BarentsKrans

568/138927

ORIGINATING DOCUMENT OF THE CLAIM INITIATING PROCEEDINGS BEFORE THE SUPREME COURT

Claimants in the appeal to the Supreme Court,

1. the association with full legal capacity **VERENIGING MILIEUDEFENSIE**, which also goes by the name Friends of the Earth Netherlands, having its registered office in Amsterdam, the Netherlands;
2. the foundation **STICHTING GREENPEACE NEDERLAND**, having its registered office in Amsterdam, the Netherlands;
3. the association with full legal capacity **LANDELIJKE VERENIGING TOT BEHOUD VAN DE WADDENZEE**, having its registered office in Harlingen, the Netherlands;
4. the foundation **STICHTING TER BEVORDERING VAN DE FOSSIELVRIJ-BEWEGING**, having its registered office in Amsterdam, the Netherlands;
5. the foundation **STICHTING BOTH ENDS**, having its registered office in Amsterdam, the Netherlands; and
6. the association with full legal capacity **JONGEREN MILIEU ACTIEF**,[1] having its registered office in Amsterdam, the Netherlands (dissolved as of 1 September 2022);

all represented in this appeal to the Supreme Court by and electing as the address for formalities pertaining to this matter the office of the Supreme Court attorneys P.A. Fruytier, LL.M and J.P. Jas, LL.M (BarentsKrans Coöperatief U.A.), having their place of business at Lange Voorhout 3, (2514 EA) The Hague, who were appointed by the claimants to represent them in this appeal to the Supreme Court and to sign and submit this original document in this capacity, hereinafter collectively referred to as (in the singular): **Milieudefensie et al.**,

is filing an appeal before the Supreme Court against the judgment (the **Judgment**) passed by the Court of Appeal of The Hague (the **Court**) on 12 November 2024, Civil Law Division, Commercial Team, under case number 200.302.332/01.

The respondent in the appeal to the Supreme Court is the legal entity under foreign law **SHELL PLC**, formerly **ROYAL DUTCH SHELL PLC**,[2] having its registered office in London (United Kingdom), in the previous instance in this case having last elected as the address for formalities pertaining to this matter the office of the attorney last representing it D.F. Lunsingh Scheurleer LL.M (Clifford Chance LLP), having its place of business at Droogbak 1a in (1013 GE) Amsterdam, hereinafter **Shell**.

The latest date when Shell can appear in this appeal to the Supreme Court is Thursday 24 April 2025.

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1 The court of appeal erroneously referred to Vereniging Jongeren Milieu Actief.
2 As of 21 January 2022 the name Royal Dutch Shell plc was changed to Shell plc.

The single-judge civil chamber of the Dutch Supreme Court handles the cases set out in the summary of cases referred to in Article 15 of the Decision on the Order of Judicial Proceedings, on the Fridays mentioned in Chapter 1 of the Procedural Regulations of the Dutch Supreme Court at 10:00 a.m. The handling of the case will take place in the Supreme Court building at Korte Voorhout 8 in The Hague.

Milieudefensie et al. presents the following grounds against the challenged judgment.

GROUND FOR THE SUPREME COURT APPEAL

Breach of law and/or failure to observe formalities which is subject to nullification, because the Court's considerations and decision as set out in the judgment that is hereby being challenged, wrongly for one or more of the following reasons, to be viewed independently and in conjunction.

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I. INTRODUCTION

1 This appeal to the Supreme Court concerns the role that Shell must perform on the basis of private law to prevent the substantial danger of climate change, which danger is threatening all of us to an ever-increasing degree. The Court rightly holds that there is no doubt that the climate problem is the greatest issue of our time. The threat posed by climate change is so great that it could be life-threatening in several places on Earth and will start to have a profound and negative impact on human and animal existence in many other places on Earth.[3]

2 The Court establishes in this respect that global warming must be limited to 1.5°C[4] and referred to important scientific findings from which it ensues that the emissions reductions this decade will be primarily decisive in this respect, which requires a rapid and substantial reduction of greenhouse gas emissions in all sectors.[5] There is a "*rapidly closing window of opportunity to secure a liveable and sustainable future for all*."[6]

3 In line with the greatest danger of this age, as acknowledged by the Court, in light of (inter alia) the Paris Agreement of 12 December 2015 (the **Paris Agreement**), Articles 2 and 8 ECHR, the decision of the Dutch Supreme Court in the *Urgenda* case, the decision of the ECtHR in the *KlimaSeniorinnen* case and various EU regulations, international protocols and soft law developed (in part) for companies, aimed at preventing dangerous climate change, the Court rightly accepts that Shell is subject with regard to this point to an independent duty of care to reduce its Scope 1, 2 and 3 CO_2 emissions.

4 According to the Court, companies are subject to an obligation to make a contribution to combating dangerous climate change and to limiting global warming to a maximum of 1.5°C.[7] Greater effort can be required of Shell than of most other enterprises, because it has been an important player on the fossil fuel market for over a hundred years and it still holds a prominent position on this market.[8] Companies must reduce their emissions on the basis of this duty of care.[9] Shell must therefore make an appropriate contribution to the climate goals of the Paris Agreement.[10] This obligation also applies to Shell's Scope 3 emissions.[11] In this originating document Milieudefensie et al. is referring to the duty of care established by the Court (to prevent or limit dangerous climate change).

5 Nevertheless, from para. 7.63 on (and in particular in para. 7.67) the Court's finding takes a surprising turn, that cannot be reconciled with the established duty of care. In paras. 7.63 to 7.66 the Court first of all assumes that it is unlikely that Shell will breach its reduction

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3 Court of Appeal, para. 7.25.
4 Court of Appeal, para. 3.7.
5 Court of Appeal, para. 3.8 under (B.5) and (B.6).
6 Court of Appeal, para. 3.8 under (C.1).
7 Court of Appeal, paras. 3.9 and 7.27.
8 Court of Appeal, para. 7.55.
9 Court of Appeal, para. 7.57.
10 Court of Appeal, para. 7.67.
11 Court of Appeal, para. 7.99.

obligations with regard to Scope 1 and 2. As of para. 7.67 the Court then holds with regard to Shell's Scope 3 emissions that the global average reduction percentage of 45% by 2030 that aligns with the Paris Agreement does not apply to Shell (paras. 7.68 to 7.81), and that the reduction pathways for the oil and gas sector developed by international organisations and in the science are too divergent to be used as a basis for determining a reduction percentage for Shell (paras. 7.82 to 7.96), despite the fact that all reduction pathways for 2030 cited by the Court and the parties show a substantial, necessary reduction in oil and gas emissions (paras. 7.82 to 7.90). The conclusion is therefore that Shell is bound to reduce its CO_2 emissions in a manner that aligns with the Paris Agreement, so that it makes its own contribution to deflecting the greatest danger of this time, but it has not been ordered by the court to do so in any way. These findings cannot be reconciled.

6 In this appeal to the Supreme Court, Milieudefensie et al. will present (in essence) the various reasons why the Court wrongly did not determine an appropriate concrete reduction obligation with the established duty of care to which Shell is subject. These reasons are sometimes fairly simple and can be presented in the form of a relatively brief complaint regarding a point of law. The most obvious point is that the Court fails to recognise the fact that Articles 2, 8 and 13 ECHR, that are reflected in the duty of care, demand an effective remedy and/or effective protection against dangerous climate change, which in turn requires that a (percentage-based) reduction obligation must be determined. Article 3:296 Dutch Civil Code (DCC) also mandates such, in light of the duty of care that was established by the Court.

7 In addition, when determining what reduction percentage may be demanded of Shell, the Court applied far too narrow a criterion. The Court requests in para. 7.67 that there is (a) consensus in climate science about specific reduction standards that should apply to a company like Shell. The Court is thus demanding far more from climate science than the science will ever be able to deliver. What is more, by applying that criterion to determine the reduction percentage, the Court excludes all normative instruments, including those which according to the Court itself,[12] are in fact relevant when determining the duty of care, such as the hazardous negligence criteria, the conventions, the protocols of international organisations, soft law and general (legal) principles. This is evidently incorrect. These normative instruments also play a role when determining the reduction percentage. These instruments themselves mention reduction percentages and conditions under which those percentages apply, while, moreover, they form a relevant guideline when evaluating reduction pathways modelled by science. A normative correction of those pathways can provide a concrete reduction percentage for Shell.

8 Based on the aforementioned complaints, the Supreme Court could set aside the Court's opinion that a reduction percentage cannot be determined in a simple and comprehensible manner, as the subsequent considerations all expand on that far too narrow criterion. After referral, justice could then truly be done to the extensive debate of the parties regarding

[12] Court of Appeal, para. 7.2.

this point. The parties have always (in part) in the light of all normative instruments discussed what reduction percentage should apply to Shell.

9 Milieudefensie et al. sees itself forced to direct a detailed appeal regarding issues of fact against the Court's judgment, in particular because the Court did not in any way do justice to the very elaborately detailed arguments presented and the position taken by Milieudefensie et al. in the light of the relevant normative instruments. In addition, many considerations of the Court simply cannot be reconciled in a comprehensible manner with the arguments presented and the position taken by Milieudefensie et al. In this appeal to the Supreme Court, Milieudefensie et al. also addresses various decisions of the Court that cannot be reconciled with each other, such as the conflict between, on the one part, (rightly) accepting Shell's duty of care that demands a reduction in CO_2, but on the other failing to determine a reduction percentage. This is the first explanation for the unusual length of this originating document.

10 Grounds of appeal 1 to 5 are dedicated to the Court's finding on the duty of care and the reduction percentage. Ground of appeal 1 discusses in this respect that the Court, both in determining Shell's duty of care and in determining the reduction percentage that can be required of Shell, applied a framework for assessment that was too limited (in light of Article 6:162 DCC). If the Court had considered all relevant circumstances and reference points, this in itself could have led to a reduction percentage for Shell. Grounds of appeal 3 and 4 zero in more specifically on the criterion based on which and the way in which the Court held whether the global average reduction percentage (appeal ground 3) or any sector-based reduction percentage (ground of appeal 4) applies to Shell in terms of reducing its Scope 3 emissions. Ground of appeal 5 also draws attention to the fact that Article 3:296 DCC also mandates that such a percentage be determined. Ground of appeal 2 relates to the Court's finding on Shell's Scope 1 and 2 emissions.

11 The Court's opinion takes a second remarkable and incorrect turn in paras. 7.97 to 7.110, that also cannot be reconciled with Shell's duty of care as established by the Court. It is there that the Court takes as its starting point that Milieudefensie et al.'s interest as referred to in Article 3:303 DCC in an action seeking a judicial order is lacking if Shell would be able to implement the order in a manner that cannot contribute to protecting against dangerous climate change. In addition, when assessing Milieudefensie et al.'s interest as referred to in Article 3:303 DCC in an action for a judicial order, the Court attributes weight to the possible conduct of third parties in response to the order.

12 With regard to how the Court reached this judgment, the Supreme Court can opt for a simple or a complex path toward setting aside the Judgment. In the simple path it becomes clear that the interest in an order as referred to in Article 3:303 DCC is not lacking if the defendant *would be able to implement* the order in a non-effective manner. The issue is, after all, (conversely) whether there is an impending breach of law and whether the order can contribute to preventing such breach. That of the many effective implementation modalities one (possible) ineffective implementation modality is conceivable, naturally

does not nullify the interest as referred to in Article 3:303 DCC. This applies equally to the possible conduct of third parties. After all, the issue is (only) that Shell actually performs its duty of care. What third parties might do is not relevant in this respect.

13 The Supreme Court can also opt for a far more complex path to set aside the Judgment. That path would focus on a series of incorrect presumptions of the Court, such as with regard to Shell's trading house, Shell Trading (**Shell Trading**), the biggest purchaser and seller of oil and gas in the world. According to the Court, Shell could opt for an ineffective method for implementing the order by stopping the sale and resale of oil and gas of producers other than Shell via Shell Trading. The same Shell Trading would then offer those other producers all its other services (such as transport and financing) to put their products on the market. The Court is thus allowing Shell Trading to perform a dual role that it cannot perform in reality. If Shell ceases its sale and resale activities, its other services will also shrink. These other services serve the sale and resale activities. Such a downsizing of the services of the biggest purchaser and seller of oil and gas in the world would naturally have an effect on global CO_2 emissions. The Court did not consider this, despite Milieudefensie et al.'s arguments regarding this issue.

14 Grounds of appeal 6 to 8 are each dedicated to (aspects of) the effectiveness of the reduction order and the presenting of (inter alia) the aforementioned complaints. Because of the detailed arguments in the debate between the parties on this point, these complaints also take up a relatively large amount of space. This is the second explanation for the unusual length of this originating document.

15 Ground of appeal 9 contains the complaint that the Court, based on the positive side of the devolutive working of the appeal, in any event should have made a decision on the declaratory judgment that Milieudefensie et al. requested. Ground of appeal 10, lastly, concerned a non-independent complaint expanding on other complaints.

II. COMPLAINTS

1. Assessment framework for claims of Milieudefensie et al.

1.1. In order to answer the question whether Shell is acting contrary to what according to unwritten law is deemed acceptable in society if it does not reduce its CO_2 emissions in line with the claim presented by Milieudefensie et al., the Court considered that this must be determined on the basis of the circumstances of the case. This societal standard of care is interpreted as much as possible on the basis of objective reference points, such as legislation, general legal principles, fundamental rights, case law and/or expert reports. (para. 7.2). The Court then presented the following considerations in paras. 7.3 to 7.57 and 7.67 to 7.96 (summarised and insofar as relevant to the complaints):

(i) The Court will not assess (specifically) on the basis of the factors in the 'Kelderluik' case whether there is a societal standard of care on the basis of which Shell is bound to reduce its CO_2 emissions by a specific percentage. The dangerous climate change that is occurring worldwide cannot be deemed completely the same as the hazardous negligence situations in which the factors of the 'Kelderluik' case tend to be applied (para. 7.3);

(ii) Protection against dangerous climate change is a human right that is supported by (inter alia) Articles 2 and 8 ECHR, the associated case law of the Dutch Supreme Court and the ECtHR, non-European case law, and in various reports and resolutions of the United Nations (the **UN**), from which it ensues that (bodies of) the UN also deem the right to a clean, healthy and sustainable living environment to be a human right (paras. 7.6 to 7.17);

(iii) This human right has an (indirect horizontal) effect in private law relationships by means of open standards, such as the societal standard of care, which obligation can be fleshed out in greater detail based on soft law (such as the UN Guiding Principles on Business and Human Rights (the **UNGP**), the guidelines (the **OECD Guidelines**) established by the Organisation for Economic Cooperation and Development (the **OECD**) and various other initiatives) (paras. 7.18 to 7.23);

(iv) When interpreting the societal standard of care, the question is what actions are being demanded of an individual or enterprise, precisely when such actions are not prescribed by specific rules (whether or not rules of public law). Whether there is action that is contrary to the societal standard of care, depends on a range of factors. The severity of the threat of a specific danger, the contribution to the occurrence of the danger and the possibility of making a contribution to combating the danger, are factors that must be taken into account (para. 7.24);

(v) The climate problem is the most important issue of our age. The threat posed by climate change is so great that it could be life-threatening in several places on Earth and will start to have a profound and negative impact on human and animal

existence in many other places. Both in the Netherlands and abroad, climate change harms the rights protected by Articles 2 and 8 ECHR and will continue to harm them. These rights are in part decisive in terms of interpreting the societal standard of care and with regard to answering the question what can be required of Shell in relation to that standard, as a large and international company (para. 7.25);

(vi) It is an established fact that fossil fuel consumption is largely responsible for creating the climate problem and that addressing climate change is something that cannot wait. To combat the associated dangers, it is precisely companies that have contributed to this and that have it in their power to make a contribution to an obligation in combating said danger, even when (public law) rules do not necessarily compel them to do so. This follows from the instruments discussed above, including the OECD guidelines and the UNGP, to which Shell has subscribed. Those instruments place the responsibility for protecting against dangerous climate change in part on (large) companies and they are called upon to take appropriate measures themselves to counter dangerous climate change (para. 7.26);

(vii) Companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations. They have their own responsibility in achieving the targets of the Paris Agreement (para. 7.27);

(viii) Although Shell, as a European company, is subject to Union law measures, under Union law it not subject to any absolute reduction obligation of 45% (or any other percentage). Nor will it be in the foreseeable future. On the one part, obligations arising from existing regulations do not stand in the way of an obligation of individual companies, based on the societal standard of care, to reduce their CO_2 emissions, on the other, those regulations are of influence on the obligations to which Shell is subject on the basis of the societal standard of care. When interpreting that standard of care, the district court took account of the EU-ETS system and the EU-ETS-2 system must also be taken into account (paras. 7.28 to 7.54);

(ix) In private law relationships, human rights, including protection against dangerous climate change, can have an effect via open standards, such as a standard of care that may be expected in society. The duty of care relating to the climate can be given further substance based on soft law such as the UNGP and the OECD Guidelines. The content and scope thereof can differ per company, depending on a company's contribution to climate change and the options that a company has to counter climate change. It ensues from the instruments discussed that the societal standard of care also entails that companies are subject to an obligation to make a contribution to countering dangerous climate change. More can be expected of Shell than of most other companies, as for more than a hundred years Shell has been an important

player in the fossil fuel market and it now holds a prominent position on that market (para. 7.55);

(x) Based on a variety of Union law measures, which are also directed at companies, companies must align their business model and strategy to the transition to a sustainable economy and to limiting global warming to 1.5°C, but these measures do not impose an absolute reduction obligation on individual companies or specific sectors. On the other hand, these arrangements and instruments are not exhaustive, in such sense that companies, in order to meet a standard of care deemed acceptable in society, can always suffice by complying with the obligations laid down in these arrangements and instruments. In addition to compliance with these measures, companies have a societal duty of care to reduce their emissions. Milieudefensie et al.'s claim cannot of itself be awarded simply on the basis of that 'general' obligation (paras. 7.56 and 7.57);

(xi) Investments in new oil and gas fields can lead to a carbon lock-in effect. It can be expected of oil and gas companies that when making investments in the production of fossil fuels, they take account of the negative consequences that further expansion of the supply of fossil fuels has for the energy transition. Shell's intended investments in new oil and gas fields can be at odds with this expectation. In these proceedings the Court does not, however, have to answer the question whether the intended investments are contrary to its societal duty of care. The issue in these proceedings is whether Shell can be made subject to an obligation to reduce its emissions (paras. 7.58 to 7.62);

(xii) Although the existing climate legislation does not provide for a concrete reduction percentage for individual companies, it is conceivable that there is consensus among climate scientists regarding specific reduction standards which should apply to a company like Shell. Paras. 7.68 to 7.81 discuss whether Shell can be bound by the consensus existing within climate science about a reduction standard of 45% (or any other percentage). In paras. 7.82 to 7.96 the Court goes into the question whether a sectoral standard for oil and gas can be determined on the basis of scientific consensus (para. 7.67);

(xiii) The Court cannot determine what specific reduction obligation applies to Shell. The global general reduction target of 45% in 2030 is not sufficiently fine-tuned and cannot be applied as the reduction percentage for Shell, in part because Shell is active not only in various sectors but also across the world, Shell does not supply coal and the gas supplied by Shell can replace carbon-intensive coal, so that although Shell's Scope 3 emissions will increase, global CO_2 emissions can fall in the shorter term. It is furthermore not likely that Shell's product supply and customer base is a reflection of the global product supply and the global customer base, which is necessary to be able to apply the standard of 45% emission reduction to Shell. Equity does not lead to another conclusion, because that standard is too general to

be able to deduce that Shell is subject to a reduction obligation of 45% (paras. 7.68 to 7.81);[13]

(xiv) Nor is their sufficient basis for the Court to impose an obligation on Shell based on sectoral reduction pathways to reduce its CO_2 emissions by a specific percentage in 2030. The (expert) reports submitted by the parties cannot simply be compared with each other, and show a fairly wide range of reduction percentages. In addition, the numbers are not stable. The Net Zero Emissions report 2023 (the **NZE scenario**) of the International Energy Agency (the **IEA**) shows that the reduction pathway for oil and gas has another form than it did in the earlier NZE scenario (from 2021). There is apparently a wide divergence of opinion among experts regarding the percentages and methodology to be applied. Nor can the NZE scenario serve as the starting point, because, nota bene, Milieudefensie et al. questions that estimate, the Court is being asked to elevate that estimate to a legal standard, even though that is not what it is intended for and the percentages are subject to change. Both parties have questions regarding the value of the Integrated Assessment Models (the **IAM models**), which according to Milieudefensie et al. are of only "limited use". This leads to more substantial restraint when elevating figures based on those reports to a legal standard. The 'Common But Differentiated Responsibilities' principle (the **CBDR principle**) does not change this, as this does not provide a standard for Shell's reduction obligation to be applied in these proceedings (paras. 7.82 to 7.94);[14]

(xv) The precautionary principle does not justify any other conclusion, as this principle only relates to uncertainty about the consequences of a specific action (CO_2 emissions), while in this case there is uncertainty regarding a standard to be applied. The precautionary principle does not justify ignoring that uncertainty at the expense of a private party and establishing a legal standard for such private party (para. 7.95); and

(xvi) The available numbers therefore do not provide a sufficient basis to impose an obligation on Shell to reduce its CO_2 emissions in 2030 by a specific percentage (para. 7.96).

1.2. The manner in which this judgment was reached is incorrect, because the Court assumes an excessively limited framework for assessment in at least six respects. When interpreting Shell's unwritten duty of care, the Court (a) wrongly did not independently review it against the doctrine of hazardous negligence and therefore did not consider the 'Kelderluik' factors or if it did, it considered them incorrectly and/or to an insufficient degree, (b) wrongly, or not in the correct manner, did not take account of the precautionary principle, (c) wrongly did not carry out a (clear) review against the principle of intergenerational equity, (d)

[13] This consideration is set out in more detail in ground of appeal 3.1.
[14] This consideration is set out in more detail in ground of appeal 4.1.

wrongly did not carry out a (clear) review, or not in the correct manner, against the CBDR principle, (e) wrongly did not attribute any weight or attributed insufficient weight to the right to an effective remedy as referred to in Article 13 ECHR and/or Article 6 ECHR, or against the right to effective protection as referred to in Article 2 and/or Article 8 ECHR, in which light the standard of care in relation to dangerous climate change requires (the determination of) a (percentage-based) concrete reduction obligation and (f) applied an incorrect legal view with regard to the influence of public law regulations on the scope of the private law duty of care, as well as with regard to what reduction obligations apply to companies according to Union law. Although the Court considered a number of these relevant facts and/or objective reference points (incompletely) when determining the duty of care, it wrongly failed to also do so when determining the concrete reduction obligation. If the Court had considered those elements, this in itself could have led to a reduction percentage for Shell. In any event, the Court's assessment relating to the aforementioned points, in light of the court documents, lacks sufficient comprehensible grounds. Milieudefensie et al. will elaborate on these points below. Grounds of appeal 3 and 4 then specifically relate to the Court's opinion on determining Shell's concrete reduction obligation.

A. Doctrine of hazardous negligence and weighing of all relevant circumstances

1.3. In para. 7.3 the Court considers that it would not assess (specifically) on the basis of the 'Kelderluik' factors whether there is a duty of care based on which Shell is bound to reduce its CO_2 emissions by a specific percentage, because the situation relating to dangerous climate change differs from the hazardous negligence situations to which the 'Kelderluik' factors tend to be applied. The Court added that whatever the case may be here, these factors must also be considered when interpreting the general standard of care. In para. 7.24 the Court comes back to that general standard of care and considers that the severity of the threat of a specific danger, the contribution to the occurrence of the danger and the possibility of making a contribution to countering the danger, are also factors that must be taken into account.

1.4. With this opinion the Court fails to recognise that to answer the question whether a party is engaging in action that endangers another party, including in the context of liability for dangerous climate change, what is decisive is whether the degree of probability that the danger will manifest itself as a result of the behaviour of that party is so great, that the party, according to the standard of care, should refrain from that behaviour, or that said party must take precautionary measures that can prevent or limit that danger, or that can contribute to preventing or limiting such. In any event, it is decisive in this respect whether another party has been exposed to a greater risk than is reasonably justifiable under the given circumstances and for which a normal person should show caution. The Court in any event fails to recognise that the doctrine of hazardous negligence shows such affinity with the duty of care to prevent dangerous climate change, that all relevant criteria provided in the case law on hazardous negligence must be deemed relevant in terms interpreting the societal standard of care. After all, to determine the degree of care that can be demanded of a company to prevent or limit dangerous climate change, all relevant circumstances of the case are significant, which in any event can include (the size of) the risk of damage, the nature of the behaviour, the nature and severity of any damage, the degree in which the company contributes and has contributed to the danger and how onerous and how common it is to take precautionary measures. In the framework of dangerous climate change, when applying the doctrine of hazardous negligence, significance must, moreover, be attributed to international (legal) principles, including the precautionary principle, the principle of intergenerational equity and the CBDR principle.

1.5. By disregarding this criterion, the Court wrongly did not include viewpoints that are essential to the doctrine of hazardous negligence in its assessment framework when answering the question what may be expected of Shell in this concrete case on the basis of the doctrine of hazardous negligence and what reduction percentage the doctrine of hazardous negligence requires, or in any event did not take this into account in an adequate and clear manner. In para. 7.24 the Court does mention facts that are (also) relevant for the doctrine of hazardous negligence, but in the Judgment does not indicate that it had reviewed these against the doctrine of hazardous negligence, or had considered the relevant facts in

conjunction with each other. The Court furthermore fails to pay attention to the principle of intergenerational equity and only pays attention in a flawed manner to the precautionary principle and the CBDR principle (see in this respect also grounds of appeal 1.11 to 1.24), which principles are also relevant in the doctrine of hazardous negligence.

1.6. Applying the doctrine of hazardous negligence and reviewing it against the facts that were relevant in that respect, the Court should have studied what precautionary measures can be required of Shell to prevent or limit dangerous climate change or, respectively, to comply with the goals of the Paris Agreement and whether it may be required of Shell in that respect that it reduce its emissions in line with the global average reduction percentage of 45% in 2030 relative to 2019, or that another reduction percentage may be required of Shell. The doctrine of hazardous negligence, after all, requires its own consideration of the relevant facts that could result in a reduction obligation of a specific percentage that can in any event be required of Shell and that contributes to deflecting or limiting the risk of dangerous climate change as much as possible. The Court wrongly failed to conduct such study.

1.7. By not independently reviewing the doctrine of hazardous negligence, but by requiring, in the framework of the question what reduction percentage can be required of Shell in para. 7.67 that there is (a) consensus among climate scientists about that reduction percentage, the Court in any event failed to recognised that, when answering the question what precautionary measures may be required of Shell to prevent or limit dangerous climate change on the basis of the doctrine of hazardous negligence, it is not a requirement for there to be (a) consensus among climate scientists regarding that measure. The required degree of reduction ensues, after all, from considering all relevant facts of the concrete case. This entails (in any event) that Milieudefensie et al. – in light of the relevant facts of the case presented by Milieudefensie et al. – also had an interest in a separate review in relation to the doctrine of hazardous negligence when determining the reduction percentage that can be required of Shell.

1.8. In any event, the Court's opinion lacks sufficient reasoning, as Milieudefensie et al., to interpret Shell's duty of care to prevent or limit dangerous climate change, based its claim (inter alia) on the doctrine of hazardous negligence, including the 'Kelderluik' factors. Toward this end Milieudefensie et al. discussed and explained the various relevant facts individually and in conjunction with each other, and applied them to Shell's specific situation and the precautionary measures to be taken by Shell. In this respect Milieudefensie et al. also mentioned the most important 'Kelderluik' factors, fleshed them out in further detail and applied them to Shell's position. In addition, Milieudefensie et al. referred in the appeal to the nature and scope of the climate damage,[15] Shell's familiarity with and ability to foresee the climate damage,[16] the scope of the chance of dangerous climate change manifesting itself if no precautionary measures were taken,[17] the nature of Shell's

[15] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 224.
[16] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 225 to 229.
[17] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 230 to 241.

behaviour[18] and the fact that the precautionary measures were not particularly onerous for Shell.[19] At first instance Milieudefensie et al. also invoked the 'Kelderluik' factors (to an even greater degree).[20] At its core, that argument comes down to the following:

(i) The climate problem is the most important issue of our age. That danger associated with climate change is so great, that it can be life threatening at various places on Earth (as the Court itself also acknowledges in para. 7.25). Strict due care requirements may and must be imposed in the case of behaviour which by its nature creates a danger that is as great and all-encompassing as (dangerous) climate change, even if the inconvenience for the injuring party of the precautionary measures to be taken is considerable.[21] In case of very serious risks, no or less weight is attributed to other factors, such as the onerousness of the precautionary measures to be taken.[22]

(ii) Shell is familiar with the dangers of climate change and those dangers are foreseeable to Shell, a matter that is not in dispute between the parties. Shell has possessed this knowledge and ability to foresee what was coming since the 1980s and 1990s.[23]

(iii) The onerousness of the claimed reduction measure is limited for Shell, because Shell and its investors have long included the risk of a court order in its calculations.[24] Shell has the capacity and the possibilities to implement the claimed reduction order of 45% in 2030.[25] Shell also shares the view that it belongs to the part of global society that has to move faster than the global average, because it has the capacity to do so.[26] The claimed reduction measure in any event weighs more heavily than

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18 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 242 to 256.
19 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 257 to 265.
20 Milieudefensie et al.'s Summons of 5 April 2019, paras. 511 to 639. There is no point in fully repeating that argument here. Milieudefensie et al. will suffice by listing the main points of the argument. The core complaint is, after all, that the Court simply did not make the required full consideration of the matter required by the doctrine of hazardous negligence.
21 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 33 and 34; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, paras. 43 to 58; Milieudefensie et al.'s. Written Arguments of 19 March 2024, paras. 6 and 14 to 99; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (121), 242 and 313; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 73 and 90; Milieudefensie et al.'s Summons of 5 April 2019, paras. 619 and 620 (with further elaboration in paras. 609 to 618) and 634 to 639.
22 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 56; Milieudefensie et al.'s Written Arguments of 19 March 2024, para. 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 242; Milieudefensie et al.'s Notes on Oral Arguments 4 at first instance of 3 December 2020, para. 16.
23 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 225 to 229; Milieudefensie et al.'s Summons of 5 April 2019, paras. 530 to 574.
24 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 88 to 93; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (122) to (125) and 710 to 714; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 90; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 69 to 82.
25 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 65; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (113), 490 and 517; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 29.
26 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 78; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 265 and 491 to 493; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 23.

the objections to such measure on the part of Shell because of the catastrophic consequences of the climate change which will in part be caused by Shell's CO_2 emissions.[27]

(iv) Shell can implement a reduction order of 45% in 2030 – weighed against the severity and the scope of the danger – in a manner that is not too onerous for Shell by becoming a smaller, but still profitable oil company.[28] In this scenario Shell reduces its investments in oil and gas production. Shell's emissions that are associated with the sale of the oil and gas products it produces will automatically fall by almost 45% in 2030 if it simply decides not to make further investments in new oil and gas fields as of 2022.[29] This method further reduces the risk of stranded assets.[30] The earlier Shell starts emissions reductions, the easier it will be for Shell to transform so that it will be able to act in line with the Paris Agreement.[31] Other companies and countries have been moving away from oil and gas for some time now.[32] This method of reducing Shell's oil and gas operations fits within the approach favoured by the IEA. The IEA has calculated that because of the sustainable alternatives, no investments are necessary in new oil and gas fields, including for the "harder to abate" sectors.[33]

(v) Shell furthermore has the option, even according to Shell itself, to transform into a sustainable energy company.[34] Shell itself already believed in the 1990s that it was possible to move the company away from oil and gas, in which respect it was of the opinion at the time that it owed it to its social standing to invest in sustainable energy. In 2004 it believed that its sustainable portfolio had to consist of wind, sun, hydrogen, biofuels and carbon capture and storage (**CCS**), so that for some considerable time now Shell has had various opportunities to become more sustainable.[35] Shell also recognises the need for such.[36] The possibilities for a transformation to sustainable

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27 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 50 and 51; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (121); Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 91; Milieudefensie et al.'s Summons of 5 April 2019, paras. 621, 622 and 637.

28 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 9; Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 20 to 34; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (114) and (115) and 261; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 77 to 80.

29 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 95; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 265, 595, 687 and 914.

30 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 33; Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 45; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 265 and 595; Milieudefensie et al.'s Summons of 5 April 2019, paras. 780 to 794.

31 Milieudefensie et al.'s Summons of 5 April 2019, paras. 629 to 633 and 637.

32 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 46; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 913; Milieudefensie et al.'s Summons of 5 April 2019, paras. 777 to 779.

33 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 95; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 265 and 593 to 597.

34 Milieudefensie et al.'s Summons of 5 April 2019, paras. 623 to 625.

35 Milieudefensie et al.'s Summons of 5 April 2019, paras. 623 to 625.

36 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 13; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 240 and 241; Milieudefensie et al.'s Summons of 5 April 2019, paras. 567 and 568.

energy have only become better for Shell since then.[37] The earlier Shell starts with this transition, the less onerous the transformation.[38] There will have to be large-scale worldwide investments in solar and wind power to generate sustainable electricity.[39] Shell itself, moreover, believes that wind power and solar power are technically and commercially on an equal footing with oil and gas[40] and Shell is itself also of the opinion that it is on the right road and positioned for the transition to sustainable energy and sustainable electricity generation.[41]

(vi) Shell is a prototypical company from which the greatest reduction efforts may be requested, a view shared by the climate protocols, so that it may be required that Shell at the very least seek alignment with the global average reduction percentage of 45% in 2030. Shell is one of the biggest and richest companies in the world with large historical, present and future emissions, with the capacity and the resilience to realise large emissions reductions in Scope 1, 2 and 3, with revenue that is primarily generated in rich countries.[42] Shell has been on a collision course (since 2007) with the global climate goals.[43]

(vii) The reduction pathways outlined by science for global society as a whole must certainly be possible for Shell as an individual company, in view of Shell's (financial) resources, its knowledge and skill and its international network and options.[44]

(viii) Shell itself applies a goal of net zero emissions in 2050 latest, from which it automatically ensues that Shell, on the road to that end goal of a net 100% reduction in 2050, must in any event first pass the point of a net 45% reduction. This net 45% reduction will therefore in any event have to be realised by Shell. The 45% reduction in 2030 is in this respect therefore a "*no regret*" reduction, because this reduction is unavoidable for Shell no matter what. The reduction order is therefore not unreasonably onerous for Shell.[45]

1.9. In light of the above-elaborated invoking by Milieudefensie et al., in short, of the doctrine of hazardous negligence, the relevant criteria therefore and the assertions involved in this respect, the Court cannot hold, without additional reasoning, which is lacking, that the

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37 Milieudefensie et al.'s Summons of 5 April 2019, paras. 623 to 625.
38 Milieudefensie et al.'s Summons of 5 April 2019, paras. 629 to 633 and 637.
39 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 261 and footnote 147; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 86.
40 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (120) and 261; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 84.
41 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (119) and 261; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 86 to 89.
42 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 261 and 487 to 508; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 21 and 22 (with further elaboration in paras. 23 to 40 and 60); Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 83 to 129 and 155 to 158; Milieudefensie et al.'s Summons of 5 April 2019, paras. 575 to 602 and 638.
43 Milieudefensie et al.'s Summons of 5 April 2019, paras. 575 to 602 and 638.
44 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 487 and 488; Milieudefensie et al.'s Summons of 5 April 2019, para. 628.
45 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (116), 261 and 510.

Court will not (specifically) assess on the basis of the 'Kelderluik' factors whether there is a standard of care on the basis of which Shell is bound to reduce its CO_2 emissions by a specific percentage, because dangerous climate change that is occurring worldwide cannot be deemed exactly the same as situations of hazardous negligence to which the 'Kelderluik' factors tend to be applied. The doctrine of hazardous negligence can be applied to this situation, and the debate between the parties gave rise to that consideration (in part) being based on the relevant 'Kelderluik' factors.

1.10. The considerations of the Court (i) that the question whether there is action in contravention of the societal standard of care depends on all kinds of factors, in which respect the severity of the threat of a specific danger, the contribution to the arising of the danger and the possibility to make a contribution to countering the danger are factors that must be taken into consideration (para. 7.24) and (ii) that the climate problem is the greatest issue of our time and the problem resulting from climate change would be so great that it can be life threatening in various places on Earth and will start to have a profound and negative impact on human and animal existence (para. 7.25), do not form an adequately reasoned response. After all, the Court only listed relevant facts in para. 7.24 *in abstracto*, while in para. 7.25 the Court attributes value (in itself correctly) to the scope and the nature of the danger and the damage. However, the Court does not consider the relationship between the facts relevant for the doctrine of hazardous negligence, neither here nor anywhere else in the Judgment, let alone that the Court has determined what degree of CO_2 reduction can be required of Shell as a result thereof. For that reason, the Court's decision lacks correct or in any event sufficient reasoning.

B. The precautionary principle

1.11. In addition, the Court fails to recognise that, in relation to the question what the duty of care to prevent or limit hazardous climate change requires, or in any event when applying the doctrine of hazardous negligence and/or when answering the question what reduction percentage can be required of Shell, significance can (in part) be attributed to the precautionary principle. In any event the Court, when assessing what obligation the societal standard of care imposes on Shell, wrongly does not take account, or in any event (in para. 7.95) does so in an incorrect manner of the precautionary principle that is encompassed both in the doctrine of hazardous negligence and arises from (inter alia) Article 2 and/or Article 8 ECHR, Article 191(2) TFEU, the UN Global Compact, the Rio Declaration and Article 3 UN Climate Convention, and is reflected in the standard of care. The precautionary principle entails that there is no time to wait to take precautionary measures until full (scientific) certainty has been reached regarding (inter alia) the scope, the nature and/or the effectiveness of the precautionary measures that may be required of parties that contribute to that danger on the basis of the duty of care to prevent or limit dangerous climate change. The precautionary principle therefore caters to (scientific) uncertainty with regard to which precautionary measure to be imposed actually offers protection against the danger against which the duty of care seeks to provide protection. In case of (scientific)

uncertainty regarding a reduction percentage that is appropriate for the party in question and/or in case of lack of a concrete measure or reduction percentage for an individual company designated by the science, by soft law and/or national or international standards, the precautionary principle can thus lead to taking precautionary measures or setting a specific reduction percentage for an individual company, or in any event can contribute to the determination of the amount of that reduction percentage. The precautionary principle is, moreover, relevant in connection with the limitations of the IAM models and reduction pathways modelled thereon, acknowledged by the science itself, the recognition in the science that these models and modelled reduction pathways do not take account of (inter alia) international (legal) principles and other normative aspects, as well as due to the lack of coordinating agreements (between the parties) of sectors and companies to go through the modelled reduction pathways. In any event, when determining a reduction percentage for a specific company, the precautionary principle can lead to not taking IAM models and the modelled reduction pathways based on those IAM models that cannot be reconciled with the precautionary principle into consideration, or giving them a more limited meaning. The precautionary principle can thus lead to a farther-reaching reduction obligation than the modelled reduction pathways prescribed by the science. The precautionary principle thus plays a role in determining the specific reduction percentage that (a company like) Shell must observe.

1.12. The Court also fails to recognise the content and purport of the precautionary principle in para. 7.95, with its opinion that the precautionary principle cannot lead to a standard to be applied to Shell's reduction obligation, as this case is not concerned with the uncertainty regarding the consequences of a specific action (the CO_2 emissions), but with uncertainty regarding a standard to be applied. According to the Court, the precautionary principle does not justify ignoring that uncertainty at the expense of a private party and establishing a legal standard for that private party. This opinion demonstrates an incorrect legal view, because the precautionary principle is not limited to situations in which there is uncertainty about the consequences of a specific action. On the contrary, the precautionary principle plays a role precisely in relation to uncertainty regarding the reduction percentage that can be required of (a company like) Shell.

1.13. In any event, the Court's opinion lacks sufficient reasoning, because Milieudefensie et al. has presented substantiated assertions and support for the argument that and why Shell (partly) in the light of the precautionary principles in the given circumstances must be obliged to achieve a CO_2 reduction relative to 2019 of (at least) 45% in 2030, or in any event another concrete percentage. Toward this end Milieudefensie et al. pointed out the following (summarised and setting out the main points):

(i) The precautionary principle implies that if existing emissions reduction measures are insufficient to prevent dangerous climate change, it will be necessary to take measures that <u>are</u> safe or, at least, are as safe as possible and that those measures

may not be postponed because there is no absolute scientific certainty about the effectiveness of those measures.[46]

(ii) Taking account of the precautionary principle, Shell must seek alignment with the global climate goals of the Paris Agreement, which means achieving an emissions reduction of 45% in 2030.[47] When taking account of a lower percentage, Shell is taking more risks than is socially responsible.[48] Taking account of a reduction percentage of 45% is the absolute minimum, when applying (inter alia) the doctrine of hazardous negligence and the precautionary principle.[49]

(iii) Shell must start the reduction task with immediate effect, as the risk of no longer being able to avoid the danger in case of a later start will increase and the (social) costs of the reduction task will increase.[50]

(iv) Insufficient reduction in emissions to prevent dangerous climate change is a breach of Articles 2 and 8 ECHR. When performing the obligations arising from those provisions, the precautionary principle must be taken into account, so that minimum emissions reductions are not in themselves good enough.[51] The precautionary principle is the guiding principle when determining the emissions reduction pathway.[52]

(v) Most IAM models that are used to calculate reduction pathways work based on cost effectiveness.[53] The typical outcome of this is that the models have the emissions reduction take place where they are most cost effective.[54] This means that IAM models are generally based on reductions in developing countries, which are greatly dependent on coal for their power supply.[55] These countries have the most limited transition capacity. Regions like Sub-Saharan Africa, South America and Asia must then take the lead in the mitigation task, even though this is not possible in reality.[56]

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46 Milieudefensie et al.'s Summons of 5 April 2019, paras. 51 and 665 (with reference to Court of Appeal of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591, paras. 62, 63 and 73 (*Urgenda*)).

47 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (110), 483, 520 and 583; Milieudefensie et al.'s Summons of 5 April 2019, para. 55.

48 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 112; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (110) and 508.

49 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 15.

50 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 98; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 150; Milieudefensie et al.'s Summons of 5 April 2019, para. 56.

51 Milieudefensie et al.'s Summons of 5 April 2019, para. 515.

52 Milieudefensie et al.'s Summons of 5 April 2019, para. 674.

53 For a more detailed representation of the position taken by Milieudefensie et al. with regard to the limitations of IAM models, see ground of appeal 4.8.

54 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 30.

55 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 30, 36 to 38 (including table) and 41; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 531 to 537.

56 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 22, 30, 31, 33 and 36 to 41; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 467 and 524 to 536.

