PAULUSSEN ADVOCATEN

Unofficial translation

Court of Appeal of The Hague
Case number: 200.302.332
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STATEMENT OF DEFENCE ON APPEAL AFTER JOINDER

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."

Counsel:
R.H.J Cox, M.J. Reij, A.J.M. van Diem

versus:

Shell plc
having its registered office in London, United Kingdom

Appellant, original defendant

Counsel:
D.F. Lunsingh Scheurleer, T. Drenth

and:

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

Stichting Milieu en Mens
having its registered office in Zwolle, the Netherlands

Joined party on the part of Shell plc

Counsel:
D.J.B. Bosscher

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1. Introduction

1. Stichting Milieu en Mens (**M&M**) submitted its Statement after Joinder (**SaJ**) on 18 July 2023. In its Statement after Joinder, M&M used abbreviations which Milieudefensie et al. will use as well. The Statement of Defence on Appeal of Milieudefensie et al. of 29 November 2022 in M&M's motion for joinder will hereinafter be referred to as the **Interlocutory Defence**. For the rest, Milieudefensie et al. will use the abbreviations it used in its Statement of Defence on Appeal in the main proceedings (**Defence on Appeal**).

2. M&M joined these proceedings on Shell's side. In doing so, M&M is supporting Shell's appeal against the Judgment and, within the boundaries of the legal battle in appeal established by Shell and Milieudefensie, may present independent reasons as to why M&M believes the Judgment should not be upheld. M&M did so in the Statement after Joinder.

3. Friends of the Earth Netherlands et al. has noted that with regard to some of the topics, M&M has taken a position that does not have an essentially different basis thanalready presented by Shell in its Appeal, so that Milieudefensie et al. will only present a brief response, referring (primarily) to its Defence on Appeal and the Interlocutory Defence. M&M's most important topics in the Statement after Joinder relate to (i) the scope and application of Article 3:305a Dutch Civil Code, (ii) the alleged interest of Dutch citizens in maintaining the supply of fossil fuel energy in the Netherlands, partly in relation to ensuring the affordability of (fossil fuel) energy, (iii) findingthe unwritten societal standard of care and (iv) the effectiveness of and the interest in the reduction order.

4. In section 2 of this defence after joinder, Milieudefensie et al. will first discuss M&M's assertions about the scope of the public interest action and Milieudefensie et al.'s standing pursuant to Article 3:305a Dutch Civil Code, including a response to M&M's assertions about what it believes to be the awkward position of the party joining these appeal proceedings.

5. In section 3, Milieudefensie et al. will discuss the central topic of the joinder of M&M, i.e. the alleged interest of Dutch citizens in maintaining the supply of fossil fuel energy in the Netherlands and M&M's concerns about the affordability of (fossil fuel) energy. M&M is of the opinion that (upholding) the Judgment will lead to those (energy) interests being harmed. All in all, M&M believes that when these energy interests have been weighed, this should lead to Shell having no responsibility whatsoever for reducing its global CO_2 emissions, which indisputably contribute to climate change. Although no objective factual substantiation has been presented for M&M's assertions, Milieudefensie et al. will set out, with reference to authoritative sources, that there is no reason to fear that the Judgment will lead to an energy shortage and/or "*drastic*" and "*unacceptable*" prices for (fossil fuel) energy in the Netherlands.

6. In section 4, Milieudefensie et al. responds to M&M's assertions about finding the unwritten societal standard of care.

7. In section 5, Milieudefensie et al. speaks about M&M's arguments concerning the effectiveness of the reduction order. Milieudefensie et al. will explain that M&M's arguments relating to effectiveness cannot succeed.

8. In its concluding remarks in section 6, Milieudefensie et al. will briefly discuss the topic of the trias politica as cited by M&M.

