

Court of Appeal of The Hague  
Case number: 200.302.332  
Session date 2 April 2024

**ORAL ARGUMENTS OF MILIEUDEFENSIE ET AL.**

**Part 1**

*in the matter of:*

**1. Vereniging Milieudefensie**

having its registered office in Amsterdam, the Netherlands;

**2. Stichting Greenpeace Nederland**

having its registered office in Amsterdam, the Netherlands;

**3. Landelijke Vereniging tot Behoud van de Waddenzee**

having its registered office in Harlingen, the Netherlands

**4. Stichting ter bevordering van de Fossielvrijbeweging**

having its registered office in Amsterdam, the Netherlands;

**5. Stichting Both ENDS**

having its registered office in Amsterdam, the Netherlands;

**6. Jongeren Milieu Actief\***

having its registered office in Amsterdam, the Netherlands;

Respondents, original claimants,

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

Legal counsel:

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

*versus:*

**Shell plc**

having its registered office in London, United Kingdom

Appellant, originally the defendant

Legal counsel:

*mr. D.F. Lusingh Scheurleer, mr. T. Drenth*

*and:*

**Stichting Milieu en Mens**

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

having its registered office in Zwolle, the Netherlands

Joined party on the part of Shell plc

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

Your Honours,

**Introduction: the democratic state based on the rule of law and the role of the courts**

1. All of us present in this courtroom have the good fortune to be living in a democratic state based on the rule of law, a deliberately chosen and cherished form of cohabitation that provides balance, resilience, safety and stability. A cohabitation form in which everyone is equal before the law and in which there is respect for fundamental rights and in which respect for everyone's inalienable human rights forms the basis of our social contract.
2. In a democratic state based on the rule of law, democracy and the rule of law are inseparably entwined, forming two sides of the same coin. One cannot exist without the other.
3. The democratic nature of a democratic state based on the rule of law is seen in such things as the freedom of choice that citizens have to determine how the country is to be run and by whom. This basis connects politics, government and citizens with each other and makes them dependent on each other.
4. A properly working democracy makes open and trustworthy relationships crucial, both between citizens and government and between citizens themselves. But this is not all. A properly functioning democracy needs the business community, in its relationships with the government and citizens, to play an equally trustworthy role.
5. Government, citizens and companies each have their own role in society. This requires trust on all parts, as well as the confidence to trust. It also requires that the trust that others have given is not put to shame, that the trust shown is respected and rewarded.
6. The importance of a trustworthy business community has become much clearer, particularly in the past decades. Since the 1980s the business community has gained a lot of trust from society throughout the world. This led to us entering a new era in terms of the relationship between national governments on the one part and the multinational business community on the other in the 1980s. An era that has been characterised by deregulation and privatisation, a greater role for market forces and a government that has increasingly stepped back. An era of increasing globalisation of markets, of fixation on shareholder value and of large mergers and acquisitions in the international business community. Because of all this, multinational companies have become bigger and more influential in the past few decades and this has led to their influence and impact on global society becoming greater.
7. Consequently multinational companies, which have increased in size over the past decades, have acquired such legal, economic and de facto power over citizens and governments, that they have a great degree of influence on the well-being of society, as well as the well-being of

democracy.<sup>1</sup> If large influential companies betray the relationship of trust with governments and citizens, if they do not respect the trust placed in them, for example by structurally undermining important collective interests, this will undermine the well-being and robustness of democracy.

8. A well-functioning democracy requires not only government, citizens and companies to trust each other, but also for them to be able to trust in jointly shared standards and legal rules, so that they can fall back on those shared standards and legal rules if they are at risk of drifting too far apart. This brings me to the nature of the rule of law of the democratic state based on the rule of law.
9. The level of the rule of law of a democratic state based on the rule of law is demonstrated by everyone in society complying with the laws and rules: citizens, government and companies. In a state based on the rule of law, the fact that every individual is bound by the law serves to protect the freedom of all of us, and to protect our human dignity. Being able to seek the protection of the law is crucial for a mature and prosperous society. Otherwise the law of the strongest, the most forceful, the richest, the most powerful applies.
10. It is comforting to know that the Netherlands is among the top states that are based on the rule of law. This is evidenced in the Rule of Law Index of the World Justice Project.<sup>2</sup> In this index, over 140 countries are reviewed annually as to aspects such as the separation of powers, security, respect for human rights, absence of corruption and the quality of jurisprudence. The Netherlands is doing very well in this area.
11. This is something to be proud of, because a state where the rule of law is firmly established serves the well-being of all citizens. A state where the rule of law is firmly established shows that we look after each other and promote each other's well-being.
12. The Rule of Law index also shows that countries where the rule of law is firmly established, have a higher than average per capita income.<sup>3</sup> The more firmly established the rule of law, the greater the prosperity. The rule of law, security, equality, well-being and prosperity are inseparably bound in this manner.
13. The judiciary is the guardian of the state based on the rule of law. Courts ensure independent jurisprudence and guarantee equal rights for all.<sup>4</sup>
14. Courts ensure that the democratic state based on the rule of law is not undermined. Courts ensure, among other things, that the protection of human rights is not subordinated to political compromises or political failure.<sup>5</sup> Courts also ensure that citizens and companies do not violate human rights in their interactions with each other. It does so by attributing a horizontal effect to human rights on a broad scale through the open standards of private law.<sup>6</sup> In this manner, human rights shape the duty of care that citizens and companies must observe with regard to each other.<sup>7</sup> It is necessary for the courts to take on this role in order to ensure every individual's dignity in our society.

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<sup>1</sup> With regard to the power relationships between companies and citizens, see Asser/Hartkamp 3-I 2022/226 as well.

<sup>2</sup> See also the former president of the Dutch Supreme Court, Geert Corstens in 'De rechter grijpt de macht - en andere misvattingen over de democratische rechtsstaat', 2020, p. 209.

<sup>3</sup> Ibid, p. 34.

<sup>4</sup> Article 17(1) Dutch Constitution, Article 116 Dutch Constitution, Articles 11 and 13 Dutch General Provisions Act.

<sup>5</sup> Article 94, Dutch Constitution.

<sup>6</sup> Asser/Hartkamp 3-I 2022/226-231 with further reference to jurisprudence.

<sup>7</sup> Ibid.