The modelled reduction pathways can therefore never be realised in the real world.[57] They therefore do not take account of the precautionary principle.[58]

(vi) In addition, IAM models rely on carbon dioxide removal (**CDR**) technologies. The CDR makes it possible to increase the carbon budget, according to modelling, so that in the IAM models fewer emissions need to be reduced in the short term. These models are based on the hypothesis that later on this century CDR will be able to remove enormous quantities of CO_2 from the atmosphere. In reality, no noteworthy removal of emissions from the atmosphere is occurring. These technologies are still in the demonstration phase at this time. The scalability thereof is also very dubious. The CDR technologies therefore cannot be a reason to allow emissions to be reduced to a lesser degree.[59] Gambling on CDR technologies brings along huge uncertainties, which is contrary to the precautionary principle.[60]

(vii) In addition, IAM models, due to the focus on cost effectiveness, work with a discount rate that is too high. This is the percentage by which the expected costs in the future are calculated back to the net present value. By applying a high discount rate, future CDR measures have a significant cost benefit in the model calculation, with the result that the IAM models make shifting to mitigation later in the century instead of in the shorter term (to 2030) more attractive based on the modelling.[61] This is contrary to the precautionary principle.[62]

(viii) Lastly, IAM models do not include (avoided) climate damage in their calculations. This damage increases if global warming continues to increase because climate measures are not taken early enough. The longer global warming is at or above 1.5°C, the greater the risk that tipping points will be passed.[63] This can result in an abrupt and irreversible climate change, that neither humans nor nature can properly prepare for and for which the risk increases "*at a steepening rate*" in the event of a temperature increase of between 1°C and 2°C.[64] Because of the serious

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57 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 41; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 59; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 537.

58 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 28 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 536 and 537.

59 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 59 (with further elaboration in paras. 60 to 88), 62, 79, 83, 105 and 112 to 116; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765. See Milieudefensie et al.'s Written Arguments of 19 March 2024, para. 91; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 790.

60 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 58, 62, 78 and 83.

61 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 88 to 92 (with further elaboration in paras. 93 to 99) and 112 to 117.

62 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 88 to 93.

63 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 100 to 111.

64 Milieudefensie et al.'s Summons of 5 April 2019, paras. 51 and 665. See Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 65 and 83; Milieudefensie et al.'s Notes on Oral Arguments 2 at first instance of 1 December 2020, para. 107.

consequences, it is of great importance to prevent such tipping points.[65] The precautionary principle requires this.[66]

(ix) The IAM models that are used to calculate reduction pathways therefore do not take account of (inter alia) convention agreements and international (legal) principles, so that it is up to the court to review the outcomes of the models against (inter alia) those agreements and principles.[67]

(x) The Intergovernmental Panel on Climate Change (the **IPCC**) points out that the IAM models are primarily economically driven and do not take account of important (legal) principles from the climate conventions, such as the precautionary principle. According to the IPCC this limitation must be taken into account when interpreting the outcomes of the model calculations.[68] According to the IPCC, caution is required when interpreting those models.[69]

(xi) In light of the limitations connected with the IAM models, and (partly) taking account of the precautionary principle, Shell is bound, in line with the global average reduction percentage, to achieve a reduction of its CO_2 emissions of 45% in 2030.[70]

1.14. In light of the above assertions the Court's opinion lacks sufficient reasoning, because the Court, when determining what may be expected of Shell in the framework of the duty of care established by the Court (paras. 7.6 to 7.67), and in the framework of the review against the doctrine of hazardous negligence (para. 7.3) and/or the determination of the reduction percentage applicable to Shell (paras. 7.68 to 7.96), should have paid attention (in part) to the question what is required under the precautionary principle. After all, it ensues from the aforementioned assertions that and in what sense the precautionary principle is reflected in the duty of care, and that and why the precautionary principle is relevant when determining the reduction percentage that can be required of Shell. In particular, it ensues from the aforementioned assertions that the reduction percentage cannot only be based on the reduction pathways that are based on the IAM models, because these lead to percentages that cannot be reconciled with the precautionary

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65 Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 4, 5, 11, 12, 47 to 68 and 98; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 10; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (5) and (22), 612 to 615; Milieudefensie et al.'s Notes on Oral Arguments 9 of at first instance of 17 December 2020, paras. 22 to 37; Milieudefensie et al.'s Summons of 5 April 2019, paras. 13, 436, 464, 492 and 493.

66 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 114.

67 Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, pp. 6, 37 and 38; Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 1 to 5; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 30, 58, 62, 79, 83 to 87, 93 to 99 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 531 to 541.

68 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 28 to 30 and 38 to 42; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 535 and 536 (with further elaboration in paras. 532 to 534 and 537 to 546).

69 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 537.

70 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 28 to 99 and 112 to 116, in which Milieudefensie et al. elaborated on this point per limitation (i.e.: cost effectiveness (paras. 28 to 53), CDR (paras. 54 to 87), discount rate (paras. 88 to 99) and being obliged to adhere to the global average (paras. 112 to 116)). See also Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 531 to 536.

principle. The Court does not include these assertions in its assessment, or in any event not in a manner that is sufficiently comprehensible. According to para. 7.3, the Court has not even (independently) reviewed the matter against the doctrine of hazardous negligence and the 'Kelderluik' factors – and therefore has also failed to review it against the precautionary principle encompassed in said doctrine – and in addition, in para. 7.95, when assessing the question what reduction percentage should apply for Shell in the light of the sectoral reduction pathways, the Court wrongly (in terms of the core of the matter) holds that in this case the precautionary principle does not justify any other conclusion, as the principle relates to uncertainties concerning the occurrence of certain consequences and not to uncertainty regarding the standard to be applied. It also follows from this that the Court has not reviewed the matter in a manner that is correct and/or is based on sufficient reasoning, against the precautionary principle and the position taken by Milieudefensie et al. in that respect.

1.15. Milieudefensie et al. elaborated on its invoking of (inter alia) the precautionary principle in its complaints relating to the global average reduction percentage (grounds of appeal 3.10 to 3.20) and its complaints relating to the sectoral reduction pathways (grounds of appeal 4.13 to 4.21). In said sections Milieudefensie et al. fleshes out in further detail that, why and in what manner the Court should have determined the reduction percentage that applies to Shell (partly) in light of the precautionary principle.

C. The principle of intergenerational equity

1.16. The Court furthermore demonstrates an incorrect legal view, because it overlooks the fact that, when answering the question whether Shell is subject to a duty of care to prevent or limit dangerous climate change and what reduction percentage that obligation requires, significance must (in addition) be attributed to the principle of intergenerational equity, that ensues from (inter alia) Article 3 UN Climate Convention, the Paris Agreement, Articles 2 and/or 8 ECHR, the preamble of the Charter of Fundamental Rights of the European Union, the Aarhus Convention, Resolution 48/13 (2021) of the UN Human Rights Council and the UN report 'Our Common Future'.[71] This principle is in part intended to provide protection to the young and to future generations who are at risk due to dangerous climate change. This principle can require or contribute to companies being expected to do more to prevent or limit dangerous climate change than is prescribed by the IAM models and reduction pathways based on those models and/or national and international standards and/or soft law and (as a minimum) can require that companies achieve the global average reduction percentage of 45% in 2030 relative to 2019. In addition, the principle of intergenerational equity is relevant because of the limitations of the IAM models and the reduction pathways based on those models recognised by the science itself and the acknowledgement by the science that these models and modelled reduction pathways do not take account of (inter

[71] The principle has, moreover, been recognised by the district court and the court of appeal in the *Urgenda* case, by the ECtHR in the *KlimaSeniorinnen* case, the Commission on Human Rights of the Philippines, by the German Constitutional Court in the *Neubauer* case and by the district court in Brussels, as explained by Milieudefensie et al. See in this respect ground of appeal 1.17.

alia) international (legal) principles and other normative aspects. In any event, when determining a reduction percentage for a specific company, the principle of intergenerational equity can lead to not considering, or giving a more limited significance to, IAM models and the modelled reduction pathways based on those IAM models, that cannot be reconciled with the principle of intergenerational equity. The principle of intergenerational equity thus plays a role in determining the specific reduction percentage that (a company like) Shell must observe.

1.17. In any event, the Court's opinion lacks sufficient reasoning, because the Court fails to consider the principle of intergenerational equity in any way when answering the question what duty of care Shell is subject to, or at least what reduction percentage Shell can be obliged to achieve, even though Milieudefensie et al. did present a substantiated argument in this respect. In this respect, Milieudefensie et al. referred to (inter alia) Article 3 UN Climate Convention,[72] the Paris Agreement,[73] Article 8 ECHR and the ECtHM's decision in the *KlimaSeniorinnen* case,[74] the Charter of Fundamental Rights of the European Union,[75] the Aarhus Convention,[76] the position of the European Commission on the manner of implementing the EU target of a 55% reduction,[77] the UN report 'Our Common Future',[78] Resolution 48/13 (2021) of the UN Human Rights Council,[79] the judgments of the district court[80] and the court of appeal[81] in the *Urgenda* case, the decision in the *Neubauer* case of the German Constitutional Court,[82] a judgment of the district court of Brussels[83] and presented a substantiated argument, with reference to a decision of the Commission on Human Rights of the Philippines[84] that the principle of intergenerational equity must be involved when answering the question what duty of care Shell is subject to and when answering the question what percentage of emissions reduction Shell is obliged to achieve to prevent or limit dangerous climate change. With regard to that principle, Milieudefensie et al. pointed out the following (these are the highly summarised main points):

(i) This case has in part been brought to protect the interests of the young and of future generations. On behalf of these generations, protection is sought against Shell's impact on human rights and life and well-being in the Netherlands due to its

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72 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 31; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 10 and 12; Milieudefensie et al.'s Summons of 5 April 2019, paras. 292, 372 and 373.

73 Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 10 and 12; Milieudefensie et al.'s Summons of 5 April 2019, paras. 410 to 412.

74 Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 6.

75 Milieudefensie et al.'s Summons of 5 April 2019, para. 291.

76 Milieudefensie et al.'s Summons of 5 April 2019, para. 292.

77 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 967, 968 and 1004.

78 Milieudefensie et al.'s Summons of 5 April 2019, paras. 288, 499 and 500.

79 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 281.

80 Milieudefensie et al.'s Notes on Oral Arguments 2 at first instance of 1 December 2020, para. 41; Milieudefensie et al.'s Summons of 5 April 2019, para. 294.

81 Milieudefensie et al.'s Summons of 5 April 2019, para. 49.

82 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 69 and 70; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 83 to 87; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 374 to 377.

83 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 383 and 384.

84 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 283.

contribution to climate change, the consequences of which form a threat for these generations.[85]

(ii) If there are insufficient emissions reductions prior to 2030, the younger and future generations will have to bear a disproportionately heavy reduction burden. The impact of climate changes leads to inequality between generations. That the consequences of climate change will become unavoidably larger in the future, automatically means that young and future generations will be impacted more severely by the consequences.[86]

(iii) The IAM models that are used to calculate reduction pathways are based on the principle of cost effectiveness.[87] Based on that principle, the IAM models allocate a significant degree of the reduction task to coal and to the developing countries that are highly dependent on coal. These countries have the most limited transition capacity. Under these models, regions like Sub-Saharan Africa, South America and Asia have to take the lead in the mitigation task, even though this is not possible in reality.[88] The modelled reduction pathways can therefore never be realised in the real world.[89] The IAM models consequently do not take account of (inter alia) convention agreements and international (legal) principles, including the principle of intergenerational equity.[90]

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85 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, paras. 19, 20, 27 to 29; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 3; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 1150; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 7, 10 and 181; Milieudefensie et al.'s Summons of 5 April 2019, paras. 285 to 295, 372, 373, 410 to 412, 473, 498 to 502, 602, 607 and 669.

86 Milieudefensie et al.'s Summons of 5 April 2019, paras. 498 to 502. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 69 and 70; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 83 to 87, 93, 96 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 280, 281, 283, 376, 377 and 384 (citation).

87 For a more detailed representation of the position taken by Milieudefensie et al. with regard to the limitations of IAM models, see ground of appeal 4.8.

88 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 22, 30, 31, 33 and 36 to 41; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 467 and 524 to 536.

89 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 41; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 59; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 537.

90 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 3; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 30, 37 to 41, 83, 84 and 114.

(iv) IAM models tend to greatly rely on CDR technologies. The CDR makes it possible to increase the carbon budget, according to modelling, so that in the IAM models fewer emissions need to be reduced in the short term. These models are based on the hypothesis that later on this century CDR will be able to remove enormous quantities of CO_2 from the atmosphere. In reality, no noteworthy removal of emissions from the atmosphere is occurring. These technologies are still in the demonstration phase at this time. The scalability thereof is also very dubious. The CDR technologies therefore cannot be a reason to allow emissions to be reduced to a lesser degree.[91] The principle of intergenerational equity cannot be reconciled with a policy of continually postponing the reduction task to the future based on those uncertain technologies.[92]

(v) In addition, IAM models, due to the focus on cost effectiveness, work with a discount rate that is too high. This is the percentage by which the expected costs in the future are calculated back to the net present value. By applying a high discount rate, future CDR measures have a significant cost benefit in the model calculation, with the result that the IAM models make shifting to mitigation later in the century instead of in the shorter term (to 2030) more attractive based on the modelling.[93] The IAM models consequently shift the reduction task to the future and to future generations, so that they can no longer be reconciled with (inter alia) the principle of intergenerational justice.[94]

(vi) Lastly, IAM models do not include (avoided) climate damage in their calculations. This damage increases if global warming continues to increase because climate measures are not taken early enough. The longer global warming is at or above 1.5°C, the greater the risk that tipping points will be passed.[95] This can result in an abrupt and irreversible climate change, that neither humans nor nature can properly prepare for and for which the risk increases "*at a steepening rate*" in the event of a temperature increase of between 1°C and 2°C.[96] Because of the serious

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91 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 59 (with further elaboration in paras. 60 to 88), 62, 79, 83, 105 and 112 to 116; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765. See Milieudefensie et al.'s Written Arguments of 19 March 2024, para. 91; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 790.

92 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 59 (with further elaboration in paras. 60 to 88), 62, 79, 83, 105 and 112 to 116; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765. See Milieudefensie et al.'s Written Arguments of 19 March 2024, para. 91; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 790.

93 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 88 to 92 (with further elaboration in paras. 93 to 99) and 112 to 117.

94 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 93 and 112 to 116.

95 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 100 to 111.

96 Milieudefensie et al.'s Summons of 5 April 2019, paras. 51 and 665. See Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 65 and 83; Milieudefensie et al.'s Notes on Oral Arguments 2 at first instance of 1 December 2020, para. 107.

consequences, it is of great importance to prevent such tipping points.[97] The principle of intergenerational equity requires such.[98]

(vii) The principle of intergenerational equity, among others, requires that systemic players like Shell use maximum effort to realise the highest possible reductions this decade, in part to prevent the costs and the consequences being passed on to future generations.[99]

(viii) Partly in the light of the above, the reduction pathways for the oil and gas sector based on IAM models cannot serve as the starting point for interpreting Shell's duty of care; companies will have to adhere to the global average reduction percentage.[100]

1.18. It ensues from these summarised assertions why the principle of intergenerational equity is relevant when determining Shell's duty of care, as well as why and in what manner that principle is relevant for determining the reduction percentage that can be required of Shell. As a result of their model-based limitations, their focus on cost effectiveness, their reliance on uncertain CDR, the high discount rate and without taking account of climate damage, IAM models and reduction pathways based on the IAM models shift the reduction task to the younger and future generations, which is contrary to the principle of intergenerational equity. In the light of these assertions, the Court therefore could not determine Shell's duty of care, or in any event determine what reduction percentage can be required of Shell, without also involving the principle of intergenerational equity and the position taken by Milieudefensie et al. in that respect, the main points of which have been set out above. The Court did not, however, pay any ostensible attention to this principle and the position taken by Milieudefensie et al. in that respect when determining the duty of care (paras. 7.6 to 7.67), nor when determining the reduction percentage (paras. 7.68 to 7.96). Consequently, the Court's finding lacks sufficient reasoning.

1.19. Milieudefensie et al. elaborated on its invoking of (inter alia) the principle of intergenerational equity in its complaints relating to the global average reduction percentage (grounds of appeal 3.10 to 3.20) and its complaints relating to the sectoral reduction pathways (grounds of appeal 4.13 to 4.21). In said sections Milieudefensie et al. fleshes out in further detail that, why and in what manner the Court should have determined the reduction percentage that applies to Shell (partly) in light of the principle of intergenerational equity.

D. The CBDR principle

[97] Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 4, 5, 11, 12, 47 to 68 and 98; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 10; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (5) and (22), 612 to 615; Milieudefensie et al.'s Notes on Oral Arguments 9 at first instance of 17 December 2020, paras. 22 to 37; Milieudefensie et al.'s Summons of 5 April 2019, paras. 13, 436, 464, 492 and 493.

[98] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 100 to 102 and 112 to 114.

[99] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 83.

[100] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 115 and 116.

1.20. The Court has furthermore demonstrated an incorrect legal view, as it fails to note that when answering the question whether Shell is subject to a duty of care to prevent or limit dangerous climate change and in any event (also) when answering the question what reduction percentage that duty does require, significance must (in part) be attributed to the CBDR principle, that is based on fair-burden sharing based on carrying capacity and (inter alia) is laid down in Articles 3 and 4 UN Climate Convention, Articles 2.2, 4.3 and 4.19 of the Paris Agreement and the Race to Zero initiative.[101] This principle can require or contribute to expecting more of a company, to prevent or limit climate change, than the IAM models and the reduction pathways based on the IAM models and/or the national and international standards prescribe. In addition, the CBDR principle is relevant because of the limitations of the IAM models and the reduction pathways based on those models and the acknowledgement by the science itself that these models and modelled reduction pathways do not take account of (inter alia) international (legal) principles and other normative aspects. In any event, when determining a reduction percentage for a specific company, the CBDR principle can lead to not considering, or giving a more limited significance to, IAM models and the modelled reduction pathways based on those IAM models, that cannot be reconciled with the CBDR principle. The CBDR principle thus plays a role in determining the specific reduction percentage that (a company like) Shell must observe. The significance of the CBDR principle is therefore not limited to whether that principle directly designates a specific reduction standard that can be applied to a company like Shell or whether such can be deduced from that principle. The Court fails to recognise the above observations, as the Court, in the context of determining the duty of care in paras. 7.1 to 7.57 and 7.67 did not pay any attention to the CBDR principle and (apparently) did not consider that principle, while when determining the reduction percentage that may be required of Shell, the Court's application of the CBDR principle was too limited, by requiring that it is necessary to (directly) deduce that a standard of 45% applies based on equity (by which the Court apparently means the CBDR principle) (para. 7.81), or a fair distribution of the burdens between countries (equity), thereby giving the CBDR principle an applicable standard for Shell's reduction obligation or for oil and gas that the Court can apply in these proceedings (para. 7.93).

1.21. In any event, the Court's opinion lacks sufficient reasoning, as Milieudefensie et al. has argued extensively that the CBDR principle is important (in part) when determining Shell's duty of care and the reduction percentage to be realised by Shell. In this respect Milieudefensie et al. – in short – referred to the following:

[101] See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 503 to 506.

(i) Shell has a large historical responsibility for climate change,[102] has large historical[103] and future CO_2 emissions,[104] has control and influence over its very substantial quantity of emissions,[105] has influence on the demand for oil and gas and consequently on what consumers are offered globally in terms of energy products,[106] achieves the bulk of its revenue in richer and developed countries,[107] is one of the biggest[108] and richest companies in the world,[109] has a large global power position,[110] is the biggest purchaser of oil and gas in the world and has large global purchasing power,[111] has the capacity to bear the heaviest loads,[112] is resilient in relation to the climate goals of the Paris Agreement[113] and is able to

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[102] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 58; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17 and 40; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (95), 487 and 490. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 22; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 155 to 158; Milieudefensie et al.'s Summons of 5 April 2019, paras. 576 to 585.

[103] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Summons of 5 April 2019, paras. 5 and 548 to 554.

[104] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 43, 53, 55 and 59.

[105] With regard to the scope of the emissions: Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 26 and 627. With regard to the control over and influence on emissions: Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (86) and (87), 243 to 251, 254 and 853 to 855; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 1 to 7, 22, 27 and 36; Milieudefensie et al.'s Notes on Oral Arguments 3 at first instance of 3 December 2020, para. 52; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 24 and 31 to 68; Milieudefensie et al.'s Summons of 5 April 2019, paras. 612 to 618.

[106] Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, paras. 4, 8, 13, 46, 81 and 90; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 26. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 29.

[107] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 57 and 58; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 48; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17, 65 and 123; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 21 and 40; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 494 to 496.

[108] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 29 and 39.

[109] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 141. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 22.

[110] Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 62, 102, 103, 124, 125 and 128; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, paras. 24 and 25; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 302. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 29, 36 and 39.

[111] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 23 to 25; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 934 to 936. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 29.

[112] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 to 17 and 65; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 487 and 586; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 23.

[113] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 23.

achieve higher reductions than the globally necessary halving,[114] so that a CO_2 reduction of 45% in 2030 is in fact the minimum reduction task that can be required of Shell.[115] Shell can pretty much realise the reduction of 45% in 2030, with regard to its own production of oil and gas, by simply not making any investments in new oil and gas fields.[116]

(ii) Partly in light of the CBDR principle, Shell can therefore be bound by a concrete reduction obligation of at least 45% in 2030.[117] If the developed countries and the developing countries together with their citizens and companies are to achieve a CO_2 reduction of 45%, it is reasonable that one of the richest companies, which is also one of the companies most responsible for causing the climate problem, will at least adhere to that global average reduction percentage.[118]

(iii) The outcome that Shell must adhere to the global average reduction percentage aligns with the soft law climate protocols for companies.[119] The Oxford University report *Mapping of current practices around net zero targets* from 2020 (the **Oxford Report**) comes to the conclusion that there is significant agreement between the various climate protocols on the basic principle that large companies from Western jurisdictions that emit a lot of greenhouse gases and that have the greatest historical responsibility for the climate problem, must achieve the most substantial climate goals.[120]

(iv) The report *'Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets'* of the '*Tyndall Centre for Climate Change Research'*, which was prepared in 2022 by D. Calverley and K. Anderson (the **Tyndall report**), shows, if the CBDR principle is applied, that in 2030 there must be a global CO_2 reduction in the oil and gas sector of 45% relative to the reference year 2021 in order to contribute to the global reduction task and remain within the carbon budget for a 50% chance of limiting global warming to 1.5˚C.[121]

(v) The Race to Zero initiative underscores the importance of applying the CBDR principle when determining the appropriate contribution (fair share) of companies

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114 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 123.
115 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15, 16 and 121 to 124; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 505 to 507.
116 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 261 and 595.
117 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 484 to 487 and 490; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 27 to 29.
118 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 488.
119 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 488 to 508; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 19 to 34; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 15 to 40.
120 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 489.
121 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 10 to 19; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 25 to 40; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 497 to 500.

to the necessary global emissions reduction, indicates the starting point as maintaining the global average reduction percentage of at least 45% CO_2 reduction in 2030 and emphasises that many companies would have to apply reduction targets that are higher than 45% before 2030 because of the CBDR principle.[122]

(vi) The United Nations Environment Programme (**UNEP**) recognises, along with the IPCC[123] and the IEA,[124] that modelled reduction pathways are based on theoretical assumptions that cannot be reconciled with (inter alia) the CBDR principle, because it wrongly places the greatest reduction task with the coal sector and consequently with developing countries. Many developing countries would have to replace virtually all their coal-fired power stations this decade. UNEP confirms that the use of oil and gas must decrease much more rapidly and that the developed countries must deliver much greater efforts regarding this issue.[125]

(vii) The IAM models that are used to calculate reduction pathways are based on the principle of cost effectiveness, so that those models shift the reduction task to coal to a significant degree and consequently to the developing countries that are highly dependent on coal for their power supply and that have the most limited transition capacity.[126] The models require that regions like Sub-Saharan Africa, South America and Asia will take the lead in the mitigation task, even though this cannot be required of those countries in reality.[127] As a result the IAM models do not take account of things like the CBDR principle.[128]

(viii) Taking the CBDR principle into account by definition means that the emissions of the oil and gas sector will have to decrease more rapidly worldwide than ensues from the model outcomes, and that the emissions of the developed countries will have to decrease much more rapidly. This is particularly relevant for Shell, as it achieves 69%[129] or 70%[130] of its revenue in the developed countries.[131]

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122 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 42 to 44; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 503 to 507.

123 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 18.

124 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 23 to 27.

125 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 8, 15 to 22 and 48; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 17 and 56; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 519 to 540 and 583.

126 For a more detailed representation of the position taken by Milieudefensie et al. with regard to the limitations of IAM models, see ground of appeal 4.8.

127 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 22, 30, 31, 33 and 36 to 41; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 467 and 524 to 536.

128 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 1, 2 and 16; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 28, 30, 31, 33, 39 to 41, 113 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 524 to 536.

129 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 494.

130 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 48; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 40.

131 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 48; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 40.

(ix) For the above reasons, the reduction pathways for the oil and gas sectors based on IAM models do not do justice to a just and legitimate distribution of the climate task and therefore cannot serve as the starting point for interpreting Shell's duty of care. They therefore cannot affect the obligation arising from the protocols to adhere to the global average reduction percentage.[132]

1.22. These (summarised) assertions set out why the CBDR principle is relevant when determining Shell's duty of care, as well as for what reason and in what manner that principle is relevant for determining the reduction percentage that can be required of Shell. As a result of model-based limitations, the IAM models shift the reduction task, contrary to the CBDR principle, to the developing countries, which are highly dependent on coal and for which the reductions desired by those models cannot be demanded in reality. In the light of the CBDR principle, the oil and gas sector, and, because of (inter alia) its large size, its large CO_2 emissions and its large share of turnover in developed countries, in particular Shell, a larger reduction may be demanded than that prescribed by the reduction pathways based on the IAM models. The Court does not respond to these assertions, neither when determining the duty of care (paras. 7.6 to 7.67), nor when determining the reduction percentage that can be demanded of Shell (paras. 7.68 to 7.96) in a comprehensible manner. For that reason the Court's finding lacks sufficient reasoning.

1.23. In the light of these (summarised) assertions of Milieudefensie et al. the Court, when determining Shell's duty of care to prevent or limit dangerous climate change and in any event when determining the (minimum) reduction percentage that can be required of Shell, cannot suffice with the (incorrect) conclusions (i) in para. 7.81 that 'equity' (by which the Court apparently means the CBDR principle) is too general to be able to deduce that Shell is subject to a reduction percentage of 45% and (ii) in para. 7.93), that a fair distribution of the burdens between countries (equity), and consequently the CBDR principle does not entail a standard for Shell's reduction obligation or another applicable standard for oil and gas that the Court can apply in these proceedings. After all, the aforementioned assertions demonstrate that Milieudefensie et al. has explained in detail that and for what reasons the reduction percentage applicable to Shell should partly have been determined on the basis of the CBDR principle, as well as in what sense the CBDR principle is relevant for determining that reduction percentage, on the basis of (in part) the pathways based on the IAM models. The aforementioned considerations do not form a sufficiently comprehensible response.

1.24. Milieudefensie et al. elaborated on its invoking of (inter alia) the CBDR principle in its complaints on the global average reduction percentage (grounds of appeal 3.10 to 3.20) and its complaints relating to the sectoral reduction pathways (grounds of appeal 4.13 to 4.21). In said sections Milieudefensie et al. fleshes out in further detail that, why and in what manner the Court should have determined the reduction percentage that applied to Shell (partly) in light of the CBDR principle.

[132] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 114 to 116.

E. Effective remedy and effective protection

1.25. The Court's finding, moreover, demonstrates an incorrect legal view, because, when determining Shell's duty of care to prevent or limit dangerous climate change and/or when assessing what reduction percentage Shell is obliged to achieve based on that duty of care, the Court did not take account of, or in any event did not attribute sufficient weight to, the fundamental right to an effective remedy as referred to in Article 13 ECHR. Or the Court wrongly overlooked in this respect that Article 2 and/or Article 8 ECHR give the right to effective protection against breach of the rights guaranteed in those articles. The right to an effective remedy respectively effective protection is also reflected in the duty of care (in part based on Article 2 and Article 8 ECHR) to prevent or limit dangerous climate change, and – by extension – in the precautionary measures that may be required to fulfil said duty of care. After all, these precautionary measures form part of the duty of care.

1.26. In particular, the Court ignores the fact that at the national level Article 13 ECHR guarantees both the existence of and the means for enforcing rights and freedoms under the ECHR. National law must therefore, if there is a breach of such rights and freedoms, offer a practical and legally effective legal remedy to properly combat such and obtain suitable relief. The effective remedy of Article 13 ECHR can therefore be translated both into the obligation, when establishing the duty of care to prevent or limit dangerous climate change, to determine the required precautionary measures, and to determine the associated remedy to impose a concrete order. To put it differently, Article 13 ECHR concerns both the legal obligation itself and the remedy to be imposed by the court. It is relevant in this respect that Article 13 ECHR also applies (via Article 6:162 DCC) in case of the (indirect) horizontal effect of ECHR rights, or in any event that said provision also applies via Article 6 ECHR, to national civil rights that (in part) find their basis in the rights guaranteed by the ECHR, such as the duty of care to prevent or limit dangerous climate change.

1.27. The Court furthermore fails to recognise that Article 2 and/or Article 8 ECHR require that national law offers effective protection to protect the rights protected by said articles, i.e. protection that is effective both from a practical and a legal perspective to protect the breach of the rights laid down therein. Article 2 and/or Article 8 ECHR and the requirement of effective protection that ensues therefrom therefore require, to provide the protection against climate change guaranteed by said articles, quantifiable reduction targets that must be made specific in relation to determining and achieving concrete reductions relative to an earlier moment in time, whether or not with attention for the associated timelines and the remaining carbon budget. These concrete reduction targets can always be expressed in percentages.

1.28. In line with the above, the Court fails to recognise that the duty of care to prevent or limit dangerous climate change (which is partly based on Article 2 and/or Article 8 ECHR) to which companies like Shell are subject, in light of the right to an effective remedy as referred to in Article 13 ECHR and/or the right to effective protection as referred to in Article 2 and/or Article 8 ECHR, always entails an obligation to achieve results or in any event a

(substantial) best efforts obligation to achieve a reduction in CO_2 emissions (that is appropriate for the company in question) that makes an effective contribution to preventing or limiting dangerous climate change. This obligation consists of concrete reduction targets that can be expressed in percentages. The Court was obliged for that reason, in the framework of the duty of care to prevent or limit dangerous climate change to which Shell is subject, to also determine a *de facto* quantifiable (minimum) reduction obligation (expressed in percentages).

1.29. In any event, the Court overlooks the fact that only a percentage-based reduction obligation is practically and legally effective to protect the rights to be protected against dangerous climate change laid down in Article 2 and/or Article 8 and 13 ECHR and, therefore, satisfies the requirement of a quantifiable reduction target. The duty of care to prevent or limit dangerous climate change that applies (in part) in the light of Article 2 and/or Article 8 and Article 13 ECHR therefore always encompasses a concrete percentage of quantifiable reduction obligation in the form of an obligation to achieve results or a (substantial) best efforts obligation. For that reason too the Court should also have determined what (minimum) reduction percentage that duty of care requires of Shell.

1.30. Insofar as the Court holds in paras. 7.59 to 7.61 that a prohibition on or a limitation of exploitation of new oil and gas fields is practically and legally effective to safeguard the rights of protection against dangerous climate change laid down in Articles 2 and/or 8 and 13 ECHR, that finding is incorrect. Although a prohibition on or a limiting of exploitation of new oil and gas fields concerns a measure that could lead to reduction of CO_2 emissions, or a measure that in combination with other measures could be practically and legally effective to safeguard the rights of protection against dangerous climate change laid down in Articles 2 and/or 8 and 13 ECHR, this in itself does not meet the requirement arising from Articles 2, 8 and/or 13 ECHR of an effective remedy and/or effective protection.

1.31. In any event, the Court fails to recognise that Articles 2, 8 and/or 13 ECHR and the requirement of an effective remedy or effective protection against dangerous climate change arising from said articles is also relevant when assessing the reduction pathways modelled by science to prevent or limit dangerous climate change in order to determine a reduction percentage that should apply to a company. In this respect, modelled reduction pathways that cannot offer an effective remedy or effective protection, must be attributed less significance. For that reason, modelled reduction pathways that are based on uncertain scientific assumptions or limitations acknowledged by the science itself, which entail that there is uncertainty about the question whether the modelled reduction percentage will contribute (to an adequate degree) to preventing or limiting dangerous climate change, should be given less significance in the light of the requirement of an effective remedy or effective protection.

1.32. Milieudefensie et al. has furthermore taken the substantiated position that the protection against dangerous climate change guaranteed by Articles 2, 8 and 13 ECHR and the effective remedy or effective protection required by these provisions, will be provided if a

(percentage) quantifiable reduction obligation of CO_2 emissions is imposed. In this respect it presented, in short, the following:

(i) There are no other effective measures to prevent dangerous climate change than reducing emissions within the maximum available carbon budget. Other measures cannot counter excessive global warming, so that the climate problem distinguishes itself from other environmental problems in which different measures are often conceivable.[133] A minimum adequate measure is that Shell reduce its emissions in 2030 by 45%.[134] The human rights framework and Article 13 ECHR force the court to offer effective legal protection by establishing a specific reduction percentage.[135]

(ii) Adaptation measures (adaptation by humans to the consequences of climate change) cannot prevent excessive global warming and the consequences thereof.[136] The Dutch Supreme Court and the court of appeal considered in the *Urgenda* case that adaptation measures cannot adequately prevent the disastrous consequences of excessive global warming. According to the Supreme Court, emissions reductions are therefore urgently necessary to protect the rights laid down in Article 2 and 8 ECHR.[137] The IPCC underscored this once again in 2022.[138]

(iii) The ECtHR also determined in the *KlimaSeniorinnen* case that urgent action must be taken to limit the risks that climate change poses to human rights and to remain below the limit of 1.5°C warming. This must be realised by emissions reductions. The ECtHR also demands in this respect that national courts also take account of the need for a carbon budget or an equivalent method to quantify CO_2 emissions.[139]

(iv) The Court of Appeal of Brussels held in the climate case against the Belgian government that a court order to realise emissions reductions is the best, if not the only remedy against breach of Articles 2 and 8 ECHR.[140]

(v) There is a scientific and politically recognised need for *"rapid, deep and sustained reductions in global greenhouse gas emissions"* and climate action "*across all actors of society, sectors and regions*" in this decade.[141] In addition, there is scientific and political consensus that to prevent dangerous climate change of more than 1.5°C, global emissions must be reduced by 45% by 2030 and the global point of net zero

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133 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 338 to 342, 347 and 348.
134 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 459 and 460.
135 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 69 to 73; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 342 to 348 and 409.
136 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 339.
137 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 339 to 341; Milieudefensie et al.'s Summons of 5 April 2019, paras. 371, 440, 455 and 490.
138 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 339 (including footnote 199) and 612 to 614.
139 Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 6.
140 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 70 (citation) and 71 to 73.
141 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 11 and 112; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 474.

emissions must have been reached by 2050.[142] Shell too recognises the need for that 45% reduction by 2030.[143] It is widely acknowledged that the global temperature target can only be achieved if non-state actors, including companies, take independent and proactive action to achieve emissions reductions in line with the temperature goal of the Paris Agreement.[144]

1.33. In light of the aforementioned assertions it is not clear, without additional reasoning, which is lacking, why the Court did not accept that a (percentage-based) quantifiable reduction obligation to be imposed on Shell in the light of Articles 2, 8 and 13 ECHR offers an effective remedy and/or effective protection to comply with the duty of care to prevent or limit dangerous climate change to which Shell is subject. It ensues from these assertions that dangerous climate change cannot be mitigated in any other way than by emissions reductions and that a reduction obligation can be expressed in a (percentage-based) quantifiable reduction.

1.34. Lastly, the Court fails to recognise that Article 8 ECHR has a direct horizontal effect, so that Milieudefensie et al. can directly base a claim against Shell directly on the effective protection offered by that article, and on the effective remedy guaranteed by Article 13 ECHR in that respect. Pursuant to Article 8 ECHR, Shell therefore has a direct horizontal relationship with the citizens whose interests Milieudefensie et al. seeks to protect and is required to achieve a (percentage-based) quantifiable reduction of its CO_2 emissions to prevent or limit dangerous climate change.

F. Influence of public law regulations and Union law

(i) Relationship of duty of care and European public law regulations

1.35. The Court considered in para. 7.35 that the EU-ETS system cannot easily be brought in line with Milieudefensie et al.'s claims, as a reduction of 45% does not align well with the EU-ETS system, through which Shell obtains carbon credits for its European emissions which it then trades in. The EU-ETS system does not bring about the reduction of CO_2 emissions by mandating that companies reduce their emissions by a specific percentage, but via an emissions ceiling in combination with freely tradable emissions rights. In para. 7.53 the Court holds that obligations that arise from existing regulations do not in themselves stand in the way of an obligation for individual companies to reduce their CO_2 emissions based on the societal standard of care. In para. 7.54 the Court then holds that this does not detract from the fact that the existing legislation is of influence on the

[142] Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 5 to 11, 37 and 61; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 473, 474 and 513; Milieudefensie et al.'s Summons of 5 April 2019, para. 416 (with further elaboration in paras. 404 to 415, 417 and 418), 728 to 756 and 827.

[143] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 3 and 474.

[144] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 28 and 30; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 99; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 18 and 73 to 76; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 25 and 35 under (41) to (45); Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 27 and 130 to 147.

obligations to which Shell is subject on the basis of the standard of care. For instance, according to the Court it must be assumed that when interpreting the duty of care, account must be taken of obligations that companies have based on the existing legislation. The district court tried to do this with regard to the EU-ETS system. According to the Court, when interpreting the duty of care, the EU-ETS-2 system must be taken into account.

1.36. If by means of the above considerations the Court holds that the existing European public law regulations discussed by the Court in paras. 7.28 to 7.49 diminish or have a limiting effect on the scope of the duty of care that Shell is subject to – under the heading of the societal standard of care of Article 6:162 DCC – to prevent or limit dangerous climate change, the Court demonstrates an incorrect legal view. The European public law regulations, the purpose of which is to combat dangerous climate change, has no limiting effect on the scope of the duty of care to prevent or limit that danger that a company must satisfy, pursuant to the societal standard of care. The European public law regulations therefore do not have a(n) (partly) indemnifying effect. This applies equally with regard to the EU-ETS system, the EU-ETS2 system, the Corporate Sustainability Due Diligence Directive (the **CSDDD**) and the Corporate Sustainability Reporting Directive (**CSRD**).

(ii) Duty of care, CSDDD and CSRD

1.37. The Court furthermore considers in para. 7.56 that companies like Shell, pursuant to EU directives like the CSDDD and CSRD, must align their business model and strategy to the transition to a sustainable economy and limiting global warming to 1.5°C, but that these measures do not impose an absolute reduction obligation on individual companies or business sectors. According to the Court, under Union law Shell does not have an absolute reduction obligation of 45% (or any other percentage), nor will it have such in the foreseeable future. The Court apparently reaches this decision in part based on its earlier considerations in paras. 7.45 and 7.46. In para. 7.45 the Court considers that Shell has also taken the position that under the CSDDD there is no obligation to introduce an absolute reduction target, that it is true that companies can include such a target in their climate transition plan, but only "*where appropriate"*, that such a target is not binding or static, as due to changing circumstances it can be modified, that the proposal to compel companies to themselves impose absolute reduction targets was not accepted and that drawing up a climate transition plan with the intensity targets intended by the CSRD is sufficient for the CSDDD. In para. 7.46 the Court considers that, on the basis of the CSDDD, Shell is under an obligation to draw up a climate transition plan that aligns with the Paris Agreement and the targets that the European Union formulates for itself, that the climate transition plan to be drawn up by Shell based on the CSDDD need not necessarily include an absolute reduction obligation (e.g. of 45%) for Scope 1, 2 and 3 and that the text (of point 73) of the preamble to the CSDDD points out that companies have some flexibility to periodically adapt their own targets to the market conditions.

1.38. Insofar as the Court were to have made these considerations (in part) the basis for (the scope of) the duty of care to prevent or limit dangerous climate change to which Shell is

subject, the Court demonstrated an incorrect legal view, as European public law regulations, including in any event the obligations under the CSDDD and CSRD, does not have a (partly) indemnifying effect in relation to that private law duty of care and otherwise does not diminish that duty of care.

1.39. With the aforementioned considerations, the Court furthermore overlooks the fact that Article 22(1) CSDDD stipulates – as the Court recognises in para. 7.43 and in the representation of that article there – that companies must draw up *and implement* a climate transition plan that contains time-specific targets in increments of five year from 2030 to 2050 based on compelling scientific evidence, and that said plan will "*where appropriate*" include *absolute emissions reduction targets* for greenhouse gases for Scope 1, 2 and 3 for every significant category. According to the preamble point referred to in para. 7.43, this concerns a best efforts obligation. It ensues from this that the absolute reduction targets included in the climate transition plan must be implemented and absolute reduction obligations do (therefore) arise from the CSDDD, in any event if the company in question satisfies the requirement of "*where appropriate*". The Court overlooks this. A duty of care that (in part) stems from the CSDDD must therefore take as its starting point, or in any event (partly) take into account, that the CSDDD at least imposes an obligation "*where appropriate*" and in any event a best efforts obligation, absolute reduction targets and emissions reductions. The Court also fails to recognise this when determining (the scope of) the duty of care.

1.40. In any event, the Court's decision is incomprehensible, because the consideration in para. 7.56 that the CSDDD does not impose any absolute reduction obligation on individual companies or sectors directly contradicts (i) the Court's earlier consideration in para. 7.43 that companies must draw up *and implement* a climate transition plan that contains time-specific targets in increments of five year from 2030 to 2050 based on compelling scientific evidence, and that said plan will "*where appropriate*" include *absolute emissions reduction targets* for greenhouse gases for Scope 1, 2 and 3 for every significant category, as well as (ii) the Court's representation of point 73 of the preamble, from which it ensues that an obligation of efforts is concerned.

1.41. The Court's decision in any event lacks sufficient comprehensible reasoning, as the Court did not (apparently) review whether on the basis of Article 22(1) CSDDD Shell is subject to the obligation to establish and implement absolute reduction targets and whether the requirement of "*where appropriate*" has been satisfied with regard to Shell, while Milieudefensie et al. has argued that Shell's obligations under the CSDDD would specifically lead to a reduction obligation and reduction targets that go at least as far as the reduction order.[145] Milieudefensie et al. furthermore pointed out that the term "*where appropriate"* is dependent on the original proposal which stated "*that where climate risks are identified as a principal risk or a principal impact of the company's operations, the company should include emission reductions in its plan"*,[146] which underscores that said

[145] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, pp. 14 and 16.
[146] Court record of oral arguments in appeal of 2, 3, 4 and 12 April 2024, p. 33.

obligation also applies to Shell. The Court wrongly does not respond to these assertions at all, even though the review requested by Milieudefensie et al. in the light of the aforementioned assertions could and should have led to the opinion that the CSDDD does in any event oblige (a company like) Shell to establish and comply with absolute reduction targets of (at least) 45%, or another reduction percentage. The Court should therefore have clearly responded to those assertions.

