of Appeal failed to mention the principle of **intergenerational justice**.

The court ruled that the **precautionary principle** could not serve to determine a reduction rate for Shell because according to the court this principle can only be used in the event of uncertainty about the consequences of a certain action, while in this case there is scientific uncertainty about the *standard* (an appropriate reduction percentage).[9] Milieudefensie showed on appeal, using (international) case law and treaties, that the precautionary principle also means that taking measures cannot be postponed until there is scientific certainty about the standard to be applied. The court erred in not addressing Milieudefensie's contentions.

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[7] Among others, Art. 3(1) UN Climate Treaty, the Paris Agreement, Art. 2 and/or 8 ECHR, the preambles of the EU Charter, the Aarhus Convention, the UN Human Rights Council Resolution 48/13 (2021) and the UN report 'Our Common Future' and the rulings in the Urgenda case, the German Neubauer case and the Belgian climate case.

[8] Art. 2.2, 4.3, 4.19 Paris Climate Agreement, and also in Articles 3(1) and 4(1) UN Climate Convention and Race to Zero Initiative.

[9] Recital of Law 7.95.

The Court of Appeal held that **CBDR** does not give a concrete reduction percentage and is therefore not relevant in this context.[10] This is incorrect. As the ruling in the Urgenda case also shows, legal principles such as CBDR provide a relevant test for arriving at a concrete reduction rate. How a court may proceed to do this is briefly explained below.

4. A BROAD STANDARD LEADS TO A CONCRETE REDUCTION RATE

Global and sectoral reduction rates

The Climate Case distinguishes between the average global reduction pathway of 45% (which is in line with the Paris Climate Agreement) and so-called sectoral reduction pathways: percentages modelled for companies in certain sectors, such as the oil and gas sector. Milieudefensie has substantiated that for Shell both routes lead to a minimum of 45% in 2030.

Should the court instead have applied the broad standard, including the principles mentioned above, it could and should have taken, inter alia, the following into account when determining a concrete reduction percentage:

- **It is necessary for the world – and therefore also for Shell – to reduce its emissions by as much as possible before 2030.**
  > Later intervention leads to more danger and the period up to 2030 is decisive ***(precautionary principle)***.
  > It must be prevented that younger generations are saddled with a disproportionally high emission reduction burden, adaptation costs and climate damage ***(intergenerational justice)***.
- **Reduction pathways should not be chosen that disproportionally rely on reducing emissions by phasing out coal, and much less on phasing out oil and gas.**
  > Expecting countries in the Global South (who use a lot of coal) to do the most is both unrealistic ***(precautionary principle)*** and inequitable ***(CBDR)***.
- **Models should not be chosen that disproportionally rely on large amounts of CO^2 capture in the future (Carbon Dioxide Removal).**
  > These models assume that not as much reduction is required now because future technologies will solve the problem, even though science shows that these technologies are not available at scale and that it is highly uncertain whether they will become available at sufficient scale ***(precautionary principle)***.

[10] Recital of Law 7.93.

However, the Court of Appeal has not taken this into account and has thus ignored the shortcomings of calculated reduction pathways that are widely recognised in science.

Sufficient guidance by law and science

Most sectoral reduction pathways are based on these flawed models and therefore calculate reduction percentages that are too low to provide effective protection against dangerous climate change. Should the court have taken all of this into account, then this would lead to faster reductions in the short term and higher reductions in the oil and gas sector (and hence for Shell). The court had sufficient guidance in law and in science to determine a concrete reduction percentage for Shell. **The court could have established a reduction percentage of at least 45% for Shell, based on, among other things, the points below**.

- The period up to 2030 is decisive in the fight against climate change. Therefore, based on the precautionary principle and intergenerational justice, **we must opt for measures that are as safe as possible**. Minimal emission reductions are not good enough.
- There is no global regulator that determines what companies should do, and companies fail to set adequate reduction targets themselves. **Judicial intervention is the only way to be sure that every company makes its own appropriate contribution (fair share) in this critical decade**.
- Shell is a large and powerful company, most of its customers come from developed and rich countries. Under the CBDR principle, **Shell should at least meet the reduction level that is required globally, which is 45% by 2030**.
- The **consensus that 45% is the minimum fair share for companies** and that many companies should do more under CBDR is also evidenced by the **UN climate protocols and other *soft law***.[11]
- The IPCC and the International Energy Agency's authoritative Net-Zero scenario (IEA NZE-scenario) show that large reductions in the oil and gas sector are possible and that a 45% reduction is not too much to ask.

In short: the broad standard offers sufficient guidance to arrive at a concrete reduction percentage. And a judge should not be concerned that 45% is too high a reduction percentage for Shell.

[11] Inter alia, Race to Zero, UN-HLEG on NZE commitments of non-state entities, UNGP, OESO, Net Zero Guidelines ISO, 1.5C business playbook.

From coal to gas: not a solution but a problem

In its ruling, the Court of Appeal went along with Shell's narrative that a switch from oil to gas leads to lower global emissions. In doing so, the court did not take into account:

- That there is no room in the remaining carbon budget* for growing gas use. To prevent dangerous climate change, emissions from gas must also be significantly reduced. This is also evident from all the reduction pathways brought forward by Milieudefensie and even Shell itself.
- That continuing to invest in fossil fuels perpetuates dependence on the fossil energy system and thus stands in the way of the energy transition.
- That research shows that coal can actually be replaced by renewable energy instead of by gas. Focusing on gas hinders the energy transition.

**The remaining carbon budget is the total amount of CO^2 that the world is allowed to emit if global warming is to be kept below 1,5 degrees.*

5. SUFFICIENCY OF INTEREST & EFFECTIVENESS

The Court of Appeal has erroneously ruled that Milieudefensie does not have an interest in a reduction order because, according to the court, **Shell could implement such an order in a way that would be ineffective**. Other companies might potentially take over Shell's sales of oil and gas. **This is incorrect for a number of reasons, including:**

- This is a lawsuit against Shell and it is about **Shell ceasing its unlawful behaviour**. Shell cannot hide behind other oil and gas companies that also do not do enough.
- Furthermore, there are many ways in which Shell might comply with the order. That Shell *might* implement the order in a way that according to the court could be potentially ineffective is not relevant. **The point is that Shell could also implement the order in an effective way**. Shell then has the duty and the ability to do so.
- Shell is the biggest buyer and seller of oil and gas in the world. If Shell were to implement the reduction order by scaling down its trading operations alone, not only Shell's buying and selling, but also its financial and logistics services would be reduced. **This would irrevocably have an impact on the world's total emissions**.
- Incidentally, it is hardly plausible that Shell would comply with an injunction in the way that the court considers potentially ineffective. **Indeed, it is very unlikely that Shell – as the court suggests – would only shrink its highly profitable trading branch and not also reduce its oil and gas production**.
- It is equally unlikely that other companies can and will take over Shell's entire business.

The Court of Appeal erred in not addressing an important part of Milieudefensie's arguments. The ruling therefore lacks sufficient reasoning.