The Hague Court of Appeal
Case number: 200.302.332
Session date 12 April 2024

PAULUSSEN ADVOCATEN

REJOINDER OF MILIEUDEFENSIE ET AL.

in the matter of:

1. **Vereniging Milieudefensie**
   having its registered office in Amsterdam, the Netherlands;
2. **Stichting Greenpeace Nederland**
   having its registered office in Amsterdam, the Netherlands;
3. **Landelijke Vereniging tot Behoud van de Waddenzee**
   having its registered office in Harlingen, the Netherlands
4. **Stichting ter bevordering van de Fossielvrij-beweging**
   having its registered office in Amsterdam, the Netherlands;
5. **Stichting Both ENDS**
   having its registered office in Amsterdam, the Netherlands;
6. **Jongeren Milieu Actief***
   having its registered office in Amsterdam, the Netherlands;

Respondents, original claimants,

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

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

versus:

Shell plc
having its registered office in London, United Kingdom

Appellant, original defendant

Legal counsel:
mr. D.F. Lunsingh Scheurleer, *mr.* T. Drenth

and:

Stichting Milieu en Mens

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

having its registered office in Zwolle, the Netherlands

Joined party on the part of Shell plc

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

Your Honours,

1. Milieudefensie et al. has had to conclude over the past few years, to its regret, that even after the court order was made in 2021, Shell continued worsening the climate problem and running away from its responsibility. It did so, inter alia, by doing nothing in respect of its Scope 3 responsibility and for the past few months Shell has been failing to step up by giving a specific twist to the Judgment that cannot be reconciled with the purport and content of the Judgment.

2. It is clear that the District Court's intention with the Judgment was to have Shell make an as effective as possible contribution to limiting global warming to 1.5˚C. The District Court did not give Shell the licence that Shell believes it was given by the District Court to sell assets without restriction and not subject to any conditions.

3. I would therefore like to use this rejoinder, inter alia, to explain more extensively why Shell's interpretation of the Judgment is not correct, and why it would be good if the Court of Appeal were to clarify this for Shell, should the Court uphold the Judgment. I will explain this.

1. Why a clarification of Shell's legal obligation is necessary and possible

4. A discussion has arisen regarding the question whether Shell only has to reduce its reported emissions or whether it must see to it that fewer emissions actually end up in the atmosphere. The answer to this question is simple. Of course the obligation must concern limiting the emissions that actually end up in the atmosphere, because this is how Shell will make the most effective contribution to combating dangerous climate change. It is this combating of dangerous climate change that is the essence of this lawsuit.

5. I explained earlier today that Milieudefensie et al. had submitted a brief amending the claim at first instance, in which the relief sought was modified and it was made clear that the requested order must encompass a reduction of atmospheric emissions. In addition, this amended relief sought states that Shell must limit these atmospheric emissions or must bring about the limiting of atmospheric emissions. That part of the relief sought makes it clear that Shell must use its control and influence to limit CO_2 emissions to the atmosphere. This is the essence of the case and it is in this manner that Shell will provide the most effective contribution to limiting the climate problem.

6. Before going into this point in greater detail, I would like to emphasise, however, that even if Shell's interpretation were to be chosen, i.e. that Shell only has to reduce its reported emissions, that in that case too Milieudefensie et al. will be satisfied with upholding of the District Court's

order. This order too will have a great degree of effectiveness and influence on the worldwide climate approach and the energy transition. This was extensively explained on behalf of Milieudefensie et al., both at first instance and in this appeal.[1]

7. Nevertheless, Milieudefensie et al. believes that Shell's interpretation, that the order supposedly only entails that it has to reduce its reported emissions and that it is not relevant whether Shell makes an actual contribution to limiting the emissions to the atmosphere, cannot be maintained.

8. The essence of the matter is, after all, that Shell has a legal obligation to make a proportional and adequate contribution to helping to prevent dangerous climate change. The discussion, both at first instance and in appeal, has focused on, inter alia, the enormous urgency of the climate problem,[2] the rapidly shrinking carbon budget,[3] the need to limit the quantity of cumulative emissions that are emitted to the atmosphere,[4] the emissions gap,[5] the lock-in that fossil fuel companies create with their investments in oil and gas[6] and the inhibitory influence that the acts and omissions of oil and gas companies, including Shell, have on the climate approach and the sustainable energy transition.[7]

9. In that context it was pointed out both at first instance and in appeal that it would not be onerous for Shell to become a smaller oil and gas company. It has also been explained at first instance that even when halving its CO_2 emissions, Shell can and will still be a global player of stature and a very profitable company.[8]

10. Milieudefensie et al. pointed out at first instance in this respect that Shell can be expected to take "*effective mitigation and precautionary measures*".[9] In other words: the precautionary measures to be taken by Shell must be effective in helping combat climate change, the lock-in, the inhibitory influence of Shell in general, etc.

11. As mentioned, Milieudefensie et al., to clarify all of this, in fact explicitly amended its relief sought by brief of 15 October 2020 (i.e. after Shell's statement of defence), so that the relief sought also clarifies that Shell is being asked to limit or bring about the limiting of CO_2 emissions to the atmosphere.

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[1] Exhibit MD-340, paras. (126) to (147) with references to the court documents at first instance, Statement of Defence on Appeal, section 8, Statement of Defence on Appeal after Joinder, section 5, Milieudefensie et al.'s Oral Arguments of 4 April 2024, part 5 (effectiveness).

[2] See, inter alia, Summons, section VI.2, section VII, section XI.

[3] See, inter alia, Milieudefensie et al.'s Notes on Oral Arguments 8 of 17 December 2020, paras. 1 to 18.

[4] See, inter alia, Statement of Defence on Appeal, para. 629 and para. 658. See also Summons, paras. 7-22, paras. 729-765, Claimant's Brief explaining the amendment of claim of, paras. 13-27, Notes on Oral Arguments 1, paras. 9-15, Notes on Oral Arguments 8, paras. 1 to 21.

[5] See, inter alia, Summons, paras. 400 et seq., Brief explaining the amendment of claim of 6 November 2020, para. 23, Notes on Oral Arguments 1 of 1 December 2020, paras. 130-147.

[6] See, inter alia, Summons, paras. 788 et seq., Brief explaining the amendment of claim of 6 November 2020, para. 23, Notes on Oral Arguments 9, paras. 1-21, Brief in response to Exhibit RK-37, para. 6. See also Statement of Defence on Appeal, paras. 599, 634, 707, 716.

[7] See, inter alia, Notes on Oral Arguments 1 of 1 December 2020, paras. 83-129, as well as Statement of Defence on Appeal para. 660 and section 6.3.3.

[8] Notes on Oral Arguments 8, paras. 73-83, Transcripts 17 December 2020, p. 5, para. 10.

[9] Summons, paras. 41 and 637.

12. With this addition Milieudefensie et al. explicitly wished to express what could be asked of Shell, i.e. that Shell would use its control and influence in such way that it will ensure that fewer CO_2 emissions are actually emitted to the atmosphere.[10] This is also how it ended up in the operative part of the Judgment. It also follows from the District Court's considerations that the District Court understood this correctly.