15. Courts provide protection against human rights violations between citizens and companies, to a great extent through liability law. This makes liability law an indispensable part of the constitutional fabric of the democratic state based on the rule of law.<sup>8</sup> Simply put, liability law is absolutely essential for the protection of a state based on the rule of law and human rights. This makes liability law subservient to the higher, if not the highest, goal of the state based on the rule of law, i.e. the protection of the fundamental rights of every citizen.
16. The European Convention on Human Rights, which has an effect in the Dutch legal order through our constitution, therefore requires that courts actively contribute to effective legal protection against violations or threatened violations of human rights.
17. As I have already stated, human rights may not be violated by the government, even if these violations arise as a result of political compromises or political failure. Human rights may not be violated by business activities of private businesses. Nor may human rights be violated by the products that businesses produce and sell, including the products sold by Shell, i.e. the fossil fuels oil and gas.
18. In this lawsuit against Shell, against the background of the climate issue, Milieudefensie et al. is making the case that the business activities of Shell and the fossil fuel products that Shell produces and sells, threaten human rights in the Netherlands.
19. Other societal interests that are being damaged by Shell's actions and which Milieudefensie et al. seeks to protect in this case concern the protection of nature and the environment, the protection of current and future generations of human beings, combating climate change and polluting of the earth, protecting biodiversity, striving for a sustainable society, promoting peace, promoting and accelerating the sustainable energy transition and protection of the Wadden Sea region.
20. Shell is being reproached for jeopardising all these societal interests through its group policy, and that its policy threatens human rights, in particular the right to life and the right to an undisturbed family life. Shell is consequently threatening the interests of humans and the environment that Milieudefensie et al. seeks to protect.
21. Milieudefensie et al. is invoking liability law and asked the District Court of The Hague at first instance to protect the interests of humans and the environment against Shell's actions. The District Court provided the requested legal protection in the form of a well-reasoned judgment and ordered Shell to act in line with the 1.5°C target of the Paris Agreement. Milieudefensie et al. and very many others in the Netherlands and across the world are very grateful to the District Court of The Hague for this judgment.
22. In these appeal proceedings, brought by Shell, Milieudefensie et al. is asking the Court of Appeal to uphold the judgment of the District Court of The Hague, so that the protection that the District Court provided against the threatened unlawful and human rights-violating behaviour of Shell is maintained.
23. The legal questions at issue in this case touch upon the foundation of the democratic state based on the rule of law, of civilisation and the internal legal order as such. This is because legal protection is sought against the actions of one of the biggest multinational companies in the world. A company that has a bigger carbon footprint than almost all countries in the world. Only

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<sup>8</sup> Van Dam, Aansprakelijkheidsrecht, 2023, para. 107.

the four superpowers China, the United States, India and Russia have a bigger carbon footprint than Shell.<sup>9</sup>

24. Shell is not a public national superpower like the United States. Shell is a private superpower, a private multinational superpower, that just like public superpowers has an effect on global society that cannot be ignored.
25. Shell generates its global influence through such things as its continuing investments in oil and gas, through its political lobbying activities, through its direct access to governments and their ministries, through revolving door constructions with governments, through its online and offline advertising campaigns, through its media performance, through its public relations, through its power in the value chain, through the dozens of industry associations in which it participates, through the greenwashing of its fossil fuel business model, through offering no or very little by way of sustainable energy alternatives and through its prominent presence in society, for example, in the form of the many tens of thousands of petrol stations that Shell has worldwide and where Shell has over 30 million client contacts every day.<sup>10</sup>
26. Through the use of all these channels, Shell is influencing government policy and regulations worldwide. Through all these channels Shell is also actively stimulating the global demand for fossil fuels. Shell is not passively sitting back and watching how the demand for oil and gas develops, but is focusing on increasing the demand for oil and gas. As a commercial organisation, Shell's goal is to sell as much oil and gas as possible. That is what the organisation of the worldwide Shell Group is geared to. The demand for oil and gas can therefore not be seen separately from the influence exerted by Shell, through political channels and market channels, to stimulate demand as much as possible. The demand for oil and gas is thus not a demand that exists in a vacuum; it is a demand that Shell and its colleagues in the industry actively keep alive; a demand that is actively stimulated, in many ways, including by continuing to offer abundant amounts of oil and gas.
27. Due to its worldwide influencing of political decision makers and market demand, Shell determines to a far from negligible degree what the future of humankind will look like, in particular in relation to the climate problem. Consequently, Shell determines to a legally relevant degree the future, life and well-being in the Netherlands.
28. After all, wherever CO<sub>2</sub> emissions are emitted in the world, they also change the climate in the Netherlands. The global CO<sub>2</sub> emissions of the activities and the products of the Shell Group therefore also lead to damage to humans and the environment in the Netherlands and consequently a negative impact on the human rights of Dutch citizens.
29. Because of its special position, Shell has the option of having a positive or a negative impact on the protection of human rights and the environment to a relevant degree. Such a special position also entails a special responsibility, i.e. the responsibility to treat these vulnerable societal interests as a *bonus pater familias* would.
30. This is also the key thought behind the establishing of the United Nations Guiding Principles on Business and Human Rights, abbreviated as UNGP. It is also the key thought behind the OECD Guidelines for Multinational Enterprises.

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<sup>9</sup> Statement of Defence on Appeal, para. 627.

<sup>10</sup> For a comprehensive discussion of Shell's global influence on policy and markets: Notes on Oral Arguments 1, opening arguments at first instance, paras. 83-129.

31. The background of these guidelines is known.<sup>11</sup> The globalisation of the past decade has led to the arising of a large imbalance of power between nation states on the one part and multinational companies on the other. The ever expanding size and influence of multinational companies has the negative effect that these companies are difficult to regulate, both nationally and internationally, resulting in a power vacuum, also known as the governance gap. This conclusion was drawn well over 15 years ago at UN level.
32. The reason for this governance gap is, inter alia, that multinational companies can easily transfer their capital and their head offices and operating companies from one country to another, assisted by large international accountancy firms and law firms. Multinational companies use the threat of a possible departure abroad to have national legislators decide against regulations that are unfavourable to the companies. This threat is also used to steer the public debate and undermine the supporting base for regulation. National legislators therefore lack the teeth to be able to guarantee enforcement.
33. A good example is the public and political discussion that took place in the Netherlands in 2008 about the undesirability of the very high salaries and bonuses of the top directors of companies. A discussion which in part arose due to the 2008 banking crisis. In the Netherlands, public and political opinion appeared to turn against the high salaries of directors. Top directors of Dutch multinationals then threatened to move their head office abroad if the criticism of their salaries persisted.<sup>12</sup> Shell's top man at that time, Jeroen van der Veer, formed part of this group of directors who wanted to shut down the public and political debate with their threat of moving their head offices abroad. Shell's CEO Van der Veer believed that society needed to be better aware of what an economic superpower Shell is. To quote Van der Veer:
- "The head office of one of the five biggest companies in the world is located here in The Hague. Not to be immodest, but in terms of profit and turnover, for example, Shell is bigger than Unilever, Philips, Akzo Nobel and DSM together. The choice is society's. Either you have a head office and accept that a large number of people work here with high salaries. Or not."*<sup>13</sup>
34. National legislators are often quickly sidelined due to these kinds of threats, as occurred in this Dutch case.
35. At the same time, there is no international legislative body that can impose globally applicable rules regarding salaries and bonuses on multinational companies. Nor does such an international legislative body exist for the regulation of even more important issues such as the protection of human rights, the climate and the environment.
36. The UN research that was carried out some 15 years ago under UN mandate by UN Special Representative John Ruggie showed that the founding of an international legislative body to regulate the behaviour of multinational enterprises at international level was doomed to fail in advance.<sup>14</sup> Even if it was only on purely practical grounds because according to Ruggie, global legislation would require worldwide harmonisation of national legal systems, at least in important areas of law such as commercial law, company law, financial law, tax law, consumer law and competition law. An impossible task, partly in view of the large cultural and constitutional differences between countries and the differences in prosperity and institutional

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<sup>11</sup> Summons, paras. 691 to 715, Statement of Defence on Appeal, paras. 419 to 431.