2. Scope and application of Article 3:305a Dutch Civil Code

9. M&M believes that Milieudefensie et al.'s collective action – the goal of which is to protect the interests of the current and future generations of Dutch citizens by ensuring they have a habitable environment – is supposedly unsuitable for "*the pathway that Article 3:305a Dutch Civil Code provides for Milieudefensie et al.*".[1] In addition, according to M&M, Milieudefensie et al. does not have standing because there are citizens who do not agree with the claims of Milieudefensie et al. and it cannot be permitted that Milieudefensie et al. enforce its "*subjective sense of urgency*" regarding taking the necessary measures to prevent dangerous climate change by means of collective action, according to M&M.[2]

10. In the response to Shell's Ground of Appeal VII (section 10.10 Defence on Appeal[3]) and in paras. 2 and 27-28 of the Interlocutory Defence, Milieudefensie et al. already explained that such arguments do not stand in the way of Milieudefensie et al. having standing pursuant to Article 3:305a Dutch Civil Code.

11. On the contrary: the decision in the Urgenda case clarifies that a claim to take appropriate measures against the threat of dangerous climate change is particularly well-suited to civil adjudication in a collective action, as this promotes efficient and effective legal protection.[4] Societal division regarding the protection of such ideal (environmental) interests is not an impediment to standing:

"Societal divisiveness about the value that must be attributed to such interests or the manner in which those interests must be weighed against other, conflicting interests do not deprive a claimant of standing in a class action in the Netherlands."[5]

12. This is also in line with Art. 9(3) in conjunction with Art. 2(5) of the Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Art. 13 ECHR, that prescribes that domestic law must provide an effective legal remedy against (threatened) violation of human rights, according to the Netherlands Supreme Court.[6]

13. Article 3:305a Dutch Civil Code gives Milieudefensie et al. the right to present a legal question to the courts and to seek legal protection in civil proceedings.

14. M&M argues in paras. 19 to 29 Statement after Joinder that, in its own words, "*limited defence options*" and "*powerlessness*" as joined party should lead to a lack of standing of Milieudefensie et al.[7] It does not provide a ground on the basis of which a joined party could undermine a general

[1] Para. 18 Statement after Joinder.
[2] Paras. 13-18 Statement after Joinder and paras. 27-28 Statement after Joinder.
[3] See in particular paras. 1160 – 1168 Defence on Appeal.
[4] Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, paras. 5.9.1 – 5.9.2.
[5] P-G Langemeijer and A-G Wissink in their Advisory Opinion with the Urgenda judgment, para. 2.5.
[6] Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, para. 5.9.2 in conjunction with paras. 5.5.1 – 5.5.3.
[7] See para. 32 Statement after Joinder for that conclusion of M&M.

interest action in this manner, nor does such ground exist. In addition, the explanation that M&M gives for its own position and options is incorrect.

15. The legal concept of joinder is intended for a party that has an interest in one of the original litigation parties winning the proceedings and fears that said party will not itself come up with the right or complete arguments. Contrary to an intervening party, the joining party is not alleging that it has its own claim, it only seeks to support one of the original litigating parties, in this case Shell. It is therefore logical that the character of the joinder should entail that the role of the joining party is limited to presenting facts and grounds for the benefit of the position of the party that it is supporting.[8] In other words: the facts and grounds that the joining party presents may not be contrary to the position of the party it is joining in litigation. Nor can M&M, as joining party, invoke facts and grounds that Shell itself cannot present.[9] It is, however, incorrect that the interest M&M is seeking to protect must also be an interest that concerns Shell, as M&M suggests in para. 24 Statement after Joinder. The joining party is acting in its own interest. It is also incorrect that M&M was not allowed to do anything more than support precisely the same arguments already presented by Shell, as it suggests in paras. 19, 22 and 23 Statement after Joinder. There are no limited options for defence in this respect.