13. The District Court established, inter alia (emphasis added):
    - "*[T]hat 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.*";[11]
    - 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. RDS is able to effectuate a reduction by changing its energy package. This all justifies a reduction obligation concerning the policy formation by RDS for the entire, globally operating Shell group.*";[12]
    - That Shell "*may also be required to take drastic measures and make financial sacrifices to limit CO_2 emissions to prevent dangerous climate change*";[13]
    - That the "*compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences RDS might face due to the reduction obligation and also the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO_2-generating activities.*";[14]
    - That 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."* [15]
    - 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;[16]
    - 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*";[17]
    - 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 legal ground 4.4.25). This could curb the potential growth of the Shell group. However, the interest served with the reduction obligation outweighs the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even growth of these activities.*"[18]

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[10] See also Milieudefensie et al.'s Notes on Oral Arguments 8, para. 52 (emphasis added): "*But as every emission matters, then naturally every action forming the basis of the emission in question also matters. That is why the same applies with regard to the production and sale of oil and gas as applies with regard to the emissions which they cause: every emission reduction matters and every reduction of fossil fuels which are produced and sold matters. One thing cannot be seen separately from the other. If fossil fuels are not produced, they cannot be burned and no additional emissions will be released into the atmosphere.*"

[11] Judgment, para. 4.4.28.

[12] Judgment, para. 4.4.54.

[13] Judgment, paras. 4.4.53 and 4.4.54.

[14] Judgment, paras. 4.4.54.

[15] Judgment, para. 4.4.39.

[16] Judgment, para. 4.4.25.

[17] Judgment, para. 4.4.25.

[18] Judgment, para. 4.4.53.

14. The considerations of the District Court show that Shell can be expected to take far-reaching measures and make financial sacrifices to help prevent actual dangerous climate change. The considerations also make it clear that the District Court realised that it is necessary that CO_2 emissions to the atmosphere must be prevented as much as possible.

15. The District Court presented no considerations in paras. 4.4.49 and 4.4.50 regarding Shell's option to sell assets, to in that manner comply with the reduction order, or to realise 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.

16. Shell pointed out during the third day of the session in appeal that at first instance, in the summons, Milieudefensie et al., by way of example, paid attention to the transformation of the Danish company Ørsted. This is correct. The summons describes that Ørsted transformed itself over a period of 10 years from a fossil fuel energy company into a sustainable energy company. It did so by ending a part of its fossil fuel activities, by selling a part of its fossil fuel activities, and by reinvesting the proceeds of the sale in renewable energy, thereby becoming a sustainable energy company.[19] The point that Milieudefensie et al. is making is that oil and gas companies have options for transformation. Shell is citing this example, as if this single example gives the green light to Shell to sell fossil fuel assets in order to comply with the reduction order, and in that manner – in the words of Shell – making the Judgment ineffective. A statement that ignores the hundreds of pages of court documents that make it clear what may be expected of Shell and, regardless of the later amendment of claim of 15 October 2020, that show that the key is limiting emissions to the atmosphere.

17. Insofar as Shell wishes to argue that this single example from the summons means that Milieudefensie et al. supposedly acknowledged that Shell is free to sell fossil fuel assets, that argument cannot be maintained. This is evidently not what was stated there, and certainly not in the light of all Milieudefensie et al.'s other assertions. Nor is there an assertion that has been divulged, also referred to as a 'covered defence' (an argument deemed to have been abandoned by virtue of the defendant's procedural conduct which unequivocally reflects the defendant's waiver of that argument), in part in view of the very stringent criteria that apply in this respect. In this context, a defence is only a covered defence if it unequivocally follows from a party's position in the proceedings that they have divulged a defence or assertion.[20] Nor will a defence be a covered defence merely because it is farther-reaching than an original defence, which will then have a subsidiary character.[21] Lastly, a change in the defence that has been presented is more likely to be accepted if it is a defence against a new element that the opposing party enters into the debate.[22] This new element concerns Richard Druce's report of a few months ago, which I will discuss shortly.

18. The fact that at first instance Milieudefensie et al. did not present an explicit argument about whether the sale of fossil fuel assets was or was not permitted to comply with the reduction order, is not relevant. It is clear that Milieudefensie et al. is concerned with effective

[19] Summons, paras. 823 to 825.

[20] Groene Serie Burgerlijke Rechtsvordering, Commentaar bij artikel 348 Rv, note 2, with reference to Dutch Supreme Court, 19 January 1996, ECLI:NL:HR:1996:ZC1964 with note by H.J. Snijders.

[21] Ibid, with reference to Dutch Supreme Court, 16 February 1973, ECLI:NL:HR:1973:AC5300.

[22] Groene Serie Burgerlijke Rechtsvordering, Commentaar bij artikel 348 Rv, note 2, with reference to Dutch Supreme Court, 19 September 2003, ECLI:NL:HR:2003:AI0268.

precautionary measures on the part of Shell to prevent CO_2 emissions to the atmosphere. There is therefore no new defence or new ground.

19. The following must also be taken into consideration. Milieudefensie et al. always assumed at first instance – and it substantiated this with documents – that Shell would be able to comply with the reduction order by simply continuing with its existing oil and gas projects, but ceasing its investments in new oil and gas projects.[23] After all, existing fields will run dry eventually, so that the CO_2 emissions from existing oil and gas projects will also decrease of their own accord. Milieudefensie et al. explained in its notes on oral arguments 7[24], using figures, that at the time production from existing fields still fit within 1.5˚C scenarios, but that this does not apply to production from new oil and gas fields. The order therefore particularly relates to Shell's intended – not yet developed – oil and gas projects and would not affect, or only barely affect, existing projects in 2021, as explained at first instance.[25]

20. This would lead to a limit on production within Shell as a result of the Judgment, whereby Shell would actually be using its control in such way as to cause fewer emissions to the atmosphere. The reduction order does not at all require that Shell sell existing oil and gas fields to third parties in order to comply with the reduction order. Shell can most certainly comply with the Judgment in a manner that is effective in terms of the climate approach and Shell has not disputed those findings. There has been little to no discussion regarding this topic, and there did not need to be a discussion regarding the question whether an asset sale would or would not be permissible.

21. In that context it is relevant that Milieudefensie et al. again pointed out in appeal that Shell's compliance with the reduction order would primarily have consequences for new oil and gas projects and not so much for (existing) oil and gas fields already in operation.[26] For that reason it was also clear at the time of the statement of defence on appeal that the reduction order does not require, or barely requires, of Shell that Shell sell existing oil and gas fields to third parties in order to comply with the reduction order. Shell did not dispute these findings either. The sale of fossil fuel assets in order to comply with the reduction order was therefore not, or barely not, an issue at that time.

22. It was only following the report of Shell's consultant, Richard Druce, which Shell submitted in December 2023, that it became clear to Milieudefensie et al. what Shell's intentions were in relation to the sale of fossil fuel activities. One of Druce's most important opinions is that the Judgment supposedly permits Shell to undermine the climate effect of the Judgment as much as possible, by taking no other action than selling existing operating activities to third parties. Shell then took over this opinion from Druce during the oral arguments.[27] Due to this new assertion of Shell's, that it may make the Judgment as ineffective as possible, this topic of the asset sale has only now become relevant in the proceedings. It is for this reason that Milieudefensie et al. saw itself forced to point out that the Judgment encompasses far more than Shell makes it appear.

[23] Notes on Oral Arguments 8 (first instance), para. 69. Notes on Oral Arguments 7 (first instance), paras. 41-69, Brief in response to Exhibit RK-37 of 30 December 2020, para. 22.
[24] Notes on Oral Arguments 7 (first instance), paras. 47 and 55.
[25] Ibid.
[26] Milieudefensie et al.'s Statement of Defence on Appeal, paras. 686-687, with reference to Exhibit MD-396, p. 4.
[27] Shell's Notes on Oral Arguments of 3 April 2024, day 2, part 4, para. 11.2.8.