<sup>12</sup> <https://www.volkskrant.nl/nieuws-achtergrond/boze-topman-verplaatst-hoofdkantoor-b210b1cd/>.

<sup>13</sup> Ibid.

<sup>14</sup> Milieudefensie et al.'s Opening Argument of 1 December 2020, paras. 161 to 165.

capacity. According to Ruggie – and with him, the UN – the solution to closing the governance gap could therefore not be found in the creation of harmonised global legislation.

37. Due to the lack of both national and international options for adequately regulating multinational companies, only one option remained to close the governance gap, only one option to achieve an international structure of 'good governance'. The only remaining option was that multinational companies would subject themselves to self-regulation of their own volition. They do this by taking account, when making group policy and the implementation of that policy, of the needed protection of human rights and the environment as laid down in the UNGP and, inter alia, the OECD Guidelines for Multinational Enterprises. Shell explicitly committed itself to these guidelines.<sup>15</sup>
38. To this day there has not been adequate self-regulation on the part of Shell. The global society has shown trust in companies like Shell and asked it not to betray that trust in the interest of humans and the environment. Unfortunately, the trust that was given has not been rewarded with the behaviour of a *bonus pater familias*. On the contrary, Shell and the fossil fuel sector as a whole have systematically betrayed the trust shown.
39. Partly due to these actions of Shell and the fossil fuel sector, we have arrived in what the 196 countries that are parties to the Paris Agreement refer to as the critical decade in the approach to climate change. This has brought us to the critical point where only the court can intervene, thus safeguarding the foundation of the rule of law and the legal order. This makes the court truly the last bastion to defend the backbone of civilisation, i.e. human rights and a habitable living environment.
40. A great deal, indeed a very great deal depends on this case against Shell. Both nationally and globally. Because if national governments cannot properly regulate Shell, if Shell cannot be regulated internationally either, if Shell does not wish to adequately regulate itself and if the court will not regulate Shell, the conclusion must be that the democratic state based on the rule of law has failed to protect the most fundamental values and rights of citizens.
41. Such an outcome can seriously impact the trust that citizens have in a democratic state based on the rule of law, because no one will protect citizens against the biggest threat that has ever confronted humankind, a threat that no human can escape, a threat that leads to an ever greater disruption of societies and economies, a threat that is irreversible and that, when tipping points are passed, will become unmanageable for humans and will reinforce itself to an increasing degree.
42. It is this threat that I would like to discuss with you now.

#### **The consequences of the earth's warming**

43. The consequences of global warming, to which Shell contributes with its group policy, causes serious damage to humans and the environment and leads to human rights violations. That climate change leads to human rights violations has already been considered in the *Urgenda* case by the District Court, this Court of Appeal and the Dutch Supreme Court, as well as by the District Court in this case against Shell.
44. As was established by the Dutch Supreme Court in the *Urgenda* case, global warming exceeding 1.5°C will be a serious threat to humans and to the ecosystems on which humans are

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<sup>15</sup> Summons, paras. 691 to 715.

dependent. The Dutch Supreme Court literally says the following about this in its summary of the judgment:

*“The warming of the earth beyond that temperature limit may have extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now.”*<sup>16</sup>

45. The judgment of the Dutch Supreme Court dates from 2019 and as has been rightly pointed out there, the aforementioned climate consequences were already partly occurring, including in the Netherlands. In this case, the consequences of climate change for the Netherlands, Dutch inhabitants and the inhabitants of the Wadden Sea region were already extensively discussed at first instance.<sup>17</sup>
46. We are now a few years further and have to conclude that the weather extremes and disruptions of ecosystems, the threat of rising sea levels and the risks of tipping points in 2024 are considerably more severe than was the case in 2019. In the written arguments Milieudefensie et al. has given a comprehensive update of these risks and consequences, that have increased since 2019. This is including an update about the risks and direct and indirect consequences of climate change for the Netherlands, Dutch inhabitants and the inhabitants of the Wadden Sea region. I would only like to add the following general points.
47. According to the IPCC, the climate change caused by humans is currently already causing many weather extremes and climate extremes in all regions of the world. This is already leading to wide-spread negative effects on food and water security, human health, the environment, the economy and society, according to the IPCC.<sup>18</sup>
48. According to the IPCC, every fraction of further warming, every extra ton of CO<sub>2</sub> that is still emitted will further influence all important components of the climate system.<sup>19</sup> According to the IPCC it will also lead to an increase in tangible and intangible damage to humans and the environment.<sup>20</sup> It is also causing an increase in climate-related risks, that are, moreover, becoming more difficult to manage.<sup>21</sup> In addition, further global warming limits the options for adaptation and the possibilities for sustainable development, according to the IPCC.<sup>22</sup>
49. What is more, when taking all this into account, sight must not be lost of the fact that the climate system has a delayed response to greenhouse gas emissions.<sup>23</sup> Some consequences of the increased CO<sub>2</sub> concentration in the atmosphere will persist for many tens and even many hundreds to thousands of years. These persistent effects apply, inter alia, to the melting of

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<sup>16</sup> Dutch Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006, summary.

<sup>17</sup> For an overview: Milieudefensie et al.'s Defence Brief in response to objection of 4 December 2020.

<sup>18</sup> Exhibit MD-495A, IPCC, 2023: Climate Change 2023: Synthesis Report, p. 42.

<sup>19</sup> Exhibit MD-495A, p. 24 (under C.1.3).

<sup>20</sup> Exhibit MD-495A, pp. 69, 70, 71, 72, 75, 88, 89, 95 and Figure 4.2 on p. 97.

<sup>21</sup> Ibid.

<sup>22</sup> Exhibit MD-495A, pp. 88, 89, 95 and Figure 4.2 on p. 97.