16. M&M was given the opportunity it wanted, by means of a statement after joinder, to independently and on grounds independently presented, present arguments against Milieudefensie et al.'s claims and did so. The fact that M&M was and remains bound in this respect by the boundaries established by Shell and Milieudefensie et al. in the legal dispute, is a consequence of the appeal system and consequently the (last possible) time of joining chosen by M&M, and therefore not of the instrument of joinder as such. After all, if M&M had joined at first instance or in appeal before Shell had submitted the Appeal, there would have been no demarcation of the legal dispute by the appeals system. It is not clear that this procedural restriction should play a role in the assessment of the standing of Milieudefensie et al., as M&M suggests in para. 32 of the Statement after Joinder.

17. In addition, M&M was able to present its key topic for joinder, i.e. seeking to draw attention to and the weighing of energy interests of Dutch citizens and its fear of (fossil fuel) energy scarcity and higher (fossil fuel) prices, by means of its joinder. It wants those interests to be considered when determining the duty of care to which Shell is subject. In that sense it is therefore not at all limited in its options. In the following section Milieudefensie et al. will explain that taking account of M&M's arguments does not lead to a different responsibility for Shell and consequently will not affect the Judgment.

3. Weighing energy interests of Dutch citizens does not lead to another responsibility for Shell and therefore will not affect the Judgment

3.1 Basic principles in the appeal and assessment framework

18. M&M's key point entails, in short, that the Judgment leads to higher prices of fossil fuel energy, that this will have drastic consequences for Dutch citizens and that this is unacceptable and must lead to the setting aside of the Judgment. M&M's assertions must be evaluated within the boundaries of Shell's grounds of appeal. Milieudefensie et al. understands the arguments of M&M

[8] Court of Appeal of The Hague, 25 April 2023, ECLI:NL:GHDHA:2023:736 para. 5.22.
[9] Ibid

in such way that they relate to Shell's Grounds of Appeal I(a) and I(b), in which Shell argues that the Judgment wrongly assumes the existence of an unwritten societal standard that obliges Shell to reduce the Shell Group's global CO_2 emissions by at least 45% net at the end of 2030 or by some other percentage and that the District Court should not have closed its eyes to the wider interest of energy and supply certainty. M&M then argues that weighing the interest of (fossil fuel) energy for specific Dutch citizens would entail that Shell cannot have any responsibility and is not subject to any legal obligation to supply a proportional and adequate contribution to the prevention of dangerous climate change.

19. Milieudefensie et al. states a priori that it believes it is important that the costs and benefits of the energy transition are fairly divided and that vulnerable households are protected. Milieudefensie et al. has been fighting for this goal for many years.[10] Nevertheless, the goal of achieving a just energy transition and ditto division of costs does not detract from Shell's shared responsibility to help prevent dangerous climate change and the right of Milieudefensie et al. to seek protection against Shell's behaviour. Milieudefensie et al. will explain this below.

3.2 Important facts that are not in dispute between the parties

20. The bottom line is that what has been established between Shell and Milieudefensie et al. in the proceedings can no longer be made a matter for discussion by M&M. This concerns, inter alia, the following facts: that dangerous climate change must be prevented; that climate change entails great dangers and risks for the life and well-being of people, including in the Netherlands; that the still available carbon budget to have a 50% chance of limiting global warming to 1.5 °C is rapidly shrinking and in case of unaltered emissions will have been used up in ten years; that consequently far-reaching and permanent emissions reductions are urgently required to bring about that global CO_2 emissions have been reduced by at least 45% by the end of 2030; that toward that end the existing energy sources and infrastructure must be replaced at an unprecedented speed and an unprecedented scale; that there is a societal consensus that individual companies have to take measures to reduce their emissions and that doing nothing is unacceptable; that states subject to the climate regime of the UN Climate Convention have indicated that they cannot tackle the climate approach alone and that companies (and other non-party stakeholders) must themselves take responsibility for reducing emissions to achieve the temperature goal of the Paris Agreement; and that there is a relationship between the Paris Agreement, the Decision with the Paris