23. Shell and Druce are in essence suggesting that under the Judgment, unlimited new oil and gas projects can still be started up this decade, for Shell to then, for example, simply transfer them in 2030 to someone else, without any conditions attached. It is clear that this is contrary to the legal obligation imposed on Shell and all arguments presented by Milieudefensie et al. at first instance and in appeal, inter alia:
    - the enormous severity and urgency of the climate problem;
    - the need to protect the climate;
    - the need to limit the cumulative emissions in the light of the rapidly shrinking carbon budget;
    - the need to limit the lock-in of fossil fuel infrastructure and the inhibitory effect thereof on the climate approach and the energy transition; and
    - the need for production and investment limitations to make room for sustainable investments.

24. At this point in time the reduction order still does not require, or barely requires, the sale of fossil fuel assets to comply with the reduction order. As Oil Change International pointed out based on Rystad data, the state of affairs at this time is that the CO_2 emissions from Shell's own production would fall considerably (by 41% relative to 2019), if it had stopped as of 1 January 2024 approving new oil and gas projects and had stopped the construction of the oil and gas projects under construction.[28] The Judgment therefore at this time still does not require the sale of oil and gas fields, or barely requires such, provided Shell stops investing in new oil and gas projects.

25. Shell's conduct as of the Judgment of 2021 makes it clear that there is a great interest in again explicitly stipulating the action that may be expected of Shell when carrying out the reduction order.

26. Milieudefensie et al. believes that the Court of Appeal has every discretion to do so based on the legal battle as presented to the Court by the parties, and that this too is not contrary to the prohibition on making the order more onerous.[29]

27. If the Court sees the matter differently and comes to the conclusion that Shell can comply with its reduction obligation through the unconditional sale of fossil fuel assets, this will make the 45% reduction order imposed on Shell (even) less onerous. I will explain this.

28. In the period between 2019 and 2022, according to Shell's own statement, Shell already effected a CO_2 emission reduction of 24.5% over the Scope 1, 2 and 3 emissions of the Shell Group.[30] This is not the result of a climate policy that was implemented with conviction. This was primarily the result of selling assets, i.e. divestments, and reduced worldwide sales of oil and gas because of, inter alia, the COVID-19 crisis. Shell's emissions level was therefore already clearly lower in 2022 than in 2019. The emission reduction already achieved as of 2022 can be seen as an interim milestone, that can serve as a starting point for the emission reduction trajectory for the period from 2022 to 2030. In that case, in the 8 years from 1 January 2023 Shell only has to

[28] Exhibit MD-573A, p. 22.

[29] Milieudefensie et al.'s Notes on Oral Arguments of 3 April 2024, day 3, part 2, paras. 117 to 120, including the literature and case law set out in footnote 138.

[30] In 2019 Shell's total Scope 1, 2 and 3 emissions were (70 $MtCO_2$ + 10 $MtCO_2$ + 1,551 $MtCO_2$ =) 1,631 $MtCO_2$ (see Exhibit MD-377, p. 91). In 2022 the total Scope 1, 2 and 3 emissions were (51 $MtCO_2$ + 7 $MtCO_2$ + 1,174 $MtCO_2$ =) 1,232 $MtCO_2$ (see Exhibit MD-534A, p. 97). This is a reduction of 24.5%.

achieve an additional emission reduction of 27.2% relative to 2022 to comply with the reduction order. On balance Shell will have thereby achieved a 45% reduction compared to its emissions in 2019.[31]

29. This emission reduction of 27.2% to be realised by Shell after 2022 is a somewhat lower reduction task than the reduction of 28% that has to be achieved for oil in the NZE scenario compared to 2022, and a somewhat higher reduction task than the reduction of 23% for gas in the NZE scenario. Shell, however, *grosso modo*, can comply with the reduction order by following the NZE scenarios after 2022, expanding on the emission reductions that Shell had already achieved in 2022.

30. There is no justification whatsoever for the view that Shell would not have to move along with the NZE scenario as of 2022. There is no justification for the view that Shell, because of the reduction it had already achieved 'could now take things a little easier', let alone that it could allow its CO_2 emissions to increase again. The absolute need for maximum efforts in this critical decade will not allow such an approach.

31. Shell could, moreover, comply with the aforementioned reduction task of 27.2% between 2022 and 2030 without having to sell oil and gas fields that are in production.

32. The OCI research already discussed on the basis of Rystad data shows this. This research shows that the CO2 emissions connected with the use of oil and gas produced by Shell will fall by 31% in 2030, compared to 2022, if Shell were to cease the construction of new oil and gas fields as of 1 January 2024.[32] This decrease of 31% in 2030 relative to 2022 is caused because oil and gas fields in production will of themselves start producing less over time.[33] This reduction of 31% would be more than sufficient to stay apace of the NZE scenario with regard to Shell's own oil and gas production. Shell would, of course, accordingly have to phase out the sale of oil and gas produced by other parties up to 2030. But this too is possible.

33. According to Milieudefensie et al. such a step certainly cannot be seen as onerous for Shell. Shell can earn back the investments in its producing fields and does not have to sell them. In addition, Shell took virtually all the investment decisions for the fields still in construction after the beginning of this case, two-thirds of them in or even after 2021.[34] This means that Shell has taken the absolute majority of these investment decisions in the same year as the Judgment at first instance. This was also the year of the publication of the IEA's first NZE report, in which it was clearly indicated that new oil and gas fields are not necessary in a 1.5℃ world. Of course, Shell knew for years before that, that the extraction of the existing fossil fuel reserves would make it impossible to achieve the 1.5℃ goal.[35] With these investment decisions Shell knowingly and willingly ran the risk that these would turn out not to be in line with its duty of care. Shell must itself bear the consequences of the risk that it knowingly and willingly took. These consequences may not be passed on to society.

[31] On the basis of the reduction order Shell must reduce its emissions in 2030 to (55% of 1,631 $MtCO_2$ =) 897 $MtCO_2$. Relative to the emissions level in 2022 (1,232 $MtCO_2$) this is a further reduction of 27.2%.
[32] Exhibit MD-573A, p. 22.
[33] Exhibit MD-528, pp. 34 and 37.
[34] Exhibit MD-573A, p. 22.
[35] See also Statement of Defence on Appeal, paras. 575 et seq.

34. Lastly, it cannot be said that Shell suffered a lot of disadvantage due to its lower sales and emissions in 2022. After all, in that year Shell achieved the highest profit in 115 years due to the high prices because of the Ukraine crisis.[36] This does not mean to say that Milieudefensie et al. believes that this is a relevant fact when determining whether it can be demanded of Shell that it follow the NZE scenario as of 2023. This does say that Shell's starting point at the beginning of this trajectory can be considered to be particularly good.

35. The above once again makes it clear that a reduction obligation of 45% for Shell in 2030 relative to 2019 is not too much to ask.

36. I will now respond to Shell's argument that the reduction obligation does not fit in the legal system.

2. The standard on which the reduction order is based was not "rejected", but it was in fact accepted

37. In its opening argument Shell asserted in bold terms that a "reduction obligation does not fit within the system of the law".[37] According to Shell, this obligation is "at odds" with the measures already taken to combat the climate problem. In addition, after the District Court's Judgment, a reduction obligation for companies had supposedly been discussed three times and explicitly "rejected" each time. Shell repeatedly showed a slide with three big red crosses.[38]

38. Shell's adamancy is misplaced and its slide sets out an incorrect representation of affairs. I will explain this.

39. It is a misconception that the notion of a reduction obligation has supposedly been rejected by the Council of State, the government and the Dutch House of Representatives, as Shell asserts. The assertion is not correct for the following three reasons:

- 1st: the Council of State never took a position with regard to a reduction obligation;
- 2nd: the Dutch House of Representatives did make some incidental remarks about reduction obligations of a specific nature, but has not made pronouncements about a reduction obligation as codified in the CSDDD or as determined for Shell by the District Court; and
- 3rd: the government has never categorically stated to be against a reduction obligation, and in fact stated to be in favour of a reduction obligation as set out in the CSDDD.