1.42. Insofar as the Court holds that Shell's duty of care is (in part) given some nuance by the fact that the text of the preamble to the CSDDD points out that companies have some flexibility to periodically adapt their own targets to market conditions, the Court's opinion is also incorrect, or in any event lacks sufficient comprehensible substantiation. After all, under the CSDDD companies do not have any flexibility to periodically adapt the company's own targets to market conditions. According to point 73 of the preamble to the CSDDD (cited by the Court in para. 7.43), specific conditions that are connected with the progress that companies make and the changing nature of the climate transition can, because of the efforts-based nature of the targets under the CSDDD, entail that it is no longer reasonable to expect that companies can achieve the targets that have been established. This does not include adapting the targets to market conditions as mentioned by the Court in para. 7.46. The duty of care is therefore not nuanced by the fact that the CSDDD permits modification of the reduction target to market conditions, so that the Court's opinion is incorrect in this respect. The Court's opinion in any event lacks comprehensible reasoning, because the aforementioned decision of para. 7.46 cannot, without additional substantiation, which is lacking, be reconciled in a comprehensible manner with point 73 of the preamble that the Court cites in para. 7.43.

1.43. Insofar as the Court holds that, according to the preamble of the CSDDD, specific conditions that are connected with the progress that companies make and the changing nature of the climate transition, because of the efforts-based nature of the targets under the CSDDD, can entail that it is no longer reasonable to expect that companies can achieve the targets that have been established and that affects (the scope of) Shell's duty of care, that decision is also incorrect. The CSDDD does, in fact, impose a best efforts obligation as the basis ("*where appropriate"*) for achieving absolute reduction targets for Scope 1, 2 and 3 (see grounds of appeal 1.39 to 1.41). The conditions referred to in the preamble therefore only relate to the leeway that a company may have *within that best efforts obligation*, but in any event do not diminish that best efforts obligation itself. The Court fails to recognise this when determining (the scope of) Shell's duty of care.

1.44. Insofar as the Court, in the framework of (the scope of) Shell's duty of care in para. 7.56 holds that the CSRD does not require that companies report absolute emissions reduction targets, this opinion is incorrect, because the CRSD is obliged ("*where appropriate*")[147] to

[147] In para. 7.40 the Court uses the Dutch words "*waar passend*" as a translation of the English term "*where appropriate*" in the CSRD. The Dutch translation of the CSRD does not use the words "*waar passend*", but the words "*indien van toepassing*" ("*if applicable*"). In the Dutch translation of the CSDDD the words "*where appropriate*" are translated as "*in voorkomend geval*" ("*where relevant*".)

describe absolute reductions of CO_2 emissions for at least 2030 and 2050. The Court itself takes this as a basic point in para. 7.40, so that the Court's consideration in para. 7.56 cannot be reconciled with this, in any event not in a comprehensible manner.

1.45. In para. 7.44 the Court holds that companies that on the basis of Article 22(2) CSDDD report a climate transition plan for limiting climate change in accordance with the CRSD, are also deemed to have fulfilled the CSDDD obligation to adopt a climate transition plan to limit climate change. Insofar as the Court thereby held that a company can fulfil its obligation ensuing from Article 22(1) CSDDD to draw up *and implement* a climate transition plan by reporting as required by the CRSD, that finding was incorrect, or in any event lacked sufficient reasoning. That in those cases the duty to draw up a plan had been fulfilled, does not mean, after all, that the substantive requirements of Article 22(1) CSDDD have also been fulfilled, in particular the implementation obligation with regard to the absolute emissions reduction targets to be included in that climate transition plan ("*where appropriate*").

2. Scope 1 and 2 emissions

2.1. In para. 7.65 the Court holds (in short) that Milieudefensie et al., in the light of Shell's assertions, had presented insufficient facts to find that there was a threatened breach of Shell's legal obligation with regard to the reduction of emissions relating to its Scope 1 and 2 emissions. The Court presents as the basis for this finding that, in order to assume a legal obligation as asserted by Milieudefensie et al., it would have to determine that it is probable that Shell would not have reduced its Scope 1 and 2 emissions in 2030 by 45%. The other considerations of the Court in paras. 7.64 to 7.66 are based on that assumption.

2.2. With this finding the Court fails to recognise that in this respect the issue is whether there is a *threatened breach* of a legal obligation. It is not required in this respect that it is *probable* that the injuring party will not perform a legal obligation. It is sufficient that such threat exists. This is a less stringent criterion. In line with this, the Court overlooks the fact that Milieudefensie et al.'s obligation to furnish facts does not extend beyond substantiating or presenting a plausible case for such threatened breach. The threshold for making a plausible case for a *threatened breach* of Shell's legal obligation is lower than the threshold for determining that it is *probable* that Shell will breach that legal obligation. The Court's finding is therefore incorrect.

2.3. In any event, the Court's finding in paras. 7.63 to 7.66 lacks sufficient reasoning. The Court provides the following basis for its finding that Milieudefensie et al. did not present sufficient assertions for the finding that there is a threatened breach of Shell's legal obligation with regard to its Scope 1 and 2 emissions to assume that it is probable that Shell will not have reduced its Scope 1 and 2 emissions in 2030 by 45%:

(i) Milieudefensie et al. asserts that there is a threatened breach of a legal obligation, because Shell will not reduce its emissions by the end of 2030 by at least 45%

relative to 2019. Shell argued (inter alia) that it had set a goal of reducing these missions by 50% relative to 2016 by the end of 2030. It is not in dispute between the parties that this goal goes further than the 45% reduction relative to 2019, as claimed by Milieudefensie et al. According to Milieudefensie et al. there is nevertheless a threatened breach of a legal obligation, as Shell has modified its policy various times and this target does not provide any guarantee of further or permanent emissions reductions (para. 7.64);

(ii) The Court does not concur with this argument, because (i) Shell committed to this target in its business plan, in documents submitted to the Securities and Exchange Commission (the **SEC**) and on the Capital Markets Day in June 2023, (ii) Shell indicated (inter alia) in its Energy Transition Progress Report 2024 how it will realise this goal and (iii) Shell had already realised this target to a significant degree: at the end of 2023 Shell had reduced its Scope 1 and 2 emissions by 31% relative to 2016. The mere fact that Shell watered down earlier targets cannot, in any event, justify a determination by the court that it is probable that Shell will not have reduced its Scope 1 and 2 emissions in 2030 by 45% (para. 7.65); and

(iii) No threatened breach of a legal obligation has therefore been established with regard to Scope 1 and 2. Milieudefensie et al.'s claim cannot be awarded in this respect (para. 7.66).

2.4. It should be first noted that the Court's finding is incomprehensible simply because the Court (in part) bases its opinion on the Energy Transition Progress Report 2024, even though there is no such document and, moreover, it is unclear whether the Court was referring to the Energy Transition Strategy 2024, (that Shell did call upon) or the Energy Transition Progress Report 2021 or 2022. This finding is furthermore incomprehensible, or in any event lacks sufficient reasoning, as the Court (in part) bases its opinion on a business plan, but fails to clarify which document submitted by Shell it has in mind in that respect. There is no document submitted by Shell with the name 'business plan'.[148]

2.5. The Court's finding in any event lacks sufficient reasoning, because Milieudefensie et al., in response to the reports presented by Shell in oral arguments on appeal, with regard to Shell's Scope 1 and 2 targets (in short) referred to the following. The Shell Annual Report 2023 and the Energy Transition Strategy 2024 – just like earlier reports[149] – contain a disclaimer that makes it clear that Shell's targets and ambitions are conditional and are

[148] There is no Energy Transition Progress Report 2024. There is an Energy Transition Progress Report 2021 and 2022, that Shell has called upon (see Shell's Notes on Oral Arguments in appeal (Part 4) of 3 April 2024, para. 11.2.5 and footnote 98). Shell does have an Energy Transition Strategy 2024 (Shell abbreviated this to ETS '24 in the aforementioned notes on oral arguments), that Shell calls upon to substantiate the assertion that in said strategy it is publicly committing to the Scope 1 and 2 targets (see Shell's Notes on Oral Arguments in appeal (Part 4) of 3 April 2024, para. 11.2.4). Nor is there a document entitled business plan. The Court apparently followed Shell's assertion (Oral Arguments on appeal (Part 4) of 3 April 2024, para. 11.2.3) in which it referred to the business plan, without clarifying precisely what document it was referring to.

[149] Namely: the Energy Transition Progress Report 2021, that contains the same disclaimer and is conditional to the same degree. Milieudefensie et al. also pointed this out in Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 649.

based on current expectations and assumptions of Shell's executive board that are subject to change. According to Shell's disclaimer, these future-oriented statements can be recognised by the following terms:

> *"These forward-looking statements are identified by their use of terms and phrases such as "aim", "ambition", "anticipate", "believe", "could", "estimate", "expect", "goals", "intend", "may", "milestones", "objectives", "outlook", "plan", "probably", "project", "risks", "schedule", "seek", "should", "target", "will" and similar terms and phrases."* [150]

What Shell expects and aspires to is conditional, depends on (inter alia) government policy and a non-exhaustive list of thirteen circumstances.[151] Milieudefensie et al. also pointed out in that respect that Shell refers to its Scope 1 and 2 targets as 'forecasts' and as an 'ambition'.[152] In addition, Milieudefensie et al. illustrated on the basis of various examples that Shell repeatedly reneges on its climate targets and ambitions, such as an announced production reduction, relinquishing 'low carbon' activities and reducing the original targets of the average carbon intensity of its products with its Energy Transition Strategy 2024.[153] During oral arguments on appeal Milieudefensie et al. furthermore pointed out that the conditionality of Shell's targets also clearly appears from the fact that Shell dropped targets 'last month' (i.e.: in March 2024).[154] In the Statement of Defence on appeal Milieudefensie et al. also pointed out that the conditionality of Shell's ambitions and targets appears from the disclaimers and warnings that Shell has been including in its records and publications for many years and that it always explicitly warns that (inter alia) results and performance may not turn out as expected.[155] In this respect Milieudefensie et al. also quotes the direct follow-up to the above-cited passage from the (same) disclaimer of 2021:

> *"There are number of factors that could affect the future operations of Shell and could cause those results to differ materially from those expressed in the forward-looking statements included in this report."* [156]

2.6. In light of these assertions, without additional reasoning, which is lacking, it is not clear why the Court deduces (in part) from Shell's business plan that Shell has committed to its targets and from the Energy Transition Progress Report (Energy Transition Strategy) 2024, or from the Energy Transition Progress Report 2021 and 2022,[157] that Shell has indicated how it will realise those goals and deems that relevant in the Court's decision, or (in part) deduces therefrom that Milieudefensie et al. has not presented sufficient facts to support

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[150] Milieudefensie et al. cited the full disclaimer from 2021 (which is identical to that of 2024) in Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 708.
[151] Appendix with Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 2 to 5.
[152] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 649 and 1108.
[153] Appendix with Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 7, 9 and 16; Milieudefensie et al.'s. Written Arguments of 19 March 2024, paras. 116, 117 and 124.
[154] Appendix with Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 7.
[155] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 708 and 709.
[156] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 708 and 709.
[157] As regards the lack of clarity as to which report the Court has in mind, see ground of appeal 2.4 and footnote 148.

the opinion that there is a risk that Shell will breach its legal obligation with regard to Scope 1 and 2. These assertions show, after all, that it cannot be deduced from the aforementioned documents that the Court deem relevant that Shell *de facto* committed to said targets and will *de facto* realise said targets, or in any event that it does not ensue from said documents that there is no threat that Shell will not realise said targets, precisely because of the conditionality of said targets as set out in the disclaimer. In addition, the Court itself determined in paras. 3.39 and 3.40 that Shell recently watered down or completely let go of its various targets, which targets were also included in (inter alia) formal public documents of Shell.[158] For that reason the Court should have clearly involved these assertions in its opinion. Without going into those assertions of Milieudefensie et al., it cannot be followed for what reasons the Court (only) based its finding on the sources cited by Shell. Nor, when viewed in that light, is it clear why Milieudefensie et al. can be deemed to have presented insufficient facts to support the opinion that there is a risk that Shell will not perform its reduction obligation with regard to Scope 1 and 2.

2.7. In light of the above, it is not clear, without additional reasoning, why the Court (in part) bases its finding – that Milieudefensie et al. did not present sufficient facts to support the opinion that there is a risk that Shell will breach its legal obligation with regard to its Scope 1 and 2 emissions and thus to assume that it is probable that Shell will not have reduced its Scope 1 and 2 emissions in 2030 by 45% – on Shell having committed to its targets for Scope 1 and 2 (i) in the documents submitted to the SEC and (ii) on the Capital Markets Day in June 2023. Milieudefensie et al. will elaborate on this.

2.8. First of all, Shell's commitment that is supposedly demonstrated in the documents submitted to the SEC, according to Shell's own assertions, is only a reference to Shell's 2022 business plan, in which the following is reportedly stated "*Our 2022 business plan will reflect this new target, which we are committed to delivering regardless of whether we win or lose our appeal against the ruling.*"[159] This commitment to the business plan that appears from the SEC filing refers to the business plan and is consequently subject to the same conditionality, uncertainties and the fact that Shell watered down or let go of various targets and to the commitments in the business plan itself and that ground of appeal 2.5 refers to. The Court therefore cannot base its finding (in part) on that SEC filing without further reasoning.

2.9. With regard to the commitment made on the Capital Markets Day in June 2023, Shell asserted that Shell's CEO explicitly confirmed on that day "*that Shell's reduction targets relating to Scope 1 and Scope 2 are unchanged.*"[160] Without additional reasoning, it is not clear why the Court (in part) bases its finding on this, because according to Shell's assertion, that commitment means nothing more than that the reduction targets set by Shell have not changed. That statement is thus also subject to the conditionality and

[158] Milieudefensie et al. also referred to this. See Milieudefensie et al.'s Written Argument of 19 March 2024, paras. 116, 117 and 124.
[159] Shell's Oral Arguments on appeal (Part 4) of 4 April 2024, para. 11.2.3 and footnote 94.
[160] Shell's Oral Arguments on appeal (Part 4) of 4 April 2024, para. 11.2.4 and footnote 96.

uncertainties relating to those targets and the fact that Shell let go of or watered down various targets as pointed out by Milieudefensie et al. in ground of appeal 2.5. In any event, viewed in that light, without additional reasoning, which is lacking, it is not clear why said statement of Shell's CEO is not subject to the aforementioned flaws.

2.10. Lastly, the Court's finding lacks sufficient reasoning, as Milieudefensie et al. has pointed out that Shell has always disputed that it has a legal obligation and responsibility with regard to its Scope 1 and 2 emissions, which underscores that it is in no way a given that Shell will implement its plans relating to its Scope 1 and 2 emissions.[161] Without further reasoning, in light of this assertion it is not clear why the Court is of the opinion that Milieudefensie et al. presented insufficient facts to support the opinion that there is a threat that Shell will breach its legal obligations relating to Scope 1 and 2. It ensues from this position that Shell denies the existence of said legal obligation, so that it is a given that Shell does not deem itself legally bound to fulfil that obligation. This in itself constitutes the existence of the threat, or in any event contributes to the threat to a relevant degree. The Court therefore could not ignore this assertion without reasoning.

3. Scope 3 emissions: global reduction standard

3.1. In paras. 7.67 to 7.81 the Court goes into Shell's obligations with regard to its Scope 3 emissions and toward this end is studying whether Shell can be bound by the global average reduction percentage of 45%. The Court considered as follows in that respect – after a representation of Milieudefensie et al.'s claims and a very limited part of its assertions (paras. 7.70 to 7.72) – summarised and insofar as relevant in the appeal to the Supreme Court:

(i) The existing climate legislation does not provide for a concrete reduction percentage for individual companies or sectors, but it is conceivable that there is consensus among climate scientists regarding specific reduction standards which should apply for a company like Shell in order to comply with its climate responsibility. The Court reviewed in this respect whether Shell can be bound by the consensus existing within climate science about a reduction standard of 45% (or any other percentage) (para. 7.67);

(ii) There is a widely supported consensus that, to limit global warming to 1.5°C, a choice must be made for reduction pathways in which the CO_2 emissions have been reduced by net 45% at the end of 2030 relative to, in any event, 2019 and in 2050 by 100%. However, these reduction pathways are concerned with a global reduction, which on balance comes to 45%. This means that there are sectors and companies in countries that must reduce more and that there are sectors and companies in countries that need to reduce less. For the following reasons, the Court cannot determine what specific reduction obligation applies to Shell (para. 7.73);

[161] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 1107.

(iii) The reduction of 45% as of the end of 2030 is an average over all sectors and for all places in the world. In addition, that average relates to the emissions of all greenhouse gases, including CO_2. CO_2 is created by burning various fossil fuels that differ in carbon intensity, namely oil, gas and coal. Shell does not mine or supply coal. To limit the CO_2 emissions, most profit can be achieved in the shorter term by ending the burning of the more carbon intensive – compared to gas – coal. Aside from the equity argument (para. 7.81), although a shift from coal to gas will lead to an increase in emissions from burning gas, but on balance that is less onerous for the climate due to the reduced emissions from burning coal (para. 7.74);

(iv) If gas energy extraction supplied by Shell is substituted for coal, this will lead to an increase in Shell's Scope 3 emissions, but on balance this can lead to lower global CO_2 emissions. It ensues from this example alone that applying the general standard of 45% reduction to Shell as of the end of 2030 (or 35% or 25% in the alternative and additional alternative claims) is not sufficiently specific. That is not what the standard is intended for (para. 7.75);

(v) On the contrary, there are indications that various reduction pathways are present per sector, which can also differ per country. The Court referred in this respect to the NZE scenario of the IEA, the *Impact Assessment Report* of the European Commission of 6 February 2024 and the Climate Act, all of which point out that CO_2 emissions are falling in varying degrees per sector (paras. 7.75 to 7.77);

(vi) Shell's Scope 3 emissions are spread out across several sectors. The sectors 'transport' and 'construction', in which alternatives for fossil fuels are more difficult to realise and in which that process takes more time, are good for a significant part of Shell's Scope 3 emissions. Applying a general percentage for the reduction of Shell's Scope 3 emissions therefore ignores the various reduction pathways for the separate sectors that belong to Shell's customer circle (para. 7.78);

(vii) The special responsibility that Shell has as a large oil company and the duty of care to which Shell is subject to prevent or limit dangerous climate change do not justify ignoring the particulars of Shell's delivery portfolio and the above-described possibility that an increase in Shell's Scope 3 emissions could on balance lead to worldwide lower emissions in the shorter term. To apply the 45% emissions reduction to Shell, a plausible case would have to be made that Shell's product supply and its customer base are a reflection of the global product supply and the global customer base (the customers of those products). This is not the case (para. 7.79);

(viii) That the *Race to Zero* initiative mentions an interim target of a reduction of 50% in 2030, does not change this. That interim target must also reflect the fair share of a company and does not in itself entail that the general standard of - in that case - 50% can be applied as a hard and enforceable standard to every company. The

same applies to the recommendations of the 'United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities' (the **UN Expert Group**) in the UN Expert Group's report '*Integrity matters: net zero commitments by business, financial institutions, cities and regions'* from 2022 (the **UN Expert Report**). The fact that the UN Expert Report, and elsewhere, sets out that companies must use maximum efforts to reduce their emissions as quickly as possible, is not sufficient to convert a global average reduction standard into a general mandatory standard for Shell (para. 7.80);

(ix) That Shell is a big player on the oil and gas market, was considered in the decision *that* Shell does have a duty of care to reduce its emissions. This does not entail, however, that Shell can be bound by the global average reduction percentage of 45%, because there are various reduction pathways for various sectors in various countries (para. 7.81); and

(x) Nor can an obligation to adhere to the global average reduction percentage of 45% be derived from the equity concept, on the basis of which, when dividing the burdens (and the benefits) of the energy transition, account is taken of (inter alia) social aspects, including the aspect that climate change is caused to a considerable degree by the industrialised countries and they benefited from this, so that they can be expected to engage in greater efforts when combatting climate change. That standard is also too general to be able to deduce a reduction obligation of 45% for Shell (pars. 7.81).

3.2. Because the Court, both when determining Shell's duty of care and the concrete interpretation of such duty in the form of a reduction percentage, applies an overly narrow framework for assessment (ground of appeal 1), these considerations cannot be maintained. This finding is also incorrect. The Court fails to recognise, in essence, that when determining the percentage reduction obligation that a company like Shell has to perform the duty of care to which it is subject to prevent or limit dangerous climate change, (a) there is no consensus requirement, (b) it is not the case that there must be consensus in climate science about a reduction percentage that applies to a specific company, but (based on Article 6:162 DCC) a broader criterion must be applied, or at least (c) the Common Ground method must be applied, which also encompasses more than only climate science consensus. In any event the Court (d) did not at all or did not sufficiently involve a large number of relevant facts and/or objective reference points presented by Milieudefensie et al. in this respect when making its finding. The Court's finding (e) regarding the substitution of coal by gas lacks comprehensible reasoning in various respects. Milieudefensie et al. will elaborate on this below.

A. Consensus requirement does not apply to private law duties of care

3.3. The Court wrongly assumes in para. 7.67 that (a) consensus is required among climate scientists regarding a reduction percentage applied to a specific company like Shell, to

prevent or limit dangerous climate change, to establish a reduction measure for Shell based on the societal standard of care. This opinion is incorrect. There is no consensus requirement in purely private law legal relationships. In any event, there is no consensus requirement when determining the specific reduction percentage by which a private law company is bound in relation to citizens, to prevent or limit dangerous climate change. When answering the question whether a court can impose a concrete percentage reduction measure, a consensus requirement can under certain circumstances play a role in relation to the State, because the court – in the force field of the separation of powers – must show the necessary reserve with regard to such an order based on the view that primacy regarding what precautionary measures can be demanded lies with politicians when it comes to fulfilling national and international obligations of the State. This primacy can lose its significance to a considerable degree if there are such clear views, agreements and/or consensus in an international context regarding the division of precautionary measures across the countries, that the court can determine what, in any event, is to be deemed the minimum fair share of the State. In this specific context a consensus requirement can therefore play a role. Companies do not operate in the forcefield of the aforementioned separation of powers and cannot in this respect be deemed equal to a government body. This entails that in a purely private law context, when determining what obligations the societal standard of care places on a company like Shell to prevent or limit dangerous climate change, there is no consensus requirement, or in any event there is no need for consensus in the climate science about a specific, concrete percentage reduction measure that should apply for a company like Shell.

B. Standard for determining reduction percentage is not limited to climate science consensus

3.4. With its finding in para. 7.67 – that climate science does not provide a concrete reduction percentage for companies or industry sectors, but it is conceivable that there is a consensus in climate science about specific reduction standards that should apply for a company like Shell, toward which end the Court would study whether Shell could be bound by the consensus of a 45% reduction standard or any other percentage existing within climate science – the Court furthermore fails to recognise that, when answering the question what can concretely be expected of a company like Shell based on the duty of care to prevent or limit dangerous climate change, it is not or cannot be decisive whether there is (a) consensus in climate science about specific reduction standards that should apply for companies like Shell. Science does not itself establish any reduction standards, let alone that it studies what reduction percentage should apply for specific companies such as Shell. In addition, the (margins of) reduction percentages modelled by climate science are (generally) based on a cost effectiveness analysis and these model outcomes are dependent on various (technical, among others) presumptions made in the modelling, while as a rule the models do not take account of normative aspects, such as with national and international standards and (legal) principles that are relevant in terms of climate liability. A consensus on a specific reduction percentage for a specific kind of company will

never exist in climate science, let alone that there will ever be normative consensus on this point in climate science. If the 'all-or-nothing' criterion applied by the Court were to apply, no actual reduction obligation - necessary to protect against dangerous climate change - could ever be established.

3.5. In order to determine what reduction percentage applies (as a minimum) to a specific company in the framework of the duty of care to prevent or limit dangerous climate change, it is always decisive what (minimum) reduction percentage may be demanded of the company in question in the given circumstances. In addition, (pursuant to Article 6:162 DCC) all relevant circumstances of the case and/or all objective reference points, including all circumstances or reference points that the Court itself already (in paras. 7.2, 7.18 to 7.27 and 7.55 to 7.57) presented as the basis for the duty of care established by the court to prevent or limit dangerous climate change must be attributed significance. When determining the reduction percentage, significance must also (in part) be attributed to the nature and severity of the danger, the nature and severity of the resulting damage, the foreseeability of the danger for the company, the degree in which the company contributes to the arising of that danger and the onerousness of the reduction obligation for the company (the hazardous negligence criteria). Significance should furthermore be attributed to what may be expected of a company like Shell pursuant to Article 2, 8 and 13 ECHR with an eye on an effective remedy respectively for effective protection against dangerous climate change. In addition, significance should (in part) be attributed to the views, agreements and/or consensus about that reduction percentage in an international context between states and/or to the very broadly supported and (in part) climate science-based views of international organisations, such as UN climate protocols and other soft law instruments, as well as climate science, national and international law, national and international case law, human rights (that form part thereof) and to the relevant (legal) principles, which in any event include the precautionary principle, the principle of intergenerational equity and the CBDR principle. In any event, the question as to what (minimum) reduction percentage applies must be studied on the basis of the objective grounds that exist in this respect, from which a concrete standard can be derived in the given case. The Court failed to recognise all of this.

C. Consensus requirement and the Common Ground method go beyond climate science consensus

3.6. The Court in any event fails to recognise that the question as to what Articles 2 and 8 ECHR, which have (indirect) horizontal effect, require to protect against dangerous climate change and what reduction percentage can be demanded of Shell in this respect, must (in part) be answered on the basis of the Common Ground method (which is reflected in Article 6:162 DCC). The Common Ground method entails (in short) that when interpreting the ECHR – and thus also when determining a concrete reduction percentage that can be required of a company like Shell to prevent or limit dangerous climate change – account must be taken of (inter alia) rules and principles of international law, including the

precautionary principle, the principle of intergenerational equity and/or the CBDR principle, as well as with the very broadly supported and views of states and/or international organisations that are (partly) based on the climate science, such as UN climate protocols and other soft law instruments. Although it is true that the fact that there is consensus (to a greater or lesser degree) in this respect, is relevant for determining the rights ensuing from the relevant provisions, this is not decisive. The degree of consensus is only one aspect of the Common Ground method. In the Common Ground method, the degree of consensus on a reduction percentage applicable to a company like Shell therefore does play a role in addition to the other relevant facts and/or objective reference points, but does not detract from the importance of those other facts or reference points.

3.7. In any event, the Court's decision is incorrect, because the consensus requirement that applies due to the (indirect) horizontal effect of Articles 2 and/or 8 ECHR is not limited to the question whether or not there is (a) consensus in climate science about a specific reduction percentage that can be required of a company, or of a company like Shell. With regard to that consensus requirement, the issue is whether there are such clear views, agreements and/or consensus in an international context regarding the (minimum) reduction obligation of a company, or of a company like Shell that, according to very broadly supported views of states and/or international organisations that are based (in part) on climate science, that such can be deemed the (minimum) reduction percentage that can be required of a company to prevent or limit dangerous climate change.

D. Many relevant facts and objective reference points were not considered

3.8. In any event, the Court's decision lacks sufficient reasoning, as Milieudefensie et al., with reference to the hazardous negligence criteria, and with reference to UN climate protocols, soft law instruments, international (legal) principles and (broadly supported) scientific and institutional sources, has argued in detail that Shell must adhere to the global average 45% reduction standard. The Court did not respond in a sufficiently comprehensible manner to Milieudefensie et al.'s invoking of those sources and the position taken by Milieudefensie et al. in that respect. Milieudefensie et al. will elaborate on this below.

(i) Doctrine of hazardous negligence and 'Kelderluik' factors

3.9. First, Milieudefensie et al., to determine Shell's duty of care to prevent or limit dangerous climate change, and to determine Shell's concrete reduction obligation, called upon the doctrine of hazardous negligence, including the factors set out in the 'Kelderluik' case. In this respect Milieudefensie et al. explained (inter alia) that on this ground, a CO_2 reduction of 45% by 2030 may be required of Shell. Milieudefensie et al. refers in this respect to the assertions set out in ground of appeal 1.8. These assertions are therefore also relevant in this context, but the Court (clearly) did not respond to them. The Court's decision therefore lacks sufficient reasoning.

(ii) Precautionary principle, principle of intergenerational equity and the CBDR principle

3.10. In addition, Milieudefensie et al. has presented extensive substantiation for the position that a CO_2 reduction of 45% by 2030 may be required of Shell (in part) in light of the precautionary principle, the principle of intergenerational equity and the CBDR principle. In this framework Milieudefensie et al. – in short – presented the following:

(i) The precautionary principle requires (in part) the determining of a reduction percentage of at least 45% relative to 2019 because – in short – the risks of no longer being able to avoid dangerous climate change with a later start of the reduction task will increase, the IAM models and the reduction pathways based on those models are calculated on the basis of cost effectiveness, so that these models place the reduction task on the coal sector and developing countries in particular, even though these developing countries have a limited transition capacity, generally rely (too) heavily on very uncertain CDR technologies, are based on an excessive discount rate and do not take account of climate damage, so that there is a danger that tipping points will be passed. As a result of those limitations, the reduction percentages for coal calculated by the IAM models are not feasible in the real world. The reduction pathways based on the IAM models result in reduction percentages that are too low for oil and gas. For that reason, the precautionary principle requires that a higher reduction percentage be set for Shell. Milieudefensie et al. refers to ground of appeal 1.13 for the summarised assertions and the related sources. The Court did not consider this principle and the assertions presented in this respect at all, or did so incorrectly, in its opinion as to whether the global average reduction percentage of 45% by 2030 applies to Shell.

(ii) The principle of intergenerational equity requires (in part) a reduction percentage of at least 45% relative to 2019 because – in short – the IAM models on which the sectoral reduction pathways are based are calculated on the basis of cost effectiveness, in general rely too heavily on very uncertain CDR technologies, make calculations based on an excessive discount rate and do not take account of climate damage, as a result of which they shift the reduction task into the future as much as possible based on assumptions shrouded in uncertainty, which is contrary to the principle of intergenerational equity. Milieudefensie et al. refers for all assertions and the associated source to ground of appeal 1.17. The Court did not at all consider this principle and the related assertions when assessing whether Shell, under the given circumstances, is obliged to achieve a CO_2 reduction of 45% by 2030 relative to 2019.

(iii) The CBDR principle requires (in part) the determining of a reduction percentage of at least 45% relative to 2019 because – in short – Shell is one of the biggest and richest companies in the world with historical and current very large CO_2 emissions, it achieves the bulk of its revenue from the developed countries and the IAM models and the reduction pathways based on said models, by their focus on cost effectiveness, place the reduction task on the coal sector and the developing

countries to a large degree, which countries are to a great degree dependent on coal for their energy supply, so that applying the CBDR principle (among others) to those reduction pathways leads to a reduction percentage of at least 45% relative to 2019. Milieudefensie et al. refers for the relevant assertions and the associated source to ground of appeal 1.21. The Court only considered this principle in an incorrect – i.e. too limited – manner, or in any event the Court's decision, in light of these assertions, lacks sufficient reasoning, as already set out in grounds of appeal 1.20 to 1.24.

3.11. In addition, Milieudefensie et al. based its appeal on the precautionary principle, the principle of intergenerational equity and the CBDR principle (in short) on the following:

(i) The bulk of all global CO_2 emissions is caused by the use of oil, gas and coal, and thus by the (fossil fuel) energy sector.[162] This makes it evident that achieving the temperature goal of the Paris Agreement and the global reduction in CO_2 emissions (necessary to do so) by at least 45% by 2030 hinges on the contribution of the (fossil fuel) energy sector and the (fossil fuel) companies that form part thereof.[163] This contribution of the (fossil fuel) energy sector of at least a 45% reduction of CO_2 emissions by 2030 can, (in part) in light of the international (legal) principles and climate protocols for companies, also be translated to an individual contribution for Shell of a 45% reduction in CO_2 emissions by 2030.[164]

(ii) Global energy consumption of fossil fuels comprises 2/3rd from oil and gas and 1/3rd from coal.[165] Although coal has higher CO_2 emissions per unit of energy, oil and gas are responsible for 48% of global CO_2 emissions, while coal is responsible for 33% of global CO_2 emissions. On balance, the production and the use of oil and gas thus make the biggest contribution to the climate problem.[166] The quantity of oil and gas that will have to be reduced globally on the road to net zero, is twice as large as the quantity of coal that will have to be reduced.[167]

(iii) If oil and gas companies do not reduce their emissions by 45% by 2030, that lack of climate action in the oil and gas sector will then necessarily have to be compensated by increasing the reduction task of other sectors, like the coal sector, and/or by increased future use of uncertain CDR technologies.[168] Making the preventing or

[162] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (103), 239 and 477 to 479.
[163] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (104), 477 to 479 and 583; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, para. 147.
[164] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (105) to (112), 467, 480 to 490 and 520; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 22 to 30.
[165] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 528
[166] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 530.
[167] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 529.
[168] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 19 and 20.

limiting of dangerous climate change dependent on uncertain CDR technologies is contrary to the precautionary principle. In addition, shifting a substantial part of the reduction task to the second half of this century on the basis of uncertain CDR technologies is contrary to the principle of intergenerational equity.[169] An increased reduction task for the coal sector is, moreover, contrary to the CBDR principle, because it transfers the reduction task for the greater part to the developing countries, which is contrary to the UN climate regime.[170] This is also contrary to the precautionary principle, as there are no global coordination and enforceable agreements on the division of emissions reductions between the coal, oil and gas sector, particularly as it has turned out in practice that the lack of climate action in the oil and gas sector cannot or will not be compensated by increased (compensatory) reductions in the coal sector (and thus primarily by the developing countries).[171]

(iv) Developing countries in particular are dependent on coal to a great degree for their energy supply. Approximately 80% of global coal use occurs in developing countries.[172] On the other hand, about 50% of the global oil and gas production is consumed by the approx. 1.3 billion people living in developed (Annex I) countries. The other 50% is consumed by the approx. 6.4 billion people in developing countries (non-Annex I).[173] Disproportionately heavy reliance on the accelerated phasing out of coal consumption would therefore be substantially more onerous for the developing countries and their population than for the developed countries that rely more on oil and gas.[174]

(v) The IAM models are extremely important for calculating emissions reduction pathways, but these models have limitations in the division of the reduction task over countries and sectors, which limitations are widely recognised in the science, including by the IPCC.[175]

(vi) The IAM models are the result of a cost effectiveness analysis, which determines the model-based distribution of mitigation measures across the world to a high

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169 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 58, 62, 78, 79, 83 and 114; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 11 and 12.

170 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6, 8, 17 to 27, 30 to 33 and 38 to 41; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 522, 524 and 583.

171 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6, 30, 40 and 41; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 58 and 59; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 483 and 520 to 523; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 26.

172 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 25; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 57; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 526 (including table).

173 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 525 and 526 (including table).

174 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 524.

175 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 30; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 532 to 539.

degree.[176] The result of this approach is that economies with low incomes bear a relatively greater part of the mitigation costs than the developed economies.[177] The typical outcome of these model calculations is that most emissions reductions take place in the world (in those countries and sectors) where they can be realised the cheapest.[178] Because emissions reductions in the coal sector in developing countries are cheaper than emissions reductions in the oil and gas sector in developed countries, under the IAM models the developing countries shoulder the bulk of the global reductions task.[179]

(vii) The scenarios that form the basis of the (original) 45% by 2030 (the C1 scenarios) assume that various regions still in development will take the lead in reducing CO_2 emissions. Sub-Saharan Africa, one of the poorest regions in the world, has the biggest reduction task and has to reduce its total emissions by 69% by 2030. It is closely followed by South America and the Caribbean region with a 63% reduction by 2030. China and Russia are also allocated a bigger reduction task than the United States, Canada and Europe, which are situated at the global average pace.[180] Prof. Rogelj and Dr Van Beek confirm that these model outcomes are caused to a significant degree by the enormous reduction in coal use in this decade based on modelling.[181]

(viii) The Coal Transition Exposure Index of the IEA *"highlight[s] countries where coal dependency is high and transitions are likely to be most challenging*".[182] Countries like China and India, which are greatly dependent on coal for their energy supply, in fact have a limited transition capacity to quickly move away from coal.[183]

(ix) Because of this lack of transition capacity, the model outcomes and the modelled reductions in coal consumption will never be (able to be) realised in the real world.[184]

(x) UNEP also points out that a purely model-based reduction pathway is not realistic, because developing countries would have to replace virtually all their coal-fired power stations this decade. According to UNEP this would lead to an unrealistic

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176 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 30; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 531 and 534.
177 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 30.
178 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 535.
179 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 531 to 537.
180 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 36 to 38 (including table) and 41.
181 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 39 (including footnote 33).
182 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 58 (including table).
183 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 39; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 58 (including table); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 523.
184 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 41; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 59.

pathway and to unreasonable pressure on developing countries.[185] This furthermore applies precisely because developing countries have a lack of transition capacity.[186]

(xi) The IPCC also warns that caution is required when it comes to interpreting the model distributions based on cost effectiveness. The IPCC points out the following with regard to the IAM models: *"Scenarios are not predictions or forecasts (...). IAMs necessarily make simplifying assumptions and therefore results need to be interpreted in the context of these assumptions (...). Equity hinges upon ethical and normative choices. As most IAM pathways follow the cost-effectiveness approach, they do not make any additional equity assumptions (…). Regional IAM results need thus to be assessed with care, considering that emissions reductions are happening where it is most cost-effective, which needs to be separated from the fact who is ultimately paying for the mitigation costs. Cost-effective pathways can provide a useful benchmark, but may not reflect real world developments."*[187] The IPCC makes it clear that the IAM models tend not to take account of important (legal) principles and agreements in the climate conventions, such as the precautionary principle, the principle of intergenerational equity, the CBDR principle and the agreement made in the climate conventions that the developed countries will take the lead in the global climate approach.[188]

(xii) That Shell must adhere to the global average reduction percentage of 45% is logical, as there are no agreements within the energy sector regarding which (fossil fuel) company or which part of the (fossil fuel) energy sector will make which contribution to the 45% reduction target for 2030. In that case it speaks for itself that every energy company will have to adhere to the global average reduction percentage of 45%, because this, (partly) bearing in mind the precautionary principle and due to lack of global coordination and enforceable agreements, is the only way to be sure that every company will make its own contribution in this critical decade to achieving the global reduction target.[189] Shell can therefore (in part) not (continue to) point to the (considerably) larger contribution that the coal sector should theoretically make according to the models, but will have to itself make a contribution of at least a 45% reduction in CO_2 emissions.[190]

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185 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 17 to 22.
186 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 39 to 41.
187 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 537 to 539.
188 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 30 to 33; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 467, 535 and 536.
189 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 6 and 118; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 56; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 483, 520 and 543; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 26.
190 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 50; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (108) to (111) and 583.

(xiii) The models based on the 45% by 2030, therefore – as the IPCC also underscores[191] – generally do not take account of normative aspects, such as the precautionary principle,[192] the principle of intergenerational equity[193] and the CBDR principle.[194] Consequently they do not form a good guideline for the division of the climate task between countries and sectors.[195] In the given circumstances, it may for that reason be required of Shell that it reduce its CO_2 emissions by 2030 by (at least) 45%.[196]

(xiv) For example, it follows from the decision of the German Constitutional Court in the *Neubauer* case, inter alia, that the precautionary principle requires that the reduction pathway from the NZE scenario up to 2035 may not be divided into a slow part up to 2030, with an acceleration after 2030, in order to protect recent investments in new oil and gas fields. These (legal) principles require, on the contrary, that a reduction in emissions is embarked upon as quickly and as substantially as possible, up to (a minimum of) 45% by 2030.[197]

(xv) The IPCC furthermore emphasises that extra caution must be shown in relation to the (more limited) scope of the carbon budgets calculated by the IPCC. The world must therefore not make too much of the calculated carbon budgets, as according to the IPCC nature will, on balance, absorb less CO_2 due to further warming and/or due to the warming will emit more CO_2 (positive feedback loops).[198] Approximately 100 Gt CO_2 should therefore be deducted from every carbon budget. For that reason, the maximum available carbon budgets should not be taken as the starting point. This too leads to a reduction obligation of 45% relative to 2019.[199]

(xvi) The various sectoral reduction pathways (the Tyndall report, the Low Demand Scenario of the IPCC AR6 report (the **Low Demand scenario**), the recalculated figures from the A. Hawkes report of 15 December 2023 (the **Hawkes report**), the report of the International Institute for Sustainable Development (the **IISD report**) and the NZE scenario) show a bandwidth of 28.5% to 51.7% for oil and of 30.1% to 51.7% for gas. These percentages are for the greater part calculated based on models that focus on cost effectiveness, which come with the above-discussed limitations and legal objections, except for the Tyndall report, that does take account

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191 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5, 6 and 30 to 33; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 535 to 539.
192 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 520, 531, 536 and 583.
193 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 42; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 58, 62, 79, 83, 93 to 97 and 114.
194 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 524, 531, 535, 536 and 583.
195 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 539 and 540.
196 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 5 and 6; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 544 to 546 and 583.
197 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 70.
198 Milieudefensie et al.'s Written Arguments of 19 March 2024, paras. 57 to 63 and 79.
199 Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 132 to 134.

of a large part of those limitations. Taking this into account, it is no more than reasonable that Shell make a contribution to the CO_2 reduction of 45% by 2030.[200]

(xvii) Indeed, for a period of thirteen years (2023 to 2035), emissions reductions of over 50% can be achieved for the oil and gas sector. This follows from the NZE scenario of the IEA.[201]

3.12. The Court's decision in paras. 7.74 to 7.81, as summarised in ground of appeal 3.1, is incorrect, or in any event, in light of the aforementioned assertions, lacks sufficient comprehensible reasoning, because those considerations do not form a comprehensible response to this argument, that has been elaborated in detail, that Shell, partly in light of the precautionary principle, the principle of intergenerational equity and the CBDR principle, can be required to achieve a reduction percentage of 45%.

3.13. The Court first of all overlooks the fact that when answering the question what reduction percentage a company can be obliged to adhere to on the basis of its duty of care to prevent or limit dangerous climate change, significance must (in part) be attributed to the precautionary principle, the principle of intergenerational equity and the CBDR principle (see also grounds of appeal 1.11, 1.12, 1.16 and 1.20).

3.14. Or in any event, the Court's decision lacks sufficient comprehensible reasoning, because in the above-summarised considerations, the Court did not respond with reasoning, or in any event sufficiently comprehensible reasoning, to the aforementioned extensively detailed assertions of Milieudefensie et al. in support of the argument that Shell, in the light of the aforementioned principles, must be compelled to adhere to the global average reduction percentage. The Court does not demonstrate anywhere to have assessed, (in part) in light of the precautionary principle, the principle of intergenerational equity and/or the CBDR principle and the arguments presented in that respect, whether Shell can be compelled to adhere to the global average reduction percentage. For example, nowhere does the Court pay comprehensible attention to the market position, the substantial CO_2 emissions, the sales market for oil and gas that is geared to a significant degree to developed countries and the special characteristics of Shell, to the argument that 2/3rd of global energy consumption comes from oil and gas and only 1/3rd from coal, 80% of which is used in developing countries, to the fact that 48% of global CO_2 emissions comes from oil and gas, to the limitations of the IAM models and the reduction pathways for the oil and gas sector based on those models, which limitations were presented by Milieudefensie et al., to the unrealistically heavy burden that, in connection with coal use, in those models, contrary to the CBDR principle, is placed on developing countries, as well as to the fact that those models transfer the reduction task to future generations on the basis of uncertain CDR technologies and a high discount rate, which is contrary to the precautionary principle and the principle of intergenerational equity. Nor does the Court pay attention in a

[200] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 53 to 59. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 43 to 52.
[201] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 59 to 61.

comprehensible manner to the consequences mentioned by Milieudefensie et al. that taking account of those limitations of the IAM models and (legal) principles has for the approach to the reduction task for the oil and gas industry and the reasons why a company like Shell, due to its position in the given circumstances, (in part) because of those limitations and the aforementioned (legal) principles, is obliged to adhere to the global average reduction percentage. The Court furthermore does not pay any attention to the question whether – in view of the bandwidth of reduction percentages of 28.5% to 51.7% for oil and of 30.1% to 51.7% for gas provided by the various sectoral pathways – in light of these principles and the assertions that Milieudefensie et al. presented in this respect, that in any event a reduction percentage of 45% by 2030 can be required of Shell. Milieudefensie et al.'s entire argument regarding those principles and the influence thereof on the valuation of the sectoral reduction pathways, as well as regarding what could be required of Shell in that light, was in reality not given any comprehensible attention by the Court.