<sup>23</sup> See also Judgment, para. 2.3.2.



glaciers and ice caps, the thawing permafrost, the warming of the oceans, the acidification of the oceans and the rising sea levels.<sup>24</sup>

50. All these persistent effects and the consequences thereof are not yet felt in full, but are already unavoidable because of the currently increased CO<sub>2</sub> concentration. We have therefore by far not seen all the consequences that climate change has in store for us. The consequences of climate change that we see today thus provide only a limited view of what in any event awaits the world and the Netherlands. Nevertheless, the consequences are already significant now. Even with the current warming of 1.2°C, there is already a risk of passing various tipping points in the global climate system.<sup>25</sup>
51. It makes it clear once again that the limiting of further risks stands or falls with the fast and substantial reduction of CO<sub>2</sub> emissions.
52. This brings me to the speech of UN Secretary General Guterres in July 2023 about the climate problem. It was clear even then that July 2023 would be the warmest month ever measured. July 2023 saw the hottest three consecutive weeks, the hottest days and the highest ocean temperature ever measured. In that month and the preceding period hitherto unknown climate extremes occurred worldwide. To name just a few examples:
53. Water temperatures of 38°C were measured around Florida; ocean water as warm as a jacuzzi.<sup>26</sup> Southern Europe suffered from heatwaves in which the temperature was more than 40 degrees for days in a row, so that working outside was unbearable.<sup>27</sup> In Morocco temperatures exceeded 50°C for the first time.<sup>28</sup> In Canada 18 million hectares of land was burned down, that is 4.5 times the surface area of the Netherlands.<sup>29</sup> In Pakistan 33 million people were affected by floods.<sup>30</sup> And in Bangladesh, 7 million people were affected by monsoon rains.<sup>31</sup>
54. It is against this background that UN Secretary General Guterres held his press conference. A part of his speech is as follows:

*“The consequences are clear and they are tragic: children swept away by monsoon rains; families running from the flames; workers collapsing in scorching heat. For the entire planet, it is a disaster. And for scientists, it is unequivocal – humans are to blame. All this is entirely consistent with predictions and repeated warnings. The only surprise is the speed of the change. Climate change is here. It is terrifying. And it is just the beginning.*

*The era of global warming has ended; the era of global boiling has arrived. The air is unbreathable. The heat is unbearable. And the level of fossil fuel profits and climate inaction is unacceptable. Leaders must lead. No more hesitancy. No more excuses. No more waiting for others to move first. There is simply no more time for that. It is still possible to limit global temperature rise to 1.5 degrees Celsius and avoid the very worst of climate change. But only with dramatic, immediate climate action.*

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<sup>24</sup> Milieudéfensie et al.'s Written Arguments of 19 March 2024, section 2.2.

<sup>25</sup> See also Milieudéfensie et al.'s Written Arguments of 19 March 2024, section 1.

<sup>26</sup> See Milieudéfensie et al.'s Written Arguments of 19 March 2024, section 2.2.

<sup>27</sup> See <https://edition.cnn.com/2023/07/21/business/europe-workers-strike-heat-wave-climate-intl/index.html>.

<sup>28</sup> See Milieudéfensie et al.'s Written Arguments of 19 March 2024, section 2.2.

<sup>29</sup> Exhibit MD-575B, p. 6.

<sup>30</sup> See Milieudéfensie et al.'s Written Arguments of 19 March 2024, section 2.2.

<sup>31</sup> Ibid.

55. These are big words, insistent words from Guterres, but they were carefully chosen and are correct. Because Guterres knows what Milieudefensie et al. and Shell also know and that is that this is only the beginning and that the damage that has already been caused to the world is already much greater than we can observe now. This is because land masses, oceans, seas, glaciers and other ice masses of the world have a delayed response to warming. It is also evident, as Guterres has indicated, that we can only prevent the most dramatic consequences if leaders from the public and private domain take immediate action now, without hesitation and without hiding behind each other. This demands immediate and drastic climate action of countries and industry and certainly of the fossil fuel industry and of companies like Shell.

### **The severity of the climate danger dictates the duty of care**

56. The almost unimaginable severity and threat posed by the climate problem, including for the Netherlands, is naturally important when determining Shell's duty of care. According to the criteria established in the *Kelderluik* case, this duty of care must be enforced in light of the severity and extent of the danger. The prevention measures and precautionary measures to be taken must therefore be proportional in relation to the severity and the extent of the expected risks, damage and violations of rights. The greater and more severe the danger, the greater the duty of care. But also: the greater and more severe the danger, the less quickly a far-reaching duty of care will be deemed unreasonably onerous.

57. In view of the severity of the climate problem and the other facts in this case, the District Court rightly held in this matter that Shell is subject to a far-reaching duty of care. According to the District Court, a duty of care is concerned that demands, among other things, financial sacrifices and drastic measures on the part of Shell;<sup>32</sup> a duty of care that might entail that Shell no longer makes new investments in fossil fuels and limits the production thereof;<sup>33</sup> a duty of care whereby the District Court assumes that although this duty of care will have far-reaching consequences for Shell, Shell can be required to accept such consequences, because of the societal interests and the significant dangers and risks for human rights of inhabitants of the Netherlands and of the Wadden Sea region.<sup>34</sup>

58. Milieudefensie et al. believes that, in view of the severity, extent and potentially irreversible consequences of climate change for the human living environment and for human rights, accepting a far-reaching duty of care for Shell is the only correct outcome. Viewed against the background of the severity of the climate problem, it is difficult to imagine how, when applying the rules of law, there could be an outcome where Shell does not have a duty of care relating to this problem. The question appears to be more a matter of what the duty of care should specifically encompass.

59. In the words of Cees van Dam in his handbook 'Aansprakelijkheidsrecht': *"There is little doubt that RDS is subject to a duty of care to reduce CO<sub>2</sub> emissions. A more complex matter is the answer to the question what this duty of care encompasses and how far it goes."*<sup>35</sup>

60. Van Dam refers to three aspects in this respect which he believes to be uncontested. Firstly, that companies must respect human rights, not only on the basis of soft law but also as a civil law liability standard; secondly, that Shell is responsible for the group policy and for the CO<sub>2</sub>

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<sup>32</sup> Judgment, paras. 4.4.53 and 4.4.54.

<sup>33</sup> Judgment, para. 4.4.39.

<sup>34</sup> Judgment, para. 4.4.53.

<sup>35</sup> Cees van Dam, *Aansprakelijkheidsrecht*, 2023, para. 518-4.

emissions of the Shell Group; thirdly, that Shell is responsible for the emissions of its suppliers and customers.

61. In Van Dam's view, the question is therefore not whether Shell is subject to a duty of care to reduce the Scope 1, 2 and 3 emissions of the Shell Group, the only question is precisely how far this duty of care goes.<sup>36</sup>
62. According to Van Dam, there can be no misunderstanding that every company must play its part in solving the climate problem and that therefore every company is responsible for its own share. Van Dam believes that just because every party's reduction of its own emissions will only have a slight effect at global level, this does not release a company from its shared responsibility to take measures. He continues by stating that a company may not hide behind political decision makers in this respect, nor may it hide behind the conduct of other companies.<sup>37</sup>
63. Shell is, of course, doing precisely what according to Van Dam is not allowed, i.e. hiding behind the responsibility of political decision makers. A great deal has already been said in Milieudefensie et al.'s court documents about the many reasons why Shell cannot, indeed, hide behind politics.<sup>38</sup> I would only like to add the following to this.