40. I will go into this in further detail, starting with the Council of State. As substantiation for the alleged "rejection" by the Council of State, Shell refers to advice concerning the initiative bill for the Responsible and Sustainable International Business Conduct Act of 11 March 2021 (or the 'IMVO Act' for short).[39] This initiative bill of 2021 did not include any climate obligations for companies. Climate obligations were not introduced until the second version of the bill of 2

[36] See, for example: https://www.bbc.com/news/uk-64489147.
[37] Shell's Speaking notes of day 1 of the session – Part 1 of 2, p. 10.
[38] Shell's Speaking notes of day 1 of the session – Part 1 of 2, p. 11. Shell's Speaking notes of day 2 of the session – Part 1 of 4, p. 5 and p. 20.
[39] Dutch House of Representatives, parliamentary year 2020–2021, 35 761, no. 2.

November 2022[40]. These encompass an absolute reduction obligation for large companies,[41] with a fixed percentage of 55% regardless of the context of the individual company. The explanatory memorandum[42] sets out that alignment has been sought in this respect with the European Climate Act[43] and the draft CSDDD Directive (about which more later).[44] In the advice mentioned by Shell, the Council of State[45] was not able to state its position on a reduction obligation, as this had not yet been included in the 2021 proposal. Although the absolute reduction obligation of 55% has now been abandoned, that is because the bill was amended again on 15 September 2023 by means of a first memorandum of amendment.[46] The absolute reduction obligation of 55% was replaced by an obligation to determine reduction targets that are appropriate to the risks that have been found, so that the reduction obligation under the bill better aligns with the CSDDD and offers room for the specific context of an individual company.[47] The Council of State was also asked for advice on this memorandum of amendment,[48] but the Council of State never made a pronouncement on the reduction obligation in this advice[49] - let alone that it had "rejected" it, like Shell asserts. In any event, the Council of State does not have the power to "reject" bills; the Council of State only has the right to give advice.

41. This brings us to the Dutch House of Representatives, starting with the IMVO Act. As I already indicated, the proposed 55% reduction for all companies has in the meantime been abandoned, and the first memorandum of amendment has put a more context-bound reduction obligation on the table. The Dutch House of Representatives has not yet voted on the bill, and the Dutch House of Representatives has thus not yet been able to make a decision on the (modified) reduction obligation.[50] Shell refers, moreover, to two motions from November 2021.[51] Although these were rejected by the Dutch House of Representatives, Shell gives them a substantial meaning. There are three reasons for this:

[40] Dutch House of Representatives, parliamentary year 2022-2023, 35 761, no. 9 (Proposed bill as amended in connection with the advice of the Council of State).

[41] According to the bill, these are large corporations as referred to in Art. 3(4) of the European Financial Statements Directive (see footnote 27).

[42] Explanatory memorandum as amended in connection with the advice of the Advisory Division of the Council of State, parliamentary year 2022-2023, 35761, no. 10, p. 26 and article-by-article commentary with Article 2.4.2 (2), pp. 80-81.

[43] Article 4, first paragraph, first sentence of the European Climate Act.

[44] Article 15, second paragraph, of the CSDDD (proposals of the European Commission of 23 February 2022).

[45] Advice of the Advisory Division of the Council of State dated 8 July 2021, W02.21.0072/II. See: https://www.raadvanstate.nl/adviezen/@124698/w02-21-0072-ii/. Shell refers to this advice via the Parliamentary Document in footnote 82 in Shell's Speaking Notes, day 2 of the session – Part 1 of 4, p. 20.

[46] Memorandum of amendment, Dutch House of Representatives, parliamentary year 2022-2023, 35761, no. 17.

[47] Memorandum in connection with the report, Dutch House of Representatives, parliamentary year 2022-2023, 35761, no. 16, p. 2.

[48] Dutch House of Representatives, parliamentary year 2022–2023, 35 761, no. 19

[49] See: https://www.raadvanstate.nl/adviezen/@140030/w02-23-00316-ii/

[50] The initiators requested a plenary discussion of the bill during a procedure meeting of 28 September 2023. A majority of the standing Parliamentary Committee on Foreign Trade and Development Cooperation decided to not yet have a plenary discussion of the bill.

[51] Exhibit S-185.

- First of all, both motions[52] must be seen in the context in which they were submitted, i.e. during the debate on determining the budget statements of the Ministry of Economic Affairs for the year 2022.[53] During this debate, 66 motions were submitted that were directed at a wide range of topics in the budget in question.
- In addition, the motions do not stand alone, in the sense that the first motion is related to public investments in green industry politics (motion no. 43) and the second concerns a generalised reduction obligation without being placed in a more comprehensive context like the bill or the CSDDD (motion no. 45). The rejection of the motions therefore says nothing about the Dutch House of Representative's position relating to a reduction obligation as determined by the District Court in the specific case of Shell or within the more comprehensive context of the bill or the CSDDD.
- Lastly, the motions cited by Shell have been overtaken by time, as a statutory reduction obligation is on the way as part of the CSDDD. I will come back to this later.

42. And finally the government, the third instance that according to Shell supposedly rejected the reduction obligation. And here too Shell is creating an incorrect suggestion. Shell speaks of the "government", but only refers to an answer of the Minister of Economic Affairs to a parliamentary question of 23 November 2022. This is an exaggerated generalisation. The relevant parliamentary question was submitted with the adopting of the budget of the Ministry of Economic Affairs for the year 2023. During the first stage of the debate, 147 questions were asked about the 2023 budget, that the Minister then answered in writing. These questions are very diverse and concern a wide range of topics relating to the budget. The Minister's answer therefore cannot be normative with regard to the government's general position relating to such a reduction obligation, let alone the application thereof to Shell. In any event, the parliamentary question was not "rejected" by the Minister, it was answered. In addition, on 7 April 2022 the Minister of Foreign Affairs, on behalf of the government, had in fact already expressed his support in favour of the reduction obligation in the CSDDD. Please note, this was explicitly including reduction targets for Scope 3. He stated (quotation):

> "*The cabinet's position with regard to the attention paid to the climate in the proposal is positive, whereby very large companies must draw up a plan to bring their company strategy in line with the 1.5 degree goal. The cabinet is in favour of a broad interpretation of the term «operations», whereby so-called «Scope 3 emissions» fall within the value chains under the scope of the directive.*"[54]

43. This brings me to the most important point, that negates the "rejection" of the reduction obligation claimed by Shell: in line with the positive position of the Minister, the Dutch

[52] Motion no. 43, submitted by Representatives Van der Lee and Thijssen, concerned the conclusion that in the coming years billions in public resources will be spent on making the industry green and that it is no more than logical that this must be met with some counter-performance. The government was therefore asked to come up with a binding climate duty of care for companies in which, e.g., it is prescribed that companies must draw up a plan for climate neutrality in 2050 and the counter-performance that is requested of companies at the time they benefit from public investments in green industry politics must be ensured. Motion no. 45, submitted by Representatives Teunissen and Van Raan, concerned the conclusion that the Emissions Gap Report of the UN environmental programme UNEP shows that the world is on a path to dangerous warming of about 2.7°C and that the Dutch Innovation Monitor 2021 shows that tens of thousands of companies expect not to be climate-neutral this century. For that reason the government was asked to impose an absolute reduction obligation for all Dutch companies with global emissions higher than 50 megatons a year of Scope 1, 2 and 3 in line with the 1.5°C goal in the Paris Agreement.