3.15. Insofar as the Court responded in paras. 7.74 to 7.81, as (in short) set out in ground of appeal 3.1, to the position taken by Milieudefensie et al. in grounds of appeal 3.10 and 3.11, those considerations do not form a comprehensible response. After all, none of those considerations explain for what reason the precautionary principle, the principle of intergenerational equity and/or the CBDR principle, (inter alia) in the light of the assertions fleshed out in grounds of appeal 3.10 and 3.11 (ground of appeal 3.14 presents the main points of the argument), nevertheless do not require that or cannot contribute to Shell, being required to adhere to the global average reduction percentage due to (inter alia) its market position, its substantial CO_2 emissions, its sales market for oil and gas that is geared to a significant degree to developed countries and its special characteristics. After all, those considerations relate (very succinctly) to the fact that Shell does not sell or produce any coal, the effect of the termination of coal consumption, the substitution of carbon-intensive coal with less carbon-intensive gas, Shell's role in this respect and the fact that there are indications that various reduction pathways have been designated per sector (paras. 7.74 and 7.75), the NZE scenario (para. 7.76), the Impact Assessment Report of the European Commission and the Climate Act (para. 7.77), the "harder to abate" sectors that Shell serves (para. 7.78), the fact that Shell's product supply and client base are not a reflection of the global product supply and client base, which would be necessary for application of the global average reduction percentage (para. 7.79), the Race to Zero initiative, the UN Expert Report and the criteria arising therefrom (para. 7.80) and the fact that there are different reduction pathways for different sectors in different countries and the concept of equity is not specific enough to be able to deduce a reduction percentage (para. 7.81). Those considerations therefore have little if nothing to do with Milieudefensie et al.'s substantiated invoking of the precautionary principle, the principle of intergenerational equity and/or the CBDR principle.

3.16. In addition and as an extension of ground of appeal 3.15 the following considerations of the Court in any event lack sufficient reasoning:

(i) In para. 7.79 the Court considers that, in order to be able to maintain the average reduction standard of 45% by 2030 for Shell, a plausible case should be made that the Shell product supply and client base forms a reflection of the worldwide product supply and the worldwide client base, which is not the case. Milieudefensie et al. in fact presented a substantiated argument by means of the assertions referred to in grounds of appeal 3.10 and 3.11 (in short) that Shell is an oil and gas company, 2/3rd of global energy consumption comes from oil and gas, the bulk of that is consumed in the developed countries and Shell earns the greater part of its revenue in richer and developed countries, while, because of the limitations of IAM models, an overly great part of the reduction task is placed on the coal-dependent developing countries, so that (partly) for that reason and partly in light of the CBDR principle, Shell can be expected to make a (minimum) contribution of the global average reduction percentage of 45% by 2030. Shell's product supply and client base is therefore, indeed, not a reflection of the global product supply and client base, but that in fact forms a reason, in light of the CBDR principle, to hold it to (at least) that global average reduction percentage.

(ii) In para. 7.80 the Court considered that (i) the Race to Zero initiative mentions an interim target of 50%, but that the target must represent a company's 'fair share' and thus not simply that the general standard of 50% mentioned in it can be applied to every company as a hard, enforceable standard, (ii) this also applies to the UN Expert Report and (iii) it is set out in that report, and elsewhere, that companies must use maximum efforts to reduce their emissions as quickly as possible, but this is insufficient to hold Shell to the global average reduction percentage. It nevertheless precisely ensues from Milieudefensie et al.'s assertions in grounds of appeal 3.10 and 3.11 that Shell's 'fair share' as referred to in the Race to Zero initiative, partly in light of those principles, can be fixed at the reduction percentage of 50% set out in the Race to Zero initiative and/or the maximum efforts desired by the UN Expert Report. This applies all the more because Milieudefensie et al. has pointed out that, inter alia, the Race to Zero initiative and the UN Expert Report entail, in line with generally accepted legal principles, including the CBDR principle,[202] the preventing or limiting of dangerous climate change.[203]

(iii) In para. 7.81 the Court considers that Shell is a major player in the oil and gas market, but that this fact does not entail that Shell can be compelled to adhere to the global average reduction percentage because there are different reduction pathways for different sectors. The assertions set out by Milieudefensie et al. in grounds of appeal 3.10 and 3.11 indicate in fact that Shell, due to its special position and the fact that it is a big player in the oil and gas market, partly in light of the CBDR principle, can be compelled to adhere to the global average reduction percentage of 45% for 2030.

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[202] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17 and 21.
[203] Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 65.

(iv) In para. 7.81 the Court interprets the term '*equity'*. Even if the Court, in its considerations in para. 7.81, has applied a correct legal view with regard to the term 'equity', and paid sufficiently comprehensible attention to the equity argument (grounds of appeal 1.20 to 1.24, 3.10 under (iii), 3.18 to 3.20 and 3.46 are directed against this finding), this consideration in any event does not constitute a comprehensible response to Milieudefensie et al.'s invoking of the precautionary principle and the principle of intergenerational equity and the assertions presented by Milieudefensie et al. in grounds of appeal 3.10 under (i) and (ii) and 3.11.

3.17. The consideration of the Court in para. 7.74 that, to limit CO_2 emissions, the greatest gain to be made in the shorter term is by ending the burning of coal, which is more carbon intensive compared to gas, and that (aside from the equity argument discussed in para. 7.81) is less onerous for the climate, also otherwise lacks sufficient comprehensible reasoning, as Milieudefensie et al.'s argument precisely entails that according to the IAM models that were set up based on cost effectiveness and the reduction pathways based on said models, in the shorter term the greatest gain was indeed to be achieved by ending the use of coal, and modelled sectoral pathways do indeed indicate lower percentages for oil and gas than the average global reduction percentage of 45%. Milieudefensie et al.'s assertions entail (in short) that those facts in fact cannot lead to a (minimum) reduction percentage of 45% applying to Shell. Indeed, in light of the precautionary principle, the principle of intergenerational equity and/or the CBDR principle, a greater focus on the reduction of oil and gas will be required to achieve the globally required CO_2 reduction of 45% by 2030 than the models presume, so that under the given circumstances Shell can be expected to make a reduction of (at least) 45% by 2030. Milieudefensie et al. in fact addressed the arguments mentioned by the Court in its detailed invoking of the precautionary principle, the principle of intergenerational equity and the CBDR principle, as insufficient reasons not to hold Shell to the global average reduction percentage, even though the Court did not pay any (apparent) attention thereto.

3.18. In para. 7.81 the Court paid attention to the equity criterion. According to the Court, that criterion is too general to be able to deduce a reduction obligation of 45% for Shell. The Court appears to have the CBDR principle in mind in this respect. That decision is also incorrect, because the Court applies an understanding of that principle that is too limited, i.e.: incorrect. In any event, that decision lacks sufficient comprehensible reasoning. Toward this end, Milieudefensie et al. refers to grounds of appeal 1.20 to 1.24 and 3.10 under (iii), in which Milieudefensie et al. has already elaborated on these points. In short: the Court fails to recognise that it is not required that a standard for a company, or a reduction percentage of 45% or another percentage for Shell, can be directly deduced from the CBDR principle (or from the precautionary principle or the principle of intergenerational equity). In the given circumstances the CBDR principle can make a relevant contribution to determining the reduction percentage that can be required of Shell.

3.19. The considerations of the Court in paras. 7.81 and 7.93 that – in short – no reduction obligation for Shell of 45% relative to 2019 or another standard applicable to Shell can be deduced from the concept of 'equity' (by which the Court is apparently referring to the CBDR principle), in addition, lacks sufficient comprehensible reasoning, because Milieudefensie et al. argued with substantiation that the CBDR principle does provide sufficient reference points for determining a concrete (minimum) reduction percentage. Milieudefensie et al. have pointed out in this respect – in short – that (i) the CBDR principle in the *Urgenda* case has been applied in such a way that the minimum 25% reduction percentage imposed on the State was the reduction percentage for which it had been scientifically determined that this was the minimum percentage that the total group of developed countries (the 42 Annex 1 countries of the UN Climate Convention) would have to have achieved by 2020, but thus did not apply to every individual country,[204] (ii) the district court, the court of appeal and the Dutch Supreme Court translated that total minimum reduction percentage of 25% via the link from the CBDR principle to an individual reduction obligation for the State, because the Netherlands is one of the richest countries, has a lot of emissions per capita and consequently has a greater responsibility than average,[205] (iii) it can in the same sense be determined that Shell, both on a global and sectoral basis, has a greater responsibility for the climate problem and therefore must (as a minimum) adhere to the reduction percentage that applies globally, as from a historical perspective and in the current time it is one of the biggest climate polluters in the world, one of the biggest and richest companies in the world and has the financial capacity, knowledge and skill to be able to realise far-reaching reductions and bear the burdens thereof,[206] (iv) developed and non-developed countries must together come to a CO_2 reduction of 45% and, in light of the aforementioned circumstances, Shell can be held to (at least) that (average) percentage,[207] (v) which finds further support in the statement of Shell's former CEO who believes that Shell must move faster than the 'global society',[208] the Oxford Report,[209] the Tyndall report,[210] the Race to Zero initiative[211] and the fact that Shell achieves 69%[212] or 70%[213] of its revenue in developed countries, (vi) so that Shell's reduction obligation should be even higher than 45% by 2030.[214] Without additional reasoning, which is lacking, it is not clear in this light why the CBDR principle, in the given circumstances, does not designate a (minimum) reduction percentage to be applied to Shell. After all, it follows from these facts that the CBDR principle leads to a (minimum) reduction percentage of 45%. The Court wrongly did not pay any (apparent) attention thereto.

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[204] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 485.
[205] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 486.
[206] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 487.
[207] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 488 and 490.
[208] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 491.
[209] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 489.
[210] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 497 to 500.
[211] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 503 to 506.
[212] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 494.
[213] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 48; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 40.
[214] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 507.

3.20. Insofar as the Court has another principle than the CBDR principle in mind when it comes to equity (or the precautionary principle or the principle of intergenerational equity), the Court's decision is in any event incorrect or lacks sufficient reasoning, because the Court then, (partly) in light of Milieudefensie et al.'s assertions, should (also) have independently reviewed the matter against the CBDR principle respectively the precautionary principle and the principle of intergenerational equity. The Court did not do so.

(iii) UN climate protocols and soft law

3.21. Milieudefensie et al. in addition presented extensive substantiation regarding the position that a CO_2 reduction of (a minimum of) 45% by 2030 can be required of Shell on the basis of UN climate protocols and soft law. In this framework, Milieudefensie et al. – in short – presented the following:

(i) The Race to Zero initiative, the UN Expert Report, the UNGPs and the OECD Guidelines are authoritative sources that reflect widely supported insights.[215] These sources to a great extent provide the same important basic principles for the way in which companies should set their reduction targets.[216] On the basis thereof there is a broad international consensus that every individual company must independently work toward the goal of net zero emissions by 2050.[217] These sources give very clear reference points for the interim reduction task that may be expected in the period up to 2030 of a company in Shell's position.[218] This must relate to absolute reductions in Scope 1, 2 and 3 emissions.[219] The individual reduction task for 2030 must be a fair share of the global reduction task and companies must show maximum ambition when determining their reduction goals.[220]

(ii) The criteria of the Race to Zero initiative of 2022 that were developed under the auspices of the UN[221] and as a corollary of the UN Climate Convention and the Paris Agreement[222] make it clear that companies will have to achieve the point of net zero emissions as soon as possible and in any event no later than 2050. To achieve the interim reduction target, companies must use maximum effort to contribute their fair share to the globally necessary emissions reduction of 50% by 2030. In this respect the initiative recommends that companies that have the capacity to reduce more

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215 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 63 and 64.
216 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 68; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 65, 75 and 121.
217 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 26 (with further elaboration in paras. 19, 21 and 39 to 41).
218 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 26 (with further elaboration in paras. 17, 19 to 21, 28, 38, 39, 56, 59, 89 and 123).
219 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 68; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17, 38, 41, 44, 65, 84, 89 and 122.
220 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17, 37 to 42, 65, 122 and 123; Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 80; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 42.
221 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 502.
222 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 503 and 858.

than 50% by 2030 should indeed do so,[223] as is also evidenced by the representation of this recommendation by the Court in para. 7.23. This must relate to a reduction of Scope 1, 2 and 3 emissions.[224] The guidelines belonging with the Race to Zero initiative clarify that for many companies a fair share means that they must reduce their emissions, (partly) in light of the CBDR principle, faster than the global average.[225]

(iii) In 2022, on the request of the UN Secretary General, the UN expert panel made ten important recommendations regarding what credible net zero targets of companies should look like.[226] The UN Expert Report has a special and universal status and forms a very important benchmark for assessing the credibility of companies' net zero targets, a view that is shared in the annual reporting of Oxford University on developments in the area of climate protocols for companies.[227]

(iv) The UN Expert Report emphasises the need for the fastest possible climate action by companies, (partly) in view of the great danger of a climate change overshoot of 1.5°C: "*It is crucial that non-state actors have short-term targets that prioritise immediate reductions aligned with pathways that keep 1.5°C in sight across their value chain to avoid crossing dangerous climate tipping points*."[228]

(v) Just like the Race to Zero initiative, the UN Expert Report emphasises that companies must reduce their emissions as quickly as possible, that absolute emissions reductions are required, for all Scope 1, 2 and 3 emissions, that the focal point is achieving net zero emissions by 2050 or earlier, that companies must show maximum efforts and that a 50% reduction by 2030 is the starting point.[229]

(vi) It furthermore clearly follows from the UN Expert Report that companies must draw up an adequate transition plan, in which it is explained what action will be taken to achieve the established reduction targets.[230] According to the UN Expert Report, it is clear that existing fossil fuel infrastructure well exceeds the remaining carbon budget for limiting global warming to 1.5˚C. The UN Expert Report therefore determines that: "*there is no room for new investment in fossil fuel supply and [there is] a need to decommission existing assets*."[231] In this respect the chairman of the

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223 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 42; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 502 to 506.

224 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 504 (citation).

225 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 42 to 44; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 505 and 506.

226 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 19.

227 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 19 to 23.

228 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 42.

229 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 37 to 39 and 44.

230 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 49.

231 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 50. In para. 7.59 the Court also refers to this finding of the UN Expert Report.

UN Expert Group that was responsible for the UN Expert Report emphasises that "*Non-state actors cannot claim to be net zero while continuing to build or invest in new fossil fuel supply*."[232]

(vii) The 2022 Net Zero Guidelines of the International Organization for Standardization (the **ISO**) and the 1.5°C Business Playbook of the Exponential Roadmap Initiative (the **ERI**) also stress that companies must use maximum effort to reduce emissions in line with the 1.5°C goal, that the halving (50% reduction) of Scope 1, 2 and 3 emissions by 2030 is the starting point, that companies that have the capacity to move faster, must in fact do so and must strive to reach the net zero point by 2040.[233] The Net Zero Guidelines refer in this respect to including in the considerations the historical responsibility and the large scope of emissions of companies when determining reduction targets.[234]

(viii) It ensues from the Science Based Targets Initiative (the **SBTi**) that the best practice for individual companies is to let their absolute emissions come down and at least apply the same reduction obligations for 2030 as the emissions reductions that apply at global level. This is bearing in mind (in part) the rapidly shrinking global carbon budget. Because emissions must have been reduced by 45% globally by 2030, this same percentage also applies as best practice for individual companies.[235] It furthermore follows from the SBTi that companies must make use of the most ambitious scenarios that lead to the fastest possible reductions and the fewest cumulative emissions. The SBTi also emphasises that companies must set science-based targets for the short term in order to roughly halve emissions before 2030.[236]

(ix) It ensues from the OECD Guidelines and the UNGP that companies must reduce their Scope 1, 2 and 3 emissions in an absolute sense in line with the global temperature goal and in line with the best available science.[237] The OECD Guidelines and the UNGP are a reflection of the universal standard of conduct for companies to respect human rights. This standard applies to all companies, regardless of size, sector, operational context, ownership relationships and structure. However, these factors can play a role in relation to the question which actions may be expected of companies. The severity of the impact of company activities on human rights is an important factor for specifying the responsibility.[238]

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[232] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 52.
[233] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 37, 38, 40 and 41.
[234] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 40.
[235] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 480; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 22; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 31 to 34.
[236] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 58 and 59 (including citation); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (104) and (105).
[237] With regard to the OECD Guidelines: Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 83, 84 and 89. With regard to the UNGP: Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 87 and 89; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 453; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 8 to 12.
[238] With regard to the OECD Guidelines: Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 49; Milieudefensie et al.'s

The UNGP originated from the power vacuum that has arisen due to globalisation, so that self-regulation of internationally operating companies is necessary to achieve the protection of human rights.[239]

(x) It furthermore ensues from the climate protocols, as well as the Scope 3 Standard with the GHG Protocol, that the greatest responsibility for emissions reductions lies with those companies for which the bulk of their CO_2 emissions consist of Scope 3 emissions. These are the companies that provide the current energy supply. Others are dependent on the choices that these companies make.[240]

(xi) Oxford University came to the conclusion back in 2020 in the Oxford Report – that has an authoritative status, as it was established in the framework of the worldwide Race to Zero initiative that operates under the auspices of the UN[241] – that contains an analysis of the circulating climate protocols for companies, that within the various climate protocols there is broad agreement that every party will have to independently work toward achieving net zero emissions by 2050, that this covers Scope 1, 2 and 3 emissions, that companies must immediately start to reduce CO_2 emissions, that companies must set concrete, robust, interim reduction targets for the short and medium term and that large companies from Western jurisdictions that emit a lot of greenhouse gases and also bear historical responsibility for the climate problem, must set the most far-reaching emissions targets of all, so that the minimum standard for Shell cannot be less than what can be required of companies on average based on these climate protocols.[242]

(xii) Shell falls within the group of countries which, based on the aforementioned protocols and soft law, are subject to the obligation to at least reduce its emissions in line with the global average reduction percentage.[243] Many companies will have

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Oral Arguments on appeal (Part 2) of 4 April 2024, para. 79; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 413 to 417 and 436; Milieudefensie et al.'s Summons of 5 April 2019, paras. 720 to 722. With regard to the UNGP: Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 49; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 79; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 413 to 417 and 436 to 438; Milieudefensie et al.'s Summons of 5 April 2019, paras. 710 to 715.

239 Milieudefensie et al.'s Summons of 5 April 2019, paras. 693 to 702.

240 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 826, 831 and 847 to 851; Milieudefensie et al.'s Notes on Oral Arguments 9 at first instance of 17 December 2020, paras. 1 to 7; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 22.

241 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 489 and 857.

242 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 489; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 28 to 30; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 16 to 21.

243 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16, with reference to its assertions at first instance and on appeal, where Milieudefensie et al. explained in detail that a reduction of 45% by 2030 in Scope 1, 2 and 3 is the absolute lower limit for what Shell must do in light of the doctrine of hazardous negligence, human rights and (legal) principles and that is supported by the climate protocols for companies and international guidelines. Milieudefensie et al. intended in this respect (in short) to make its assertions the basis for its invoking of the protocols and soft law. Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 18 to 74 was then fully dedicated to the Race to Zero initiative, the UN Expert Report, the Net Zero Guidelines of the ISO, the 1.5°C Business Playbook of the ERI and the SBTi. The OECD Guidelines and UNEP are discussed in this respect in Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 75 to 102. In Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 102, Milieudefensie et al. concludes on the basis of what preceded it that the same can be required of Shell as under Dutch liability law (i.e.: 45%). In its Statement of Defence on appeal Milieudefensie et al. also elaborated

to reduce their emissions faster than the global average. According to those protocols and soft law, this particularly applies to influential Western companies with substantial emissions and a large historical responsibility for the climate problem. Shell too earns the greater part of its revenue in rich and primarily Western countries, i.e. in countries that must take the lead in the climate approach and will therefore have to phase out their fossil fuels the quickest in order to reduce their emissions.[244] On the basis of the maximum effort and fair share required by the protocols and soft law, Shell must do more than the global average, in connection with its great responsibility for the climate problem, its large emissions scope, the fact that it earns the greater part of its revenue in the richest countries and it undeniably has the capacity to quickly adapt.[245]

(xiii) Shell has a large historical responsibility for climate change,[246] has large historical[247] and future CO_2 emissions,[248] has control and influence over its very substantial quantity of emissions,[249] has influence on the demand for oil and gas and consequently on what consumers are offered globally in terms of energy products,[250] earns the bulk of its revenue in richer and developed countries,[251] is one of the biggest[252] and richest companies in the world,[253] has a large global power position,[254]

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that because of its position, Shell is subject to the protocols and soft law, including the Race to Zero initiative, (that existed at the time of submission). See Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 488, 489 and 503 to 507.

244 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 44 (footnote 51); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (89) and (95), 489, 490, 494, 496 and 502 to 507.

245 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 65.

246 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 58; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17 and 40; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (95), 487 and 490. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 22; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 155 to 158; Milieudefensie et al.'s Summons of 5 April 2019, paras. 576 to 585.

247 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Summons of 5 April 2019, paras. 5 and 548 to 554.

248 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 43, 53, 55 and 59.

249 With regard to the scope of the emissions: Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 17; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 26 and 627. With regard to the control over and influence on emissions: Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 35 under (86) and (87), 243 to 251, 254 and 853 to 855; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 1 to 7, 22, 27 and 36; Milieudefensie et al.'s Notes on Oral Arguments 3 at first instance of 3 December 2020, para. 52; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 24 and 31 to 68; Milieudefensie et al.'s Summons of 5 April 2019, paras. 612 to 618.

250 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, paras. 4, 8, 13, 46, 81 and 90; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 26. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 29.

251 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 57 and 58; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 48; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 17, 65 and 123; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 21 and 40; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 494 to 496.

252 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes

is the biggest purchaser of oil and gas in the world and has large global purchasing power,[255] has the capacity to bear the heaviest burdens,[256] is resilient in relation to the climate goals of the Paris Agreement[257] and is able to achieve higher reductions than the globally necessary 50%,[258] so that a CO_2 reduction of 45% in 2030 is in fact the minimum reduction task that can be required of Shell.[259] Shell can pretty much realise the reduction of 45% in 2030, with regard to its own production of oil and gas, by simply not making any investments in new oil and gas fields.[260]

(xiv) The fact that Shell has a client portfolio that has more companies than average that operate in sectors that are harder to abate, does not stand in the way of holding Shell to the global average reduction percentage of 45% for its Scope 3 emissions.[261] Even after a reduction of 45% of its CO_2 emissions, Shell can still sell 55% of the volume in fossil fuels that it sold in 2019 – the accuracy of which assertion the Court did not address in para. 7.94, so that said accuracy must be assumed in the appeal to the Supreme Court (at least hypothetically) – and depending on the way in which the reduction order is implemented, even more, e.g. if it works with CCS or reduces its Scope 1 and 2 emissions by more than 45%.[262] In addition, the sectors that are harder to abate must also have reduced their emissions by 2030.[263] In case of sufficient investments in sustainable alternatives, no new investments in oil and gas fields are necessary, including for the "harder to abate" sectors. According to the IEA, all sectors, including the "harder to abate" sectors, can suffice with the supply options from the existing oil and gas fields.[264] In the event of continuing investments

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on Oral Arguments 7 at first instance of 15 December 2020, paras. 29 and 39.

253 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 141. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 22.

254 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 62, 102, 103, 124, 125 and 128; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, paras. 24 and 25; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 302. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 29, 36 and 39.

255 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 23 to 25; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 934 to 936. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 29.

256 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 to 17 and 65; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 487 and 586; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 29; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 23.

257 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15 and 16; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 23.

258 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 123.

259 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 15, 16 and 121 to 124; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 505 to 507.

260 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 261 and 595.

261 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 584 (with further elaboration in paras. 585 to 606).

262 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 585 and 586.

263 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 587 to 593.

264 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 594 to 597.

in oil and gas fields, Shell's clients, including the "harder to abate" sectors, will be held back from making their own transition.[265]

3.22. In light of the aforementioned assertions, it is not clear, without additional reasoning, which is lacking, how the Court arrives at the opinion that the global average reduction percentage of 45% by 2030 for Scope 1, 2 and 3 does not apply to Shell, in light of the protocols and soft law presented by Milieudefensie et al. Milieudefensie et al. will elaborate on this below.

[265] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 598 to 600.

3.23. Insofar as the Court finds that the Race to Zero initiative, the UN Expert Report, the UNGP, the OECD Guidelines, the Net Zero Guidelines of the ISO and/or the 1.5°C Business Playbook of the ERI do not qualify as sources that can be attributed significance when determining the reduction percentage that can be required of Shell, the finding is first of all incomprehensible, or lacks sufficient reasoning, because the Court itself in paras. 7.26 and 7.27, when determining the duty of care to which Shell is subject, (in part) attributes significance to "*the instruments discussed above*" (para. 7.26), whereby the Court (in part) is referring to the Race to Zero initiative (para. 7.23 under (d)), the UN Expert Report (para. 7.23 under (e)), the UNGP (paras. 7.20 and 7.26), the OECD Guidelines (paras. 7.21, 7.22 and 7.26), the Net Zero Guidelines of the ISO (para. 7.23 under (b)) and the 1.5°C Business Playbook of the ERI (para. 7.23 under (c)) and to the findings of the Oxford Report (which is related to the Race to Zero initiative) (para. 7.23 under (h)). In addition, the Court itself determines in para. 7.55 that the duty of care relating to preventing or limiting dangerous climate change can be given further substance based on soft law such as the UNGP and the OECD Guidelines. The fact that according to the Court too those sources are to be attributed relevant significance when determining the duty of care to which Shell is subject cannot be reconciled in a comprehensible manner with the view that it is not to be attributed significance when determining the reduction percentage that may be required of Shell. After all, that reduction percentage concerns the concrete legal obligation ensuing from said duty of care. Or in any event, that legal obligation is an extension of the duty of care. For that reason it is in any event not clear without additional reasoning, which is lacking, why those sources should have significance in the framework of determining the duty of care, but not when determining the reduction percentage that may be required of Shell.

3.24. In addition, the Court's decision lacks sufficient reasoning. After all, it ensues from the aforementioned assertions of Milieudefensie et al. first of all that the Race to Zero initiative, the UN Expert Report, the Net Zero Guidelines of the ISO, the 1.5°C Business Playbook of the ERI and/or the SBTi (the **50% protocols and soft law**) are relevant sources for the determination of the reduction percentage applicable to a company. Those assertions furthermore show that these 50% protocols and soft law prescribe as the starting point that all companies (that are capable of doing so) and in any event companies like Shell must reduce their emissions in Scope 1 to 3 in line with the global average reduction percentage of (at least) 45% in 2030 (more specifically: the Race to Zero initiative: companies that have the capacity must reduce emissions by at least 50% by 2030, the UN Expert Report: maximum effort of companies and as starting point 50% reduction by 2030, the Net Zero Guidelines of the ISO and the 1.5°C Business Playbook of the ERI: maximum effort and 50% reduction as starting point, the SBTi: reduce as quickly as possible and at least adhere to the global necessary reduction percentage (45%)). In addition, it ensues from the assertions set out in grounds of appeal 3.21 under (xii) to (xiv) that Milieudefensie et al. pointed out, with substantiation, that and for what reasons Shell qualifies as a company for which this obligation to use maximum efforts and the aforementioned starting point of (at least) 45% reduction or adhering to the global average reduction percentage in any event apply respectively that Shell has the capacity to do so. The reasons mentioned by the

Court in paras. 7.74 to 7.79 in any event do not form a sufficiently comprehensible response to the aforementioned assertions, simply because the Court does not go into this at all in the aforementioned 50% protocols and soft law and the starting point ensuing therefrom of a global average reduction percentage of (at least) 45% in 2030 for companies like Shell, let alone that the Court will review whether Shell qualifies as a company for which these 50% protocols and soft law prescribe a reduction of (at least) 45%.

3.25. In any event, the Court's opinion lacks sufficient reasoning in light of the assertions of Milieudefensie et al. that (i) the IAM models generally do not take account of normative aspects, such as the precautionary principle, the principle of intergenerational equity and the CBDR principle,[266] so that they do not form proper guidance for the division of the climate task between countries and sectors,[267] while (ii) the 50% protocols and soft law generally do take account of these principles.[268] In light of these assertions of Milieudefensie et al. it is not clear without additional reasoning, which is lacking, for what reason the Court did not attribute greater significance to the 50% protocols and soft law than to the IAM models, or in any event for what reason the Court attributed equal weight to the 50% protocols and soft law on the one part and the IAM models on the other. These assertions point out that the 50% protocols and soft law can contribute directly, or in any event can contribute more, to the determination of the reduction percentage that can be required of a company like Shell.

3.26. The facts mentioned by the Court in paras. 7.74 to 7.79 also cannot explain in a sufficiently reasoned manner why the starting point provided by the 50% protocols and soft law to strive for the global average reduction percentage of (at least) 45% by 2030 does not apply to Shell. Milieudefensie et al. will elaborate on this hereinafter.

3.27. The fact stated in para. 7.74 that 45% is a global average over all sectors and relates to all greenhouse gases can in itself not explain for what reason Shell is not bound on the basis of the 50% protocols and soft law to adhere to (at least) that average, because those sources explicitly designate that average as the reduction percentage that all companies (that have the capacity to do so) must strive to achieve.

3.28. In addition, the Court's finding in para. 7.74 – that the average reduction percentage of 45% relates to the emission of all greenhouse gases, including CO_2 – lacks sufficient comprehensible reasoning. First of all, the Court itself (rightly) stated in para. 3.9 and in para. 3.1 (in conjunction with para. 2.3.5.2 of the judgment of the district court of 26 May 2021 (the **District Court Judgment**)) that the average reduction of 45% relates to the emission of CO_2. Secondly, Milieudefensie et al. pointed out that this percentage relates to

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[266] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 42; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 30 to 33, 58, 62, 79, 83, 93 to 97 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 520, 524, 531, 535 to 539 and 583.

[267] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 539 and 540.

[268] Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 65; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 16 and 17; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 42 to 44; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 497 to 499 and 505 to 507.

the reduction of CO_2 emissions.[269] Thirdly, Shell itself takes as the starting point that the percentage of 45% relates to the reduction of CO_2 emissions.[270] Without additional reasoning, which is lacking, it is therefore not clear for what reason the Court believes that this percentage relates to all greenhouse gases. This is factually incorrect.

3.29. The Court furthermore considered in paras. 7.74 and 7.75 that in the shorter term the greatest profit could be achieved by means of reducing coal consumption, Shell does not supply coal and although substitution of coal for gas coming from Shell increases Shell's Scope 3 emissions, it can lower global emissions. Nor can this consideration explain that and for what reason Shell is not bound by the starting point of a reduction of Shell's emissions by 45% in 2030. After all, the 50% protocols and soft law point out that the starting point is that all companies, insofar as they have the capacity to do so, must have reduced their CO_2 emissions in 2030 by 45%. Those 50% protocols and soft law do not, moreover, make a distinction between companies in the coal sector and companies in the oil and gas sector. For companies in both sectors, the target of the global average reduction percentage of (at least) 45% is also the starting point. In this respect it is therefore not relevant that coal could be substituted by gas, so that global CO_2 emissions would fall. Nor does it follow from the facts mentioned by the Court that Shell is not able to realise that reduction and/or cannot be held to that starting point. This decision lacks sufficient reasoning, precisely because Milieudefensie et al. pointed out by means of the substantiated argument presented in ground of appeal 3.21 under (xii) to (xiv) that and why the global average reduction percentage of 45% for Shell is achievable and may be required of Shell.

3.30. The fact stated in paras. 7.76 and 7.77 that in the NZE scenario, the Impact Assessment Report of the European Commission of 6 February 2024 and the Climate Act a distinction is made between various sectors, in light of the 50% protocols and soft law mentioned by Milieudefensie et al., which prescribe maximum effort and, if they have the capacity for such, reducing CO_2 emissions (as the starting point) by (at least) 45%, as well as in light of the argument set out in ground of appeal 3.21 under (xii) to (xiv) that Shell is able to do so and such a reduction may be required of it, also cannot explain in a sufficiently comprehensible and/or reasoned manner why Shell is not bound to strive for (at least) the global average reduction percentage of 45%. After all, it ensues from this that those 50% protocols and soft law require of all companies that are capable of doing so that they maintain a reduction percentage of (at least) 45%, and that Shell is able to achieve the reduction percentage of 45% in 2030 and that this can be required of Shell. It ensues from this that the fact that there are also different sectoral reduction pathways does not detract from the fact that Shell is capable of achieving a CO_2 reduction of 45% and that such can be required of Shell.

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[269] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 474; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 6; Milieudefensie et al.'s Summons of 5 April 2019, para. 742 (with reference to Exhibit MD-135, p. 14 (the IPCC SR-15 report)).

[270] Shell's Statement of Appeal of 22 March 2022, para. 1.4.1.

3.31. In any event, the Court's finding in para. 7.78 that Shell's Scope 3 emissions are spread out across several sectors, Shell also operates in sectors (transport and buildings) in which alternatives for fossil fuels are more difficult to realise and which sectors, moreover, account for a significant part of Shell's Scope 3 emissions, in light of the 50% protocols and soft law mentioned by Milieudefensie et al., as well as in light of the argument set out in ground of appeal 3.21 under (xii) to (xiv), also cannot sufficiently explain why Shell is not bound to strive to achieve the global average reduction percentage of 45%. After all, it ensues from this that those 50% protocols and soft law require of all companies that are capable of doing so that they maintain a reduction percentage of (at least) 45%, and that Shell is able to achieve the reduction percentage of 45% in 2030 and that this can be required of Shell. Milieudefensie et al. also argued with detailed substantiation that this does not detract from the fact that Shell is also active in sectors in which alternatives for fossil fuels are more difficult to realise ("harder to abate"). The Court does not go into that argument at all, even though this could be required in light of the assertions set out in ground of appeal 3.21 under (xiv). It follows from this, after all, that said fact does not diminish the reality that a CO_2 reduction of 45% is achievable for Shell and can be required of Shell on the basis of the 50% protocols and soft law, and this will not affect the energy needs of the "harder to abate" sectors.

3.32. Nor can the fact mentioned by the Court in para. 7.79 – that Shell does not have a product supply and/or client base that (fully) corresponds with the worldwide product supply and the worldwide client base (the clients of those products) and that its client portfolio consists to a more than average degree of (companies from) sectors that are "harder to abate" – detract from the fact, in a comprehensible manner, that the starting point for all companies is the requirement to strive to achieve the global average reduction percentage of 45%, insofar as they are able to do so, and that this may also be required of Shell, in light of the assertions regarding Shell's position set out in ground of appeal 3.21 under (xii) to (xiv). After all, it does not follow from that fact that Shell would not be capable of achieving the global average reduction percentage of 45% and/or that this may not be required of Shell. In addition, the fact that the 50% protocols and soft law that Milieudefensie et al. presented as the starting point, encompass the requirement of a 45% reduction for all companies that are capable of doing so, does not require that such company has a product supply and/or a client base that corresponds with the global average in order to answer the question whether a company is subject to such obligation. After all, companies (virtually) never form a perfect reflection thereof. Nor do the 50% protocols and soft law require such. Contrary to what the Court held, under the aforementioned 50% protocols and soft law this does not apply as a requirement for the global average reduction percentage of 45%.

3.33. In any event, the Court's opinion is lacking sufficient reasoning. Milieudefensie et al. has taken the position, for which it presented substantiation, that the fact that Shell does not have a product supply and/or client base that (fully) corresponds with the worldwide product supply and the worldwide client base (the clients of those products) and/or a more than average degree of its client portfolio consists of (companies in) sectors that are "harder to

abate", does not detract from the fact that Shell is bound to achieve the global average reduction percentage of 45%. In this respect Milieudefensie et al. – in short and in addition to the assertions set out in ground of appeal 3.21 under (xiv) – presented the following argument:

(i) If Shell reduces its CO_2 emissions by 45%, it will still be able to sell a minimum of 55% of the volume in fossil fuels that it sold in 2019 and can consequently continue to serve the "harder to abate" sectors.[271]

(ii) In the "harder to abate" sectors there will have been emissions reductions in 2030 and the dependence on fossil fuels will have decreased. This applies all the more because the "harder to abate" sectors also must and want to become sustainable.[272] Shell is also aware that its clients want to become sustainable, that this is a trend that is broadly supported in society and that this has an impact on its portfolio.[273] It is, moreover, clear to Shell that clients want to reduce their own emissions and that this changing behaviour on the part of clients, and the societal concerns about climate change and the effects of the energy transition in general, lead to a reduced demand for fossil fuels. According to Shell, this changing demand for fossil fuels leads to a risk environment for its business model.[274] Shell also mentioned in its 2021 annual report that its clients want to become sustainable.[275]

(iii) In addition, in its 2021 annual report Shell stated that the "harder to abate" sectors, like air travel and goods transport, increasingly wish to limit their CO_2 emissions and that this has become a top priority among board members.[276] The marine shipping sector, that Shell also calls "harder to abate" is also working on emissions reduction. Maersk, the biggest shipping company for container transport, for example, does not care for gas as a transition fuel and immediately wants to switch to sustainable propulsion of its container ships.[277] According to Maersk, those sustainable alternatives exist for the shipping sector.[278]

(iv) According to the IEA, there are enough options for sustainable energy generation and there is not one sector that still needs investments in new oil and gas fields, including the "harder to abate" sectors.[279] Continuing investments in oil and gas

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271 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 585 and 586. The Court recognises this assertion in para. 7.94, but does not address the accuracy thereof, so that said accuracy must be assumed in the appeal to the Supreme Court (at least hypothetically).
272 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 587 to 593
273 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 588.
274 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 589.
275 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 588 and 589.
276 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 590.
277 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 591.
278 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 592.
279 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 593 to 597.

fields and the sale of oil and gas to Shell's clients in fact delay the transition (including the transition of Shell's clients) to new energy systems.[280]

(v) Shell can (almost) entirely realise the emissions reduction of 45% in 2030 in its production branch by deciding against further investments in new oil and gas fields.[281] The claim for a CO_2 reduction of 45% in 2030 is consequently not too much to ask.[282]

(vi) In addition, not one sector and not one company can claim a right to a part of the remaining global carbon budget, particularly as there are no agreements between the various sectors regarding the manner in which they are distributed.[283]

(vii) In light of the above circumstances, companies and sectors must change to best possible capacity and switch to sustainable energy. This is a road that can be travelled and over which worldwide in 2030 an emissions reduction of at least 45% can be achieved, while, at the same time, there is sufficient energy access for every sector.[284] The existence of "*harder to abate*" sectors in the Shell client portfolio can therefore not entail that Shell does not have to reduce its emissions, in conformity with the global average reduction percentage of 45% by 2030.[285]

(viii) If Shell's client portfolio were to be taken as the starting point, this would, in addition, lead to an individual reduction percentage having to be determined for every (sub-) sector or company from the Shell portfolio based on the IAM models. This cannot be a good guideline. Shell's obligation would then be a derivative of the reduction task of Shell's clients. This matter, however, concerns the reduction obligation of Shell itself and therefore Shell's own responsibility.[286]

(ix) The IEA makes it clear that the oil and gas industry cannot wait until the demand for oil and gas decreases. The continuing production of oil and gas influences demand and creates a carbon lock-in effect.[287] The IEA believes that separate action has to be taken both on the supply side and the demand side. Shell has an influence on both sides. According to the IEA it is a misunderstanding to think that oil and gas companies can wait for a change in demand and all oil and gas companies must take action and set out on the road to reduction.[288]

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280 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 597 to 600.
281 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 595.
282 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 595.
283 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 601 to 604.
284 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 604.
285 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 604 and 605.
286 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 605.
287 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 124 to 126.
288 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 124 to 126 (including citation).

(x) In addition, the IEA provides insight that oil and gas companies use opportunistic arguments to continue producing oil and gas during the energy transition.[289] All companies use the same strategy and want to be the "last man standing".[290] If Shell were to be given the option of reducing fewer emissions (and therefore selling more oil and gas) the more it focuses on the "harder to abate" sectors, the more this will become a cop-out that other oil and gas producers will be only too happy to follow. The production gap will never be closed in this manner.[291]

(xi) The IEA furthermore shows that high emissions reductions (of more than 50% for oil and more than 55% for gas) can be achieved in the oil and gas sector in a time frame of approx. a decade. This is important, because the IEA includes in its modelling what is possible in the real world on the demand side for consuming sectors that use oil and gas. This means that these sectors too – including the "harder to abate" sectors – can suffice with a similar substantial global emissions reduction of the oil and gas sector.[292]

(xii) The IPCC also makes clear that the global mitigation potential is such that the global emissions in 2030 can fall by more than 50% relative to 2019[293] and that for sectors like the manufacturing sector and the transport sector there is a greater mitigation potential than appears from the IAM models.[294]

3.34. Without additional reasoning, which is lacking, in light of these assertions it is not clear for what reason the Court deems it important in para. 7.78 that Shell's Scope 3 emissions take place to a significant degree in the transport and buildings sectors and alternatives in those sectors are more difficult to realise, as well as for whatever reason the Court found in para. 7.79 that, for application of the global average reduction percentage of 45% by 2030, there must be a plausible case that the product supply and client base of Shell is a reflection of the worldwide product supply and client base. After all, it ensues from the aforementioned substantiated assertions of Milieudefensie et al. that and why the fact that the client portfolio is not a reflection of that and consists in part of "harder to abate" sectors, cannot be a reason to deviate from the global average reduction percentage of 45% by 2030. The Court should have paid attention to those assertions, because without them it is not clear for what reason the Court nevertheless is of the opinion that Shell, because of its client portfolio that deviates from the global average and consists in part of "harder to abate" sectors, cannot be held to that global average reduction percentage.

3.35. In para. 7.80 the Court considered that the Race to Zero initiative does not alter the Court's opinion, because the interim target of 50% in 2030 mentioned in said decision must reflect

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289 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 113 to 129.
290 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 124.
291 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 600.
292 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 59 to 63, 76 and 77.
293 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 78; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 514 to 516.
294 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 79 and 81.

the fair share of a company and thus does not simply entail that this percentage can be applied to every company as a hard and enforceable standard. With this decision, the Court first of all overlooks the fact that this initiative also qualifies as a source of soft law and under that heading is relevant when determining the duty of care that applies to Shell – as the Court itself recognises in paras. 7.23 under (d) and 7.26 ("*the instruments discussed above*") – and is therefore also relevant when determining the reduction percentage that applies to Shell. In any event, the Court's finding lacks sufficient comprehensible reasoning, because Milieudefensie et al., as evidenced in the assertions presented in ground of appeal 3.21 under (i) and (ii) pointed out that (inter alia) the Race to Zero initiative is an authoritative source that reflects broadly borne insights, so that meaning is attributed thereto when determining the scope of the reduction obligation to which Shell is subject. This applies all the more as the Court, according to para. 3.1 (in conjunction with para. 2.4.8 of the District Court Judgment) has (in part) taken as the starting point that the Race to Zero initiative shows what companies must do based on scientific findings.