#### **Shell cannot hide behind politics**

64. Shell is seeking refuge behind what it asserts to be the primacy of politics with regard to the climate approach. The primacy of politics supposedly entails that the court cannot establish an individual duty of care for Shell, because such a duty of care could only be established in regulations laid down by the legislator. In addition, a judicial decision on Shell's duty of care would interfere with the political decision makers' freedom to make policy in the Netherlands and abroad. For these reasons the Court should refrain from a legal opinion because otherwise this would interfere with the rules regarding the separation of powers. According to Shell, the primacy of the climate approach lies within the political domain and the political domain alone. M&M is of a similar opinion.
65. It is evident that combating climate change is a topic of public interest, both nationally and internationally. It is also evident that governments have the primary responsibility to represent the general interest. But contrary to what Shell suggests, politicians do not have a monopoly on representing and protecting the public interest. Courts also have an important role to play in this respect. The same applies to interest groups. This is established in the Netherlands in, inter alia, Article 3:305a Dutch Civil Code, that enables interest groups to not only act on behalf of the general interest outside of court, but also in court.
66. The primacy of politics that Shell goes on and on about can therefore never have the purport that political decision makers have a monopoly on promoting and protecting the general interest. This cannot be the conclusion, particularly as Shell is undermining political decision making relating to the climate approach worldwide, and in many ways. That countries are still doing too little to jointly achieve the 1.5°C target can therefore not be seen separately from, inter alia, the very influential lobbying of Shell and the oil and gas industry to which Shell belongs. This process of exerting influence must be halted, if there is to be a chance of combating dangerous climate change.

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<sup>36</sup> Cees van Dam, *Aansprakelijkheidsrecht*, 2023, para. 518-4.

<sup>37</sup> Cees van Dam, *Aansprakelijkheidsrecht*, 2023, para. 518-4.

<sup>38</sup> See, inter alia: Milieudefensie et al.'s Statement of Defence on Appeal, sections 3 and 10.4.

67. If application of liability law entails that the court should determine that Shell is subject to an individual duty of care, such judicial decision is no less legitimate than any decision of the legislator in relation to the climate issue.
68. As stated, liability law is an important part of the constitutional fabric of the democratic state based on the rule of law. Political decision makers have not set liability law aside in relation to claims concerning the climate issue.
69. The mere existence of legislation regarding the climate issue does not mean that there is no longer a role for liability law. The matter could only be different if legislation has explicitly and undeniably considered and decided that liability law does not apply. This is not the case, neither in national legislation, nor in EU legislation.
70. In this respect it is worth referring to a recent judgment of the Supreme Court of New Zealand in the case of *Smith v Fonterra*, a case which has previously been discussed in these proceedings and in which the Supreme Court passed judgment, with particularly sharp reasoning, on 7 February 2024. In said judgment the Supreme Court decided that the unlawful act claim of Smith against seven large companies based on their contribution to the climate issue, must go ahead and must be adjudicated on the merits. The High Court and the Court of Appeal had dismissed the *Smith* case, inter alia based on the reasoning that there was already a substantial legislative framework in New Zealand in relation to the climate approach and that a judicial opinion could interfere with this legislation. Shell referred to these judicial decisions of the lower courts in New Zealand in its statement of appeal to reinforce its assertion that the climate approach is only a topic for politics and not for the courts as well.
71. The Supreme Court clearly decided otherwise, whereby it considered that the common law duty of care – being the equivalent of the societal duty of care in the common law system – has not been set aside by the relevant legislation. Had this been what the legislator had intended, as the defendants argue, according to the Supreme Court the legislator should explicitly and unequivocally have made this clear, as doing so would sideline the judiciary. Such a far-reaching conclusion cannot be construed by reading into statute texts something that these texts do not literally and clearly state, according to the Supreme Court. The need for this clarity is discussed as follows, inter alia, in the judgment:

*“What is clear is that the common law duty of care was not expressly removed. Nor can it be said that the duty was removed by necessary implication. If Parliament had meant to achieve the outcome for which [the defendant] contended, it would have done so in clear and unmistakable terms.”*<sup>39</sup>

72. Another quotation from the judgment reads as follows

*“If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear [...] Any such implication would have to be both clear and necessary.”*<sup>40</sup>

73. The Supreme Court of New Zealand therefore ultimately concluded:

*“There is therefore no basis to conclude that Parliament has displaced the law of torts in the realm of climate change in New Zealand. Rather, it has left a pathway open for the common law*

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<sup>39</sup> Exhibit MD-570A, para. 98.

<sup>40</sup> Exhibit MD-570A, para. 98.

*to operate, develop and evolve [...] amid a statutory landscape that does not displace the common law by the interposition of permits, immunities, policies, rules and resource consents.”*

<sup>41</sup>

74. The substance of the case of *Smith versus Fonterra* and other companies will now be reviewed, because the New Zealand legislator did not exclude liability law in relation to the climate problem. Nor is this the case in the Netherlands and the EU. This makes it clear that the climate approach in the Netherlands is not only a matter for the political domain, but is also a matter for the courts.
75. This New Zealand case shows that in a democratic state based on the rule of law, the separation of powers in essence means a balance of powers, whereby the powers of the state keep each other in check. This balance of powers encompasses, inter alia, that where according to judicial standards politics has failed to take action, the courts may intervene to restore the balance. It also encompasses that if the court's judgments go too far in the view of politicians, politicians can intervene to restore the balance, e.g. by amending legislation. The court in turn interprets this new legislation from the cases presented to it, and can review such new legislation against high law, such as the ECHR. The freedom of political decision makers is in turn limited by constitutional rights and human rights. In this manner the powers of the state keep each other in balance and no one has the last word. That is the balancing effect of democratic states based on the rule of law.
76. If in this case against Shell the Dutch government or the parliament had been of the opinion that the judgment of the court had gone too far, political decision makers could have taken corrective action, had they so desired. This has not happened.<sup>42</sup> Rather the contrary, for years preparation of European regulations have been ongoing to impose an individual climate obligation on companies.<sup>43</sup>

### **Shell cannot hide behind developing countries**

77. For what it's worth, there were also no negative signals from other governments in the world in relation to the judgment. There is nothing to show that the world wishes to nip the legal development set in motion by the District Court of The Hague in the bud, let alone that good reasons have been presented for this.
78. Nor have, for example, international institutes or international aid organisations called out to cease this lawsuit. I am only saying this because Shell and M&M, with their assertions and exhibits, wish to create the impression that certain countries would supposedly not be able to continue developing if Shell were held to the Judgment. This is, however, incorrect and there is no evidence to support the assertion.
79. On the contrary, the United Nations in fact emphasised through its Secretary General Guterres that oil and gas companies must take their responsibility in the approach to climate change. Guterres emphasises the importance of holding “*climate-wrecking corporations*” like fossil fuel companies to account.<sup>44</sup> In his annual report, Guterres specifically refers to this lawsuit against

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<sup>41</sup> Exhibit MD-570A, para. 101.

<sup>42</sup> See also Exhibit MD-341 (the parliamentary letter from the government regarding the Shell judgment), pp. 1 to 4.