[53] See: https://www.tweedekamer.nl/debat_en_vergadering/plenaire_vergaderingen/details/activiteit?id=2021A06886

[54] Dutch House of Representatives, parliamentary year 2021–2022, 22 112, no. 3393, p. 7.

government has in the meantime agreed to the CSDDD in the European Council, and thus also to the reduction obligation for companies encompassed therein.[55] In this respect too the statement of the Minister of Economic Affairs mentioned by Shell has now been overtaken by time.

44. Contrary to what Shell asserts, a statutory reduction obligation, which includes Scope 3, has not been "rejected". Not by the Council of State, not by the Dutch House of Representatives and not by the government. The point of view that for this reason a reduction obligation would interfere with Dutch climate policy and Dutch law, is therefore untenable. In fact: the reduction obligation is entirely appropriate in a development of law that increasingly recognises and codifies the responsibility of companies to reduce their emissions. I will now discuss this more extensively.

3. The development of law recognises and codifies the standard on which the reduction order is based

45. The recognition and codification of a reduction obligation in legislation is part of a development of law that has been going on for some 20 years, and encompasses that companies have a responsibility to combat environmental and human rights violations, both as a result of their own activities and in their value chains. This was already extensively discussed last week.[56]

46. These responsibilities relating to human rights are not only given substance on the basis of instruments such as the UNGP and the OECD Guidelines. They have also been given a place in the CSDDD. The obligations of companies relating to human rights have equally been given a place in the Corporate Sustainability Reporting Directive, often abbreviated to CSRD, as of the financial year 2024. This European directive provides frameworks for sustainability reporting for companies and demands in the context of climate change, inter alia, a description of the absolute emission reduction targets of companies,[57] for which the European Commission has laid down detailed requirements in its "*European Sustainability Reporting Standards*" (or ESRS).[58]

47. All these normative frameworks express a societal expectation about the responsibility to be taken by companies with regard to human rights and other collective interests. This societal expectation is also evidenced in the doctrine of hazardous negligence, human rights law as such and the many other objective leads highlighted by Milieudefensie et al. in these proceedings.

48. It is this societal expectation that the District Court applies to Shell, within the context, facts and circumstances applicable to Shell, and that the District Court presents as the basis for the societal climate duty of care of Shell on which it bases its reduction order.

49. This climate duty of care will always require a further specification when applied to a specific, individual company. This specification will also depend on the specific context of a company. This context-related specification is also explicitly recognised by, inter alia, the UNGP and the

[55] See: https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf.

[56] Milieudefensie et al.'s Oral Arguments, Shell's reduction obligation – Part 2, Climate protocols and guidelines, pp. 9-21.

[57] Art. 19a(2) under (b) and Art. 29a(2) under (b) of the European annual financial statements directive (which was amended by the CSRD). These articles refer to a description of (quotation) "*the time-bound targets related to sustainability matters set by the undertaking, including, where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description of the progress the undertaking has made towards achieving those targets, and a statement of whether the undertaking's targets related to environmental factors are based on conclusive scientific evidence*".

[58] Regulation 2023/2772/EU.

OECD Guidelines,[59] and aligns with the context-related character of the societal standard of care of Art. 6:162(2) Dutch Civil Code.[60] This context-related character was also discussed last week.[61]

50. As the aforementioned climate duty of care of necessity demands specification for individual companies, it is logical that the effect thereof in civil law leads to a role for the civil court. The court is, after all, able to review whether an individual company, in light of its specific context, provides proper substantiation for the civil law obligations that arise for that company based on the climate duty of care.

51. There can be no doubt that the civil court can play a role and this has been extensively explained. In addition, the development of the climate duty of care, and other standards in the area of human rights and sustainability, have intentionally been left to the civil domain. This was a conscious political choice, for which it has in the meantime been established that this choice fell short. This is evidenced by, inter alia, the 'National Action Plan on Business and Human Rights'. The government concluded in this respect that the approach chosen in 2013, which is based on cooperation through voluntary sector covenants, has turned out to be "insufficient".[62] It cannot be surprising that this leads to an a claim before the civil court. As the Council of State already signalled in 2018 (quotation):

    "*If the legislator does not provide sufficient guidance, the court is often asked to create such clarity. In case of a lack of clear standards in the law, the court will be forced to do more in terms of forming law in order to further clarify the law. It is unavoidable that the court will pass judgments with a law-forming character that exceed the interest of the dispute between the parties to give parties other than those involved certainty.*"[63]

52. As Milieudefensie et al. has already asserted several times in these proceedings, it is a misconception that the civil court has exceeded its constitutional powers. The words of Prof. Vranken of 2005 speak volumes in this respect. I quote:

    "*In fact, the forming of laws by the courts is a must. The contribution of the courts to the development of law is deemed essential in a modern society. (…) Legislation and case law are 'partners in the business of law', as indeed they should be.*"[64]

53. The conclusion therefore is that at first instance the District Court rightly deemed itself competent to decide on the applicability of the societal standard of care and the effect of the above-discussed climate duty of care in relation to said standard, which the District Court rightly tailored to the specific context of Shell. That the District Court attributed weight to soft law instruments like the UNGP and the OECD Guidelines, is also right. The law supports the effect of those instruments in the civil law relationship between private actors such as Milieudefensie et al. and Shell under Article 6:162(2) Dutch Civil Code. I will now discuss the latter point in further detail.

[59] UNGP Principle 18; OECD Guidelines Chapter VI (Environment); Commentary on Chapter II no. 19.
[60] Statement of Defence on Appeal, para. 4.2.
[61] Milieudefensie et al.'s Oral Arguments, Shell's reduction obligation - Part 1, para. nos. 56-69.
[62] See: https://open.overheid.nl/documenten/ronl-920644a5e6ea6e951c65230ed2a9c21093bd513f/pdf, p. 58.
[63] Council of State, Annual Report 2018, The Hague 2019, p. 26.
[64] J.B.M. Vranken, *Algemeen deel***. Een vervolg, Deventer: Kluwer 2005, pp. 9-10 (no. 9).

4. The law supports soft law as the basis for the standard on which the reduction order is based

54. Milieudefensie et al. has repeatedly explained in these proceedings that the unwritten standard of care is an open standard that can be given substance by seeking alignment with various objective starting points. In addition to, inter alia, the doctrine of hazardous negligence and the horizontal effect of human rights, various soft law sources also provide support for determining Shell's duty of care.[65] In this part of the oral arguments I will, partly in connection with the Court's question, provide further explanation that and why soft law can be attributed significant weight when upholding the reduction claim.

55. The question whether the Court of Appeal can seek alignment with soft law when giving substance to the unwritten standard of care, in view of national and international case law and opinions of authoritative authors, cannot be up for discussion.

56. Both at first instance and in the statement of defence on appeal, Milieudefensie et al. referred to case law of the Dutch Supreme Court from which it undeniably follows that soft law is increasingly important in finding the unwritten standard of care of Article 6:162(2) Dutch Civil Code.[66] For example, the Dutch Supreme Court decided in the *Achmea/Rijnberg* case from 2014[67] and the *Graafrichtlijn* case ['Excavation Guideline' case] from 2018 that soft law could be taken as the starting point when adjudicating the unlawfulness claim.[68] This legal opinion has been confirmed several times since then, including recently.[69]

57. The same trend can also be observed in an international context. P-G Langemeijer and A-G Wissink concluded in their advisory opinion for the *Urgenda* judgment that with regard to international soft law "*significance is increasingly attributed to them in the implementation of generally formulated obligations under international law and, by extension, in the implementation of open standards in national law*."[70] In that case the Dutch Supreme Court then explicitly referred to the interpretation criteria of the ECtHR, including the '*common ground method*'. On that basis the ECtHR also attributes value to soft law when interpreting the ECHR, for example in relation to WHO noise standards.[71,72]

58. This Court of Appeal recently passed a relevant judgment in this context. This concerns a case in which it had to be reviewed whether the policy of the state of the Netherlands and potable water companies, that permitted potable water to be shut off when minor children were involved due to default on payment on the part of their parents, was contrary to the unwritten

[65] Statement of Defence on Appeal, section 2.1

[66] See, inter alia: Statement of Defence on Appeal, paras. 435-445, and Notes on Oral Arguments 6, first instance, paras. 68 – 72.