3.36. In any event, the aforementioned decision lacks sufficient comprehensible reasoning, as Milieudefensie et al., as evidenced by the argument presented in ground of appeal 3.21 under (ii), pointed out that the Race to Zero initiative recommends that companies that have the capacity to reduce Scope 1, 2 and 3 emissions by more than 50% by 2030, must in fact do so, as is also evidenced in the representation thereof by the Court in para. 7.23 under (d) and in the representation of the position of Milieudefensie et al. in para. 7.70, while Milieudefensie et al., as evidenced by the assertions presented in ground of appeal 3.21 under (xii) to (xiv) also argued that and why a reduction by 45% in the given circumstances can also be required of Shell, and that Shell is capable of doing so. Without additional reasoning, which is lacking, it is therefore not clear why the fact that the Race to Zero initiative sets an interim target of 50% in 2030 that must reflect a company's fair share, does not alter the Court's decision. After all, it in fact ensues from the aforementioned assertions that the conditions set by the Race to Zero initiative have been satisfied.

3.37. In addition, the Court's decision lacks sufficient reasoning, as Milieudefensie et al. has substantiated, that it also ensues from the OECD Guidelines and the UNGP that companies must reduce their Scope 1, 2 and 3 emissions in an absolute sense in line with the global temperature targets and in line with the best available science, and that it may also be required of Shell on the basis thereof that Shell reduce its emissions by (at least) 45% (ground of appeal 3.21 under (ix) and (xii) to (xiv)). Nor does the Court pay sufficient, comprehensible attention to that substantiated invoking of the OECD Guidelines and the UNGP in paras. 7.74 to 7.79, for the same reasons as set out above with regard to the 50% protocols and soft law. Those considerations cannot – in short – explain why Shell is not bound by (at least) the global average reduction percentage, while those sources require such in the given circumstances.

3.38. In addition, the Court's finding in para. 7.80 that the reduction percentage mentioned in the *Race to Zero* initiative cannot simply be applied to every company as a hard and enforceable standard is, moreover, incorrect, or in any event lacks comprehensible reasoning. Whether or not a specific reduction percentage can be applied *to every company* as a hard and enforceable standard, is not relevant when answering the question what reduction percentage can be required of Shell in the given circumstances. The issue is thus only that the Court, (partly) on the basis of the Race to Zero initiative, should have assessed whether a reduction percentage of (at least) 45% in 2030 can be required of Shell. That is the question that the Court must answer. Whether a percentage mentioned in a particular report could also be applied to other companies, is not relevant, so that the Court wrongly attributed significance to that fact, or did so in an incomprehensible manner. Insofar as the Court made the same finding with regard to the UN Expert Report ("*The same applies to (…)*"), that finding is incorrect for the same reasons, or lacks comprehensible reasoning.

3.39. The Court furthermore considered in para. 7.80 that the same applies to the recommendations in the UN Expert Report. The fact that the UN Expert Report, and elsewhere, sets out that companies must use maximum endeavours to reduce their emissions as quickly as possible, is not sufficient to convert a global average reduction standard into a general mandatory standard for Shell. With this consideration the Court first of all overlooks the fact that Milieudefensie et al. also pointed out with regard to the UN Expert Report in its assertions in ground of appeal 3.21 under (iii) to (vi) that this is an authoritative source that has a special and universal status, so that it has significance when determining the scope of the reduction obligation to which Shell is subject.

3.40. Milieudefensie et al. furthermore pointed out, as evidenced in the assertions set out in ground of appeal 3.21 under (v) that the UN Expert Report not (only) prescribes that companies must use maximum effort to reduce their Scope 1, 2 and 3 emissions as quickly as possible, but that they must demonstrate maximum ambition and *that a reduction of 50% in 2030 is deemed the starting point.* The UN Expert Report therefore not only requires that companies use maximum endeavours. In para. 7.80 the Court wrongly did not pay any attention to the fact that the UN Expert Report takes a reduction of 50% in 2030 as a starting point. This is, moreover, incomprehensible, because the Court itself recognises in para. 7.23 under (e) and in the representation of the position of Milieudefensie et al. in para. 7.70 that the UN Expert Report makes the recommendation to companies of a reduction of 50% in 2030. In any case, without additional reasoning, which is lacking, it is not clear why this percentage should not apply to Shell. This applies in particular because Milieudefensie et al. explained with the assertions set out in ground of appeal 3.21 under (xii) to (xiv) that and why the starting point of a reduction percentage of 45% in 2030 can also be achieved by and may be required of Shell.

3.41. Nor do the Court's considerations in para. 7.80 form a sufficiently comprehensible response to (i) Milieudefensie et al.'s argument presented in ground of appeal 3.21 under (vii) that

the Net Zero Guidelines of the ISO and the 1.5°C Business Playbook of the ERI also support the view that companies must use maximum effort to reduce emissions in line with the 1.5°C goal, based on the starting point of halving Scope 1, 2 and 3 emissions in 2030, nor to (ii) Milieudefensie et al.'s argument presented in ground of appeal 3.21 under (viii) that according to the SBTi it is best practice for individual companies to (at least) maintain the same emissions reductions as are globally necessary, i.e. 45% by 2030. Contrary to the Court's finding, those sources too include more than that companies must use maximum effort to reduce their emissions as quickly as possible. In addition to the obligation to use maximum effort, these sources also point to the global average reduction percentage of (at least) 45% in 2030 as the starting point for companies with regard to the target reduction percentage. The Court overlooks this.

3.42. In any event, the Court's decision lacks sufficient reasoning, because Milieudefensie et al., as ensues from ground of appeal 3.21 under (vii) to (x), has pointed out that the Net Zero Guidelines of the ISO, the 1.5°C Business Playbook of the ERI and the SBTi prescribed as best practice for individual companies to maintain (at least) the same emissions reductions as are globally necessary, i.e. 45% by 2030, while it ensues from the climate protocols, and from the Scope 3 Standard with the GHG Protocol, that the greatest responsibility for emissions reductions lies with those companies for which the majority of CO_2 emissions consists of Scope 3 emissions. Nevertheless, the Court did not pay separate attention to these sources, even though in light of Milieudefensie et al.'s substantiated claim, the Court could be expected to do so.

3.43. In para. 7.81 the Court considered (i) that Milieudefensie et al. had pointed out that Shell is a major player on the oil and gas market and therefore Shell can be expected to make special efforts, (ii) the Court considered the fact that Shell is a major player in the decision *that* Shell is obliged to reduce its emissions and (iii) that, in view of the fact that there are various reduction pathways for various sectors in various countries, this fact does not entail that Shell can be bound by the global average reduction percentage. Nor do these considerations form a sufficiently reasoned or sufficiently comprehensible response to the above argument of Milieudefensie et al., as it will set out below.

3.44. First of all, the fact that Shell is a big player on the oil and gas market and that therefore special efforts can be demanded of it, not only carries weight in the framework of the question whether Shell is subject to a duty of care, but, on the basis of the 50% protocols and soft law, as well as on the basis of the OECD Guidelines and the UNGP and otherwise in the light of the CBDR principle, but also carries weight in the framework of the question what degree of reduction may be required of Shell. This fact can therefore be relevant when it comes to the question whether Shell can be required to achieve a reduction of 45% by 2030. Milieudefensie et al. also presented that assertion (inter alia) in that respect, as is evidenced in the assertions set out in ground of appeal 3.21 under (xii) to (xiv). The Court's opinion therefore lacks correct, or in any event sufficient (comprehensible) substantiation.

3.45. Secondly, the fact that there are different reduction paths for different sectors in different countries cannot explain, without additional substantiation, which is lacking, why it cannot be demanded of Shell, based on the 50% protocols and soft law presented by Milieudefensie et al., that it reduce its CO_2 emissions by (at least) the global average reduction percentage of 45%. The 50% protocols and safe law are in fact based on the starting point that all companies, to the extent they are capable of doing so, must (at least) realise the global average reduction percentage of 45% in 2030. The fact that (as the starting point) there are various reduction pathways for various sectors in various countries does not detract from this. This applies in particular because Milieudefensie et al. explained with the assertions set out in ground of appeal 3.21 under (xii) to (xiv) that and why the starting point of a reduction percentage of 45% in 2030 can also be achieved by and may be required of Shell.

3.46. In para. 7.81 the Court considers that Shell's obligation to comply with the global average reduction percentage of 45% in 2030 cannot be deduced on the basis of equity, because that standard is too general to be able to deduce that Shell is subject to a reduction obligation of 45%. Milieudefensie et al. has already challenged this consideration in grounds of appeal 1.20 to 1.24, 3.10 under (iii) and 3.18 to 3.20. Milieudefensie et al. set out there for what reason(s) the finding of the Court is incorrect or in any event lacks sufficient reasoning. For the sake of brevity, Milieudefensie et al. refers to said grounds of appeal.

E. The Court's opinion on substituting coal with gas is also incomprehensible

3.47. The Court's opinion is furthermore incomprehensible, because the Court acknowledges on the one part that companies are under an obligation to limit CO_2 emissions (para. 7.27) and to reduce their CO_2 emissions (paras. 7.56 and 7.111), and that the supply of fossil fuels must be limited in order to keep the climate goal of the Paris Agreement within reach (para. 7.61) and, without exception, it follows from all reports and sectoral pathways presented by the parties and referred to by the Court (in paras. 7.82 to 7.90) that the CO_2 emissions connected with gas must fall prior to 2030, while the Court held, on the other hand, in paras. 7.74 and 7.75 that the global average reduction percentage cannot be followed, (in part) because in the shorter term the greatest profit can be gained by ending the burning of coal, the substitution of coal with gas is on balance less onerous for the climate and, specifically in relation to Shell, this means that the substituting of coal with gas to be supplied by Shell will cause Shell's Scope 3 emissions to rise, but on balance can lead to lower global CO_2 emissions. These considerations do not have a consistent and logical relationship, so that the Court's considerations in paras. 7.74 and 7.75 are incomprehensible. If the duty of care requires a reduction of Shell's CO_2 emissions and all sectoral reports and reduction pathways also assume that the CO_2 emissions from gas must decrease, this cannot be reconciled with the fact that Shell's CO_2 emissions connected with gas are allowed to increase in Scope 3. The one excludes the other. Because of this lack of comprehensibility, the substitution argument presented by the Court

cannot form a comprehensible reason to reject Milieudefensie et al.'s argument that the global average reduction percentage also applies to Shell.

3.48. In addition, the Court's decision in paras. 7.74 and 7.75 lack sufficient comprehensible reasoning, because (i) the Court itself acknowledges in paras. 7.59 and 7.60 that investments in new oil and gas fields, and in a broader sense investments in exploration for, extraction, production, transport and distribution of fossil fuels, can lead to a carbon lock-in effect and Shell, in the period up to 2030, is continuing to focus on the same level of oil production and expansion of LNG sales by 20% to 30%, a part of which will come from its own production, which is accompanied by investments in upstream oil and gas activities of USD 40 billion between 2023 and 2025 and of USD 60 billion between 2025 and 2030, (ii) the Court considers in para. 7.61 that (a) in order to achieve the climate goals of the Paris Agreement, the emissions must be drastically reduced by 2030, (b) the duty of care obligation of oil and gas producers requires that they take their responsibility in this respect and that when making investments in the production of fossil fuels they must take account of the adverse impact that further expansion of the fossil fuel supply has for the energy transition and (c) that Shell's intended investments in new oil and gas fields could be at odds with this. Without additional reasoning, which is lacking, it is not clear how the Court can assume, on the one hand, that investments in new gas fields (and consequently in Shell's increasing LNG sales mentioned by the Court) for the reasons mentioned by the Court, including the risk of the carbon lock-in effect, could be at odds with the duty of care to which oil and gas companies (like Shell) are subject, but on the other hand assumes that Shell can and may let its Scope 3 emissions increase by selling more gas as a substitution for coal consumption. Selling more gas can only take place through new investments in gas fields and by letting (LNG) gas sales increase, while the increase of the (LNG) gas sales also contributes to the carbon lock-in effect that the Court (in part) precisely sees as a reason to hold that new investments in gas fields can be at odds with the duty of care to which oil and gas companies are subject.

3.49. The Court's finding, moreover, lacks sufficient reasoning, because Milieudefensie et al. has pointed out that the production and the consumption of gas will have to decrease in order to avoid exceeding the carbon budget.[295] In line with this Milieudefensie et al., in response to Shell's statement that it is working together with its clients to replace carbon-intensive coal with less carbon-intensive gas, pointed out that this substitution method cannot be reconciled with any reduction scenario and certainly not with a reduction scenario in which global warming can be limited to 1.5°C.[296] Milieudefensie et al. has furthermore pointed to the scientific agreement that this substitution method is not valid. In this respect Milieudefensie et al. argued (inter alia) that UNEP has determined that gas, because of the

[295] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 101 to 103; Milieudefensie et al.'s. Written Arguments of 18 March 2024, para. 115; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 681 to 684.

[296] Milieudefensie et al.'s Written Arguments of 18 March 2024, para. 115; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 581.

associated CO_2 emissions, cannot serve as a transition fuel,[297] nor can an increase in gas consumption be reconciled with the findings of the IEA.[298] In this light it is difficult to see, without additional reasoning, which is lacking, why the Court rejects the position that Shell is bound by the global average reduction percentage, (in part) because, to reduce global emissions, coal consumption can be replaced by gas supplied by Shell, so that Shell's Scope 3 emissions may and can increase. Milieudefensie et al. precisely disputed that substitution argument by pointing out that this argument cannot be reconciled with any scenario for achieving the goals of the Paris Agreement and remaining within the carbon budget, so that the Court should not have ignored that argument without providing any reasoning.

3.50. This decision in any event lacks sufficient (comprehensible) reasoning, in light of the 50% protocols and soft law, that point out that the starting point is that all companies, insofar as they have the capacity to do so, must have reduced their CO_2 emissions in 2030 by (at least) 45%. In addition, it ensues from the Court's own determinations that (i) various scientific reports entail that the existing fossil fuel production already exceeds the remaining carbon budget (paras. 3.8 under (B.5) and 7.58), (ii) various scientific reports entail that the emissions connected with oil and gas must decrease up to 2030 (and after that) according to the 1.5˚C scenarios (paras. 3.8 to 3.11 and 7.87 to 7.89), (iii) Milieudefensie et al. on the basis of various UNEP reports and the IEA has substantiated that large-scale investments in new oil and gas fields are not desirable (para. 7.58) and (iv) too many investments in new oil and gas fields can lead to a carbon lock-in effect, because parties that have invested in fossil fuel infrastructure have an incentive to keep using this infrastructure for as long as possible and can offer fossil fuels for low prices so that the use of fossil fuels imposed on the parties from the supply side of the market can seriously delay the energy transition (para. 7.59). These responsibilities ensuing from the 50% protocols and soft law and the Court's determinations cannot be reconciled, in a sufficiently comprehensible manner, with the view that Shell's (gas-related) Scope 3 emissions should be allowed to increase.

4. Scope 3 emissions: sectoral reduction standard

4.1. In paras. 7.67 and 7.82 to 7.97 the Court studied – based on the assessment benchmark presented in para. 7.67, which was challenged in grounds of appeal 3.3 to 3.7 – whether there is (a) consensus in the climate science about a sectoral reduction standard for oil and gas applicable to a company like Shell, by which Shell can be bound. The Court considers the following in this respect:

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[297] Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, para. 52 (with further elaboration in paras. 47 to 51 and 53 to 85); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 581 and 596 to 600.

[298] Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, paras. 61 and 84; Milieudefensie et al.'s. Written Arguments of 18 March 2024, para. 115; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 594 to 596.

(i) The existing climate legislation does not provide for a concrete reduction percentage for individual companies or sectors, but it is conceivable that there is consensus among climate scientists regarding specific reduction standards which should apply for a company like Shell in order to comply with its climate responsibility. The Court goes into the question whether on the basis of scientific consensus a sectoral standard for oil and gas can be determined (para. 7.67);

(ii) Various reports go into the question what degree of reduction of oil and gas is necessary to achieve the goals of the Paris Agreement. The Court refers in that respect to the earlier NZE scenario (from 2021), the NZE scenario, the UNEP Production Gap Report 2021 and 2023, the Low Demand scenario, the report 'Lighting the path: what IPCC energy pathways tell us about Paris-aligned policies and investments of the International Institute for Sustainable Development' from June 2022, the EU Fit for 55 package, the Tyndall report, a letter from K. Anderson, the report of J. Rogelj of 4 March 2024, the Hawkes report and Milieudefensie et al.'s calculation of various reduction percentages presented by these reports back to the base year 2019 (paras. 7.82 to 7.90);

(iii) The court is of the opinion that no sufficiently unequivocal conclusion can be drawn from all these sources regarding the required reduction in emissions from the combustion of oil and gas on which to base an order by the civil courts against a specific company. The sources presented above refer partly to oil and gas production and partly to emissions from combustion. This means they are not readily comparable. (para. 7.91);

(iv) What is more important is that the various reduction figures are quite divergent. Hawkes arrives at the lowest figures for oil and gas, while the Tyndall report arrives at the highest figures. The experts hired by the parties have mutually criticised and questioned each other's conclusions. (para. 7.91);

(v) Even in the numbers recalculated by Milieudefensie et al., the scope of the reduction varies from 28.5% to 51.7% for oil and from 30.1% to 50.5% for gas. In addition, the figures are not stable. The NZE scenario of the IEA shows in the 2023 update that the reduction pathway for oil and gas has a different form than in 2021. Among experts there are apparently significant differences of insight about the percentages to be applied and the methodology that must be used for the various calculations (para. 7.91);

(vi) The IEA percentage in the NZE scenario also cannot serve as the starting point, because the Court would then be ignoring the questions that nota bene Milieudefensie et al. itself has with regard to the creation of that estimate. What is more important is that the Court would thereby elevate that estimate to a binding legal standard for a specific company. That standard was never intended for this purpose and, as already mentioned, that standard is subject to change, which

cannot be reconciled with imposing an order on Shell to achieve a fixed reduction percentage up to 2030 (para. 7.92);

(vii) The Court takes into account that both parties have also questioned the value of the IAMs on which the figures are (partly) based. According to Milieudefensie et al., those models are of only "*limited use*". That too calls for far-reaching restraint in elevating the figures based on those reports to a legal standard. (para. 7.93);

(viii) The fact that the reduction percentages are based on IAM models that do not take sufficient account of a fair division of the burdens between countries (equity) and therefore of the CBDR principle, does not lead to a more comprehensive standard. The Court recognises that on the basis of the CBDR principle, which is also laid down in the Paris Agreement, especially the rich developed countries must follow a faster reduction pathway than the developing countries. While that fact may call into question reduction pathways that prioritise the phasing out of coal, no standard for Shell's reduction obligation to be applied in the present case follows from that (para. 7.93);

(ix) In other words, even if the Court accepts Milieudefensie et al.'s contention that the IAMs take too little account of the coal dependency of developing countries, and that therefore emissions from coal should fall less quickly than the models prescribe, this does not establish a standard applicable to Shell (in developed countries) for oil and gas which the Court could use in these proceedings (para. 7.93);

(x) That Shell, in the case of a 45% reduction in its CO_2 emissions in 2030, would still be able to sell 55% of the amount of fossil fuels sold in 2019, thus meeting the needs of sectors that are harder to abate, as Milieudefensie et al. argue, is also not a fact that can contribute to establishing a legal standard (para. 7.94);

(xi) The precautionary principle does not justify a different conclusion. This principle implies that even in the event of (scientific) uncertainty regarding the occurrence of certain consequences, it may be appropriate to intervene in a certain activity. The precautionary principle also precludes non-intervention because of scientific uncertainty regarding the consequences of a given action. However, this case does not concern uncertainty about the consequences of a particular action (CO_2 emissions), but is about uncertainty about a standard to be applied. The precautionary principle does not justify ignoring that uncertainty at the expense of a private party and setting a legal standard for that private party (para. 7.95); and

(xii) Therefore, however much Shell may be required to do its part in combating dangerous climate change, the available figures do not provide the Court with sufficient support to oblige Shell to reduce its CO_2 emissions by a certain percentage in 2030, as claimed by Milieudefensie et al. This applies to both the principal and

alternative claims. This therefore leads to the conclusion that the claims of Milieudefensie et al. regarding Scope 3 must be rejected (para. 7.96).

4.2. Because the Court, both when determining Shell's duty of care and the concrete interpretation of such duty in the form of a reduction percentage, applies an overly narrow framework for assessment (ground of appeal 1), these considerations cannot be maintained. What is more, these considerations expand on the considerations challenged in grounds of appeal 3.3 to 3.7 and for the same reasons mentioned there, are based on an incorrect legal view. To prevent repeating itself, Milieudefensie et al. refers to those grounds of appeal, which it also directed against the aforementioned considerations. In short: the Court wrongly applies a consensus review and wrongly narrows that review down to a study of (a) climate science consensus regarding a reduction percentage applicable to companies like Shell. The Court thus fails to recognise that (on the basis of Article 6:162 DCC) significance must be attributed to all relevant facts of the case and/or all objective reference points, or the Court (in any event) overlooks the Common Ground method.

4.3. The aforementioned decision of the Court is furthermore incorrect, or in any event lacks sufficient reasoning, because (a) the Court did not review (in part) on the basis of the hazardous negligence criteria and/or all relevant UN climate protocols, soft law instruments, international (legal) principles and (broadly supported) scientific sources presented by Milieudefensie et al., whether a (minimum) reduction percentage can be determined for Shell and (b) whether the NZE scenario can serve as the basis for determining a reduction percentage applicable to Shell. The reasons mentioned by the Court for not following that scenario do not, (partly) in light of the debate between the parties on the matter, in any event constitute sufficient comprehensible reasoning in this respect. In addition, (c) the Hawkes report cannot in any event serve as the basis for determining a reduction percentage for Shell, for which Milieudefensie et al. presented substantiated arguments, but to which arguments the Court paid no attention whatsoever.

4.4. In addition, the Court's finding cannot be maintained because (d) the distinction noted by the Court between production reduction figures and emissions reduction figures are in fact in Shell's favour, so that this cannot form a reason not to determine a reduction percentage, (e) the criticism of Milieudefensie et al. regarding the IAM models seeks to establish that those models and the reduction pathways based thereon, contrary to the precautionary principle, the principle of international justice and/or the CBDR principle, will lead to reduction percentages for the oil and gas sector and (therefore) for Shell that are too low, so that this criticism cannot contribute to a restrained application thereof when determining a reduction percentage for Shell, (f) determining a reduction percentage is not the same as elevating it to a legal standard and (g) the precautionary principle is relevant for determining the reduction percentage that may be required of Shell. Milieudefensie et al. (h) also drew attention to an internal contradiction in the Judgment.

4.5. Lastly, the Court overlooked (i) that – (partly) in light of the effective remedy required by Article 13 ECHR respectively the effective protection required by Articles 2 and/or 8 ECHR – a company is at least obligated to fulfil the *minimum* reduction percentage that can, in any event, be determined. This applies even if the narrow consensus requirement of the Court were correct. Milieudefensie et al. will elaborate on the aforementioned complaints below.

A. Many relevant facts and objective reference points were not considered

4.6. The Court's finding lacks sufficient reasoning, because Milieudefensie et al., (partly) with reference to the hazardous negligence criteria, the UN climate protocols, soft law instruments, international (legal) principles and (broadly supported) scientific sources, comprehensively argued that, on the basis of sectoral pathways, a (minimum) reduction percentage can be determined that Shell must achieve based on its duty of care to limit or prevent dangerous climate change. Milieudefensie et al. will elaborate on this below.

(i) Doctrine of hazardous negligence and 'Kelderluik' factors

4.7. First of all, Milieudefensie et al., to determine Shell's duty of care to prevent or limit dangerous climate change, and to determine Shell's concrete reduction obligation, called upon the doctrine of hazardous negligence, including the factors set out in the 'Kelderluik' case. In this respect Milieudefensie et al. explained (inter alia) that these criteria are of significance when determining the reduction percentage that may be demanded of Shell. Milieudefensie et al. refers in this respect to the assertions set out in ground of appeal 1.8. These assertions are therefore also relevant in this context, while the Court (apparently) did not respond to them. The Court's finding therefore lacks sufficient reasoning.

(ii) Less weight to be attributed to reduction pathways and IAM models that rely too heavily on CDR

4.8. Milieudefensie et al. first of all pointed out that achieving a global reduction of 45% in 2030 is of considerable importance and that reduction pathways and the IAM models on which said pathways are based, that rely too heavily on CDR technologies, in connection with the associated uncertainties and risks, are to be attributed less weight when determining the reduction percentage applicable to Shell. In that light, greater weight is in any event to be attributed to the Tyndall report and the IISD report, which reports take account of the limitations of CDR. Milieudefensie et al. presented the following more detailed arguments in this respect:

(i) Achieving the reduction target of 45% in 2030 is important, because the cumulative global CO_2 emissions must be kept within the now very limited carbon budget that remains until net zero emissions is achieved, as otherwise there will be an overshoot of the 1.5˚C limit.[299] There are great climate risks involved in an (even temporary)

[299] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 4 to 13; Milieudefensie et al.'s Statement

overshoot of the 1.5˚C limit in the event of failure to remain within the carbon budget, including the risk of reaching tipping points.[300]

(ii) In case of a temporary overshoot of the 1.5˚C limit, CDR technologies will be necessary for the large-scale removal of CO_2 from the atmosphere to remove the overshoot.[301] These CDR technologies cannot be deployed at scale at this time and it is widely recognised in the science by (inter alia) the IPCC,[302] UNEP[303] and other sources, that the hypothesis that these technologies will be available in time and in sufficient scale later on this century is subject to great uncertainty and risks.[304] The IPCC has pointed out in this respect that reducing such an overshoot requires a "*massive deployment"* of CDR and warns at the same time that the scaling up of CDR is "*tightly limited by techno-economic, social, political, institutional and sustainability constraints*".[305]

(iii) Partly as a result of this it is very uncertain whether it will be possible to return to a warming of the Earth at 1.5˚C in case of an overshoot of this temperature threshold. An overshoot can therefore be irreversible.[306] Because of the enormous uncertainties regarding the CDR technologies, CDR cannot be a reason to lower the emissions reduction requirement.[307]

(iv) Even if CDR technologies were to come available in any degree, there are sustainability limits for scaling up CDR. It is widely recognised in the science that such scaling up will be accompanied by considerable environmental and socio-economic risks in the area of food production, biodiversity, availability of water and

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of Defence on appeal of 18 October 2022, paras. 533, 534 and 629; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 1 to 18; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 32 to 34.

300 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 4 to 13; Milieudefensie et al.'s. Written Arguments of 18 March 2024, paras. 47 to 68 and 84 to 99); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 612 to 626; Milieudefensie et al.'s Summons of 5 April 2019, paras. 436 to 448 (with further elaboration in paras. 415 to 435 and 449 to 529).

301 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 63 to 66; Milieudefensie et al.'s. Written Arguments of 18 March 2024, paras. 91 to 94; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 111 and 112.

302 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 789; Milieudefensie et al.'s Summons of 5 April 2019, paras. 750 and 760 (including citations).

303 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 77 and 78; Milieudefensie et al.'s Summons of 5 April 2019, para. 758 (including citation).

304 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 04 April 2024, para. 57 to 62; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 10 to 13; Milieudefensie et al.'s. Written Arguments of 18 March 2024, paras. 91 to 99; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 38, 45, 93, 110 to 112 and 117 to 120; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 792 and 808 under (iv) and (vii)a; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 11 to 14; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765.

305 Milieudefensie et al.'s Written Arguments of 18 March 2024, para. 94.

306 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 57 to 62; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 10 to 13; Milieudefensie et al.'s. Written Arguments of 18 March 2024, paras. 91 to 99; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 38, 45, 93, 110 to 112 and 117 to 120; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 792 and 808 under (iv) and (vii)a; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 11 to 14; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765.

307 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 58.

the energy and finance necessary for scaling up. Even if the uncertainty of the scaling up of CDR is overcome, CDR cannot play the role in the real world that it plays in the world of modelling.[308]

(v) The IPCC,[309] UNEP[310] and the OECD[311], among others, because of the uncertainties regarding CDR, warn against taking reduction pathways that are based on a temporary overshoot of the 1.5˚C limit as the starting point, as this creates a dependence on the uncertain upscaling of CDR. The Court also shared this view in the *Urgenda* case, with reference to a report of the European Academies Science Advisory Council (entitled: '*Negative emission technologies: What role in meeting Paris Agreement targets?*'), which report underscores the conclusions of the IPCC and the UNEP.[312] According to the court of appeal in the *Urgenda* case, it could not be assumed that the temperature goal could in fact be achieved when based on reduction pathways with (too many) negative emissions due to the use of CDR.[313] The expert engaged by Shell, Hawkes, also pointed out that CDR in emissions reduction scenarios wrongly facilitates the continued use of fossil fuels[314] and that the use of CDR may not be at the expense of urgent emissions reductions.[315]

(vi) IAMs are generally based on the hypothesis that later on this century CDR will be able to remove enormous quantities of CO_2 from the atmosphere using CDR. Because of the uncertainties regarding CDR, the reliance of models on CDR comes with great risks and limitations.[316] Various experts take the position that following a reduction pathway that relies on CDR to a great extent is contrary to the Paris Agreement, human rights and various international (legal) principles, such as the principle of intergenerational equity. In addition, if the uncertainties regarding CDR materialise, this will inevitably lead to a warming of the Earth higher than the 1.5˚C goal of the Paris Agreement, with all associated risks and dangers for humans and the environment.[317]

(vii) Taking IAM models that greatly rely on CDR technologies, which technologies cannot be applied at this point in time and for which it is very uncertain whether those technologies can in fact be applied this century, so that the reduction percentages

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308 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 59.
309 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 789; Milieudefensie et al.'s Summons of 5 April 2019, para. 750 (including citation).
310 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 111 (footnote 107); Milieudefensie et al.'s Summons of 5 April 2019, para. 758 (including citation).
311 Milieudefensie et al.'s Written Arguments of 18 March 2024, para. 98.
312 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 87; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 11; Milieudefensie et al.'s Summons of 5 April 2019, para. 764, with reference to Court of Appeal of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591, (*Urgenda*) para. 49.
313 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 87.
314 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 117; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 808 under (iv).
315 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 808 under (iv) (citation).
316 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 58 (with further elaboration in paras. 59 to 87); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 792.
317 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 79 and 80.

calculated by those models are in reality not feasible and the reduction task is transferred to the future, as the starting point, is contrary to the precautionary principle and the principle of intergenerational equity.[318]

(viii) Modelled reduction pathways that rely to a great extent on uncertain CDR technologies show lower emissions reductions in the oil and gas sector in the short term based on the assumption that excess CO_2 emissions now, that exceed the carbon budget, can be removed from the atmosphere later using CDR. Conversely, this means that in the short term higher emissions reductions will be necessary in the oil and gas sector to take account of the risks and limits of CDR.[319]

(ix) The IISD report studies what reductions in oil and gas in the C1 scenarios as set out in the IPCC AR6 report will follow, if these scenarios are filtered for the threshold values reported by the IPCC itself based on medium feasibility concerns for the use of CDR. After this filtering, the C1 scenarios show (as median) a 30% reduction in oil and gas in 2030.[320] Based on the average annual reduction, the calculation back to 2019 would lead to a reduction of 32.4% in 2030.[321]

(x) The Tyndall report also calculated what has to happen when CDR is not used to facilitate a continuing use of oil and gas and to artificially increase the carbon budget. This report, that concerns a study of equitable reduction pathways based on the CBDR principle for phasing out oil and gas, shows a required CO_2 reduction of 45% in 2030 relative to 2021.[322] A calculation back to 2019 leads to a reduction for oil and gas of 51.7%.[323] The Tyndall report in fact takes account of a large part of the limitations of the IAM models.[324]

(xi) According to the IEA calculations in the NZE scenario, these emissions reduction percentages are also feasible for the oil and gas industry. Based on IEA calculations back to 2019, an emissions reduction of 45.7% is possible for oil and 50% for gas in 2030.[325]

4.9. In the light of these assertions it is not clear, without additional reasoning, which is lacking, for what reason the Court, when determining the reduction percentage applicable to Shell, does not make a (further) differentiation with regard to the weight to be attributed to the various reduction pathways discussed by the parties. After all, it ensues from the aforementioned assertions that the IAM models (generally) rely too heavily on the highly uncertain CDR technologies, causing them to transfer too much of the reduction task to

[318] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 57 to 59, 62, 78 to 80, 83, 93 and 113.
[319] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 81; Milieudefensie et al.'s Written Arguments of 18 March 2024, para. 91; Milieudefensie et al.'s Summons of 5 April 2019, para. 747.
[320] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 48 (including footnote 49).
[321] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 53 (including table).
[322] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 10 to 12.
[323] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 53 (including table).
[324] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 56.
[325] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 59 to 63.

the future, with the risk of an irreversible overshoot of the 1.5˚C scenario, as a result of which these reduction pathways will not align with the goals of the Paris Agreement and will be contrary to the precautionary principle and the principle of intergenerational equity. This applies all the more as the Court itself takes as the starting point in para. 7.67 that Shell, to perform its duty of care, must make an appropriate contribution to the goals of the Paris Agreement. The IISD report in any event does take account of the great uncertainties of CDR technologies. In addition, the Tyndall report also takes account of the great uncertainties of CDR technologies, and of the CBDR principle and a large part of the (other) limitations of IAM models. For that reason, without additional reasoning, which is lacking, it is not clear for what reason the Court, when assessing on the basis of what modelled reduction pathway a reduction percentage must be determined for Shell, did not make a (further) differentiation regarding the weight to be attributed to the various reduction pathways discussed by the parties, or in any event did not (at least) attribute greater weight to the Tyndall report and/or the IISD report than to the other reduction pathways to determine the (minimum) reduction percentage that may be required of Shell.

4.10. In any event, without additional reasoning, it is not comprehensible for what reason the Court – when determining the reduction percentage on the basis of the various sources discussed by the parties in this framework – did not take account of the limitations of the IAM models associated with CDR technologies, (in part) in light of the precautionary principle, the principle of intergenerational equity and/or the CBDR principle. Without responding to the above-represented detailed argument of Milieudefensie et al. regarding the limitations of CDR, the relevance thereof for the evaluation of the IAM models and the reduction pathways based on those models, and in particular regarding the Tyndall report and the IISD report, to determine the reduction percentage that can be required of Shell, the Court's decision lacks sufficient reasoning.

4.11. In any event, in light of the aforementioned assertions of Milieudefensie et al., it is not clear for what reason the Court attributes significance in para. 7.93 (and possibly also in the final sentence of para. 7.82) (in part) to the fact that Milieudefensie et al. has questions regarding the value of the IAM models on which the figures are (partly) based and in part takes this as the basis for the view that significant restraint must be shown when elevating the figures based on those reports to a legal standard. After all, it ensues from the aforementioned assertions that Milieudefensie et al.'s criticism of the IAM models and the sectoral reduction pathways based thereon for the oil and gas sector in part consisted – in short – of these leading to a reduction percentage that was too low for Shell to be able to achieve the goals of the Paris Agreement and, in addition, that they could not be reconciled with the precautionary principle and the principle of intergenerational equity, because they (generally) rely too much on very uncertain CDR technologies, (in part) to compensate an overshoot, which technology in reality is not (yet) achievable and scalable and for which it is uncertain whether it will be achievable and scalable later this century. This criticism of Milieudefensie et al. regarding these (normative) shortcomings of modelled sectoral reduction pathways therefore does not lead to significant restraint when applying the

figures arising from those reduction pathways to determine a reduction percentage that applies to Shell. On the contrary, this criticism requires that the risks and uncertainties of relying on CDR, widely acknowledged in the science, be considered when assessing the various modelled reduction pathways to determine a reduction percentage that applies to Shell. For that reason, the Court's decision lacks sufficient reasoning.

4.12. In addition, in light of the aforementioned assertions, it is not clear, without additional reasoning, which is lacking, for what reason the reduction percentages for oil and gas set out in the Tyndall report and/or the IISD report could not (at least) serve as the minimum reduction percentage to be achieved by Shell that could be determined on the basis of the criterion of the Common Ground method referred to in ground of appeal 3.5, or in any event with regard to which the consensus requirement set by the Court has been fulfilled. The Court wrongly did not carry out that assessment at all.

(iii) Precautionary principle, principle of intergenerational equity and the CBDR principle

4.13. Milieudefensie et al. furthermore argued, including in the framework of assessing the sectoral reduction pathways, that when determining the reduction percentage to be applied to Shell, attention must be paid (in part) to the precautionary principle, because – in short – the risks of no longer being able to avoid dangerous climate change with a later start of the reduction task will increase, the IAM models and the reduction pathways based on those models are calculated on the basis of cost effectiveness, so that they place the reduction burden on the coal sector and developing countries in particular, even though these developing countries have a limited transition capacity, generally rely (too) heavily on very uncertain CDR technologies, based on an overly high discount rate and do not take account of climate damage, so that there is a danger that tipping points will be passed. As a result of those limitations, the reduction percentages for coal calculated by the IAM models are not feasible in the real world. That is why the reduction pathways for oil and gas based thereon come to reduction percentages that are too low. For that reason, the precautionary principle requires a higher reduction percentage to be set for Shell. The Court wrongly did not consider this principle when assessing whether a reduction percentage could be determined for Shell on the basis of the sectoral reduction pathways or in any event (in para. 7.95) did not consider such appropriately. Milieudefensie et al. refers for its assertions and the associated sources to grounds of appeal 1.13 and 3.10 under (i) and for the legal complaints regarding para. 7.95 to grounds of appeal 1.11 and 1.12.

4.14. In addition, Milieudefensie et al., including in the framework of assessing the sectoral reduction pathways, argued that (in part) attention must be paid to the principle of intergenerational equity, because – in short – the IAM models on which the sectoral reduction pathways are based, are calculated on the basis of cost effectiveness, in general rely too heavily on very uncertain CDR technologies, make calculations based on an overly high discount rate and do not take account of climate damage, as a result of which they shift the reduction task into the future as much as possible based on assumptions shrouded

in uncertainty, which is contrary to the principle of intergenerational equity. Milieudefensie et al. refers for its assertions and the associated sources to grounds of appeal 1.17 and 3.10 under (ii). The Court wrongly did not consider this principle at all when assessing whether a reduction percentage could be determined for Shell on the basis of the sectoral reduction pathways.

4.15. Milieudefensie et al. furthermore argued, including in the framework of the assessment of the sectoral reduction pathways, that attention must (in part) be paid to the CBDR principle, because – in short – Shell is one of the biggest and richest companies in the world with very large historical and current CO_2 emissions, it earns the bulk of its revenue in the developed countries and the IAM models and the reduction pathways based on said models, due to their focus on cost effectiveness, place the reduction burden on the coal sector and the developing countries to an overly large degree, which countries are to a great degree dependent on coal for their energy supply, so that applying the CBDR principle (in part) to those reduction pathways leads to a reduction percentage of at least 45% relative to 2019. Milieudefensie et al. refers with regard to the related assertions and the associated sources to grounds of appeal 1.21 and 3.10 under (iii). The Court only considers this principle in an incorrect – i.e. too limited – manner, or in any event the Court's opinion, in light of these assertions, lacks sufficient reasoning, as already set out in grounds of appeal 1.20 to 1.24.

4.16. More specifically, and in line with the above, Milieudefensie et al., in the framework of the question regarding what reduction percentage can be determined for Shell based on the sectoral reduction pathways, pointed out that these sectoral reduction pathways to a significant degree rely on IAM models that, to determine the reduction percentage applicable to Shell, have limited use in at least five respects, or in any event those IAM models, in light of the precautionary principle, the principle of intergenerational justice and the CBDR principle, come to excessively low percentages for companies in the oil and gas sector: (i) the IAM models are based on cost effectiveness, so that they greatly rely on reducing the use of coal, which will be disproportionately at the expense of developing countries, which is contrary to the CBDR principle, so that a greater part of the reduction burden will have to be placed on oil and gas (and therefore Shell) than indicated by those models,[326] (ii) the IAM models rely heavily on CDR technologies that at this time cannot yet be applied and for which it is very uncertain whether that technology can in fact be applied this century, so that the reduction percentages calculated by those models for the oil and gas sector are too low and the reduction task is transferred to the future, so that basing a reduction percentage for Shell on only those modelled reduction pathways is contrary to the precautionary principle and the principle of intergenerational equity,[327] (iii) IAM models use a high discount rate, so that mitigating measures in those models will be cheaper in

[326] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 1, 2 and 16; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 28, 30, 31, 33, 36 to 41, 113 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 467 and 524 to 536.

[327] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 58, 62, 78, 79, 83, 105 and 112 to 116; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765.

the future than they are now, with the result that IAM models focus greatly on postponing mitigating measures to a later time and focus on the use of CDR (in the event of an overshoot over 1.5˚C (in part) to reduce global warming to 1.5˚C) for which it is uncertain whether this technology will in fact be available in the future at sufficient scale, which is contrary to the principle of intergenerational equity and the precautionary principle,[328] (iv) the IAM models do not include the (avoided) climate damage in their cost effectiveness analysis and consequently, contrary to the precautionary principle and the principle of intergenerational equity, transfer the reduction task to the future[329] and (v) the modelled scenarios in the meantime are virtually all scenarios that assume an overshoot past 1.5˚C.[330]

4.17. In line with this, Milieudefensie et al. argued that, taking account of the limitations of the IAM models and/or the aforementioned (legal) principles, the sectoral reduction pathways also lead to a sufficient reduction percentage of (at least) 45% in 2030. Milieudefensie et al. – in short – presented the following in this respect:

(i) The Tyndall report takes account of the limitations of the IAM models and works with international (legal) principles, including the CBDR principle.[331] On the basis thereof the Tyndall report comes to a reduction percentage of 45% for oil and gas in 2030 relative to 2021, so that a calculation back to 2019 leads to a reduction for oil and gas of 51.7%.[332]

(ii) When a choice is made for a lower reduction percentage than the rounded 50% reduction from the Tyndall report, this is a choice that makes the world dependent to a greater degree on uncertain future CDR technologies and means that the coal sector has to reduce more quickly, to compensate for the lack of climate action in the oil and gas sector.[333]

(iii) The NZE scenario of the IEA takes account of the CBDR principle, has a lower reduction percentage for coal use[334] and arrives at reduction percentages of 28% for oil and 23% for gas in 2030 relative to 2022,[335] so that a calculation back to 2019 leads to an emissions reduction of 36.2% for oil and 30.1% for gas.[336]

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328 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 88 to 90 (with further elaboration in paras. 91 to 99) and 112 to 117.
329 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 100 to 102 (with further elaboration in paras. 103 to 111) and 112 to 114.
330 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 103 to 105.
331 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 10, 11, 19 and 56; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 26 (with further elaboration in paras. 25 and 27 to 40).
332 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 12, 19, 53 (including table), 54 and 56.
333 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 20.
334 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 23 to 25.
335 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 51 and 52 (including table).
336 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 49, 53 (including table), 54 and 56.