<sup>43</sup> This relates to the Corporate Sustainability Due Diligence Directive (CSDDD).

<sup>44</sup> Exhibit MD-559B, para. 22. See also Exhibit MD-559C, pp. 1 to 4.

Shell as a prime example of a successful lawsuit for the protection of human rights, including the rights of the most vulnerable people in the world.<sup>45</sup>

80. As Guterres has thus indicated, the approach to climate change and litigation such as this suit against Shell, are crucial to the protection of human rights, including the rights of the most vulnerable people in the world.
81. Various UN Special Rapporteurs and UN commissions steadfastly emphasise the importance of reining in the fossil fuel industry and the importance of access to the law to protect human rights through climate cases.<sup>46</sup>
82. The Special Rapporteur for human rights and climate approvingly stated, and I quote: *“Courts are now starting to play a key role in defining appropriate climate change governance and thus directing regulatory decision-making, corporate behaviour and public understanding of the climate crisis.”*<sup>47</sup>
83. Other UN organisations, like those relating to Economic and Social Affairs, have concluded that climate change is threatening to reverse decades of development and development aid and, in addition, is seriously jeopardising inclusive and sustainable growth worldwide. Countries are thus often seeing their development opportunities curtailed due to climate change. They are at risk of losing precisely the progress that has been made in the past decade. To quote the conclusion of the UN:  
  
*“It is clear that climate change threatens decades of development progress and jeopardizes inclusive and sustainable growth.”*<sup>48</sup>
84. The UN Development Programme (the UNDP), the biggest development aid organisation in the world, comes to the same conclusion. According to the UNDP, further global warming will disrupt the lives of billions of people. To quote the UNDP:  
  
*“The impacts of climate change will continue to disrupt economies and the lives of billions. Extreme weather events are becoming more frequent and devastating, resulting in the reversal of development gains even in countries with significant levels of socioeconomic progress.”*<sup>49</sup>
85. The above shows that insofar as Shell and M&M wish to create the impression that certain countries supposedly will not benefit from an accelerated climate approach, this is incorrect.
86. That the consequences of climate change lead to disruption, and certainly in the countries that historically speaking have contributed the least to CO<sub>2</sub> emissions, is clearly evident from the IPCC reports.<sup>50</sup> It is also clearly evident from the examples of Pakistan and Bangladesh given in the written arguments. In those countries millions, even tens of millions of people were seriously affected by extreme downpours resulting in unimaginable flooding in 2022. In those countries, consequences of climate change result in destruction of basic facilities with unimaginable human suffering that is difficult to conceive for us in the Netherlands, along with staggering damage amounting to tens of billions. The worst thing is that according to climate science, these

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<sup>45</sup> Exhibit MD-559D, para. 37.

<sup>46</sup> Exhibit MD-486, paras. 1-3, Exhibit MD-559A, paras. 82 to 90, Exhibit MD-559E, paras. 33 to 37 and paras. 70 to 73.

<sup>47</sup> Exhibit MD-559B, para. 20. See also paras. 21 to 31.

<sup>48</sup> See furthermore Notes on Oral Arguments 5, first instance, section 1C (The threat of climate change to the Sustainable Development Goals).

<sup>49</sup> Ibid.

<sup>50</sup> Exhibit MD-495A, p. 5 (A.2).

kinds of extremes will occur more frequently and will thus result in recurring destruction.<sup>51</sup> These disasters are therefore not a one-off, but due to climate change can occur several times in a human life.<sup>52</sup> It should be noted that according to the IPCC, at present more than 3 billion people worldwide are living in areas that are very vulnerable to climate change.<sup>53</sup>

87. How Shell and M&M can maintain that an accelerated climate approach could conflict with the interests of developing countries,<sup>54</sup> is something that Milieudefensie et al. cannot follow.
88. The Judgment is fully in line with what is necessary to prevent that precisely the most vulnerable countries and communities end up where they started and are pushed ever further into poverty by the consequences of climate change. It is for that reason that precisely the most vulnerable countries have insisted that the 1.5°C target be included in the Paris Agreement.<sup>55</sup>
89. That there are no national or international signals that the Judgment of the District Court of The Hague is getting in the way of the international community, is therefore not surprising. The Judgment is in line with what the international community of countries have agreed in climate conventions and by which they are bound vis-à-vis each other in conformity with public international law. This public international law component may not be overlooked.
90. Pursuant to public international law, all 196 countries that are involved with the UN Climate Convention and the Paris Agreement comply with both conventions to realise the content, goal and purport of these conventions. We may therefore assume that these countries want this too and that they deem those conventions to be in the interest of their citizens. In the *Urgenda* case specific reference was made to the principle of public international law that states are presumed to wish to perform their obligations under the conventions.<sup>56</sup>
91. Shell and M&M cite the international consequences of the gas crisis of 2022 to suggest that countries – and particularly developing countries – have had other things on their mind since then than the climate approach and achieving the 1.5°C target. But nothing is farther from the truth and public international law shows this. What developing countries want, is for the developed countries to finally truly take the lead in solving the climate problem. This is in conformity with the agreements made in the conventions and the division of responsibilities laid down in the conventions. Shell and M&M should not wish to take on the attitude that they supposedly know better what is good for the population of vulnerable countries than the governments of those countries, that have made international climate conventions in the interest of their population.
92. All 196 contracting countries are and remain committed to achieving the 1.5°C target of the Paris Agreement. This is, in fact, what they emphatically communicated to each other a few months ago. This was during the UN Climate Conference in Dubai in December 2023, COP28 aka the 28<sup>th</sup> UN Climate Conference. As is known, these annual climate conferences are intended for the implementation of the UN Climate Convention and since 2015 also to implement the Paris Agreement.

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<sup>51</sup> See, for example, Exhibit MD-495A, p. 69.

<sup>52</sup> Exhibit MD-575G.

<sup>53</sup> Exhibit MD-495A, p. 51, and p. 5 (under A.2.2).

<sup>54</sup> By using the terms developing countries and developed countries, Milieudefensie et al. seeks to align with the terminology of the Paris Agreement. Normally it uses the more neutral terms of global North and global South.

<sup>55</sup> Exhibit MD-581, p. 3.

<sup>56</sup> See, inter alia, District Court, para. 4.43 and PG Langemeijer and AG Wissink in their opinion under 2.30. See also Notes on Oral Arguments 5 at first instance under part 2 (Public international law supports the awarding of the claim).