[67] "*In view of the content and set-up of the Code of Conduct, the basic principle can be that if an insurer acts in contravention of the code, there is an unjustified and therefore unlawful infringement of the insured's personal life*." Dutch Supreme Court, 18 May 2014, ECLI:NL:HR:2014:942, para. 5.2.1.

[68] Dutch Supreme Court, 25 May 2018, ECLI:NL:HR:2018:772, para. 3.7.2: "*When giving substance to the duty of care, the court must in principle align with the [Excavation] Guideline. If the court wishes to give substance to a duty of care that deviates therefrom, the court must present reasoning as to which facts justify deviation from the [Excavation] Guideline in the specific case.*"

[69] Dutch Supreme Court, 15 December 2023, ECLI:NL:HR:2023:1750, para. 3.2.

[70] Advisory Opinion of P-G Langemeijer and A-G Wissink, 13 September 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.31.

[71] Dutch Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 5.4.3., with reference to, inter alia, ECtHR 20 May 2010, no. 61260/08 (*Oluić/Croatia*), paras. 29-31, 49, 60 and 62 (WHO noise standards).

[72] See also M.E. Coenraads en J.E.S. Hamster, Verantwoord ondernemen: van soft low naar harde verplichtingen via strategisch procederen, TOP 2019/8, pp. 35-36 and the examples included there.

standard of care and Article 3(1) of the Convention on the Rights of the Child. When determining what was to be deemed 'access to sufficient water', this Court too sought alignment with soft law of the WHO[73] and reference was made to *General Comments* of UN treaty bodies in the area of human rights.[74]

59. The international trend of increasingly attributing value to soft law when giving substance to standards of care is easy to explain. It enables the court to provide its opinion on an open standard of objective starting points, which benefits legal certainty.[75,76] Specifically in relation to companies and human rights, the use of soft law is the only way to give citizens effective legal protection in a world in which multinational companies make use of the governance gap to prevent hard law.

60. Milieudefensie et al. has already extensively discussed the governance gap in general and Shell's lobbying power in particular. It is nevertheless worthwhile to briefly remind ourselves of the analysis of the late John Ruggie, the founder of the UNGP. Ruggie stated that in case of lack of adequate self-regulation by companies and the political reality that a binding international convention on human rights violations by companies is doomed to fail, allowing soft law to have an effect in national legal systems can offer a way out of the impasse.[77] In other words, the rise of soft law is connected with the increasing role of non-state actors in a globalising world, in which the creation of traditional sources of national and international law becomes ever more complex.[78] In this manner soft law can therefore pave the way for hard law[79] and service as a building block for the development of unwritten law.[80]

61. It is therefore not only possible, but also necessary that the courts are led by authoritative and widely-supported soft law sources where they are to determine the law.

62. Let me lastly briefly explain why, specifically, the soft law sources to which Milieudefensie et al. has frequently referred, are particularly the kinds of sources to which significant weight can be attributed. It is not so much whether the legal status of a document is binding or non-binding that is relevant, but the material content of the rule laid down therein.[81]

63. In the first place the soft law sources to which Milieudefensie et al. refers, are often closely affiliated with the United Nations. These were drawn up by renowned experts by means of broad consultations with stakeholders. It should be clear that these kinds or sources have great

[73] Court of Appeal of The Hague, 19 March 2024, ECLI:NL:GHDHA:2024:363, paras. 6.16 and 6.18.

[74] Court of Appeal of The Hague, 19 March 2024, ECLI:NL:GHDHA:2024:363, paras. 6.12, 6.13 & 6.16; Judgment, footnote 42.

[75] Advisory Opinion of P-G Langemeijer and A-G Wissink 13 September 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.19.

[76] "*If with regard to a certain private standard it has been determined that such is, indeed, in principle decisive for determining the lawfulness of the matter, then in the cases in which action is taken that is in conflict with such standard, this will to a significant extent decrease the uncertainty regarding the question whether such action was also unlawful within the meaning of Art. 6:162 of the Dutch Civil Code.*" P-G Valk 28 May 2021, ECLI:NL:PHR:2021:534, para. 3.8.

[77] Milieudefensie et al.'s, Opening Argument at first instance, 1 December 2020, paras. 163-168.

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

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

[80] Van Dam, *Aansprakelijkheidsrecht* (2023), pp. 118 et seq.

[81] Advisory Opinion of P-G Langemeijer and A-G Wissink, 13 September 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.31.

authority.[82,83] With regard to the UNGP and the concurring OECD Guidelines and the UN Global Compact, this has also been acknowledged in the Judgment, against which Shell did not present any grounds of appeal.[84,85]

64. A similar degree of authority is found, inter alia, under the flag of the documents developed by the UN on which Milieudefensie et al. is basing its arguments, such as the UN Race to Zero criteria and the recommendations of the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities.[86] The global community too has welcomed the recommendations of the United Nations' High-Level Expert Group.[87]

65. In the second place there is a widely accepted consensus that there must be compliance with the substance of soft law. One by one, the sources seek to prevent human rights violations. This is evident for the UNGPs, the OECD Guidelines and the UN Global Compact. Other soft law documents, such as the UN Race to Zero criteria and the UN High-Level Expert Group on the Net Zero Emissions of Non-State Entities, seek to prevent or limit dangerous climate change in line with the best available knowledge and commonly accepted legal principles. These soft law sources are also intended to prevent human rights violations. It follows, after all, from the *Urgenda* judgment of the Dutch Supreme Court and the very recent *KlimaSeniorinnen* decision of the ECtHR[88], among others, that it is undeniable that climate change threatens human rights.[89]

66. That companies must respect human rights cannot be up for discussion. This particularly applies to large multinational companies that possess considerable political, legal and economic power.

67. In summary, only one conclusion is possible. Both national and international law provide a more then sufficient basis to attribute significant weight to soft law when giving substance to the societal standard of care. This is desperately necessary precisely with regard to a multinational like Shell, particularly as human rights are at issue and authoritative and widely-supported sources all point in the same direction.

68. All these sources to a great extent provide the same important basic principles for the way in which companies should establish their reduction targets. The recurring basic principles are that they must concern absolute emission reductions over the Scope 1, 2 and 3 emissions, based on the best available science. The CSDDD too is based on these principles.

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[82] Just as much as, according to the Dutch court, for example, the non-binding opinions of UN treaty bodies in the area of human rights have authority. See: Gerards, 'De rechtsmacht van niet-bindende uitspraken van verdragscomités op het terrein van de grondrechten', in: Hybride Bestuursrecht (VAR-reeks 156), The Hague, 2016;

[83] As this Court also rightly remarked in paras. 6.12 and 6.16 of ECLI:NL:GHDHA:2024:363.

[84] Judgment, para. 4.4.11.

[85] Van Dam states with regard to the UNGP and the OECD Guidelines that they have developed "into the standard of what is deemed acceptable of companies in society"; Van Dam, *Aansprakelijkheidsrecht* (2023), p. 215.