(iv) If a correction is made to the NZE scenario by taking account of the precautionary principle and the principle of intergenerational equity, this will lead to an emissions reduction of 45.7% for oil and 50% for gas in 2030 relative to 2019.[337]

(v) The IEA and the NZE scenario have an important global status, in part because the IEA was given the instruction and the mandate by its affiliated countries – that represent 80% of global energy use and 80% of global CO_2 emissions – in 2021 to supervise them in the energy transition.[338]

(vi) The precautionary principle and the principle of intergenerational equity cannot be reconciled with being greatly reliant on CDR in reduction pathways in connection with the associated risks and uncertainties.[339] The IISD report studies what reductions in oil and gas in the C1 scenarios as set out in the IPCC AR6 report will follow, if these scenarios are filtered for the threshold values reported by the IPCC itself based on medium feasibility concerns for the use of CDR. After this filtering, the C1 scenarios show (as median) a 30% reduction in oil and gas in 2030.[340] Based on the average annual reduction, the calculation back to 2019 would lead to a reduction of 32.4% in 2030.[341]

(vii) The Low Demand scenario too shows that significant reductions in the oil and gas sector can be realised in 2030. This scenario comes to a reduction of 47% for both oil and gas in 2030 relative to 2020. A calculation back to 2019 leads to a reduction for oil and gas of 50.5%.[342]

(viii) All these reduction pathways lead to a bandwidth of emissions reductions between rounded 30% and 50% in 2030 (namely: 28.5% to 51.7% for oil and 30.1% to 51.7% for gas). The greater part of these percentages is calculated based on the principle of cost effectiveness, to which the previously discussed limitations and legal objections apply, with the exception of the Tyndall report.[343]

(ix) These reduction percentages relate to the global average reductions in the oil and gas sector to be realised. There is reason to take account of the CBDR principle within this sector. In this respect, Shell, due to its historical responsibility, its large emissions scope, its capacity to change, its wealth and the fact that Shell primarily achieves its revenue in developed countries, can and must move faster than is applicable on a global average to the oil and gas sector. In this light it is no more

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337 Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, pp. 35 to 38; Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 70 to 71 (with further elaboration in paras. 59 to 69).
338 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 85 to 89.
339 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 58, 62, 78, 79, 83, 105 and 112 to 116; Milieudefensie et al.'s Summons of 5 April 2019, paras. 757 to 765.
340 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 48 (including footnote 49).
341 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 53 (including table).
342 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 47, 53 (including table), 54 and 56.
343 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 53 (including table) and 54 t/m 56.

than reasonable that Shell be required to reduce its CO_2 emissions by 45% in 2030.[344]

4.18. In paras. 7.91 to 7.96 (and in particular in paras. 7.91 and 7.92) when assessing the sectoral reduction pathways to determine the reduction percentage that may be required of Shell, the Court did not take account in a manner based on sufficient reasoning of the limitations, pointed out by Milieudefensie et al. in the aforementioned arguments, of the IAM models on which the reduction pathways were based and/or the focus of said models on cost effectiveness, as well as the influence thereof on the assessment of those reduction pathways in light of the precautionary principle, the principle of intergenerational equity and/or the CBDR principle. The Court's finding, moreover, lacks sufficient (comprehensible) reasoning, because Milieudefensie et al. presented for several sectoral reduction pathways (also mentioned by the Court) that and why the relevant reduction pathway does or does not take (sufficient) account of the precautionary principle, the principle of intergenerational equity and the CBDR principle and to what (minimum) reduction percentage taking account of those (legal) principles based on those reduction pathways will lead. Despite this argument of Milieudefensie et al., geared to the various reduction pathways and the aforementioned (legal) principles, in its assessment of the various reduction pathways to determine the reduction percentage that may be required of Shell, the Court does not differentiate with sufficient reasoning the weight to be attributed to the various reduction pathways, or in any event not in the light of these (legal) principles and the position taken by Milieudefensie et al. in this framework. The Court's decision also lacks sufficient reasoning because the Court, based on the position taken by Milieudefensie et al. in this respect, could have come to a specific percentage (of (at least) 45% in 2030) or (at least), as the lower limit of the bandwidth of 30% to 50% rounded (namely: 28.5% to 51.7% for oil and 30.1% to 51.7% for gas), to a minimum reduction percentage of 30% rounded for oil and (or in any event: 28.5% for oil and 30.1% for gas).

4.19. In light of the aforementioned assertions, in particular the assertions referred to in grounds of appeal 4.16 and 4.17, without additional reasoning, which is lacking, it is not clear for what reason the Court, in para. 7.93 (and possibly also in the final sentence of para. 7.82) (in part) attributes significance to the fact that Milieudefensie et al. has questions regarding the value of the IAM models on which the figures are (partly) based and the Court takes this as the basis for the view that significant restraint must be shown when elevating the figures based on those reports to a legal standard. After all, it follows from the aforementioned assertions that the IAM models in fact lead to lower reduction percentages for the oil and gas sector being necessary than those for achieving the goals of the Paris Agreement – toward which Shell's duty of care is oriented (para. 7.67) – and in light of the precautionary principle, the principle of intergenerational equity and the CBDR principle, can be required of a company like Shell, so that it cannot, logically, follow from this that Milieudefensie et al.'s criticism of the IAM models (in part) demands significant restraint when determining a reduction percentage for Shell. Precisely the opposite applies:

[344] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 57 and 58.

Milieudefensie et al.'s criticism of the IAM models indicates that the reduction percentages following therefrom are too low in light of the duty of care to which Shell is subject.

4.20. In para. 7.94 the Court considers that the fact that Shell, in the case of a 45% reduction in its CO_2 emissions in 2030, would still be able to sell 55% of the fossil fuels Shell sold in 2019, thus meeting the needs of sectors that are harder to abate, as Milieudefensie et al. argue, is also not a fact that can contribute to establishing a legal standard. This finding evidences an incorrect legal view. This fact can indeed have relevance when determining a legal standard respectively a reduction percentage that is applicable to Shell. This fact is, after all, relevant for assessing the degree of onerousness of the precautionary measures to be taken and plays a role when applying the CBDR principle. In addition, that fact is of importance to answer the question whether Shell, in the given circumstances, can be bound by the global average reduction percentage of 45%, even if its client portfolio consists to an important degree of sectors in which alternatives for fossil fuels are more difficult to realise (see grounds of appeal 3.33 and 3.34).

4.21. In paras. 7.93 and 7.95 the Court does mention the CBDR principle and the precautionary principle, but does not give any indication to have assessed the sectoral reduction pathways and the assertions presented in this sense in the light of those (legal) principles. On the contrary, the Court has demonstrated an incorrect legal view, as it was too limited, with regard to these (legal) principles. The consideration of the Court in para. 7.93 that, on the basis of the CBDR principle, questions can be asked with regard to reduction pathways that prioritise the phase-out of coal, but that this does not lead to a standard for Shell's reduction obligation, in any event does not form an adequate response to the aforementioned assertions, as that consideration is equally based on an incorrect legal view with regard to the CBDR principle. Milieudefensie et al. already set out in grounds for appeal 1.11, 1.12, 1.20, 3.18, 3.20 and 3.46 that the Court is basing its decision on an incorrect legal view with regard to the CBDR principle and/or the precautionary principle. For the sake of brevity, Milieudefensie et al. refers to those earlier complaints.

(iv) Tyndall report, IISD report and Low Demand scenario did not come from the parties

4.22. Insofar as the Court held in para. 7.91 and (in particular) para. 7.92 that the Tyndall report, the IISD report and/or the Low Demand scenario come from experts engaged by Milieudefensie et al. or Shell and for that reason cannot be taken as the starting point,[345] that opinion is incomprehensible, or in any event lacks sufficient reasoning. Milieudefensie et al. has pointed out that (i) the Tyndall report was written by climate scientist and professor, K. Anderson and Dr D. Calverley, both affiliated with the renowned Tyndall Centre for Climate Change Research,[346] as the Court acknowledges in para. 7.86, (ii) the

[345] This suggestion is based on para. 7.92, in which the Court holds that it could choose to take a percentage as a starting point that in any event does not come from the experts engaged by the parties, i.e. the percentage set by the IEA (the NZE scenario).

[346] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 10.

IISD report comes from the International Institute for Sustainable Development[347] and (iii) the Low Demand scenario has been specifically highlighted by the IPCC.[348] These reports thus did not come from experts engaged by Milieudefensie et al. or Shell.

B. The NZE scenario of the IEA

4.23. Furthermore, the Court's reasoning in paras. 7.91 and 7.92 is incorrect or insufficient. In those considerations the Court holds that it cannot take the reduction percentage from the IEA's NZE scenario as the starting point, even if that reduction percentage does not come from the experts engaged by the parties. The reasons that the Court presents in this respect are incorrect or cannot support or contribute to the Court's finding in a sufficiently comprehensible manner. In any event, the Court's opinion is lacking sufficient reasoning.

4.24. The Court first of all presents as the basis for its decision that, by taking the reduction percentage from the IEA's NZE scenario as the starting point, this would elevate the IEA's estimate for a specific company to a legal standard, even though that was never what the estimate was intended for. With that decision the Court overlooks the fact that, to answer the question by what reduction percentage Shell can be bound in order to perform its duty of care to prevent or limit dangerous climate change, it is not relevant whether the estimate from the NZE scenario is intended to be a legally binding standard (for a specific company). In any event, the fact that a reduction pathway is not intended as a legal standard (for a specific company) does not entail that no or less weight can be attributed to answering the question what reduction percentage is required by a duty of care. A reduction pathway outlined by science is, by definition, not intended as a legally binding standard, let alone for a specific company. In any event, the Court overlooks the fact that the IEA's NZE scenario, within the criterion outlined by ground of appeal 3.5, or in any event within the Common Ground method, does have significance when determining the reduction percentage that can be required of Shell, even if the NZE scenario does not intend to provide a legally binding standard (for a specific company).

[347] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 48
[348] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 47.

4.25. The aforementioned decision is, moreover, incorrect, or lacks sufficient comprehensible reasoning, because the Court itself, in para. 7.67 applies as (too narrow an) assessment criterion whether there is (a) climate science consensus regarding what reduction percentage should apply to a company like Shell. If the NZE scenario meets that consensus requirement (set by the Court), it furthermore ensues therefrom that Shell, on the basis of the duty of care to which it is subject, is bound by that reduction percentage. The (overly narrow) consensus requirement that the Court sets out a priori does not demand that the matter must concern a reduction pathway that is intended as a legally binding standard (for a specific company). The fact that the NZE scenario's goal is not to act as a legally binding standard (for a specific company), therefore cannot lead or contribute to the conclusion that the consensus requirement applied by the Court has not been met. In any event, the Court could not suffice with that conclusion, because the fact that the NZE scenario is not intended as a legally binding standard (for a specific company) does not exclude that the NZE scenario does meet the consensus requirement applied by the Court.

4.26. Secondly, the Court bases its decision on the ground that when taking the NZE scenario as the starting point, this would ignore the questions that nota bene Milieudefensie et al. had regarding the making of that estimate. That decision lacks sufficient or comprehensible reasoning, as Milieudefensie et al. only criticised (the making of) the NZE scenario in such sense that the scenario in reality, for various reasons, arrived at reduction percentages that are *too low* for the oil and gas industry and therefore for Shell. In essence, this criticism comes down to the following: (i) with the NZE scenario, the IEA is trying to protect recent investments in new oil and gas fields as much as possible,[349] (ii) in the short term the NZE scenario therefore takes account of investments in new oil and gas fields that were made after 2021,[350] (iii) the NZE scenario is trying to kick the reduction task into the long grass as much as possible for that reason,[351] (iv) that the NZE scenario does indeed kick the reduction task into the long grass also follows from the fact that the NZE scenario has become an overshoot scenario, while the earlier NZE scenario (from 2021) was not,[352] (v) the NZE scenario relies (too heavily) on CCS and/or CDR[353] and (vi) the IEA itself refers to relying on CCS and/or CDR as 'key uncertainty'.[354] This criticism by Milieudefensie et al. of the creation of the NZE scenario cannot contribute in a comprehensible manner to the decision that the NZE scenario cannot serve as a starting point or cannot contribute to determining the reduction percentage that applies to Shell. The purport of this criticism is that the NZE scenario in essence arrives at reduction percentages for oil and gas that are *too low*. This criticism can therefore at most contribute to the conclusion that following the

[349] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 63 and 64; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 64; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 564 to 568.
[350] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 37; Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 63 to 67.
[351] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 37; Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 63 to 67.
[352] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 67.
[353] Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 93; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 570 and 682.
[354] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 569 to 572 and 681 to 684.

NZE scenario leads to a reduction percentage for Shell that is too low. This cannot be reconciled with the view that the NZE scenario cannot be taken as the starting point, or in any event cannot (at least) be used to determine the minimum reduction percentage that can be required of Shell.

4.27. Insofar as the Court has held that the fact that the reduction percentages from the NZE scenario might be too low contributes to the conclusion that NZE scenario cannot serve as the starting point to determine the reduction percentage that can be required of Shell or that no significance can be attributed to the NZE scenario in that framework, that decision is also incomprehensible, because that fact cannot contribute to that conclusion in a comprehensible manner. It follows from this, at most, that the reduction percentages of the NZE scenario are indeed too low, so that it in any event cannot follow from this that the NZE scenario (in its entirety) has no significance when determining the reduction percentage that can be required of Shell (as a minimum).

4.28. Insofar as the Court holds that Milieudefensie et al. has criticised the NZE scenario in such sense that it contains reduction percentages that are *too high* for Shell or otherwise cannot be used to determine a (minimum) reduction percentage for Shell, the Court has provided an incomprehensible interpretation of the court documents and/or the Court moved beyond the boundaries of the legal dispute. After all, Milieudefensie et al. has not taken a position to this effect.

4.29. Thirdly, the Court supports its decision with the consideration that the NZE scenario cannot serve as a starting point, because this estimate is not stable and/or subject to change, as the figures of the earlier NZE scenario (of 2021) differ from those of the updated NZE scenario (of 2023). According to the Court, this cannot be reconciled with an order that Shell be required to effect a fixed reduction percentage up to 2030. This decision lacks sufficient comprehensible reasoning, because Milieudefensie et al. has explained that this variability is the result of the following: (i) the NZE scenario wants to protect investments made in new oil and gas fields and prevent stranded assets and as a result takes account of investments made by the oil and gas industry from after 2021, so that relatively low reductions are modelled in the short term,[355] (ii) if the fossil fuel sector continues investing in fossil fuel infrastructure in the coming years, the NZE scenario of (e.g.) 2026 will again show lower reduction percentages for 2035 than is the case now, so that the reduction percentages of the models *de facto* reward the poor behaviour – continuing to invest in new oil and gas fields – of oil and gas companies,[356] (iii) so that the continuing investments in new fossil fuel infrastructure have an impact on the outcomes of scenarios,[357] (iv) as, after all, these fossil fuel investments lead to a greater carbon lock-in effect and to continuing to shift the climate task ever more into the future based on modelling, so that the reduction task for 2030 that is based on modelling keeps decreasing[358] and (v) it is

[355] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 64 and 65.
[356] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 66.
[357] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 65.
[358] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 65.

important that this process of ever-shifting and ever-decreasing reduction goals is interrupted.[359] In light of these assertions, the fact that the reduction percentages designated by the earlier NZE scenario (from 2021) and the NZE scenario differ cannot, without additional reasoning, which is lacking, contribute in a comprehensible manner to the Court's opinion that no reduction percentage applicable to Shell can be based thereon. This variation in reduction percentages arises precisely because the oil and gas industry is continuing to make new investments in oil and gas and is therefore not moving toward reduction. This process will only stop if the oil and gas industry is actually held to a reduction percentage, which can (in part) be based on the NZE scenario. The reasons indicated by Milieudefensie et al. for the variability of the NZE scenario in fact therefore form, on the contrary, a greater reason to (partly) on the basis thereof impose a percentage reduction obligation on Shell.

4.30. Insofar as the Court holds that not only the figures from the NZE scenario, but also the figures represented by the Court in para. 7.90 of the Tyndall report, the Low Demand scenario and the IISD report are not stable and/or subject to change, this decision in any event lacks sufficient (comprehensible) reasoning, because (i) it does not follow from the determinations of the Court about those figures from those reduction pathways that and why those figures are not stable and/or are subject to change and (ii) it in any event cannot follow, in a comprehensible manner, from the fact that the NZE scenario has received an update that those other figures are not stable or subject to change, because the NZE scenario does not relate to those other reduction pathways.

4.31. The Court's finding furthermore lacks sufficient reasoning, because (i) in paras. 7.59 and 7.60 the Court itself acknowledges that investments in new oil and gas fields can lead to a carbon lock-in effect and Shell, for the period to 2030, is continuing to focus on the same level of oil production and expansion of LNG sales by 20% to 30%, a part of which will come from its own production, which is accompanied by investments in upstream oil and gas activities of USD 40 billion between 2023 and 2025 and of USD 60 billion between 2025 and 2030 and (ii) the Court considers in para. 7.61 that (a) the emissions must be drastically reduced by 2030 in order to achieve the climate goals of the Paris Agreement, (b) the duty of care of oil and gas producers requires that they take their responsibility in this respect and that when making investments in the production of fossil fuels it can be required of oil and gas companies that they take account of the adverse impact that further expansion of the fossil fuel supply has for the energy transition and (c) that Shell's intended investments in new oil and gas fields could be at odds with this. The Court thus holds that precisely (a part of) the facts pointed out by Milieudefensie et al. that entail that the NZE scenario deviates from the earlier NZE scenario (from 2021) – the carbon lock-in effect and the continuing investments in oil and gas fields – are at odds with the duty of care to which Shell is subject. This cannot be reconciled with the fact that the NZE scenario, because of the variation of this scenario compared to the earlier NZE scenario (from 2021),

[359] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 68 and 69; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 104 to 111.

cannot serve as the starting point or (partly) serve as the scenario to determine the (minimum) reduction percentage that may be required of Shell.

4.32. The foregoing applies all the more as Milieudefensie et al. itself pointed out that investing in new oil and gas fields cannot be reconciled with the 1.5˚C goal,[360] the IEA also acknowledges this and frequently warns that new investments in oil and gas fields will lead to an overshoot of the 1.5˚C target.[361] According to the IEA, the existing oil and gas fields can deliver sufficient production to complete the NZE scenario up to 2050 and – with the exception of a few investments with very short lead times[362] – there is no scope to add new fields.[363] With regard to the four most common arguments presented by oil and gas producers to continue investing in new oil and gas fields, the IEA explained why these arguments cannot be followed.[364] These counter-arguments thus did not form a reason for the IEA to arrive at different modelling for the NZE scenario.[365] These assertions also underscore that the variations in the NZE scenario do not detract from maintaining the NZE scenario as the starting point for determining a reduction percentage that applies to Shell. The IEA modifies the NZE scenario in order to safeguard investments that have already been made. For this reason too, there is a lack of sufficient comprehensible reasoning for the Court's consideration that the fact that the earlier NZE scenario (from 2021) deviates from the NZE scenario is (partly) relevant for the Court's decision that the NZE scenario cannot serve as the starting point for determining a reduction percentage to which Shell is subject or can contribute thereto.

4.33. In addition, the Court's decision lacks sufficient comprehensible reasoning, because Milieudefensie et al. have pointed out that (i) the IEA and the NZE scenario have a special status, including in a political sense,[366] (ii) the IEA's goal is to safeguard energy security by securing the supply of oil and gas to the West as much as possible,[367] (iii) the IEA has 31 member states, 5 candidate members and 13 association countries, together representing 80% of global energy consumption and 80% of global CO_2 emissions,[368] (iv) in 2015 the member states expanded the IEA's mandate to serve the interest of energy security in a broad sense and this new mandate was a reason for the IEA to get involved with the energy transition and to address dangerous climate change, resulting in the earlier NZE scenario (from 2021),[369] (v) in 2021 the IEA members specifically instructed the IEA to supervise them in the energy transition,[370] (vi) the IEA then set up the NZE scenario, after which the global community got behind the measures in that scenario and decided to move away

[360] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 105.
[361] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 106 (including citation).
[362] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 112.
[363] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 107, 112, 113 and 119.
[364] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 113 to 116 (with further elaboration in paras. 118 to 128).
[365] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 117.
[366] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 85.
[367] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 86.
[368] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 87.
[369] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 88.
[370] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 89.

from fossil fuels,[371] so that political consensus arose regarding the most important principles of the NZE scenario,[372] (vii) the above indicates that the IEA and the NZE scenario have an important global status that is acknowledged by all countries in the world[373] and (viii) the political adherence to the NZE scenario is furthermore confirmed by the IEA Ministerial meeting of February 2024, as the IEA member states, in the Ministerial Communique published as a result of that meeting, confirmed the danger of the climate crisis, the need to accelerate climate action and the important role of the IEA in supervising the member states in the energy transition,[374] they again subscribe to the need to move away from fossil fuels and acknowledge that in the NZE scenario no or hardly any new oil and gas fields are necessary and this, together with the other findings of the IEA, forms an important guideline for an orderly transition away from fossil fuels.[375] Hawkes, the expert engaged by Shell, also believes that the IEA is a "*widely respected source of information on energy and decarbonisation options*".[376]

4.34. The aforementioned assertions of Milieudefensie et al. show that there is broad (political) consensus among the member states and countries affiliated with the IEA, representing 80% of global energy use and 80% of global CO_2 emissions, as well as among the global community, regarding the status of the IEA and, in particular, regarding the most important principles of the NZE scenario. Without additional reasoning, which is lacking, it is not clear for what reason the NZE scenario does not satisfy the criterion mentioned in ground of appeal 3.5 and/or the Common Ground method. In any event, in light of those assertions, without additional reasoning, which is lacking, it is not clear why the NZE scenario would not satisfy the criterion of (a) climate science consensus to which the Court attributes particular importance in para. 7.67. The assertions of Milieudefensie et al. point out, after all, that the member states and countries that represent 80% of global energy use and 80% of global CO_2 emissions, as well as the global community, via the IEA – an international organisation – share the most important principles of the NZE scenario. In this light it is therefore difficult to see why the Court could not (at least) qualify the percentages from the NZE scenario as a (minimum) reduction percentage.

4.35. In addition, Milieudefensie et al. pointed out that according to the IEA itself, the NZE scenario is a normative scenario,[377] that the IEA takes account of the CBDR principle in the NZE scenario, which leads to a less rapid reduction of emissions from coal and a more rapid reduction in emissions from oil and gas,[378] that consequently according to the IEA there will be a less abrupt transition in countries not affiliated with the OECD, which countries represent more than 80% of global coal consumption,[379] with as a result that the

[371] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 90 to 92.
[372] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 92.
[373] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 92.
[374] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 95 and 97.
[375] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 96.
[376] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 51.
[377] Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 60 (footnote 67).
[378] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 23 to 25 (including footnote 14).
[379] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 23 to 25; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 56 to 59.

countries affiliated with the OECD will have to reduce their emissions in this critical decade almost twice as fast as countries not affiliated with the OECD,[380] that the IEA in its modelling takes account of "*real world feasibility*" for the sectors that use oil and gas,[381] to improve access to and affordability of energy,[382] and that the IEA in the NZE scenario brings together all its knowledge of the energy markets and of the global energy infrastructure and, in that respect, (inter alia) takes account of policy developments, the use of technology, investments, supply chains, infrastructure, innovation and costs, as well as of the various circumstances of individual countries and regions.[383] It follows from those assertions that the NZE scenario also takes account of the CBDR principle that is relevant for determining a reduction percentage that applies to Shell. In this light too it is not clear, without additional reasoning, which is lacking, why the NZE scenario does not receive more weight than the Court has attributed to it.

C. The criticism of the Hawkes' report was not assessed

4.36. The Court's decision furthermore lacks sufficient reasoning, because Milieudefensie et al. has argued, and substantiated, that the Hawkes report (from December 2023), that the Court refers to in para. 7.91, in connection with the associated scientific flaws, cannot be attributed any significance when answering the question what reduction percentage must apply for a company like Shell.[384] Milieudefensie et al. argued in this respect that (i) Hawkes in his explanation of 17 March 2022 came to the conclusion that a reduction of 32% for oil and 18% for gas should take place in the oil and gas sector in 2030,[385] (ii) Hawkes makes a new selection of scenarios in the Hawkes report and arrives at a reduction of 5% for oil and 15% for gas in 2030,[386] (iii) the Hawkes report, according to a subsequent calculation by Prof. Rogelj and two fellow climate scientists is not correct according to the methodology provided by Hawkes, and the difference in outcome is substantial (the correct outcome with the methodology used would be: 26% for oil and 31% for gas in 2030 relative to 2020),[387] (iv) Hawkes responded to that subsequent calculation and then modified his methodology, which methodology according to Prof. Rogelj is plagued by scientific and logical weaknesses and is not supported by the sources to which Hawkes refers and on which he bases his approach,[388] (v) Hawkes, in particular, according to Prof. Rogelj, excludes the IAM models that lead to the biggest reduction in oil and gas, Hawkes is not transparent about this and even asserts that he has chosen a conservative approach,[389] (vi) Hawkes in reality is not transparent and has chosen his IAM models very selectively in a scientifically incorrect and possibly even misleading manner,[390] (vii) the foregoing applies

[380] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 23 to 25.
[381] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 77.
[382] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 18 (including citation).
[383] Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, para. 26.
[384] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 44.
[385] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 22.
[386] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 23.
[387] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 24 to 28.
[388] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 29 to 31.
[389] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 32 to 35.
[390] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 36.

all the more because in the Hawkes report, in his two other calculations, Hawkes only chose the C1a scenarios and excluded the C1b scenarios, which foreseeably leads to lower reductions in oil and gas, as Prof. Rogelj explained[391] and (viii) Hawkes is the director of the Sustainable Gas Institute, an institute that was founded together with the gas industry and for which Shell is in fact the co-founder and most important financier.[392] In light of these assertions it is not clear, without additional reasoning, which is lacking, why the Court, when assessing the question what reduction percentage should apply for Shell, attributes equal weight to the reduction percentages presented by Hawkes as it does to (the) other sources (submitted by the parties and/or mentioned by the Court). In any event, the Court's decision lacks sufficient reasoning, because the Court, in light of these assertions, should have presented reasoning as to why, when answering that question, the Hawkes report should nevertheless be attributed significance.

4.37. In any event, the Court's decision in para. 7.90 does not form an adequate response, because the Court only considered in that paragraph that in the representation of the picture painted by the figures back calculated by Milieudefensie et al. in Oral Arguments in appeal (Part 4) of 4 April 2024 to base year 2019, emphatically did not take account of the criticism expressed *by Shell* in this respect. As evidenced by that consideration, the Court had not yet taken account of the criticism of Milieudefensie et al. of the findings in the Hawkes report. On the contrary, the consideration underscores that the Court did not weigh or assess Milieudefensie et al.'s criticism.

[391] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 39 to 42.
[392] Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, para. 38.

D. The distinction in production and emissions reduction figures is in fact in Shell's favour

4.38. In para. 7.91 the Court deems it relevant that the sources represented in paras. 7.83 to 7.90 in part relate to the production of oil and gas and in part to the emissions from burning oil and gas. For that reason the Court does not deem these sources to be directly comparable.

4.39. This consideration cannot contribute in a comprehensible manner to the decision that no (minimum) reduction percentage can be determined for Shell. Milieudefensie et al. initially, with reference to the Tyndall report, argues that the distinction between the reduction percentages for production and emissions is not relevant, because on balance global production is equal to the decrease in global consumption.[393] At a later stage of the proceedings Milieudefensie et al. then explained in further detail that and why the decrease in production is even slower than the decrease in the emissions figures, so that an order to reduce emissions based on production reduction figures is in fact conservative and to Shell's benefit.[394] By way of illustration, Milieudefensie et al. referred to the earlier NZE scenario (from 2021), in which a production reduction in oil of 28% is associated with an emissions reduction of 35%.[395] In this light it is not clear, without additional reasoning, why the fact that the figures in part relate to production and in part to emissions, can contribute to the decision that no reduction percentage can be determined for Shell. After all, Milieudefensie et al. does not believe this distinction to be truly relevant. Indeed, that distinction would, if in addition to the emissions reduction figures significance were to be (partly) attributed to the production reduction figures, according to Milieudefensie et al.'s assertions this could only be to Shell's benefit, so that this cannot form a reason not to determine a (minimum) reduction percentage. Without going into that argument, the Court's opinion lacks sufficient comprehensible reasoning.

E. Use of IAM models only leads to a reduction percentage that is too low

4.40. The Court considers in para. 7.82 that it has taken into consideration that the parties and their experts each questioned the value of the IAM models to determine a sectoral reduction obligation. In para. 7.93 the Court then holds that it has taken into consideration that each of the parties questioned the value of the IAM models on which the figures are (partly) based and the IAM models are only of limited use according to Milieudefensie et al. According to the Court this demands significant restraint when it comes to elevating the figures based on those reports to a legal standard. The Court furthermore points out that Milieudefensie et al. argued that the figures based on the IAM models do not sufficiently take into account a fair distribution of the burden between countries (equity) and thus the CBDR principle, which may (conversely) lead to a more far-reaching standard to be determined by the Court. The Court does not concur. The Court does recognise that the

[393] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 556.
[394] Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 53.
[395] Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, footnote 61.

CBDR principle entails that rich, developed countries must follow a faster reduction pathway than developing countries and questions can therefore be asked regarding reduction pathways that prioritise the phase-out of coal. According to the Court, this can entail that the models do not take sufficient account of the coal-dependence of developing countries, so that the emissions due to coal would have to fall less rapidly than the models prescribe, but this does not make a reduction standard for oil and gas to be applied in these proceedings a given, according to the Court.

4.41. This finding of the Court lacks sufficient comprehensible reasoning. Milieudefensie et al. in fact made it clear that the IAM models are extremely important for calculating an emissions reduction pathway.[396] Its criticism of the IAM models in essence entailed that the IAM models lead to reduction percentages that are *too low* for Shell. Milieudefensie et al. pointed out in this respect – summarising the main points – that (i) IAM models are based on cost effectiveness, which entails that the models impose the greatest reduction burden on sectors and/or countries where the reduction can be realised the cheapest, and thus on coal use in developing countries, even though those countries cannot in reality realise those reductions and those reductions cannot be required of them,[397] (ii) IAM models, in part due to reliance on uncertain CDR technologies, (generally) shift the reduction task to the future as much as possible,[398] (iii) IAM models work with a discount rate that is too high, which in turn leads to future CDR technologies providing a large cost advantage in the model calculation, with the result that the IAM models make shifting to mitigation later in the century instead of in the shorter term (up to 2030) more attractive,[399] (iv) IAM models (generally) do not include (avoided) climate damage in their calculations which, as a result of taking climate measures too late, will increase further and there is a greater risk of passing tipping points with potentially irreversible consequences[400] and (v) IAM models for these reasons do not take account of (legal) principles such as the precautionary principle and the principle of intergenerational equity,[401] or the CBDR principle,[402] and consequently do not take account of a just and fair division of the reduction burden.[403] Taking account of these limitations of IAM models, Shell faces a reduction percentage of (at least) 45% in 2030.[404] This argument has also been presented (in more detail) in grounds of appeal 1.13, 1.17, 1.21, 3.10 under (i) to (iii), 3.11, 4.8 and 4.17, to which Milieudefensie et al. refers for

396 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 534.
397 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 1, 2 and 16; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 28, 30, 31, 33, 36 to 41, 113 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 534, 535 and 541.
398 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 54 to 58 (with further elaboration in paras. 59 to 87); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 787 to 792.
399 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 88 to 92 (with further elaboration in paras. 93 to 99) and 112 to 117.
400 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 93 and 112 to 116.
401 Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 57 to 59, 62, 78 t/m 80, 83, 93, 100 to 102 and 112 to 114.
402 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 1, 2 and 16; Milieudefensie et al.'s Oral Arguments on appeal (Part 3) of 4 April 2024, paras. 10, 28, 30, 31, 33, 39 to 41, 113 and 114; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 524 to 536.
403 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 539, 540 and 545.
404 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 56 to 59; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 544 to 546.

the sake of brevity. In light of that argument, without additional reasoning, which is lacking, it is not clear why the criticism expressed by Milieudefensie et al. (partly) led the Court to demonstrate significant restraint in relation to elevating the figures based on the IAM models to a reduction percentage for Shell. This criticism only entails, after all, that the reduction percentages calculated using the IAM models are *too low* and, taking account of (inter alia) the CBDR principle, should lead to a higher reduction percentage, respectively a reduction percentage of (at least) 45% in 2030.

4.42. The Court furthermore provided an incomprehensible interpretation of Milieudefensie et al.'s court documents, insofar as the Court held in para. 7.93 that Milieudefensie et al. asserted that *insofar as* ('if') the IAM models do not take account of the CBDR principle,[405] this provides grounds to assume a more comprehensive standard. According to the above-presented argument, Milieudefensie et al. asserted (in short) that the IAM models – (inter alia) because of their focus on cost effectiveness, as a result of which the reduction burden will to a considerable degree come to lie with coal-dependent developing countries that cannot support the modelled reduction of coal in reality – (generally) do not align with the CBDR principle, the IAM models therefore lead to reduction percentages that are too low for the oil and gas industry and the CBDR principle therefore in part provides grounds for determining a higher reduction percentage.

4.43. Insofar as the Court has attributed significance to Shell's criticism of the IAM models, said decision lacks sufficient reasoning, because the Court does not present any reasoning regarding what criticism of Shell the Court has in mind and for what reason it feels required to show restraint. Because the Court does not provide any clarity on that point, Milieudefensie et al. cannot check whether the Court paid attention, in a comprehensible manner, to the (possible) response that it had to that criticism. This underscores that the Court could have been expected to provide additional reasoning in this respect.

4.44. In addition, the Court's opinion in para. 7.93 also otherwise demonstrates an incorrect legal view. With its decision that the CBDR principle and, what that principle requires, does not lead to a reduction obligation for Shell to be applied in these proceedings, the Court fails to recognise that, in order to answer the question whether the CBDR principle plays a relevant role in determining what reduction percentage a company is bound by to prevent or limit dangerous climate change, it is not required that such principle, and what that principle demands, (directly) leads to a specific reduction percentage. The CBDR principle can also (partly) provide support for or contribute to determining a (minimum) reduction percentage, certainly together with other (legal) principles and sources of international law, soft law and widely supported scientific insights. The Court overlooks this.

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[405] The Court's verbatim consideration in para. 7.93 reads: *"Milieudefensie et al. have argued that if the figures based on those models do not sufficiently take into account a fair distribution of the burden between countries (equity) and thus the CBDR principle, a more far-reaching standard to be determined by the court of appeal may conversely result from that. The court of appeal does not concur with Milieudefensie et al. in this respect."*

4.45. In any event, the Court's decision lacks sufficient reasoning, because the considerations in para. 7.93 referred to above cannot explain in a comprehensible manner why the CBDR principle cannot play a relevant role in determining a reduction percentage by which Shell can be bound. The facts acknowledged by the Court itself that (i) it follows from the CBDR principle that rich, developed countries must go through a faster reduction pathway than the developing countries and (ii) the IAM models do not take enough account of the coal dependency of developing countries, so that the emissions by coal should decline less than the models prescribe, offers (at least) support for the conclusion that Shell can be bound by a reduction percentage that the models prescribe. After all, these facts support the view that the IAM models are based on lower reduction percentages for oil and gas than required by the CBDR principle, so that applying those models in a normative sense in any event will not lead to determining a reduction percentage that is too high. In any case, those facts provide relevant support for the conclusion that Shell can be bound by the *minimum* reduction percentage that can be determined on the basis of the benchmark referred to in ground of appeal 3.5, the Common Ground method or in any event the consensus requirement presented by the Court, so that the decision of the Court lacks sufficient reasoning in this respect.

F. Determining a reduction percentage is not the same as elevating it to a legal standard

4.46. The Court considers several times – in short – that the expert communications and submitted reports do not provide sufficient substance to elevate the reduction percentages referred to therein to a legal standard (paras. 7.92 and 7.93). With these considerations the Court overlooks the fact that to answer the question by what reduction percentage Shell is bound in order to perform its duty of care to prevent or limit dangerous climate change, the key question is not whether those reduction percentages can be elevated to a legal standard, but what (minimum) reduction percentage can be required of Shell, using the criterion stated in ground of appeal 3.5, the Common Ground method or in any event the consensus requirement presented by the Court. The issue is not about elevating those reduction percentages to a legal standard, but studying what reduction percentage Shell must comply with in this case and/or reviewing whether those reduction percentages satisfy the aforementioned benchmark. This also equally applies to the Court's decision that the fact referred to in para. 7.94 or the precautionary principle referred to in para. 7.95 cannot contribute to determining a legal standard, or in any event cannot justify such.

G. The precautionary principle is relevant for determining the reduction percentage

4.47. In para. 7.95 the Court considers that the precautionary principle does not justify any other conclusion and, therefore, cannot contribute to determining a legal standard for Shell. According to the Court, the precautionary principle entails that in cases of (scientific) uncertainty regarding the occurrence of specific consequences, it can be appropriate to intervene in a particular activity, so that the precautionary principle precludes non-intervention based on scientific uncertainty about the consequences of a specific action. The Court adds to this that this case does not concern uncertainty about the consequences of a particular action (CO_2 emissions), but uncertainty about a standard to be applied. The precautionary principle does not justify ignoring that uncertainty at the expense of a private party and nevertheless setting a legal standard for that private party, according to the Court.

4.48. This finding is incorrect, or lacks sufficient reasoning, for the reasons stated in grounds of appeal 1.11 to 1.15. These sections are directed against the aforementioned decision. Milieudefensie et al. refers to these sections for the sake of brevity. In any event, the Court wrongly did not go into Milieudefensie et al.'s assertions listed in ground of appeal 1.13 in the framework of the precautionary principle, so that the Court's decision lacks sufficient reasoning for the reasons stated in ground of appeal 1.14.

H. The Court does not follow the global average, because there are sectoral reduction pathways

4.49. In paras. 7.75, 7.78 and 7.81 the Court holds that the global average reduction percentage cannot be followed, (partly) because there are various reduction pathways for separate sectors. In light of those considerations, the Court could not then in a comprehensible manner, or in any event without additional reasoning, which is lacking, in the framework of the question whether on the basis of the sectoral reduction pathways for the oil and gas sector a reduction percentage could be determined for Shell, be of the opinion in paras. 7.91 to 7.96 (in short) that the sources mentioned by the Court in paras. 7.82 to 7.90 also do not provide sufficient grounds on which to base a reduction percentage for Shell. In paras. 7.75, 7.78 and 7.81 the Court in fact rejects adhering to the global average reduction percentage precisely because sectoral pathways have been developed. For the Court to then reject all sectoral pathways developed for the oil and gas sector cannot be reconciled with this.

4.50. The above in any event applies with regard to the NZE scenario. In para. 7.75 the Court specifically refers to the NZE scenario to support its decision that there are indications that sectoral pathways have been specified and that the global average reduction percentage of 45% in 2030 cannot be followed. In that light, without additional reasoning, which is lacking, it is incomprehensible, or in any event it is not clear, in supplementation of the above complaints directed against paras. 7.91 and 7.92 about the Court's decision relating to not following the NZE scenario (grounds of appeal 4.23 to 4.35) why the Court then

deems that same NZE scenario insufficient for deducing a reduction percentage for Shell. The existence of that sectoral reduction pathway was precisely (in part) the reason why the Court did not want to accept the global average reduction percentage.

4.51. In any event, in light of the Court's rejection of the global average reduction percentage (partly) because of the existence of sectoral reduction pathways, it is not clear, without additional reasoning, which is lacking, why the Court fails to determine what reduction percentage the sectoral reduction pathways in any event require as a minimum. Milieudefensie et al. elaborates on the imposing of a minimum reduction obligation in grounds of appeal 4.52 to 4.55.

I. Obligation to impose minimum reduction obligation (lower limit)

4.52. The Court furthermore fails to recognise that the duty of care to prevent or limit dangerous climate change in any event – (partly) in light of the right to an effective remedy as referred to in Article 13 ECHR and/or the right to effective protection as referred to in Articles 2 and/or 8 ECHR – entails that a company is bound by a reduction percentage that can be determined on the basis of the benchmark referred to in ground of appeal 3.5 or the Common Ground method, or in any event is bound by a reduction percentage that satisfies the consensus requirement presented by the Court. In other words, a company is in any event bound to perform the *minimum* reduction percentage, the lower limit, which can be determined on the basis of the criterion applicable for the determination thereof.

4.53. The Court's finding in any event lacks sufficient reasoning. The Court did not study in the considerations set out in ground of appeal 4.1, or in another section in its Judgment, what minimum reduction percentage is set for Shell by applying the benchmark referred to in ground of appeal 3.5 or the Common Ground method, or in any event with regard to what reduction percentage the consensus requirement set by the Court will be satisfied. The Court's considerations in any event do not make it clear by means of reasoning that is sufficiently comprehensible, that the Court carried out such an assessment of the matter and that and why the Court was unable to determine such a minimum percentage. The considerations of the Court cannot, in a comprehensible manner, support the decision that such a minimum percentage cannot be determined. After all, the Court only concludes – in short – that the reduction pathways presented by the parties differ on various points, the science and the parties' own criticism of and objection to various reduction pathways, that the reduction percentages referred to therein diverge and the percentages from the earlier NZE scenario (from 2021) and the NZE scenario vary, so that no reduction percentage can be deduced that can serve as a legal standard, the parties question the value of the IAM models, the CBDR principle does not provide a standard that the Court can apply in these proceedings and the precautionary principle does not justify another conclusion. It cannot follow from this that no minimum percentage at all can be determined by applying the criterion referred to in ground of appeal 3.5, the Common Ground method or the consensus requirement set by the Court, such as in the form of the lowest percentage that is mentioned in the relevant reduction pathways and sources. In reality, at no point did the Court review

what minimum percentage Shell in any event can be bound by on the basis of the criterion referred to in ground of appeal 3.5 or the Common Ground method, or in any event what minimum reduction percentage for Shell will satisfy the consensus requirement set by the Court.

4.54. The Court's decision furthermore lacks sufficient reasoning, because Milieudefensie et al. pointed out that emissions reductions are the sole effective remedy as referred to in Article 13 ECHR and/or form of effective protection referred to in Articles 2 and/or 8 ECHR to effectively protect against dangerous climate change, and that the court, on the basis of and/or in light of the legal grounds and (legal) principles existing in this respect (and with an eye on climate science) must and can determine what the minimum emissions reduction for Shell must be,[406] in particular because the court cannot offer any effective legal protection without imposing a reduction obligation.[407] In this light it is all the more clear that the Court should have studied what protection guaranteed by Articles 2, 8 and/or 13 ECHR can in any event be provided as a minimum by determining a minimum reduction percentage.

4.55. In any event, the Court's decision lacks sufficient comprehensible reasoning, because the figures of the Hawkes report recalculated by Milieudefensie et al. for the base year 2019 (represented in para. 7.90) show a lower limit of 28.5% for oil and 33.2% for gas. Without additional reasoning, it is not clear why at least these figures – which were, nota bene, calculated on the basis of the methodology of Shell's expert[408] – cannot serve as a minimum reduction percentage. Insofar as the Court holds that it could not even determine the recalculated figures of the Hawkes report to serve as a minimum, because Shell criticised that recalculation (para. 7.90), this is incomprehensible, because according to para. 7.90, when assessing this point, the Court did not take account of Shell's challenging of those figures. The Court should at least have assessed whether and to what degree that challenge holds water in light of the assertions and the recalculation of Milieudefensie et al. Without assessing the matter, the Court's finding lacks sufficient reasoning.