[10] In 2016, through its policy plan "Working together on a fair transition" for the period 2016-2025, Milieudefensie made the topic of climate justice a spearhead of its policy. It instructs various studies to be carried out regarding this topic and frequently publishes its findings in order to draw attention to the need for a just climate policy and a just energy transition. Milieudefensie also calls on political decision-makers to guarantee the affordability and broader justice of policy in this area and toward this end has formed broad societal coalitions with, inter alia, the FNV trade union and the Woonbond, other societal (environmental) organisations and MVO Nederland (the corporate network for sustainable businesses). Milieudefensie is continually acting on behalf of the energy interests of Dutch citizens. These interests are served by an adequate climate approach. See, for example, the letter to the Netherlands House of Representatives of 27 October 2021 from Milieudefensie, Woonbond and FNV: 'Laat kwetsbare huishoudens niet in de kou zitten' [Don't leave vulnerable households out in the cold], available on https://milieudefensie.nl/actueel/20211025-brf-498-alternatief-voorstel-compensatie-stijgende-energieprijzen-en-isolatie-maatregelen.pdf. See also the launch of the Eerlijke Klimaatagenda on 9 June 2021, 'Brede coalitie lanceert klimaatplan voor lagere inkomens' [Broad coalition launches climate plan for lower incomes], available on https://milieudefensie.nl/actueel/brede-coalitie-lanceert-klimaatplan-voor-lagere-inkomens. See also Milieudefensie 2 July 2020, Verruiming warmtefonds biedt miljoenen huishoudens kans op kosteloos isoleren [Expansion of heating fund offers millions of households the chance of free insulation], available on https://milieudefensie.nl/actueel/verruiming-warmtefonds-biedt-miljoenen-huishoudens-kans-op-kosteloos-isoleren and Milieudefensie 24 June 2018, Vision: Eerlijke verdeling van lusten en lasten [Fair division of the costs and the benefits], available on https://milieudefensie.nl/actueel/eerlijke-verdeling-van-lusten-en-lasten.pdf.

Agreement and the internationally accepted Sustainable Development Goals, from which it ensues that the interest of, inter alia, access to affordable, reliable and sustainable energy must be served within the boundaries of the climate goals. Nor is it a matter for discussion that a global energy transition will have to be based on energy efficiency (less and more efficient use of energy) and making the energy supply sustainable.

21. The global climate approach and related energy transition which must globally lead to a minimum 45% CO_2 emissions reduction in 2030, is possible according to the UN Climate Panel.[11] This energy transition is possible for the global community, it is certainly possible for a rich, prosperous, stable and institutionally well-organised country like the Netherlands. It has been neither asserted nor proven that in the Netherlands access to reliable and affordable energy would be at risk if the global climate target of a 45% reduction in 2030 would be achieved and the Netherlands makes its (proportionally larger) contribution to this. The feasibility of an ambitious climate policy for the Netherlands was recently confirmed by the Netherlands Scientific Climate Council (Wetenschappelijke Klimaatraad).[12] Nor is there any indication that in the period up to and including 2030 (the period to which the Judgment relates), the Judgment would result in an affordable and reliable energy supply in the Netherlands being out of reach.

3.3 M&M does not present substantiation for what it asserts to be the effects of the Judgment

22. M&M asserts that the supply of fossil fuel energy in the Netherlands will be reduced by the Judgment and/or that it will cause the prices to increase significantly in the Netherlands. It does not provide substantiation, other than by suggesting that this is what Milieudefensie et al. would have asserted itself with regard to the consequences of the Judgment for the Netherlands.[13] This suggestion of M&M is not correct, as Milieudefensie et al. has, in response to Shell's substitution defence, only spoken in general terms and abstractly about the (price) effects of the Judgment. Shell has the freedom to determine how it will implement the Judgment globally.