93. The UAE Consensus was agreed during COP28 in Dubai in the United Arab Emirates. The UAE Consensus contains additional implementation agreements for achieving the climate targets. In the UN press statement, the outcome of this 28<sup>th</sup> UN climate conference is summarised as follows:

*“COP28 closed today with an agreement that signals the “beginning of the end” of the fossil fuel era by laying the ground for a swift, just and equitable transition, underpinned by deep emissions cuts and scaled-up finance.*

*In a demonstration of global solidarity, negotiators from nearly 200 Parties came together in Dubai with a decision on the world’s first ‘global stocktake’ to ratchet up climate action before the end of the decade – with the overarching aim to keep the global temperature limit of 1.5°C within reach.”<sup>57</sup>*

94. It is absolutely clear: the 1.5°C target is and remains the central ambition of the Paris Agreement. The consequences of the gas crisis of 2022 did not change this: not the 1.5°C target as such, nor the efforts of countries and the solidarity between countries to achieve this 1.5°C target.
95. According to the UAE Consensus, countries are determined to move away from fossil fuels in this critical decade and last December made a more concrete commitment than ever to scaling up sustainable energy and improving energy efficiency. Concretely, this first of all concerned the agreement to have realised a tripling of the current worldwide capacity of sustainable energy by 2030. In addition, the matter concerns the agreement to have doubled energy efficiency improvements in 2030. A large scaling up of the collective efforts to be able to achieve the 1.5° target.<sup>58</sup>
96. With this tripling of sustainable energy capacity and doubling of energy efficiency by 2030, the 196 countries followed the advice of the International Energy Agency (IEA). The IEA communicated to the countries that its 1.5°C scenario shows that this tripling and doubling in 2030 is necessary to keep the 1.5°C target within reach.<sup>59</sup>
97. The foregoing means that all 196 countries that are party to the Paris Agreement may not only be presumed to wish to achieve 1.5°C target pursuant to public international law, they actually confirmed this to each other and to the world just five months ago for the so-manieth time. Other developments in the world, like the gas crisis in 2022 and the Covid crisis of 2019, but, for example, the war in Gaza that started in 2023, have not impaired the commitment of countries to perform the Paris Agreement. On the contrary: because of the developments of the last few years, countries appear to be more aware than ever that the climate crisis must be prevented, that this is in everyone’s interest and that everyone has to keep working together.
98. The phase-out of fossil fuels and the scaling up of sustainable energy and energy efficiency as agreed in the UAE Consensus not only serves the climate approach, but also serves the other Sustainable Development Goals that countries have agreed in a UN context in 2015. An adequate climate approach is in fact a prerequisite for all associated development tasks, including the tasks of sustainable economic growth, of energy access, of combating poverty and of peace, safety and justice. This has already been explained in detail in these proceedings.<sup>60</sup> The Judgment thus provides support for achieving the 1.5°C target and the associated development

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<sup>57</sup> Exhibit MD-569A, p. 1.

<sup>58</sup> Exhibit MD-569B, para. 28.

<sup>59</sup> Exhibit MD-525, p. 14. Exhibit MD-568E, p. 1.



targets and is not an obstacle. An obligation of Shell to act in line with the climate goal of the Paris Agreement therefore not only supports the climate approach, but also the realisation of the other Sustainable Development Goals.

99. It is good to remember in this context that the national states collectively in UN context started 10 years ago to call on companies and other important non-state actors to take their own responsibility in the approach to climate change. It is the states themselves that are asking for help and that have been communicating together for a long time that they cannot handle achieving the climate goals on their own and that this requires urgent action on the part of companies.<sup>61</sup> Independent and proactive action of companies is therefore explicitly desired and deemed necessary by states. It is not clear why this should be any different for company action ordered by the court on the basis of liability law.
100. When taking all of this into account, sight may not be lost of the fact that the Judgment was passed back in 2021 and that up to and including 2030 there is time to achieve the reduction target imposed on Shell. It is thus a process that will be completed over a period of almost 10 years. This is enough time for countries and other third parties to be able to take this into account. Shell's fossil fuel tap will not be shut off overnight. Even in 2030 Shell will still be able to sell large quantities of oil and gas, albeit, of course, considerably less than today. But as already mentioned, it is a process that countries and other third parties can prepare for over a longer period.
101. In this respect it is good to point out that the oil and gas company BP has announced that its oil and gas production in 2030 will have fallen by 25%.<sup>62</sup> There is no one claiming that BP should not be allowed to apply its own reduction target because this would disrupt the efficiency and effectiveness of the climate approach, or that BP would thereby jeopardise the global energy supply, or that this would be a danger for the other Sustainable Development Goals. In short, there is no one claiming that BP's goal is to interfere with political policy. It shows once again that the Judgment and Shell's subsequent action to comply with the Judgment do not interfere with political policy.
102. In addition, states remain completely free to respond to the consequences that BP's decision entails, just as states remain free to respond to the consequences of Shell's modified actions as a result of the Judgment. Nor do the Judgment and the consequences therefore result in other situations than the situations countries already frequently had to deal with if due to events in the world there are consequences for the oil and gas markets.<sup>63</sup> In the past decades there have been many large crises in oil and gas markets that states have had to deal with, most recently the gas crisis. Countries can adjust to these situations, learn from them and take measures to deal with them. The consequences of the Judgment pale into insignificance when compared to these crisis situations and the Judgment will not even remotely have these kinds of consequences.<sup>64</sup> It may be assumed that the world will have no problem dealing with the consequences of this Judgment.

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<sup>60</sup> Milieudéfense et al. already explained this in detail at first instance in Notes on Oral Arguments 5 and in the Statement of Defence on Appeal, paras. 13-24 and Exhibit MD-340, paras. (11) to (19).

<sup>61</sup> Notes on Oral Arguments 1, Opening Argument at first instance, paras. 130 et seq.

<sup>62</sup> Exhibit MD-558, p. 10 (Box 3). Milieudéfense et al. is not asserting that BP's policy is consequently in line with the Paris Agreement.

<sup>63</sup> Statement of Defence on Appeal after Joinder, section 3.

<sup>64</sup> Statement of Defence on Appeal after Joinder, section 3.