[86] See, inter alia: Milieudefensie et al., Oral Arguments on Shell's reduction obligation, part 2 – Climate protocols and guidelines, 4 April 2024.

[87] Decision -/CP.27, Sharm el-Sheikh Implementation Plan, available on https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf, para. 60.

[88] Case of *Verein Klimaseniorinnen Schweiz and others v. Switzerland* (Application no. 53600/20).

[89] Dutch Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 5.7.9.

69. In view of the human rights framework and Article 13 ECHR, it is then up to the court to provide effective legal protection, by determining a specific reduction percentage, taking account of these basic principles and circumstances of the case.

70. In this respect I would like to refer to the Court of Appeal in the Belgian climate case, which court determined the reduction percentage for the Belgian authorities in a similar manner. I quote:

"*while it is true that Articles 2 and 8 of the ECHR do not explicitly provide for a sanction in the event of a breach of the obligations enshrined therein, such a sanction may nevertheless be inferred from the right to an effective remedy enshrined in Article 13 of the ECHR, which must make it possible to put an end to the violation of the other rights enshrined in the Convention, and ideally to prevent it, but also to obtain compensation for the damage caused by the violation. […]*

It is therefore perfectly possible for an injunction to be the best, if not the only, remedy for a violation of Articles 2 and 8 of the ECHR, particularly in environmental litigation."[90]

71. When determining the reduction percentage of 55%, for which an order was imposed, the Belgian Court of Appeal also made use of soft law, including the UNEP Emissions Gap reports, as well as climate science.[91] The Court of Appeal made it clear in this respect that this is the appropriate manner to give substance to the human rights obligations of the governments, as well as the civil law duty of care based on unlawful act:

"*Such an approach does not, any more than in the context of the examination of articles 2 and 8 of the ECHR, amount to granting scientific reports a "legal consecration" (conclusions of the Belgian State, p. 192) or to recognizing them indirectly as a "source of positive law" (conclusions of the Belgian State, p. 192) or to recognizing them indirectly as a "source of positive law" (conclusions of the Brussels-Capital Region, p. 86), but to ascertain the extent to which the best available climate science makes it possible to confer on the standard of care a sufficiently precise content to assess, in law, the conduct of the authorities to which a fault is attributed […].*"[92]

72. The IPCC too makes it clear that it is the task of the court, based on equity considerations, the circumstances of the case and the best available science, to make a judgment on how to give substance to the duty of care.[93]

73. In these proceedings Milieudefensie et al. has presented extensive substantiation that providing effective legal protection, taking account of the above-discussed basic principles, must lead to a reduction obligation for Shell of 45% in 2030, relative to 2019.

5. The standard on which the reduction order is based can anticipate, and be farther-reaching than, (codification of the standard in) legislation and market use (there is no indemnifying effect)

[90] Exhibit MD-570B, para. 277 (p. 154).
[91] Exhibit MD-570B, paras. 240 and 244 (pp. 132 and 134), see also para. 284 (p. 158) with reference to paras. 198-202.
[92] Exhibit MD-570B, para. 240 (p. 132).
[93] Milieudefensie et al.'s Defence Brief of 19 December 2023, p. 5, with reference to Exhibit S-140 (IPCC AR6), section 14, p. 1468.

74. It is therefore established that the reduction order can and may find support in soft law such as the UNGP and the OECD Guidelines. I previously discussed that the climate duty of care is not only evidenced in these soft law instruments, but is also increasingly recognised and codified in supervisory legislation, hard law. These soft law instruments thus show that they in fact pave the way for hard law. [94]

75. In the opinion of Milieudefensie et al. this development can only support the reduction order. This is an extra underscoring of the societal expectation that also has an effect in unwritten law, and therefore the societal standard of care laid down in Article 6:162(2) Dutch Civil Code. In addition, a future codification of that societal expectation does not stand in the way of an earlier effect in the societal standard of care, as set out in the Judgment. Existing and future regulations, such as the CSDDD, therefore cannot indemnify Shell against its obligations under the societal standard of care.

76. Illustrative for this principle is the duty of care case law of the Dutch Supreme Court relating to the responsibilities of financial institutions to their clients. A fixed line in that case law is that financial institutions are subject to a civil law duty of care, in addition to the public law duties of care to which they are subject on the basis of supervisory law. In addition, the civil law duty of care can go further than the public law duty of care, if there is a reason for such in the circumstances of the case.

77. According to the Dutch Supreme Court this comes back to the principle that Dutch law has a system of dual duties of care: public law duties of care and private law duties of care. These types of duties of care each have their own function. According to the Dutch Supreme Court, private law duties of care are necessary because, contrary to public law duties of care, they can be tailored to a specific case. A key case in this case law is the judgment in the share leasing case of *De Treek/Dexia*.[95] The advisory opinion in this case of P-G De Vries Lentsch-Kostense is particularly insightful. She states, inter alia (quotation):

> "*The banks have claimed that gathering information on the income and capital position (the so-called 'know-your-client principle'), was not common practice at the time, nor was it prescribed in the codes of conduct that were included in the public law regulations, the Decree on the Supervision of Share Transactions (Bte 1995) and the Additional regulations on the supervision of share transactions 1995 (NR 1995)51. and the successor to the NR 1995, the Additional regulations on the supervision of share transactions 1999 (NR 1999).52 in force at the time when the share leasing agreements were made. It is argued that the same applies to the special warning obligation assumed in the jurisprudence. The banks are claiming in this respect that they could follow the provisions of the [public law regulations] Bte 1995 and the NR 1995 and the NR 1999 and that they could expect to be in compliance with their duty of care if they satisfied the rules laid down in said provisions.*"[96] (emphasis added by legal counsel)
>
> "*The above-mentioned argument of the banks nevertheless ignores the fact that when determining the extent of the special duty of care incumbent on the bank, arising from the*

[94] Advisory Opinion of P-G Langemeijer and A-G Wissink, 13 September 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.32.
[95] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182.
[96] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182, Advisory Opinion of acting P-G De Vries Lentsch-Kostense, para. 3.20.

requirements of fairness and equity, meaning can be attributed to the content of the public law regulations, but that it cannot be maintained that this private law duty of care can go no further than the code of conduct rules laid down in said public law regulations. This would disregard the fact that the Netherlands has a system of dual duties of care, public law duties of care and private law duties of care (primarily developed by the Dutch Supreme Court). These public law supervisory regulations are intended to guarantee a careful, expert and ethical form of action with regard to the work of stockbrokers (and/or credit providers) and with this in mind, contains additional rules on the basis of which the supervisory authority can promote the aforementioned goals. The requirements of fairness and equity and the requirements that may be set with regard to a good contractor, are geared to the specific case and can entail that a financial service provider is bound by a more comprehensive duty of care than that which arises from the still applicable public law regulations, simply because the public law duty of care influences, but does not determine, the private law duty of care."[97] (emphasis added by legal counsel)

"*That the obligations arising from the special private law duty of care, as accepted by the courts of appeal in the share leasing cases - the warning duty and the duty to provide information regarding income and capital - prior to 1999 did not yet apply in the public law regulations in force at that time because at that time the supervisory authority had not yet set specific rules, is without prejudice to the fact that it is in line with these public law regulations to accept that these obligations can arise from the bank's special private law duty of care.*[98] (emphasis added by legal counsel)

78. The Dutch Supreme Court therefore held in this case (quotation):

> "*Insofar as the section recognises the opinion that this private law duty of care cannot have any greater scope than the duties of care laid down in public law regulations, it fails. This view is incorrect.*"[99]

79. This principle was further solidified in subsequent case law of the Dutch Supreme Court and, moreover, was given further substance. For example, in the judgment in the case of *SNS/Stichting Gedupeerden Overwaardeconstructie W&P*.[100] Said judgment highlights that the civil law duty of care gives expression to the circumstances of the case.[101]

80. In the *Amstelsteate/Verweerders* case[102] it was again affirmed that the civil law duty of care can extend beyond public law regulations. In addition, this case makes it clear that the civil law duty of care can anticipate public law regulations, in line with the previously discussed 'paving the way principle' that also applies to soft law.[103]

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[97] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182, Advisory Opinion of acting P-G De Vries Lentsch-Kostense, para. 3.21.