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406 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 340 to 348. See also Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 69 to 73.

407 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 301, 342, 344, 348 and 409. See also Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 69 to 73. See in this respect also ground of appeal 1.32.

408 Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 24 to 28. The recalculation carried out by Milieudefensie et al. concerns the emissions reduction figures for 2030 relative to 2020. A calculation back to those recalculated percentages relative to 2019 leads to the percentages referred to in the ground of appeal. See also Milieudefensie et al.'s Oral Arguments on appeal (Part 4) of 4 April 2024, paras. 51, 53 (including table) and 54.

5. Determining or estimating the reduction obligation on the basis of Article 3:296 DCC

5.1. In paras. 7.67 to 7.96 the Court in essence holds that it must be studied whether there is (a) consensus in climate science regarding a specific reduction standard applicable to a company like Shell (para. 7.67), after which the Court, after studying the expert communications and reports submitted by the parties (paras. 7.68 to 7.95), concludes that the available figures do not provide sufficient substance to compel Shell to reduce its CO_2 emissions in 2030 by a specific percentage, which leads to all claims of Milieudefensie et al. relating to Scope 3 having to be rejected (para. 7.96).

5.2. These considerations cannot be maintained, insofar as they are based on the findings of the Court challenged in the preceding grounds of appeal 1, 3 and 4. If (one of) the complaints referred to in said grounds of appeal (is) are held to be valid, this will result in these considerations having to be set aside as well. Aside from this, the Court's decision not to offer Milieudefensie et al. any remedy in the form of a reduction order for Shell, is in itself incorrect in various aspects, or lacks comprehensible reasoning.

5.3. The decision first of all evidences an incorrect legal view with regard to Article 3:296 DCC, because the Court fails to recognise that, in view of Shell's duty of care as determined by the Court, the Court was bound to award a concrete order to comply with that duty of care. After all, it has not been demonstrated – nor has the Court considered such – that any other conclusion follows from the law, the nature of the obligation or from any legal transaction. If the conditions for awarding an order that has been claimed have been satisfied, a court has no discretionary power to nevertheless reject that order. This entails that Milieudefensie et al. is entitled to having the Court impose preventative measures that align with the duty of care established by the Court.

5.4. Insofar as the Court believes that the reduction percentages claimed by Milieudefensie et al. are too far-reaching to be awarded, the Court fails to recognise that a less far-reaching option, that is encompassed in Milieudefensie et al.'s claims, could and should have been awarded. The Court should in that respect in any event have studied whether it could have awarded one of Milieudefensie et al.'s claims for a percentage that aligns with the duty of care established by the Court. In any event, the Court should have studied, including in the framework of Article 3:296 DCC, in alignment with the duty of care, whether, (partly) with an eye on the effective remedy and/or effective protection guaranteed by Articles 2, 8 and/or 13 ECHR, a reduction percentage can be determined that in any event can be awarded as a minimum percentage, because this in any event can be determined on the basis of the benchmark referred to in ground of appeal 3.5, the Common Ground method or in any event the consensus requirement presented by the Court. The Court did not carry out such a study.

5.5. Insofar as the Court believes that none of the reduction percentages mentioned by the parties can be awarded, the Court fails to recognise that pursuant to Article 3:296 DCC, to perform Shell's duty of care to prevent or limit dangerous climate change as determined

by the Court, the Court was bound to determine an adequate and effective remedy, whether or not after appointing an expert, by at least itself determining or estimating a reduction percentage that aligns with that duty of care. This applies in any event because the duty of care to limit Shell's CO_2 emissions established by the Court (in part) is intended to prevent or limit (additional) damage for citizens. In para. 7.25 the Court speaks of climate change that can be life threatening, that can have a profound and negative impact on humans and animals and damages and will continue to damage the rights protected by Articles 2 and 8 ECHR. In this respect there is no relevant normative difference with the obligation of a court that has established an obligation to pay damages, but believes that such damages cannot be precisely determined. That court may not, in such case, reject the claim for damages in its entirety, but must estimate those damages on the basis of Article 6:97 DCC. By extension, a court that has determined a legal obligation on the basis of Article 3:296 DCC to prevent or limit damage, cannot reject the claim for an order enforcing performance of said obligation in its entirety, but will itself, whether or not after appointing an expert, have to determine an appropriate and effective measure based on an estimate. When determining in what degree Shell must reduce its CO_2 emissions in order to perform the duty of care to prevent or limit dangerous climate change to which it is subject, the aforementioned obligation of the Court is no different. The Court will have to determine on the basis of an estimate – whether or not with the assistance of an expert appointed by the Court – in what degree Shell may be required to reduce its CO_2 emissions. The claims of Milieudefensie et al. that seek a percentage reduction offer plenty of scope for such a determination.

5.6. Or in any event, the Court's decision not to order a percentage-based reduction is incomprehensible, as it cannot be reconciled with the Court's earlier considerations in the Judgment. The Court determined (i) that companies like Shell, that significantly contribute to the climate problem and have it in their power to make a contribution to combatting the climate problem, are *subject to an obligation to limit CO_2 emissions* in order to counter dangerous climate change (para. 7.27), (ii) that more can be expected of Shell than of most other companies, as for more than a hundred years Shell has been an important player in the fossil fuel market and it now holds a prominent position on that market (para. 7.55), (iii) that companies have a duty of care *to reduce their emissions* (para. 7.57), (iv) that Shell is subject to obligations *to reduce its Scope 3 emissions* (para. 7.111), (v) that companies like Shell, to perform their duty of care to prevent or limit dangerous climate change, must make an appropriate contribution to the climate goals of the Paris Agreement (para. 7.67) and (vi) that in order to keep the climate goals of the Paris Agreement within reach, *emissions must be drastically reduced by 2030* (para. 7.61). This alone entails that Shell can only perform its duty of care, according to the Court, by reducing Shell's CO_2 emissions. In light of the obligations geared to reducing emissions, pursuant to Article 3:296 DCC, (partly) with an eye on the effective remedy and/or effective protection guaranteed by Articles 2, 8 and/or 13 ECHR, the Court is obliged to determine what (percentage) emissions reduction Shell is (at least) obliged to effect.

5.7. Insofar as the Court takes as the starting point that the duty of care to prevent or limit dangerous climate change, in connection with the fact that the NZE scenario is not stable and/or subject to change, would lead to determining a variable reduction percentage and that this is not possible, the Court's decision is incorrect. After all, Article 3:296(1) DCC offers sufficient scope for such. In any event, the Court overlooks the fact that pursuant to Article 3:296(2) DCC it could (and should) have attached conditions to that reduction percentage. Article 3:296(2) DCC offers the possibility of imposing an order subject to a condition by which a party is bound. Such a condition can also include a variable reduction percentage.

6. Sufficient interest and effectiveness of reduction obligation

6.1. In paras. 7.97 to 7.110 (in particular in paras. 7.101, 7.102 and 7.106 to 7.110) the Court holds – summarised and insofar as relevant in the appeal to the Supreme Court – that Milieudefensie et al. does not have sufficient interest as referred to in Article 3:303 DCC in its legal action that Shell be ordered to limit its Scope 3 emissions by 45% (or 35 or 25%) by 2030. In essence, the Court – after a representation of the parties' positions in paras. 7.97, 7.98, 7.100 and 7.103 to 7.105 – in essence presents the following as the basis for this:

(i) It follows from the District Court Judgment that Shell has the freedom to itself determine the manner in which it will comply with the obligation imposed by the district court. Milieudefensie et al. did not present a ground of appeal against this decision. The Court must therefore assume that Shell could choose to comply with the obligation imposed by the district court by limiting the sale of fossil fuels of third parties to end users. This raises the question whether this serves the interest that Milieudefensie et al. seeks to protect in these proceedings (para. 7.101);

(ii) It ensues from Article 3:303 DCC that there must be a sufficient interest in a legal action. Whether there is sufficient interest can be assessed by making a comparison between the situation in which an order is made and the situation in which no order is made. If there is no relevant difference between the two situations, in such sense that awarding the claim will in essence not benefit the claimant, the required interest in the legal action is lacking. Geared to Milieudefensie et al.'s claims, this means that Milieudefensie et al. has no interest in a court order that Shell limit its Scope 3 emissions by 45% (or 35% or 25%) by the end of 2030, if such an order can be implemented in a manner that cannot contribute to the interest that Milieudefensie et al. is seeking to protect: the protection of the citizens of the Netherlands and the citizens of the Wadden Sea reason against dangerous climate change as a result of CO_2 emissions (para. 7.102);

(iii) The district court rejected Shell's assertion that an obligation to limit its Scope 3 emissions by a specific percentage would not be effective on the basis of the consideration that every reduction of greenhouse gas emissions will have a positive

effect on countering climate change (para. 4.4.49 of the District Court Judgment). This consideration is in itself correct and also aligns with what the Dutch Supreme Court considered in the *Urgenda* case (paras. 5.7.7 and 5.7.8). This does not mean to say, however, that a reduction obligation imposed on a specific company will have such a positive effect, certainly not if this reduction obligation can also be realised by selling fewer fossil fuels. In such case the specific company will only disappear from the value chain and the (already produced) fossil fuels will reach the end user via a different broker. There may be a causal relationship between placing a limit on production and reducing emissions, as the district court assumed (cf. para. 4.4.50 of the District Court Judgment), but Milieudefensie et al. has not presented sufficient arguments to assume that in this case there is (also) a causal relationship between placing a limit on sales and reducing emissions (para. 7.106);

(iv) Climate scientists Erickson and Green (**Erickson et al.**) do not explain in their report how a limit on sales of fossil fuels imposed on a specific company could lead to price increases for end users, which in turn could lead to a decrease in the demand for fossil fuels. The study cited by Erickson et al. does not show this, because it relates to the effects on the consumption of fossil fuels of a limit on production in a specific region (the territory of the US). A limit that extends to an entire region (certainly a region as big as the US) is of a significantly different order than a limit on sales that applies to a specific company. In addition, a limit on production is less easy for other market parties to take over than a limit on sales (para. 7.107);

(v) Milieudefensie et al.'s arguments regarding the added value of Shell's trading house, Shell Trading, misses the mark because the reduction order made by the district court does not oblige Shell to phase out Shell Trading's activities. Shell could reduce its sale of fossil fuels, while Shell Trading could continue to offer its services to the market. A party that would sell fossil fuels instead of Shell, does not itself have to possess the logistics and financial capacities of Shell Trading. If necessary, this party can purchase these services from Shell Trading or other service providers. That is why the example of Enron, a large commodities trader (**Enron**), cannot be set aside by pointing out the differences between Enron and Shell Trading. In any event, the comparison between Enron and Shell Trading with regard to the earnings per traded barrel of oil fails, because the amount of USD 86 mentioned for Shell Trading covers not only the costs of Shell Trading, but also the total exploration and production costs of Shell (para. 7.108);

(vi) A possible signalling function of a reduction order for other fossil investors is too speculative and is too far removed from Shell's alleged wrongful conduct to serve as an interest in the reduction order (para. 7.109); and

(vii) The conclusion of the above is that Shell can perform the obligation of reducing its Scope 3 emissions by a specific percentage by limiting the resale of fossil fuels that Shell has purchased from third parties. It has not been established in this case that

a reduction of the resale activities of Shell Trading will lead to a reduction in CO_2 emissions. Because this is precisely what Milieudefensie et al. wants to achieve with the reduction order it is seeking, the conclusion is that such an order is not effective with regard to Scope 3 emissions and Milieudefensie et al. therefore has no interest in its claim (para. 7110).

A. Incorrect legal view with regard to the required interest of Article 3:303 DCC

6.2. In the aforementioned decision, in particular in para. 7.102 and expanding on said paragraph, in paras. 7.106 to 7.108 and 7.110, the Court fails to recognise that the question whether there is sufficient interest as referred to in Article 3:303 DCC in the order that is sought, cannot be answered by making a comparison between the situation in which an order is awarded and the situation in which an order is not awarded, as a result of which the interest as referred to in Article 3:303 DCC is lacking if the awarding of the order does not actually provide the claimant with any benefit. This not the correct criterion. This criterion is not intended to determine whether a party has a sufficient interest in its claim as referred to in Article 3:303 DCC.

6.3. In addition, the Court fails to recognise the fact that a court order *might be implemented* in some manner that will not contribute to the interest that a party is seeking to protect in the proceedings, (in itself) does not entail that such party does not have an interest as referred to in Article 3:303 DCC in its claim to impose that order. Or in any event the Court fails to recognise that an interest in an order as referred to in Article 3:303 DCC is only lacking if it has been established that the order will not have any effect. The Court in any event overlooks the fact that it can be assumed with regard to an order that is being sought, that the claimant already has sufficient interest in such, if the order can contribute to preventing or limiting the asserted threatened impact on the interest, which aligns with the basic principle that there is sufficient interest as referred to in Article 3:303 DCC if there is a threatened breach of a legal obligation. The issue is therefore not whether the order can be implemented in a manner that does not lead to protecting the interest the claimant wishes to protect, but (on the contrary) whether there is a threatened breach of a legal obligation and the order can be implemented in a manner that <u>can</u> contribute to preventing or limiting the interests that the claimant seeks to protect. The assumption that one possible implementation modality out of a number of different conceivable implementation modalities of an order will not be effective, does not nullify the interest in that order.

6.4. Or in any event, the Court fails to recognise that the fact an order *can be implemented* in a manner that will not contribute to the interest that a party in the lawsuit seeks to protect, does not as such entail that the comparison of the situation in which the order is awarded and the situation in which the order is not awarded, will result in the claim not actually providing the claimant with any benefit. The fact that an order *can be implemented* in a specific manner that will not lead to any benefit for the interest that the claimant seeks to protect, does not mean that the defendant *will implement* the order in (only) that manner. The situation in which the order is awarded and the situation in which the order is not

awarded can therefore differ in favour of the interests of the claimant. For this reason, the Court's decision in any event lacks sufficient comprehensible reasoning. After all, the fact that an order (in theory) can be executed in a specific manner that does not lead to a benefit for the claimant, does not entail that the comparison between the situation in which an order is made and the situation in which it is not, will result in the claimant not being provided with any benefit in this respect.

6.5. In any event, the Court overlooks the fact that, when asking whether a party has sufficient interest as referred to in Article 3:303 DCC, how others (might) act if the defendant complies with the order is not relevant. In the framework of Article 3:303 DCC, the only focal point is the (relative) question whether in the relationship between the claimant and the defendant, there is a threatened breach of a legal obligation and whether compliance with the order by the defendant can lead to protecting the interests that the claimant seeks to protect. The conduct of others is not relevant in this respect. The Court therefore wrongly attaches significance to the fact that the reduction obligation, in its opinion, can also be performed by Shell by selling fewer fossil fuels, so that the specific company disappears from the value chain and (already produced) fossil fuels reach the end user via another broker. In the framework of its review against Article 3:303 DCC, the Court wrongly deems it relevant that others (other brokers) will, in the Court's opinion, take over those sales activities.

B. Imposing a reduction order on a company is effective

6.6. The Court furthermore considers in para. 7.106 – in short – that the fact that every reduction of greenhouse gas emissions has a positive effect on countering climate change, does not mean to say that a reduction obligation that is imposed on an individual company will also have a similar positive effect, certainly not if the reduction obligation can also be realised by selling fewer fossil fuels.

6.7. The Court assumes an incorrect legal view, or in any event has not presented sufficient comprehensible reasoning for its decision, as said decision entails that imposing a reduction order on an individual company, or in any event on Shell, cannot lead to a reduction of greenhouse gas emissions and consequently to countering dangerous climate change, in any event if that obligation can be performed by reducing the sale of fossil fuels. Milieudefensie et al. will elaborate on this in the following grounds of appeal.

6.8. First, the fact that an individual company reduces CO_2 emissions can lead to a reduction of those emissions and consequently have a positive effect on climate change. After all, this leads, or can in any event lead, to fewer CO_2 emissions in the atmosphere, while precisely the emission of CO_2 into the atmosphere leads to climate change, as the Court itself takes as the starting point in paras. 3.3 and 3.4. In addition, the CO_2 emissions into the atmosphere are, at least in a degree relevant for the occurrence of dangerous climate change, determined by the Scope 1, 2 and 3 emissions of all individual companies together (see also paras. 3.3 to 3.5), so that the reduction by one of them will or can have a positive effect on countering climate change. That a reduction order imposed on one company can

have such a positive effect, applies all the more because (i) the Court itself determined in para. 7.27 that companies like Shell make an important contribution to the climate problem and it is within their power to contribute to countering the climate problem, (ii) the Court deems it relevant in para. 7.53 that governments too have emphasised that companies also have their own task in reducing their emissions, (iii) the Court takes as the starting point in para. 7.57 that companies other than Shell also have a duty of care to start reducing CO_2 emissions, (iv) the Court determines in para. 7.59 that the use of fossil fuels is imposed by the supply side of the market and this can severely delay the energy transition and (v) the Court itself considers in paras. 7.59 and 7.61 that the societal standard of care demands that fossil fuel producers take account, when investing in the production of fossil fuels, of the negative consequences that a further expansion of the supply of fossil fuels has for the energy transition, (in part) because of the infrastructure, institutional and behaviour-based carbon lock-in effect that ensues from investments in the exploration for, extraction, production, transport and distribution of fossil fuels. These considerations are based on the starting point that the reduction of CO_2 emissions by individual companies (with the result that investments in the fossil fuel value chain are limited and the carbon lock-in effect is reduced) can (and will) contribute to preventing or limiting dangerous climate change, while the consideration referred to under (iii) indicates that the reduction obligation not only applies to one company, but to all companies that on the basis of the duty of care are obliged to reduce CO_2 emissions in Scope 1, 2 and/or 3. A reduction order can be pronounced with regard to each of them individually, that individually and in any event jointly can lead to a positive effect on countering dangerous climate change. In addition, it follows from the considerations referred to under (iv) and (v) that all of this can lead to a positive effect on countering dangerous climate change, not only by the resulting reduction in CO_2 emissions, but also because the infrastructure, institutional and behaviour-based carbon lock-in effect that comes from investments in the exploration for, extraction, production, transport and distribution of fossil fuels will be decreased by the reduction order. After all, the reduction order can lead to a reduction of investments and consequently a reduction of this carbon lock-in effect. Even according to the considerations of the Court itself, the carbon lock-in effect impedes the energy transition, and therefore the climate approach. In short, a reduction order for a company can indeed contribute to preventing or limiting dangerous climate change. All of this aligns with the duty of care to prevent or limit dangerous climate change that was established by the Court.

6.9. In addition, the Court's decision lacks sufficient comprehensible reasoning, insofar as said decision entails that imposing a reduction order on Shell cannot lead to a reduction of greenhouse gas emissions and consequently to countering dangerous climate change, in any event if that obligation can be fulfilled by reducing the sale of fossil fuels. After all, the Court has established that (i) the use of fossil fuels is responsible to a significant degree in causing the climate problem, that the approach to climate change cannot be delayed and that everyone has a responsibility to counter the danger of climate change (para. 7.26), (ii) Shell is one of the biggest oil and gas companies in the world, 91% of its energy sales consist of oil and gas (para. 3.21) and (iii) that more can be expected of

Shell, in relation to its obligation to contribute to preventing dangerous climate change than can be expected of most other companies, because it has been an important player on the fossil fuel market for more than a hundred years and it holds a prominent position on this market (para. 7.55). This cannot be reconciled, in a comprehensible manner, with the claim that reducing the sale of fossil fuels by Shell will not or cannot (in some degree) lead to fewer CO_2 emissions into the atmosphere, while it is precisely the emission of CO_2 into the atmosphere that leads to climate change, as the Court itself takes as the starting point in paras. 3.3 and 3.4. At least some effectiveness (as a starting point) may be expected of placing a limit on the sales of one of the biggest oil and gas suppliers in the world, which supplier has precisely been made subject to the duty of care to prevent or limit dangerous climate change as established by the Court.

C. The order can be implemented in an effective manner and is an effective starting point

6.10. The Court's decision that the interest as referred to in Article 3:303 DCC when imposing a reduction order is lacking, because the reduction order cannot contribute to limiting CO_2 emissions, is furthermore incorrect, or lacks sufficient reasoning, because in para. 7.99 the Court itself takes as the starting point that (i) Shell has an influence on its Scope 3 emissions, (ii) instruments have been developed that can assist Shell in influencing the choices of its clients, like the ISO's Net Zero Guidelines and the ERI's 1.5°C Business Playbook, (iii) Shell itself has also formulated Scope 3 goals and (iv) Shell has a responsibility for its own actions with regard to Scope 3 emissions. It follows from these facts that Shell can implement an order relating to reducing Scope 3 emissions (in part) by exercising its influence on the demand side as a result of which the Scope 3 emissions in the atmosphere will fall. Because of the existence of that (partial) implementation modality of the claimed reduction order, it is a given that a reduction order for Shell relating to its Scope 3 emissions can actually have a positive effect on the CO_2 emissions into the atmosphere and consequently on preventing or limiting dangerous climate change.

6.11. The Court's decisions lacks correct or sufficient reasoning, because the OECD Guidelines (including according to the representation thereof in para. 7.22), the Net Zero Guidelines of the ISO, the 1.5°C Business Playbook of the ERI, the Race to Zero initiative, the UN Expert Report, the Oslo Principles on Global Climate Change, the Principles on Climate Obligations of Enterprises, the Oxford Report (including according to the representation thereof in para. 7.23) and the CSDDD (Article 22 and the preamble under 73; see also paras. 7.43 and 7.44) always assume the responsibility of individual companies to reduce CO_2 emissions in order to prevent or limit dangerous climate change. It follows from this that it must be assumed that such reduction obligations are effective or in any event could be effective. In addition, the Court itself explicitly includes the aforementioned regulations according to paras. 7.22, 7.23, 7.43, 7.44 and 7.55 in its consideration. This cannot be reconciled, in a comprehensible manner, with the Court's decision to the contrary, that a reduction obligation for an individual company will not (or might not) be effective.

6.12. In addition, the Court's decision lacks sufficient reasoning, because Milieudefensie et al. has always emphasised the crucial and internationally widely acknowledged importance and effect of non-state climate action to prevent dangerous climate change, from which it follows that emissions reductions in conformity with the goals of the Paris Agreement by non-state actors, including companies, are indispensable in order to limit global warming to 1.5°C. Milieudefensie et al. presented the following assertions in this respect:

(i) Within the context of the UN climate regime, the importance and effect of climate action by non-state actors, such as companies, has been emphasised since 2012, i.e. that the climate policies of companies that align with the Paris Agreement cause a very important flywheel effect.[409] The important role of non-state actors in preventing dangerous climate change is also acknowledged in the decision with the Paris Agreement.[410] If non-state actors make firm commitments and engage in ambitious climate action, this gives states the confidence to take faster and farther-reaching climate action. This more ambitious policy of states helps non-state actors in accelerating their own action to keep the 1.5°C target within reach. The interplay between state and non-state climate action is consequently the indispensable basis for positive transformation toward the 1.5°C target.[411]

(ii) The importance and effect of climate action by non-state actors in accordance with the Paris Agreement is also emphasised by UNEP, that has determined that countries need the scaling up of climate action of non-state actors to achieve the climate goals and that the potential of emissions reductions (the mitigation potential) to be achieved by non-state actors is very large.[412]

(iii) According to UNEP, the value of non-state climate action goes much further than merely the emissions reductions which the non-state actors manage to achieve themselves in this respect. In addition to the fact that non-state parties reduce their own emissions, they make it possible for states to tackle more ambitious goals themselves. When states know that others are sharing the load, it becomes easier to achieve their national goals and therefore also easier to show more ambition.[413]

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409 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 28 to 32; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 25, 26, 88, 127, 380, 495 and 854.

410 Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 139 and 140; Milieudefensie et al.'s Summons of 5 April 2019, para. 708.

411 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 30 to 32; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 76; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 380; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 26; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 138, 140 and 147.

412 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 74 to 76 (including citations); Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 141 to 145 (including citations).

413 Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, paras. 74 to 76 (including citations); Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 495; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 144 and 145 (including citations).

(iv) Every action in conformity with the Paris Agreement on the part of important non-state parties may thus be expected to produce a flywheel effect so that countries and other parties will be able to, will dare to and will show more climate ambition.[414]

(v) The need for non-state actors to make a contribution to the climate task, applies first and foremost to the biggest CO_2 emitters.[415] Shell's CO_2 footprint is very substantial: when Shell's emissions are compared to the emissions of states, worldwide there are only four states with a greater scope of emissions (China, the United States, India and Russia).[416]

6.13. In light of these assertions it is not clear why imposing a reduction order on Shell could not contribute to a limiting of the CO_2 emissions in the atmosphere. After all, it follows from these assertions that among the contracting parties of the Paris Agreement, as well as within the UN, there is agreement that the actions of non-state actors, like Shell, will, as a starting point, contribute to limiting or preventing dangerous climate change. This applies in particular because it follows from Milieudefensie et al.'s assertions that Shell has a very large CO_2 footprint, so that Shell is by definition a party that the contracting parties and the UN have in mind. The Court itself determines in para. 3.21 that Shell is one of the biggest oil and gas companies in the world and considers in para. 7.55 that more can be expected of Shell than of most other companies, as for more than a hundred years Shell has been an important player in the fossil fuel market and it now holds a prominent position on that market. When answering the question whether the reduction order is effective, viewed in this light, it could have at least been expected of the Court that it would pay attention to the aforementioned essential assertions presented by Milieudefensie et al. in relation to the issue of effectiveness and interest.

6.14. In addition, the Court's decision lacks sufficient reasoning. Milieudefensie et al. has asserted that the claimed reduction order will decrease the carbon lock-in effect, because the reduction order leads to a reduction of investments in the oil and gas infrastructure and therefore provides scope for further upscaling of sustainable energy.[417] The Court then considers in para. 7.59 that (i) a carbon lock-in effect can occur in the area of infrastructure, because exploration for, extraction, production, transport and distribution of fossil fuels require considerable initial investments that can no longer be reversed and can only be earned back by making use of the infrastructure, (ii) there are institutional and behaviour-based carbon lock-in effects, as institutions and users focus on the use of fossil fuels and

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[414] Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 30 and 31; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 380 and 495; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 103; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 26 and 27; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 136 to 147.

[415] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 26; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, paras. 21 and 22.

[416] Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 5; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 23; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 26 and 627.

[417] Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 118; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (138).

require effort to move away from fossil fuels, so that (iii) the use of fossil fuels forced on the market from the supply side can seriously delay the energy transition. In this light, without additional reasoning, which is lacking, it is not clear why the Court nevertheless holds that the reduction order could not contribute to limiting the emission of CO_2 into the atmosphere.

6.15. The Court's decision furthermore lacks sufficient reasoning, as Milieudefensie et al. has outlined several implementation modalities in the fact-finding instances, that could have an effect on CO_2 emissions into the atmosphere and, consequently, on preventing or limiting dangerous climate change. Milieudefensie et al. presented the following assertions in this respect:

(i) Shell determines the energy package of the Shell group and is in full control of the number of fossil fuels that the Shell group produces and trades, now and in the future.[418] Shell can reduce its CO_2 emissions by becoming a smaller oil and gas company.[419] In particular, Shell can implement the reduction order by ceasing its investments in new oil and gas fields.[420] Shell can still exploit the existing fields, which will run dry in due time due to continuing extraction, so that the CO_2 emissions from existing oil and gas fields will also decrease. This fits within the 1.5°C scenario and leads to a limit on production and thus the *de facto* reduction of CO_2 emissions into the atmosphere.[421]

(ii) Investments in fossil fuel infrastructure create a carbon lock-in effect – a point underlined by the IPCC as well[422], which forms a large obstacle for the energy transition and a large risk of an overshoot of the 1.5°C limit.[423] Making Shell subject to a reduction order will lead to fewer investments in oil and gas on the part of Shell, which will reduce the carbon lock-in effect of its investments.[424] This will also decrease Shell's inhibitory effect on the energy transition.[425] A change in investments by Shell will create more room for sustainable alternatives, both within Shell and on the energy market in general.[426] It follows, moreover, from Article 2 of

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418 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 122; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 243 to 248 and 628; Milieudefensie et al.'s Summons of 5 April 2019, para. 612.

419 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 3, 4, 261 and 878; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 83 and 89; Milieudefensie et al.'s Summons of 5 April 2019, para. 626.

420 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 595.

421 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 19 and 20; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 595.

422 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, paras. 15 to 18 (including citations).

423 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, para. 51; Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 2) of 2 April 2024, para. 12; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 634 and 660; Milieudefensie et al.'s Summons of 5 April 2019, paras. 788 to 791.

424 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 118; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (138).

425 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 118; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 817; Milieudefensie et al.'s Summons of 5 April 2019, para. 617.

426 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 118; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (130); Milieudefensie et al.'s Notes on Oral Arguments 9 at first instance of 17 December 2020, paras. 3 to 5.

the Paris Agreement that a change in investments is the ultimate instrument to achieve the emissions reductions that are necessary to counter dangerous climate change.[427]

(iii) The sale of fossil fuel assets to comply with the order will generate proceeds that Shell can invest in the growth of its sustainable energy branch, so that global emissions will fall, because Shell will be increasing the supply of sustainable energy and the price thereof will fall accordingly.[428]

(iv) Petrol stations can be transformed into charging stations, which can have positive climate effects.[429]

6.16. In light of the implementation modalities presented by Milieudefensie et al., without additional reasoning, which is lacking, it is not clear why Shell would not be able to implement the order in a manner that does contribute to the reduction of CO_2 emissions into the atmosphere.

6.17. The Court's decision also lacks sufficient comprehensible reasoning because Milieudefensie et al. has argued that it is not logical that Shell would choose to apply the reduction order only to its trading arm – and therefore only at the expense of the sale of oil and gas of third-party producers – and not also partly apply it to its own production, as its trading arm would in such case have to be considerably reduced, even though this is an enormously profitable part of the Shell group.[430] Milieudefensie et al. furthermore pointed out that Shell, when choosing how it would implement the reduction order, will also take account of other important factors, like its licence to operate with regard to employees, shareholders, politics and the public at large.[431] In light of those assertions, without additional reasoning, which is lacking, it is not clear why the Court assumes that Shell will not implement the reduction order (at least in part) by limiting is own production.

D. No obligation to adhere to the duty of care established by the district court

6.18. The Court holds in para. 7.101 that – when assessing Shell's defence as represented in para. 7.100, and consequently when answering the question whether Milieudefensie et al. has sufficient interest as referred to in Article 3:303 DCC in the reduction order relating to Shell's Scope 3 emissions that is being sought – the Court is bound by the decision of the district court, which was not challenged in appeal, that Shell is free to itself determine in what manner it will comply with the duty of care that was established by the district court.

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427 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 35 under (132) and (133); Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, paras. 50 and 51; Milieudefensie et al.'s Notes on Oral Arguments 5 at first instance of 3 December 2020, paras. 42 to 44 and 89.

428 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 49.

429 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 47 and 48.

430 Court record of oral arguments on appeal of 2, 3, 4 and 12 April 2024, p. 35, last paragraph and p. 36, first 9 lines: "*it does not seem logical to purely apply the reduction order to production or the trading arm. (…) Applying it only to the trading arm means that almost nothing will be left of the trading arm, even though this is in fact an enormously profitable part of the company.*"

431 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 11.

The Court must therefore assume that Shell could choose to comply with the obligation imposed by the district court by limiting the sale of fossil fuels of third parties to end users. With that freedom to choose, the Court is apparently referring to the district court's decision in para. 4.1.4 of the District Court Judgment that it is up to Shell how it will realise the reduction obligation and/or to para. 4.4.54 of the District Court Judgment, in which it considers that Shell is entirely free to perform the reduction obligation according to its own insight, Shell is entirely free to realise the policy of the Shell group fully according to its own insight and a 'worldwide' reduction obligation, that concerns the policy of the entire Shell group, gives Shell far more freedom to act than a reduction obligation that is limited to a specific territory or business unit/units and/or para. 4.4.55 of the District Court Judgment, in which the district court holds that it is up to Shell to give substance to the reduction obligation. In paras. 7.102 to 7.110 the Court then, in short, arrives at the decision that Shell may perform the obligation imposed by the district court in the, according to the Court, ineffective manner described in those considerations.

6.19. The Court fails to recognise that the fact that Milieudefensie et al. did not challenge the aforementioned decision of the district court as such, is not relevant when answering the question whether Milieudefensie et al. has sufficient interest as referred to in Article 3:303 DCC in its claim to enforce fulfilment of the duty of care to which Shell is subject. After all, the Court itself establishes the duty of care to which Shell is subject in paras. 7.1 to 7.57 and 7.67. When assessing the question whether Milieudefensie et al. has sufficient interest as referred to in Article 3:303 DCC that a reduction order to fulfil the *duty of care established by the Court,* the Court is not bound by the considerations of the district court regarding the manner in which the *duty of care established by the district court* can be fulfilled. After all, those considerations concern a different duty of care, i.e. the duty of care established by the district court, and not the duty of care established by the Court of Appeal.

6.20. In any event, the Court wrongly assumes that not challenging the aforementioned decision of the district court entails that in the appeal the Court must take as the starting point that Shell may perform the *duty of care for Shell established by the Court* relating to the reduction of Scope 3 emissions in any way, including by limiting the sale of fossil fuels of third parties to end users, even if this were not to lead to limiting CO_2 reductions in the atmosphere. The consideration of the district court regarding the duty of care established by the district court, after all, has no effect on the content of the duty of care established by the Court.

6.21. The Court particularly overlooks the fact that the obligation relating to not challenging the aforementioned decision of the district court at most extends to what is required under the duty of care determined by the district court. The Court nevertheless independently establishes in paras. 7.1 to 7.57 and 7.67 a duty of care to which Shell is subject that – in short – entails that Shell must make an appropriate contribution to the climate goals of the Paris Agreement (para. 7.67). This obligation furthermore entails that Shell must limit its CO_2 emissions in order to counter climate change. This means that Shell has its own

responsibility in achieving the targets of the Paris Agreement (para. 7.27). The Court should therefore, in the framework of the question whether Milieudefensie et al. has sufficient interest in its claim for an order as referred to in Article 3:303 DCC, have considered whether the duty of care established by the Court itself entails that the appropriate contribution can always be made in a manner to be determined by Shell itself and (in part) can be made in a manner that would not contribute to an actual reduction of CO_2 emissions into the atmosphere.

6.22. In any event, the Court's decision is incomprehensible or lacks sufficient reasoning, because the duty of care to which Shell is subject and which was established by the Court, (partly) entails that the only measures that may and must be taken are measures that are effective and not illusory and therefore (can) *de facto* contribute to reducing CO_2 emissions into the atmosphere. The duty of care established by the Court stands in the way of fulfilling said duty in such manner that it can be fulfilled in a manner that contributes to the reduction of CO_2 emissions into the atmosphere. This follows, first of all, from paras. 7.27, 7.53, 7.57, 7.67 and 7.111, where the Court speaks of (i) Shell's obligation *to limit CO_2 emissions in order to counter dangerous climate change* (para. 7.27), (ii) the duty of care of individual companies *to reduce* their CO_2 emissions (para. 7.53), (iii) the societal standard of care of companies *to reduce* their emissions (para. 7.57), (iv) making an *appropriate contribution to the climate goals* of the Paris Agreement (para. 7.67) and (v) Shell's obligations *to reduce its Scope 3 emissions* (para. 7.111). This duty of care presupposes that measures must be taken that (can) actually – effectively – contribute to reducing the risk of dangerous climate change, as they must be geared to *countering* climate change, *reducing* the emissions and *must make a contribution* to the climate goals of the Paris Agreement. Because climate change can only be countered by reducing the CO_2 emissions in the atmosphere (see also paras. 3.3 and 3.4), this duty of care cannot be performed in a manner that cannot contribute to this. In addition, the Court bases the duty of care that was established as evidenced by paras. 7.9 an 7.25 (in part) on (the indirect effect of) Articles 2 and 8 ECHR and the ECtHR's decision in *Verein KlimaSeniorinnen Schweiz/Switzerland*, from which it follows that Article 8 ECHR demands "*effective protection"* against the effects of climate change, such as by "*quantifying national GHG emissions limitations through a carbon budget",* and offers guarantees that are *practical and effective* and not *theoretical or illusionary*."[432] This too shows that the standard established by the Court entails that the CO_2 reduction must take place in an effective – and non-illusory – manner and therefore in a manner that can actually contribute to preventing or limiting dangerous climate change. This cannot be reconciled with the fact that Shell might perform its duty of care in a manner that does not effectively lead to a reduction of CO_2 emissions into the atmosphere. This particularly applies because the Court furthermore (partly) derives the duty of care from the UNGP that Shell supports (paras. 7.20 and 7.55) and the OECD Guidelines (paras. 7.21, 7.22 that 7.55), which oblige companies to safeguard human rights. For that reason, the Court's decision therefore in any event contradicts itself and is therefore

[432] ECtHR, 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).

incomprehensible. The standard established by the Court prohibits an ineffective manner of performing the duty of care to which Shell is subject, while the Court precisely takes as the starting point in the considerations challenged by this ground of appeal (in particular paras. 7.101, 7.102, 7.106 to 7.108 and 7.110) that said duty of care permits an ineffective manner of performance.

6.23. Insofar as the Court holds in paras. 7.1 to 7.57 and 7.67 (and in particular in paras. 7.27, 7.57 and 7.67) that the *duty of care established by the Court* that requires that Shell reduce CO_2 emissions to prevent or limit dangerous climate change, can also be performed in a manner determined by Shell itself and (in part) can be performed in a manner that does not contribute to the reduction of CO_2 emissions into the atmosphere, this decision is incorrect. The Court fails to recognise that the duty of care to which Shell is subject to prevent or limit dangerous climate change, (partly) in light of Articles 2 and/or 8 ECHR (that have a horizontal effect via the duty of care) and the UNGP and OECD Guidelines that oblige compliance with human rights, requires that Shell must take (appropriate) effective – not theoretical or illusory – measures to prevent or limit dangerous climate change. This requires measures that contribute or in any event can contribute to the actual reduction of CO_2 emissions in the atmosphere. Performance of that obligation therefore cannot take place in a manner that cannot lead to an actual reduction of CO_2 emissions into the atmosphere, as such a measure is not effective to prevent or limit dangerous climate change and cannot contribute to achieving that goal.

E. Incorrect or insufficiently reasoned interpretation of the considerations and dictum of the district court

6.24. The Court furthermore fails to recognise in paras. 7.100 to 7.110, which decision is set out in summary in ground of appeal 6.18, that the question regarding the manner in which a judicial consideration and the dictum that (partly) follows from such consideration is to be understood, must be answered by reviewing the other considerations of the judgment in conjunction, in particular the considerations that led to the dictum. In this respect, significance must (partly) be attributed to the goal and the purport of the content of the dictum, as well as the reasonableness thereof.

6.25. In any event, the Court's decision lacks sufficient comprehensible reasoning, because the dictum of the District Court Judgment, as well as paras. 4.1.4, 4.4.54 and/or 4.4.55 of the District Court Judgment referred to above, cannot be interpreted, in a comprehensible manner, as leading to the conclusion that the district court intended that Shell may also perform its reduction obligation in a manner that does not materially contribute to the reduction of CO_2 emissions into the atmosphere, or in any event, in line with this position, to preventing or limiting dangerous climate change. After all, the district court presented the following considerations in the District Court Judgment with regard to the reduction obligation (insofar as relevant):

(i) Shell can be expected with regard to business relations, including end users, to take the necessary steps *to remove or prevent* the serious risks resulting from the CO_2 emissions generated by Shell and that it use its influence to limit any *lasting consequences as much as possible* (paras. 4.1.4, 4.4.24, 4.4.37, 4.4.39 and 4.4.55);

(ii) The reduction obligation partly finds its basis in the (indirect) horizontal effect of Articles 2 and 8 ECHR (paras. 4.4.2, 4.4.9 and 4.4.10);

(iii) The responsibility to protect human rights entails that Shell must refrain from breaching the human rights of others and that Shell must tackle adverse consequences in the area of human rights by *preventing, limiting and where necessary addressing* these consequences (para. 4.4.15);

(iv) The obligation to respect human rights according to the UNGP requires that companies must take efforts to *prevent or to limit adverse consequences for human rights* that are associated with their activities, products or services through their business contacts (para. 4.4.17);

(v) The issue is that *countering CO_2 emissions and global warming* cannot exclusively be realised by states, but there is also a role for others and that it is necessary that *those others contribute* to *reducing CO_2 emissions* (para. 4.4.26);

(vi) The goals of the Paris Agreement assume that the global *concentration of greenhouse gases* must be limited to the level of 450 ppm in 2100 and the target must be a *maximum greenhouse gas concentration* of 430 ppm (para. 4.4.27), while the current concentration of *greenhouse gases in the atmosphere* (401 ppm in 2018) means that the remaining carbon budget is limited and that, the longer it takes before *the necessary emissions reductions* are realised, the greater the total quantity of excluded greenhouse gases and the sooner *the remaining carbon budget* will be depleted (para. 4.4.28);

(vii) A consequence of the reduction obligation could also be that Shell does not make new investments in extracting fossil fuel resources and/or limits its production of fossil fuel resources (para. 4.4.39);

(viii) The obligations of states to provide the energy supply is separate from the obligation of states and companies like the Shell group to *bring the composition of the energy supply in accordance with the CO_2 reduction that is necessary to counter global warming* (para. 4.4.43);

(ix) Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Wadden Sea region, private companies such as Shell may also be required to take drastic measures and make financial sacrifices *to limit CO_2 emissions to counter dangerous climate change* (paras. 4.4.37, 4.4.53 and 4.4.54);

(x) There is broad international consensus that it is necessary that non-state actors contribute to emissions reductions and that companies *have their own responsibility to achieve the reduction goals* (para. 4.4.52);

(xi) The compelling common interest that is served by complying with the reduction obligation carries more weight than the adverse consequences Shell might face due to the reduction obligation and the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO_2 generating activities (para. 4.4.54);

(xii) The reduction obligation has significant consequences for Shell and the Shell group. The reduction obligation requires a change of policy, which will require *an adjustment of the Shell group's energy package* (see para. 4.4.25). This could curb the potential growth of the Shell group. However, the interest served by the reduction obligation outweighs the Shell group's commercial interests, which for their part are served by an uncurtailed preservation or even growth of these activities (para. 4.4.53); and

(xiii) Shell – taking account of the current obligations – is *free to decide* not to make new investments in explorations and fossil fuels, and to change the energy package offered by the Shell group (para. 4.4.25).

These considerations, inter alia, resulted in the dictum of the District Court Judgment which – summarised and insofar as relevant in appeal to the Supreme Court – under 5.3 entails that the district court is ordering Shell to limit the total annual volume of all CO_2 emissions *into the atmosphere* (Scope 1, 2 and 3) associated with the operating activities and sold energy-carrying products of the Shell group by 45% in 2030 relative to 2019.