103. Without the Judgment, Shell will push the world ever further in the direction of a climate catastrophe. With the Judgment, Shell will in fact help prevent this catastrophe and, moreover, it creates a flywheel effect.<sup>65</sup> Both through the example that it will set with its change in strategy and because of the many possibilities that Shell has to make that change a commercial success, because of the degree of influence that it has in the political domain, the market and public opinion.
104. Because of all of this, Shell therefore cannot hide behind politics and behind the effects of the Judgment across the borders. Shell cannot once again hide behind the subordinate position of developing countries in this world.
105. Shell is not the spokesperson for developing countries, nor is it an organisation that represents the societal interests of developing countries. Shell is a commercial organisation whose goal is to sell as much oil and gas as possible, thereby generating as much profit as possible for its shareholders. These shareholders are, moreover, virtually all based in the rich Western countries. Shell's customers too are for the greater part based in the most prosperous countries.<sup>66</sup>
106. M&M in turn focused attention on the argument of former Vice President Osinbanjo of Nigeria. M&M submitted this argument as an exhibit.<sup>67</sup> Apparently to argue that the Judgment will lead to unacceptable consequences in Nigeria. Aside from the fact that M&M can only act on behalf of the interests of Dutch citizens and aside from the fact that there is no evidence that the Judgment will have consequences in Nigeria that cannot be justified, I would like to take some time to go over Osinbanjo's argument. This is because it provides interesting insights that support important assertions of Milieudéfensie et al.
107. Former Vice President Osinbanjo of Nigeria first of all exposes the inconsistencies of the West when it comes to the financing of gas projects. He points out that on the one part the West continues to finance gas projects in its own territory and on the other is taking steps to no longer finance any gas projects in Sub-Saharan Africa. He then points out that the 1 billion people in Sub-Saharan Africa have caused less than 1% of all cumulative CO<sub>2</sub> emissions and that the energy consumption of these 1 billion people is so low, that even if their gas consumption were to triple, this would still only result in an additional 0.6% in global emissions.
108. Osinbanjo hastens to immediately add that he does not wish to argue at all that gas consumption should triple in this part of Africa, but he wants to make two points. Firstly, that growth in gas consumption by the 1 billion poorest on earth has barely any effect on global emissions. Secondly, that the West has a double standard when it comes to gas investments: the poorest in the world are deprived of access to gas, while the West continues investing in gas on its own territory.
109. Osinbanjo then emphatically underlines in his argument that all countries must make a contribution to achieving the climate goal, including Nigeria. He does not in any way distance himself from the need to achieve the Paris goals and in fact points out that Nigeria too wishes to achieve net zero emissions in 2050. He says that Nigerian policy therefore focuses on scaling up sustainable energy. It is in relation to those sustainable ambitions that he points out that many

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<sup>65</sup> Regarding the flywheel effect: Milieudéfensie's Opening Argument at first instance, paras. 130 to 147, Milieudéfensie et al.'s Notes on Oral Arguments 7 paras. 26- 27, Milieudéfensie et al.'s Defence Brief of 19 December 2023, para. 76.

<sup>66</sup> Milieudéfensie et al.'s Defence Brief after Shell's Brief commenting on exhibits, para. 40, based on Exhibits MD-535B and MD-535C. See also Exhibit MD-568H (Shell's revenue in IEA advanced economies).

<sup>67</sup> M&M's Exhibit 9.

of the electricity networks in Africa function poorly, and that certain gas projects could bring about stability in the network, so that it will become easier to introduce solar energy and wind energy to the grid more quickly. It is worth pointing out in this respect that the role of gas as support for sustainable energy only entails a very limited demand for gas, and does not stand in the way of the emission reductions that are necessary for the climate approach.<sup>68</sup>

110. The argument of former Vice President Osinbanjo of Nigeria aligns with the argument that Milieudéfense et al. presented in this case at first instance, i.e. that gas is not a transition fuel,<sup>69</sup> and that Shell cannot hide behind the fate of the 1 billion poorest in the world to avoid making its contribution to the Paris temperature goal.<sup>70</sup> Milieudéfense et al. already explained extensively at the time - with reference to the findings of UNEP, the IEA and science - that the demand for energy of these 1 billion poorest is so small compared to the energy consumption of the rest of the world, that it does not matter if, for example, an exception were made for them and tomorrow they would be connected to a new gas infrastructure.<sup>71</sup> Nevertheless, this is not needed at all and Osinbanjo too makes it clear that this is not needed. The only thing being asked for is gas projects that can stabilise the grid, so that sustainable energy can be used for the other energy that is required. Milieudéfense et al. already argued this in the same terms at first instance with reference to the findings of UNEP, the IEA and science.<sup>72</sup>
111. It is perhaps pleasing to note that Osinbanjo now works for the Global Energy Alliance for People and Planet. This is an organisation that has the ambition of scaling up investments in sustainable energy in Africa, Asia, Latin America and the Caribbean.
112. Hiding behind the fate of the poorest people and countries in the world in order not to have to make your own contribution to improving the world is not particularly admirable. Osinbanjo in essence makes this argument in his previously quoted argument. He points out that European and American oil and gas companies are busy with new gas projects in various countries in Africa, not to help the Africans, but to export the African gas to Europe and Asia. The West and Western companies therefore do not use fossil fuel energy extracted in Africa to increase prosperity in Africa, but to increase their own prosperity. It is also why Osinbanjo subtly points out that although Nigeria does have a lot of fossil fuels, it still lives in energy poverty.
113. Where Shell and other oil and gas companies like to claim that they have to be able to continue drilling for oil and gas in Africa in order to lift the 1 billion poorest in the world out of poverty, this turns out not to be the case in practice. In view of the very limited energy consumption of the 1 billion people in Sub-Saharan Africa and in view of their extreme poverty, a company like Shell obviously cannot earn anything on the people in that part of the world.
114. Sub-Saharan Africa is an area of 46 African countries, an area that is much larger than the EU and the United States combined. But the energy consumption in that enormous area is utterly negligible when compared to the energy consumption in Europe and the US. This African region

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<sup>68</sup> Exhibit MD-528, p. 32.

<sup>69</sup> Statement of Defence on Appeal, para. 581, with reference to Exhibit MD-276, UNEP et al., Production Gap Report 2019, p.18, Box 2.2. (Gas as transition fuel?). Statement of Defence on Appeal, paras. 591 to 599. See also at first instance, Milieudéfense et al.'s Notes on Oral Arguments 7, paras. 55 et seq. and Milieudéfense et al.'s Notes on Oral Arguments 9, paras. 12 et seq.

<sup>70</sup> See Notes on Oral Arguments 5 at first instance, section 1F (Energy access for the 1 billion poorest is consistent with the Paris goal) and section 1G (Developing countries themselves have a wish to become sustainable and can become sustainable).

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

therefore holds no interest whatsoever for Shell as a sales territory. Shell and other Western oil and gas companies have been active in Africa for more than 60 years, but this has not done anything for the 1 billion people in the region in terms of their energy supply, well-being and prosperity. This also appears from the extreme poverty and enormous inequality that still exists in the year 2024. Oil and gas extraction in these countries therefore only serves to supply the rich economies of the world and certainly not to lift the people in Africa out of poverty.

115. It does not surprise Milieudefensie et al. in any way that in these proceedings and publicly, Shell has for years been using the argument that continuing to invest in oil and gas is needed to help out the poorest people in the world, but that none of this is evidenced in practice and that history also shows that none of it is correct.
116. It is evidently the so-called narrative that Shell and its colleagues in the industry have disseminated across the world to make their extremely profitable but destructive fossil fuel business model appear virtuous. Shell and its colleagues in the industry use a multitude of these kinds of narratives and strategies in order to continually wrong-foot political decision makers and the public. It is *the* way to retain the societal support basis for their activities. After all, who can think badly of Shell if Shell is standing up for the poor, or if Shell is also investing in wind turbines, or if Shell says that it pays a lot of taxes, or if Shell says that gas is a transition fuel, or if Shell says that it embraces the Paris Agreement?
117. The following part of this opening argument is about the many ways in which Shell and its colleagues in the industry have managed to avoid losing their social license to operate in this and other ways for decades and that the public and the political domain have started to rebel against their business model.