[98] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182, Advisory Opinion of acting P-G De Vries Lentsch-Kostense, para. 3.26.

[99] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182, para. 4.10.3.

[100] Dutch Supreme Court, 16 June 2017, ECLI:NL:HR:2017:1107, NJ 2017/363, para. 4.2.5.

[101] Dutch Supreme Court, 16 June 2017, ECLI:NL:HR:2017:1107, NJ 2017/363, Advisory Opinion of A-G Timmerman, paras. 4.4. and 4.5.

[102] Dutch Supreme Court, 14 December 2018, ECLI:NL:HR:2018:2298, 2019/184, para. 3.4.2.

[103] Dutch Supreme Court, 14 December 2018, ECLI:NL:HR:2018:2298, NJ 2019/184, Advisory Opinion of A-G Wissink, para. 3.20.

81. The above-described banking duty of care case law lends itself, *mutatis mutandis*, well for application to the climate duty of care of companies like Shell. There are at least three reasons for this.

- In the first place, the previously discussed climate duty of care forces a specification in the application thereof to an individual company. When specifying the individual context and circumstances of that company, it is very important to be able to determine what precisely the climate duty of care entails for this specific company. This means that when applying the climate duty of care, there is definitely a role for the civil law and the civil court. I have previously gone into this.
- A second reason is that the public law standards that banks invoke in the aforementioned jurisprudence, are more specifically intended for the protection of affected interests than, for example, that the EU-ETS system is geared to the interest that Milieudefensie et al. is seeking to protect. The need for the role of the civil court and the civil judge is all the more evident.
- A third reason is that with the climate duty of care, even more than with the banking duty of care, there is a need to protect the interests that are affected if a company fails in its duty of care. After all, the interests protected by the climate duty of care are greater. The banking duty of care only serves to protect the financial interest (i.e. the financial loss) of a relatively small group of stakeholders (clients) directly involved with the bank. The climate duty of care, on the other hand, also protects against property damage and personal injury of innumerous individuals.

82. It should be clear: applicable public law evidently does not indemnify Shell in respect of the civil law duty of care to which it too is subject with regard to Milieudefensie et al. Indeed: public law regulations in fact provide additional starting points for a farther-reaching civil law duty of care on the basis of Article 6:162(2) Dutch Civil Code. This applies to existing law, and to future law like the CSDDD and ETS2. In addition, there is every reason to hold Shell to its obligations under that already existing civil law duty of care now. It is simply not possible to wait for any future legislation.

83. There is thus every reason and scope to uphold the reduction order. Civil law duties of care are characterised by the fact that they can go further than more general legislation, if the circumstances of the case demand such. Milieudefensie et al. has presented extensive reasons as to why this is the case with Shell.

6. The consequences of the Judgment are for the account of Shell's strategic risk appetite

84. Lastly, the following should be noted. On behalf of Milieudefensie et al. we have shown, as the team of attorneys, that and how Shell seriously failed in its societal duty of care. It is good to once again make it clear that the reproach made against Shell in these proceedings, is only a reproach against the legal entity that is Shell. This case is thus a case against the legal entity Shell and not against the employees of Shell.

85. Many tens of thousands of people work at Shell, people who are simply busy with their work and day-to-day worries. People who themselves do not all have the information that was discussed in these proceedings and therefore do not understand why their company is being held liable by Milieudefensie et al. Milieudefensie et al. wishes to make clear to all those people

that this case is not directed against them. Thousands of people work at Shell who are also worried about the climate problem, wish to make a contribution to it and are willing to put in the effort. Milieudefensie et al. appreciates this and I wish to note this appreciation here on behalf of Milieudefensie et al.

86. None of this affects the fact that a serious reproach can be made against the legal entity Shell in relation to its acts and omissions. If the Court upholds the order - and in the opinion of Milieudefensie et al. there are very good grounds for doing so - this may possibly have consequences for certain employees of Shell. They may become part of a transition plan to be drawn up by Shell. They may have to retrain, find another job within the company or be given assistance to find a job elsewhere. These are the kinds of restructuring processes that regularly occur in a company like Shell, but nevertheless this may have unpleasant aspects for employees. Milieudefensie et al. is aware of this.

87. Taking all things into consideration, these consequences are not so much the result of the Judgment, but of the unwillingness of Shell's board of directors and Shell's shareholders, who in the past few years and even after the Judgment was pronounced, knowingly and willingly accepted these risks for the company. This has to do with Shell's strategic risk appetite previously discussed in these proceedings, which can be simply described as: the desire to simply accept certain risks.[104]

88. The following can be said, in short, about that strategic risk appetite. Shell has been aware for very many years of the considerable risks of climate change and the energy transition for its fossil fuel business activities. For that reason Shell reports annually on these risks in its annual reports.

89. According to Shell, climate change and tackling greenhouse gas emissions entail considerable risks for Shell that are interrelated and indicate a rapidly developing risk landscape. Shell divides this risk landscape into four sub-areas: (i) commercial risks, (ii) regulatory risks, (iii) societal and legal risks and (iv) physical risks.[105]

90. Shell acknowledges very explicitly in its annual reports that the increasing concerns about climate change and the increasing focus on the role of oil and gas companies in the area of climate change and the energy transition, entail considerable risks, including negative consequences for the Shell brand and reputation, a reduced demand for oil and gas products, accelerated laws and regulations, capital destruction, shareholders jumping ship, financing risks and liability risks.[106]

91. Nevertheless, Shell's board of directors, with the approval of the majority of its shareholders, time and again in the past few years made the strategic choice not to act in line with the global temperature goal of Paris and to thereby accept all these risks. This means that Shell's board of directors and the shareholders were willing year after year, including after the Judgment in 2021, to accept the climate-related risks that the company is running. This is in exchange for the

[104] Section 6.2.10, Milieudefensie et al.'s Statement of Defence on Appeal with references to, inter alia, Notes on Oral Arguments 1 at first instance.
[105] Exhibit MD-377, p. 86.
[106] Exhibit MD-377, pp. 23, 28, 80 - 82.

high returns that can be achieved for the company and its shareholders by simply continuing with the fossil fuel business model despite these climate risks.[107]

92. Because these risks recur year after year in the annual reports, Shell's suppliers are also aware of these risks, Shell's banks and insurers also know about them, Shell's works council knows about these risks and all other relevant Shell stakeholders also know of these risks. If these risks then actually occur, due to the Judgment or otherwise, it is also up to the company and its stakeholders to knowingly and willingly bear these accepted risks. Because these risks have been taken into account by all parties involved in their decision making, the risks can then also actually be borne by them, or at least must be borne by them.

93. For these reasons too the Judgment can be upheld by the Court, even if the consequences of upholding the Judgment will be considerable for Shell and its stakeholders. After all, they took into account that a day like this would come at some point and they all thought that was acceptable.

[107] See also Milieudefensie et al.'s Notes on Oral Arguments 1, paras. 83 – 129 - Making identified transition risks manageable by means of such things as lobby and PR activities.