6.26. No other conclusion can be drawn from the above-represented considerations and the dictum of the District Court Judgment than that the district court intended for Shell to perform the reduction obligation to which it is subject in a manner that actually contributes or can contribute to the reduction of CO_2 emissions into the atmosphere, to prevent or limit dangerous climate change, or in any event that the district court did not intend for the reduction obligation to be performed in a manner that will not lead to any reduction of CO_2 emissions into the atmosphere and thus will not contribute to preventing or limiting dangerous climate change. This applies all the more because Articles 2 and/or 8 ECHR, that the district court deems relevant in relation to the duty of care to which Shell is subject, demand *effective* – not theoretical or illusory – *protection* against breach of the rights guaranteed by said articles, including against dangerous climate change, and such effective protection is lacking if the reduction obligation is allowed to be performed in an ineffective manner.

6.27. In light of the considerations of the District Court Judgment represented in ground of appeal 6.25, and in light of the works of the dictum of the District Court Judgment, in paras. 4.1.4,

4.4.54, 4.4.55 and the dictum of the District Court Judgment, the district court in any event did not intend for Shell to also be free to comply with its duty of care and/or the dictum in a manner that does not or cannot lead to a limiting of the CO_2 emissions into the atmosphere. According to the aforementioned considerations, the district court sought to express that Shell, within the limits of its obligation to take measures that contribute to reducing CO_2 emissions into the atmosphere, is free to choose what concrete measures it will take in this respect. This appears from the considerations set out in ground of appeal 6.25, as well as from the text of the dictum of the District Court Judgment that, viewed individually and (at least) in conjunction, point to a reduction obligation that can actually lead to a limiting of CO_2 emissions into the atmosphere. The interpretation of paras. 4.1.4, 4.4.54 and/or 4.4.55 and the dictum of the District Court Judgment that the Court arrives at (and which it contradicts) is incomprehensible for that reason.

6.28. The Court furthermore fails to recognise that, when answering the question what a judicial consideration and the dictum (partly) following therefrom should be understood to mean, significance must (also) be attributed to the debate between the parties to which the consideration in question and the dictum (partly) ensuing therefrom forms a response. In any event, the Court's decision lacks sufficient comprehensible reasoning, because the considerations referred to in ground of appeal 6.18 as set out in paras. 4.1.4, 4.4.54 and 4.4.55 of the District Court Judgment apparently form a response to (i) Shell's assertion that the *Urgenda* case shows that (in that case) the State was allowed the freedom to itself choose in what manner it would implement the reduction order (after which Shell argued that this was preceded by political choices that Shell cannot make and the reduction obligation therefore cannot apply to Shell)[433] and (ii) the contrary argument of Milieudefensie et al., which entailed that the requested judgment only leads to a reference framework (a duty of care), the district court can determine what on the basis of the societal standard of care is to be deemed the lower limit and Shell is then free *within those frameworks* to act at its own discretion.[434] In light of those assertions, the district court apparently only wished to express that Shell, within the duty of care established by the district court, has the freedom to determine the manner in which it wishes to realise this duty. In that light, the district court's consideration cannot be interpreted, in a comprehensible manner, in such manner that Shell may implement the reduction obligation in a manner that by definition does not or cannot lead to any reduction of CO_2 emissions into the atmosphere.

6.29. In any event, the Court's interpretation of the District Court Judgment in paras. 7.101 et seq. – that Shell can implement the reduction order in a manner that does not lead to a *de facto* reduction of CO_2 emissions into the atmosphere – lacks sufficient comprehensible reasoning in light of Milieudefensie et al.'s substantiated argument that the district court's order entails that Shell is obliged to reduce its CO_2 emissions in a manner that makes or

[433] Shell's Notes on Oral Arguments 1 at first instance of 1 December 2020, para. 19; Shell's Statement of Defence of 13 November 2019, paras. 408 to 413.

[434] Milieudefensie et al.'s Notes on Oral Arguments 6 at first instance of 15 December 2020, paras. 110 to 112; Milieudefensie et al.'s Notes on Oral Arguments 3 at first instance of 3 December 2020, para. 100.

can make an *actual* contribution to limiting CO_2 emissions *into the atmosphere*, or in any event does not permit a manner of implementation that cannot lead to such a contribution.[435] Milieudefensie et al. referred to the following in this respect:

(i) The assertion from the Expert Report of Richard Druce from NERA Economic Consulting of 15 December 2023 (the **Druce report**) that Shell (by selling its oil and gas assets) can single-handedly ensure that the District Court Judgment will be ineffective in combatting climate change, overlooks the fact that the district court's order must be understood in light of the legal considerations preceding the order. In light of those considerations, it is evident that the court order does not stand alone, but that its goal is to have Shell contribute to countering dangerous climate change.[436] Shell's actions will have to be in accordance with the goal of the order as such appears from the legal considerations of the District Court Judgment. It will have to act in such manner that the 45% reduction to be achieved by it results in the full climate gains that Shell can attribute to it.[437]

(ii) The duty of care established in the District Court Judgment and the considerations that led to the dictum make it clear that Shell must endeavour to actually help to prevent dangerous climate change. The method for performing the order proposed in the Druce report overlooks this.[438]

(iii) According to the other considerations of para. 4.4.54 (every emission contributes to dangerous climate change, this justifies a reduction obligation, the significant general interest is served by a reduction obligation, private companies may be required, due to the large and real dangers for human rights, to take substantial measures and make financial sacrifices to counter CO_2 emissions and dangerous climate change), the District Court Judgment entails that Shell has a duty of care to contribute to actually prevent dangerous climate change and use its control and influence to ensure that there is an actual 45% reduction of CO_2 emissions into the atmosphere. Shell may determine itself where in the world it reduces its CO_2 emissions and within what business units.[439]

(iv) Shell can be required to take *effective* mitigation and precautionary measures. This means: measures that are effective in (inter alia) helping to counter climate change.[440]

(v) To clarify this, Milieudefensie et al. even explicitly amended the relief sought at first instance by brief of 15 October 2020, so that the relief sought also indicates that

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435 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 4 and 7; Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 137.
436 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, paras. 136 and 137.
437 Milieudefensie et al.'s Oral Arguments on appeal (Part 1) of 4 April 2024, para. 138.
438 Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 8 to 10.
439 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 105 to 112.
440 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 10; Milieudefensie et al.'s Summons of 5 April 2019, paras. 41 and 637.

Shell is being asked to limit the CO_2 emissions into the atmosphere or to bring about that they are limited.[441] With this addition, Milieudefensie et al. explicitly wishes to express that Shell must use its control and influence in such way that it ensures that fewer CO_2 emissions are actually emitted into the atmosphere. This is how this ended up in the dictum of the District Court Judgment.[442]

(vi) With the dictum of the District Court Judgment, the district court also intended for Shell to use its control and influence in such way that it would ensure that fewer CO_2 emissions are actually emitted into the atmosphere. This ensues from (inter alia) the considerations of the district court that entail:[443]

(a) That tackling dangerous climate change needs immediate attention. Given the current concentration of greenhouse gases in the atmosphere (401 ppm in 2018), the remaining carbon budget is limited (para. 4.4.28);[444]

(b) That Shell must immediately reduce CO_2 emissions in light of that limited carbon budget. After all, each reduction means that there is more room in the carbon budget. Shall can effectuate a CO_2 reduction by changing its energy package. This all justifies a reduction obligation concerning the policy formation by Shell for the entire, globally operating Shell group (para. 4.4.54);

(c) That Shell may also be required to take drastic measures and make financial sacrifices to counter CO_2 emissions and (by doing so) counter dangerous climate change (paras. 4.4.53 and 4.4.54);

(d) That the compelling general interest that is served by complying with the reduction obligation carries more weight than (i) the adverse consequences Shell might face due to the reduction obligation and (ii) the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO_2 generating activities. 4.4.54);

(e) That a consequence of the reduction obligation could also be that Shell does not make new investments in the extraction of fossil fuel resources and/or limits its production of fossil fuel resources (para. 4.4.39);

(f) That Shell – taking account of the current obligations – is free to decide not to make new investments in explorations and fossil fuels, and to change the energy package offered by the Shell group in line with the claim (para. 4.4.25);

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441 Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 11.
442 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 12 and 16.
443 Milieudefensie et al.'s Rejoinder of 12 April 2024, paras. 13 and 14; Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 104 to 113.
444 Milieudefensie et al.'s Rejoinder of 12 April 2024, footnote 11 refers erroneously to para. 4.4.29. It is evident that the reference is to para. 4.4.28. It is 4.4.28 that includes this consideration (also cited in Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 13).

(g) That Shell, through the energy package offered by Shell, controls and influences the Scope 3 emissions of the end users of the products produced and sold by the Shell group (para. 4.4.25); and

(h) That the reduction obligation has significant consequences for Shell and the Shell group. The reduction obligation requires a change of policy, which will require an adjustment of the Shell group's energy package (see para. 4.4.25). This could curb the potential growth of the Shell group (para. 4.4.53).

(vii) The district court presented no considerations in paras. 4.4.49 and 4.4.50 of the District Court Judgment regarding Shell's option to sell assets, so that in that manner Shell could comply with the reduction order, or to interpret the Judgment in another manner that does not limit CO_2 emissions to the atmosphere or does so to a lesser extent than is reasonably possible for Shell.[445]

6.30. In light of these extensively reasoned assertions, which are essential for the interpretation of the considerations and the dictum of the District Court Judgment, the Court could not in this respect, without additional reasoning, which is lacking, arrive at the decision that Shell can also perform the reduction order imposed by the district court in a manner that cannot contribute to the actual reduction of CO_2 emissions into the atmosphere. After all, the aforementioned assertions indicate that the district court, in its considerations and dictum in light of the debate between the parties, and in light of its own considerations regarding the grounds for assuming the existence of the duty of care and imposing the reduction order, cannot have intended that the reduction obligation can also be performed in a manner that cannot contribute to the actual reduction of CO_2 emissions into the atmosphere, or in any event is ineffective. Without a response to this debate, insufficient reasoning has been presented regarding why the Court nevertheless arrived at its divergent interpretation.

6.31. The Court furthermore fails to recognise that a court order must always be implemented in light of the goal and the purport of that order, as a result of which a court order (as the starting point) may not be implemented in a manner that cannot contribute to achieving the goal and the purport of the order. Or in any event, an order must (in principle) be implemented in a manner that can at least contribute to that goal and that purport. In any event, the implementation of an order that is imposed in connection with breaching the (indirect) horizontally effective fundamental rights, such as Articles 2 and 8 ECHR, are sufficiently effective to guarantee effective protection against that breach (as much as possible).

6.32. In any event, the Court's opinion – that Shell can perform the district court's order in a manner that does not lead to a reduction of CO_2 emissions into the atmosphere – lacks sufficient comprehensible reasoning. According to the considerations set out in ground of

[445] Milieudefensie et al.'s Rejoinder of 12 April 2024, para. 15.

appeal 6.25 and the dictum of the District Court Judgment and Milieudefensie et al.'s assertions set out in ground of appeal 6.29 regarding these points, the goal and purport of the order issued by the district court is that Shell, to perform its duty of care to prevent or limit dangerous climate change, must proceed to take precautionary measures that (can) lead to CO_2 emissions into the atmosphere actually being reduced. In this light, without additional reasoning, which is lacking, it is not clear why Shell should be allowed to implement that order in a manner that does not or cannot *de facto* contribute to reducing CO_2 emissions.

6.33. Insofar as the Court holds in paras. 5.3 and/or 7.5 – with its decision that it will not go into Milieudefensie et al.'s requests to clarify the District Court Judgment, because those requests would lead to an impoverishment of the dictum – that the duty of care determined by the district court entails that Shell may implement the reduction order in any manner, including an ineffective manner, that decision, in light of the above complaints, cannot be maintained either.

7. Limit on sales and effectiveness of reduction obligation

7.1. The Court bases its decision that imposing a reduction obligation is not effective on, in short, the following considerations (inter alia) in paras. 7.97 to 7.110 (in particular in paras. 7.100, 7.106 to 7.108 and 7.110):

(i) Shell has argued that it can perform the obligation to reduce its Scope 3 emissions by a specific percentage by (partly) ceasing the trade in third-party fossil fuels. The producers of fossil fuels will continue to supply the fuels. The only difference is that Shell will no longer form part of the value chain (para. 7.100);

(ii) Although every reduction of greenhouse gas emissions has a positive effect on countering climate change, this does not mean to say that a reduction obligation that is imposed on a specific company will also have a similar positive effect, certainly not if this reduction obligation can also be realised by selling fewer fossil fuels. In such case the specific company will only disappear from the value chain and the (already produced) fossil fuels will reach the end user via a different broker (para. 7.106);

(iii) There is a causal relationship between a limit on production and a reduction in emissions, but Milieudefensie et al. has not presented sufficient arguments to assume that in this case there is (also) a causal relationship between a limit on sales and a reduction in emissions (para. 7.106);

(iv) Erickson et al. does not explain in his report how a limit on sales of fossil fuels imposed on a specific company could lead to price increases for end users, which in turn could lead to a decrease in the demand for fossil fuels. The study cited by Erickson et al. does not show this, because it relates to the effects on the

consumption of fossil fuels of a limit on production in a specific region (the territory of the US). A limit that extends to an entire region (certainly a region as big as the US) is of a significantly different order than a limit on sales that applies to a specific company. In addition, a limit on production is less easy for other market parties to take over than a limit on sales (para. 7.107);

(v) Milieudefensie et al.'s argument regarding the added value of Shell Trading misses the mark because the reduction order made by the district court does not oblige Shell to phase out Shell Trading's activities. Shell could reduce its sale of fossil fuels while Shell Trading continues offering its services to the market. A party that would sell fossil fuels instead of Shell, does not itself have to possess the logistics and financial capacities of Shell Trading. If necessary, this party can purchase these services from Shell Trading or other service providers. That is why the example of Enron cannot be set aside by pointing out the differences between Enron and Shell Trading. In any event, the comparison between Enron and Shell Trading with regard to the earnings per traded barrel of oil fails, because the amount of USD 86 mentioned for Shell Trading covers not only the costs of Shell Trading, but also the total exploration and production costs of Shell (para. 7,108); and

(vi) The conclusion of the above is that Shell can perform the obligation of reducing its Scope 3 emissions by a specific percentage by limiting the resale of fossil fuels that Shell has purchased from third parties. It has not been established in this case that a reduction of the resale activities of Shell Trading will lead to a reduction in CO_2 emissions. Because this is precisely what Milieudefensie et al. wants to achieve with the reduction order it is seeking, the conclusion is that such an order is not effective with regard to Scope 3 emissions and Milieudefensie et al. therefore has no interest in its claim (para. 7110).

A. Effectiveness of limiting resale and sale activities of Shell Trading

7.2. The Court's decision lacks sufficient reasoning, or is incomprehensible, when the Court holds that Shell can perform the reduction order by ceasing or reducing its resale and sale activities of fossil fuels produced by third parties (i.e. fossil fuels not produced by Shell). The Court's decision cannot be followed based on this interpretation, because the resale/sale by Shell of fossil fuels produced by third parties – as Milieudefensie et al. asserted without challenge[446] and the Court itself took as the starting point in para. 7.104 – (only) takes place via Shell Trading. This manner of performance of the reduction order therefore means a reduction in the activities of Shell Trading. This cannot be reconciled in a comprehensible manner with the Court's consideration in para. 7.108 that Milieudefensie et al.'s argument regarding the added value of Shell Trading is not effective because the district court's reduction order does not oblige Shell to phase out the activities of Shell Trading and Shell could reduce its sale of fossil fuels, while Shell Trading continues to offer

[446] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 17, 19 and 21 to 23.

its services to the market. This is incomprehensible, because limiting the sale of fossil fuels produced by third parties is taking place precisely *by* phasing out the activities Shell Trading or ceasing or phasing out the resale/sale activities of oil and gas products of third parties by Shell Trading. The Court itself acknowledges this in para. 7.110, with its consideration that it has not been established in this case that a *reduction of the resale activities of Shell Trading* will lead to a reduction in CO_2 emissions. As a result of limiting the resale/sale activities of oil and gas products of third parties, Shell Trading will therefore not continue offering its services to the market (in the same degree). If this were to be the case, Shell Trading would not be able to phase out/reduce its activities. In other words: the Court holds, on the one part, that Shell can perform the reduction obligation by phasing out the activities of Shell Trading, while on the other – in response to the defence of Milieudefensie et al. – the Court holds that Shell Trading will not phase out or does not have to phase out its activities. This is incomprehensible, because the performance modality referred to by the Court in fact presumes the phasing out of those activities.

7.3. The considerations of the Court, (partly) due to the fact that Shell Trading would be phasing out/reducing its activities if it were to cease the resale/sale of thirty-party oil and gas products, in any event do not form a sufficiently comprehensible response to Milieudefensie et al.'s argument regarding the role of Shell Trading and the effect that would follow from limiting its activities. Milieudefensie et al. has argued that a limit on the activities of Shell Trading respectively the ceasing or limiting by Shell Trading of its resale/sale activities of third-party oil and gas products would lead to a price increase[447] and that Shell Trading's place cannot simply be filled by third party.[448] In support of this argument, Milieudefensie et al. referred to the fact that Shell Trading has its own transport network, including its own shipping fleet of oil tankers, (the biggest fleet worldwide of) LNG ships and other kinds of ships,[449] Shell Trading is an important spider in the web of the flow of oil and gas that takes place within every link of the value chain,[450] there are hundreds of independent oil and gas producers that do not have the infrastructure and/or the distribution and trade network to get what has been produced to the end user and are thus dependent on Shell Trading in this respect,[451] Shell is the biggest buyer and seller of oil and gas in the world,[452] Shell Trading also finances independent oil and gas companies and helps in acquiring financing,[453] without the intervention of Shell Trading, it is more difficult for independent oil and gas producers to obtain the financing necessary for their activities,[454] a reduction order would in fact affect future production to a significant degree,[455] according to the Erickson

[447] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 30, 37 and 38.
[448] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 31.
[449] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 20.
[450] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 32; Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 19 to 23.
[451] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 22.
[452] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 23 and 24.
[453] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 25 to 27; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 934.
[454] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 26; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 934 to 936.
[455] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 42.

et al. report, Shell itself states that it promotes the production of other oil and gas producers by financing them and guaranteeing the purchase and procurement of the oil and gas that is produced,[456] Shell in its own words can attribute extra financial value to its clients because of the economies of scale that it can create as the biggest trader in the world[457] and that, as soon as Shell Trading's trade in third-party oil and gas has to be downsized, the associated services will be reduced because, as Shell itself can no longer purchase oil from independent oil producers, it will no longer finance those oil-producing companies, it will no longer ship that oil and it will no longer provide other logistics services to these producers,[458] points also acknowledged by Shell itself, at least insofar as it points out that some transport and storage services that it provides to third parties are inseparably connected with Shell's trade activities.[459]

7.4. The consideration of the Court in para. 7.108, that a party that would sell the fossil fuels instead of Shell, need not itself possess the logistic and financial capacities of Shell Trading and this party can, if necessary, procure these services from Shell Trading or other service providers, does not form a sufficiently comprehensible response to Milieudefensie et al.'s argument in ground of appeal 7.3, because (i) these considerations wrongly, or in an incomprehensible manner, take as the starting point that Shell is not obliged to and/or will not proceed to phase out the activities of Shell Trading if it performs the reduction order by ceasing the resale and sale of third-party oil and gas products, (ii) without additional reasoning, which is lacking, in light of the aforementioned assertions of Milieudefensie et al., it is not clear how the phase-out of the resale/sale activities by Shell Trading can take place if Shell Trading at the same time continues to provide its services (in the same scope) to the market, as those assertions in fact encompass that providing those services and the resale/sale of third-party oil and gas products go hand in hand and the reduction of the resale/sale activities also leads to a reduction of the (other) activities that Shell Trading develops in this respect and offers to the third-party producers of oil and gas and (iii) these assertions furthermore encompass that third-party oil and gas producers are in fact dependent for producing and offering their products at current market conditions, on the (current) services of Shell Trading, which cannot be reconciled in a comprehensible manner with the Court's belief that they can also procure the services (on the same conditions) from other service providers than Shell Trading, as Milieudefensie et al.'s point is precisely that those others cannot provide the services offered by Shell Trading, or in any event not on the same (favourable) conditions.

7.5. In light of the assertions listed in ground of appeal 7.3 it is furthermore not clear, without additional reasoning, which is lacking, for the Court's view that Milieudefensie et al. presented insufficient arguments to assume that in this case there is a causal relationship

[456] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 934.
[457] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, pp. 31 and 32; Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 24.
[458] Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 32; Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, paras. 25 and 26.
[459] Shell's answers to the Court's questions of 12 April 2024, paras. 14.2.6 and 14.2.7.

between a limit on sales and a reduction in emissions (para. 7106). After all, it follows from the aforementioned assertions that Milieudefensie et al. has presented extensively and in detail that and why a limit on sales at Shell Trading will lead to a reduction in emissions. In short: a limit on sales via Shell Trading will lead to a reduction in its activities, so that third-party oil and gas producers can no longer offer their products to the market on the same favourable conditions, resulting in price increases, which will cause the use thereof to decrease, in turn resulting in fewer CO_2 emissions into the atmosphere.

7.6. Insofar as the Court assumes that ceasing the resale/sale activities of third-party products by Shell Trading only affects fossil fuels of other producers *that have already been produced*, without additional reasoning, which is lacking, that decision cannot be followed. Firstly, that decision does not exclude that oil and gas *still to be produced* will also be affected, so that the production of oil and gas is affected in this respect, which according to the Court itself can be effective (para. 7106). In addition, such a decision lacks sufficient reasoning in light of the assertions set out in ground of appeal 7.3. According to those assertions, the reduction order would also affect the new production by those third parties. It is relevant in this respect that Milieudefensie et al. has pointed out that Shell, in its own words, helps oil and gas producers find financing for the new production of oil and gas and guarantees the purchase and procurement of oil and gas (to be newly produced).

7.7. In addition, with its decision the Court moved beyond the boundaries of the legal dispute, because Shell has not taken the position that Shell, to perform the reduction order, will phase out (or can phase out) the resale/sale activities of Shell Trading and Shell Trading will at the same time (continue to) offer its logistic and financial services (to the same degree) to third-party oil and gas producers, or that others will offer such services on the same conditions, so that the oil and gas produced by third parties will end up on the market on the same conditions. In any event, this is an impermissible surprise decision, because the question whether Shell Trading can continue offering its services in the same degree if it phases out its resale/sale activities in the manner envisioned by the Court demands a factual debate about the influence that this phase-out has on the scope of all (other) activities of Shell Trading. This is a crucial link in the Court's reasoning, so that the Court should at least have offered the parties the opportunity to state their position on the matter. The Court wrongly failed to do so.

7.8. Insofar as the Court has interpreted Shell's assertions (in part) in para. 7.100 in such way that Shell also argued that Shell Trading will continue offering its services (in the same degree) to third-party oil and gas producers, or that others will offer such services on the same conditions, the Court has given an incomprehensible interpretation to the court documents. After all, Shell never took that position.

7.9. The Court's decision is, moreover, incomprehensible or lacks sufficient reasoning, because Shell Trading offering or continuing to offer (inter alia) financial services to third-party oil and gas producers equally qualifies – or can at least qualify – as Scope 3 emissions of Shell Trading and consequently of Shell. After all, Scope 3 emissions concerns the other

indirect emissions (not Scope 2 emissions) arising in the company's value chain, as the Court acknowledges in para. 3.5. The activities of Shell Trading fall within the value chain of the Shell organisation. If the reduction order is implemented in a manner in which Shell Trading continues to offer its services to third-party oil and gas producers, Shell's Scope 3 emissions will not decrease, or in any event not in the same degree. The Court therefore assumes on incomprehensible grounds that Shell can satisfy its reduction obligation by phasing out or reducing the resale/sale activities of oil and gas of third-party producers, while at the same time maintaining the activities of Shell Trading.

7.10. In para. 7.108, the Court holds that the comparison between Enron and Shell Trading with regard to the earnings per traded barrel of oil fails, because the amount of USD 86 mentioned for Shell Trading covers not only the costs of Shell Trading, but also the total exploration and production costs of Shell. This consideration therefore does not form a sufficiently reasoned response to the argument presented by Milieudefensie et al. To support its position that a downsizing of Shell cannot be deemed the same as the bankruptcy of Enron, it presented the following argument:

(i) Enron's position cannot be compared to that of Shell. Enron was primarily a broker that made margins acting as a broker, but other than that added little market value to the traded goods. Shell's position is completely different.[460]

(ii) Erickson et al. pointed out that Enron, in 2000, the year before its bankruptcy, was earning approx. USD 1 per traded barrel of oil and gas as broker. This is less than 10% of the then oil and gas prices. According to Erickson et al., this low margin per barrel implied that Enron was to a great extent busy trading in "*commodity and futures contracts",* i.e. trading on paper rather than physically.[461]

(iii) By way of comparison: In 2022 Shell earned approx. USD 86 per traded barrel of oil and gas. This is equal to more than 80% of the current oil and gas prices. This shows that Shell adds far more value to the market per traded barrel.[462]

(iv) It is evident that the loss of a legal entity that adds more value to the market will have a greater impact on the market than if a legal entity that only adds a fraction of that value to the market disappears. In other words, Shell and Enron are incomparable entities and so the market impact cannot be compared.[463]

7.11. The Court's consideration that the comparison between Enron and Shell with regard to the earnings fails, because the amount of USD 86 mentioned for Shell Trading covers not only the costs of Shell Trading, but also the total exploration and production costs of Shell, does

[460] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 33.
[461] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 34.
[462] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 35. See Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, p. 31.
[463] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 35. See Milieudefensie et al.'s answers to the Court's questions of 12 April 2024, pp. 31 and 32.

not form a sufficiently reasoned response. That this USD 86 also relates to the covering of Shell's costs mentioned by the Court and the USD 1 of Enron does not, does not explain why the fact (partly) appearing from that earnings difference that Shell and Enron hold a different position in the market and give a different added value to oil and gas is also not relevant with regard to the question to what degree Shell Trading can be replaced (just as easily as Enron). That difference in covering the costs illustrates the difference in market position and their substitutability presented by Milieudefensie et al. and supported by Erickson et al. on that market, or in any event does not affect that difference.

B. Effectiveness of limiting sales of oil and gas products produced by Shell

7.12. Insofar as the Court holds that Shell can perform the reduction obligation by (partly) ceasing its sale of oil and gas products produced by Shell itself, but that imposing an order to perform that obligation is nevertheless not effective, the Court's decision lacks sufficient reasoning, as it is not clear why limiting the production of oil and gas products by Shell itself cannot lead to a limiting of CO_2 emissions into the atmosphere. After all, this is highly suited to lead to limiting CO_2 emissions into the atmosphere, because Shell will then be selling less oil and gas it produced itself. The effectiveness thereof is therefore equal to a limit on production, the effectiveness forms the starting point for the Court in para. 7.106, or in any event does not exclude it. Nor does the Court provide reasoning as to why the oil and gas products produced by Shell in such case via an alternative route could nevertheless find their way to the market and to the end users.

7.13. In addition, with such a decision the Court exceeded the boundaries of the legal dispute, because Shell did not claim, in any event not in the framework of its argument that an interest as referred to in Article 3:303 DCC in a reduction order is lacking, that it can satisfy the reduction order in an ineffective manner by (partly) ceasing the sale of oil and gas produced by Shell itself. In para. 7.100 the Court therefore accurately only represents Shell's argument that it could satisfy the reduction order by (partly) ceasing the resale/sale of third-party oil and gas products.

C. Report of Erickson et al. does concern the effectiveness of a limit on sales

7.14. In para. 7.107 the Court holds that Erickson et al. does not explain in his report how a limit on sales of fossil fuels imposed on a specific company could lead to price increases for end users, which in turn could lead to a decrease in the demand for fossil fuels. That study relates to the effects on the consumption of fossil fuels of a limit on production in a specific region. Such a limit that extends to an entire region is of a significantly different order than a limit on sales that applies to a specific company. In addition, a limit on production is less easy for other market parties to take over than a limit on sales.

7.15. This decision is incomprehensible, or in any event lacks sufficient reasoning, because Milieudefensie et al., with reference to the Erickson et al. report, has explained in what manner a limit on sales that is imposed on Shell could lead to price increases for end users. Milieudefensie et al. has pointed out that every restriction or price increase in the trade

chain – whether this takes place on the production side, or on the consumption side or somewhere in between – can, according to Erickson et al., lead to a price increase for the consumer.[464] Every friction, every restriction and every delay that arises due to an intervention in the trade chain can push the price of a product up further than would have been the case without that intervention, according to Erickson et al.[465] Nota bene, the Court itself cites Erickson et al.'s conclusion on this point in para. 7.105 by quoting "*Constraints or increases in costs anywhere along the extensive process of producing and selling oil and gas could increase the price to final consumers*". In line with this, Milieudefensie et al. pointed out that Shell holds a special position as the biggest trader in the world, so that it is evident that Shell cannot simply be replaced and reducing Shell's trading activities will have a market effect.[466] Erickson et al. does indeed explain that a sales limit on a specific company can lead to price increases for end users and, in line with this, to a reduction of the demand for fossil fuels, even according to the Court's own representation of that report in para. 7.105. The Court should therefore have gone into essential assertions of Milieudefensie et al. and presented reasoning for its findings, while the Court's decision is furthermore incomprehensible, as it conflicts with its own representation of the Erickson et al. report.

8. Sufficient interest and indirect effects of reduction obligation

8.1. The Court considers in para. 7.102 (in short) that the Article 3:303 DCC interest can be assessed by making a comparison between the situation in which an order is made with the situation in which an order is not made. If there is no relevant difference between the two situations, in such sense that awarding the claim will in essence not benefit the claimant, the required interest in the legal action is lacking. This interest is thus lacking if the order can be implemented in a manner that cannot contribute to the interest the claimant seeks to protect. The Court then held in para. 7.109 that a possible signalling function of a reduction order for other fossil fuel investors is too speculative and is too far removed from Shell's alleged wrongful conduct to serve as an interest in the reduction order.

8.2. With this finding the Court demonstrates an incorrect legal view. The fact that parties other than the defendant, as a result of a court order, (possibly) will act in a manner that serves the interest that a party in a lawsuit seeks to protect, is deemed or can be deemed an interest as referred to in Article 3:303 DCC and/or in any event contributes to that interest. This in any event applies if an Article 3:305a DCC legal entity seeks to protect against dangerous climate change. The fact that fossil fuel investors (and producers) as a result of a claim filed by Milieudefensie et al. and/or a reduction order to prevent or limit dangerous climate change imposed on Shell (possibly) – whether or not on the instigation of a court

[464] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 37.
[465] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 38. See also Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 59, in which Milieudefensie et al. sets off the Erickson et al. report against the UNEP report referred to there concerning supply limits.
[466] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 37; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 935 (citation).

or government body – can also proceed to reduce their CO_2 emissions into the atmosphere, therefore does form an interest as referred to in Article 3:303 DCC, or in any event can contribute to Milieudefensie et al.'s interest as referred to in Article 3:303 DCC. Or in any event, the Court fails to recognise that a deterrent effect of an order on parties other than the defendant, that contributes or can contribute to protecting the interest that a party seeks to protect, results in an Article 3:303 DCC interest. The above in any event applies (i) if those other parties have the same or a similar duty of care as the defendant, (ii) in the case of duty of care obligations to prevent or limit dangerous climate change, whereby the danger can only be prevented or limited by joint action of all relevant actors and/or (iii) in case of a claim on the basis of Article 3:305a DCC by a party standing up for the protection against dangerous climate change.

8.3. In any event, the Court's decision that Milieudefensie et al. does not have an interest as referred to in Article 3:303 DCC in the reduction order, lacks sufficient reasoning, because Milieudefensie et al., to support its assertion that it does have sufficient interest as referred to in Article 3:303 DCC in its claims, presented a substantiated argument that the reduction order (even aside from the compliance therewith by Shell) partly by the actions of parties other than Shell will lead to a decreased use of oil and gas and consequently to reduced CO_2 emissions into the atmosphere. In this respect Milieudefensie et al. – in short – presented the following:

(i) In his expert report Erickson et al. pointed out that companies that buy oil and gas fields will take account of existing and expected rules and trends relating to the decarbonisation of the energy system. The District Court Judgment is a signal to the market that cannot be ignored, regarding how those decarbonisation rules and trends might develop more quickly than expected. Buyers and sellers of oil and gas fields will discount this market signal in their decisions.[467]

(ii) Erickson, Green, Hagem and Pye pointed out in their (earlier) expert report from 2022 that the District Court Judgment is expected to have a limiting effect on the financing options for new oil and gas fields, and that due to the District Court Judgment, companies in the oil and gas sector must take account, more than would otherwise have been the case, of restrictions on oil and gas production as well as with their own potential liability position.[468]

(iii) Erickson et al. furthermore pointed out that the Judgment will also have an effect on oil and gas fields that are not yet in development, and precisely that fact means that they are decisive to a significant degree for the future production of a company.[469]

(iv) Rotmans and Loorbach pointed out in their expert report that the District Court Judgment has already *de facto* contributed to an increased risk profile of the fossil

[467] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 40.
[468] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 41.
[469] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 42.

fuel industry and the awakening of other companies in all kinds of sectors at home and abroad, and that the District Court Judgment forms the inspiration for a growing number of lawsuits in which companies are summoned to combat dangerous climate change and protect human rights.[470]

(v) What is more, the IPCC acknowledges the influence of those lawsuits on the climate approach.[471] The IPCC acknowledges the influence that lawsuits can have throughout the world on the risk perception of financial institutions relating to carbon-intensive activities, on public opinion, the financial and reputation consequences for the party being held liable, the influence on other lawsuits and the influence on the way in which climate policy is perceived. The IPCC explicitly refers to the District Court Judgment in this respect.[472]

(vi) Van Wijnbergen and Van der Ploeg support Erickson et al.'s analysis relating to the District Court Judgment's effect on future production and the requisite project development.[473] They furthermore point out that Shell, because of its special position, is able to develop very capital-intensive and highly complex oil and gas fields, which position cannot easily be taken over by others.[474]

(vii) According to Erickson et al., the District Court Judgment will, moreover, have an influence on other investments and transactions than oil and gas fields, like the sale of petrol stations, pipelines, ships and land. Buyers can use the purchased assets for something else, so that less oil and gas is sold, resulting in a positive climate impact. This can include such things as transformation of land into a storage place for CCS activities and transforming petrol stations into charging stations.[475]

(viii) Rotmans and Loorbach pointed out in their expert report that Shell is a systemic player in the energy market around which an entire ecosystem of parties has developed. A price change with a systemic player leads to a shift of the entire system.[476] According to Rotmans and Loorbach, a reduction order to reduce CO_2 would help greatly to achieve the necessary internal transition at Shell and in addition would give the broader energy market a push in the same direction and would therefore be indirectly effective.[477]

(ix) A court order will bring about that the risk perception of fossil fuel investors increases, so that the capital costs for investments become higher and the supply

[470] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 944.
[471] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 945.
[472] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 945 (citation).
[473] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 43.
[474] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 44.
[475] Milieudefensie et al.'s Oral Arguments on appeal (Effectiveness) of 4 April 2024, para. 47.
[476] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 947 to 950.
[477] Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 951 to 954.

of fossil fuels declines.[478] Erickson et al. too emphasises that Shell can have a great influence on accelerating the energy transition.[479]

(x) The international climate regime of the UN has long recognised that proactive contributions of companies are indispensable for achieving the climate goals and cause a flywheel effect, so that countries, cities and consumers are able to be more ambitious in the climate approach.[480]

(xi) Guterres, the Secretary-General of the United Nations, specifically mentions the District Court Judgment with a reduction order against Shell as the example of a successful case to protect human rights, including the rights of the most vulnerable people in the world,[481] while various UN Special Rapporteurs and UN commissions mention the interest of reining in the fossil fuel industry, the importance of access to justice to protect climate cases by means of human rights[482] and the importance of courts that are starting to play a 'key role' in this respect.[483]

8.4. Without additional reasoning, which is lacking, in light of these assertions it is not clear why the reduction order does not serve the interest referred to in Article 3:303 DCC that Milieudefensie et al. seeks to protect in these proceedings. It follows from these assertions, that at least eight experts (Erickson, Green, Hagem, Pye, Van Wijnbergen, Van der Ploeg, Rotmans and Loorbach) and the IPCC have evidence for believing that the reduction order will have an impact on and indeed already has had an impact on (investments in) the current oil and gas production as well as on (investments in) the future production thereof by parties other than Shell. In addition, Erickson et al. pointed out concrete effects in the form of an altered function of land and transformation of petrol stations into charging stations. Rotmans and Loorbach furthermore presented concrete support for the position that and why a reduction order for Shell, because of its position as systemic player, will also have *de facto* effects on the entire system. In addition, it follows from Milieudefensie et al.'s assertions that a court order makes the financing of fossil fuel projects more difficult. In addition, the court order can in turn lead to other reduction orders issued by courts in other countries, that underscore and reinforce the above-described effects, as UN representatives and institutes agree. Said assertions thus show that the reduction order serves and has already served the interest that Milieudefensie et al. seeks to protect, of reducing CO_2 emissions into the atmosphere by fossil fuel investors and producers. In any event, in that light it is not clear for what reason the presented facts are too speculative or

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478 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, para. 939; Milieudefensie et al.'s Notes on Oral Arguments 8 at first instance of 15 December 2020, para. 71.
479 Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 931 and 932.
480 Milieudefensie et al.'s Oral Arguments on appeal (Part 2) of 4 April 2024, paras. 30 to 32 and 43; Milieudefensie et al.'s Defence Brief commenting on exhibits of 19 December 2023, para. 76; Milieudefensie et al.'s Statement of Defence on appeal of 18 October 2022, paras. 25, 35 under (45), (87) and (152), 88, 380, 495 and 854; Milieudefensie et al.'s Notes on Oral Arguments 7 at first instance of 15 December 2020, para. 26; Milieudefensie et al.'s Notes on Oral Arguments 1 at first instance of 1 December 2020, paras. 136 to 147.
481 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, paras. 79 and 80.
482 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 81.
483 Milieudefensie et al.'s Opening Oral Arguments on appeal (Part 1) of 2 April 2024, para. 82 (citation).

too far removed from the reduction order. After all, the facts point out that the reduction order will have and has had a relevant effect on the investment choices of other fossil fuel investors and producers in favour of CO_2 emissions reductions and that effect, as a result of other climate cases, in line with the reduction order imposed in the District Court Judgment, is also broadly expected by experts, UN representatives and UN institutes. It is not the case that the connection is therefore too far removed or of a speculative nature.

8.5. Insofar as the Court has interpreted the aforementioned assertions in para. 7.105 in such manner that Milieudefensie et al. has (only) taken the position that the reduction order sends a signal because companies in the oil and gas sector must take account of this signal in their investment decisions and consequently, in comparison to the situation without a reduction order, must show greater restraint with regard to fossil fuel investments, the Court has given an incomprehensible interpretation to the court documents. According to the assertions cited in ground of appeal 8.3, Milieudefensie et al.'s assertions were not limited to the position set out by the Court.

8.6. The decision of the Court in any event contradicts itself and is therefore incomprehensible, or lacks insufficient comprehensible reasoning, because the Court (i) on the one part in paras. 7.100 to 7.110 deems it important that limiting Shell's sales of oil and gas of third-party producers will lead to other parties taking over those sale activities, but (ii) on the other in para. 7.109 holds that a possible signalling function of a reduction order for other fossil fuel investors is too far removed from Shell's alleged wrongful conduct to serve as an interest in the reduction order. In this manner, in the framework of the decision on the effectiveness of the reduction obligation (to the detriment of Milieudefensie et al.), the Court sometimes does and sometimes does not attribute relevant significance to the effects of a reduction order on the actions of third parties. This is incomprehensible, because the conduct of third parties either does not have any relevant significance in the effectiveness question, or it does have significance.

9. No opinion on the claimed declaratory judgment

9.1. At first instance Milieudefensie et al. (inter alia) claimed the following declaratory judgment:

> *"4.1 (…) a declaratory judgment:*
>
> *a) that the aggregate annual volume in CO_2 emissions to the atmosphere (scope 1, 2 and 3) that is connected with the business activities of and energy-carrying products sold by Shell and the companies and legal entities which it includes in its consolidated financial statements and with which it jointly forms the Shell group, is unlawful with regard to the claimants and (i) that this volume of emissions must be reduced by Shell, both directly and via the companies and legal entities which it includes in its consolidated financial statements and with which it jointly forms the Shell group and (ii) this reduction obligation must take place with regard to the emissions level of the Shell group in the year 2019 and in accordance with the global*

temperature goal of Art. 2(1)(a) of the Paris Climate Agreement and the related best available (UN) climate science (…)". [484]

The District Court dismissed the second part of the requested declaratory judgment because there was no longer an interest in said declaratory judgment, because of the awarding of the reduction order:

"4.5.9. The second part of claim 1(a), namely for a declaratory decision about RDS' reduction obligation, is also dismissed. Since the court deems the claimed reduction order allowable, it is of the opinion that Milieudefensie et al. have insufficient interest in allowing this declaratory decision."

9.2. The Court holds in paras. 8.1, 8.2 and 9 that Shell's appeal is successful, that the District Court Judgment will be set aside for that reason and the claims of Milieudefensie et al. will be rejected. The Court thus overlooks the fact that on the basis of the positive side of the devolutive effect of the appeal, it should have reviewed whether in any event the claimed declaratory judgment (or the lesser claim encompassed therein) could be awarded. The fact that the district court rejected the claim does not diminish this, as said rejection is fully based on a lack of interest due to the awarding of the claimed reduction order. Milieudefensie et al. therefore could not present a (cross-)appeal in this respect. As a result of the Court's rejection of the claimed reduction order, Milieudefensie et al.'s interest in a decision regarding the claim for a declaratory judgment was revived (if only because of the associated status of a final and binding decision), so that the Court should have decided this point. There is all the more ground to do so because the Court did hold – in short – that Shell must make an appropriate contribution to the climate goals of the Paris Agreement (para. 7.67) and that it must reduce its emissions (paras. 7.53, 7.57 and 7.111), which (in any event in part) corresponds with the claimed declaratory judgment and in any event qualifies as the lesser part of that claimed declaratory judgment.

[484] Court of Appeal, para. 4.1. Milieudefensie et al.'s Brief explaining the amendment of claim of 21 October 2020, relief sought.

10. Complaint expanding on other complaints

10.1. The success of (one of) the complaints of grounds of appeal 1 or 3 to 8 also affects the Court's decision in para. 7.111. That decision cannot remain in effect for that reason.

10.2. The success of (one of) the complaints in grounds for appeal 1 to 9 also affect the Court's decision in paras. 8.1, 8.2 and 9. These decisions cannot remain in effect for that reason.

ON THE GROUNDS OF THIS APPEAL TO THE SUPREME COURT

Milieudefensie et al. requests that the Supreme Court quash the challenged Judgment, and make such further decision as the Supreme Court deems just; and that a costs order be made. Milieudefensie et al. furthermore claims that the compensation for court costs be increased by the statutory interest thereof, to be counted as of fourteen days after the date of the judgment of the Supreme Court.

Appendices:
- the judgment of the Court of Appeal of The Hague of 12 November 2024 against which the appeal to the Supreme Court was filed;
- the decisions on the motions based on Article 217 DCCP of the Court of Appeal of The Hague of 25 April 2023;
- the judgment at first instance of the District Court of The Hague of 26 May 2021; and
- the offer letter.

Legal counsel

This originating document contains 74,654 words.

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