23. In addition, in its court documents Milieudefensie et al. explained that, and why, the Judgment will contribute in a multitude of ways to the necessary acceleration of the global climate approach and related energy transition.[14] The Judgment consequently not only contributes to preventing dangerous climate change – the key point of this lawsuit against Shell – but also, as a side effect, to reinforcing the (permanent) access to affordable and reliable sustainable and modern energy.

24. Milieudefensie et al. already explained these points at first instance and in the Defence on Appeal, as well as emphasising them in the Interlocutory Defence, with submission of exhibits.[15] Reference was made, inter alia, to the findings of the European Commission that the sustainable energy transition is necessary for both climate protection and access to affordable and reliable energy

[11] Defence on Appeal, paras. 514 – 515.
[12] **Exhibit MD-479**, Letter from the Netherlands Scientific Climate Council of 29 August 2023 to parliament, 'Science highlights the need for reinforcing climate policy'. On p. 2 of this letter, partly on the basis of the advice of the European Scientific Advisory Board on Climate Change (ESABC), it is recommended to fix the Dutch climate target for 2040 at a 90-95% emissions reduction compared to 1990. ESABC's recommendation "*is based on a study of what is necessary to limit global warming to 1.5 °C, which is globally justified in view of the historical emissions and available resources of the EU, and what is feasible.*", according to the Netherlands Scientific Climate Council. The Netherlands Scientific Climate Council was founded to provide the government and the parliament with solicited and unsolicited advice on the climate policy on the basis of the most recent scientific insights.
[13] Statement after Judgment, para. 11.
[14] For a summary of the ways in which the Judgment contributes to the climate approach and the energy transition, see pp. 18-22 Defence on Appeal, paras. (126) to (172) and section 8 of the Defence on Appeal.
[15] Interlocutory Defence, paras. 50 – 52, footnotes 52 – 56 and Exhibits MDV-13 to MDV-15.

and that both goals can only be achieved by moving away from "*an economy driven by fossil fuels*, *an economy where energy is based on a centralised*, *supply-side approach and which relies on old technologies and outdated business models.*"[16]

25. Contrary to what it has asserted, M&M therefore cannot deduce from the reasoning of Milieudefensie et al. that the Judgment will lead to drastic and unacceptable price increases in (fossil fuel) energy in the Netherlands. Its unsubstantiated assertion that Dutch citizens will not have any alternatives in the short and mid-long term cannot be maintained either, as will be explained hereinafter. Nor is it the case that there will be a general phasing out of fossil fuels in the period up to 2030 (the period covered by the Judgment), as a result of the Judgment or due to the energy transition in general. During that period Dutch citizens will in any event not only be dependent on alternatives. Even in case of a rapid energy transition, fossil fuels will remain available in the period to 2030, albeit that the dependency on fossil fuels will be phased down during that period, which phasing down will be continued after 2030.

3.4 M&M's fear of drastic and unacceptable price increases is unfounded

26. The only other argument that M&M appears to make to substantiate its fear of drastic and unacceptable price increases is the reference in its Statement after Joinder to the gas crisis as a result of the Russian invasion of Ukraine. Milieudefensie et al. deduces this from para. 11 Statement after Joinder, in which M&M refers to the concern that energy users will "*again*" be confronted with unreasonable costs and from the reference to the consequences of the war in Ukraine in para. 6 of the Statement of Joinder of 4 October 2022. Although Milieudefensie et al. understands that this concern is being highlighted – after all, the gas crisis does have worrisome consequences for part of the population, that concern Milieudefensie et al. as well – a comparison between the effects of the Judgment and the gas crisis shows that this concern is unwarranted.

27. The restriction of the gas supply for the Netherlands and Europe in 2022 was, measured by scope and time, many times greater than the restriction in Shell's supply of oil and gas which will take place worldwide following the Judgment. The two situations cannot be compared. Milieudefensie et al. will briefly explain this difference.

28. According to the International Energy Agency (IEA) in its World Energy Outlook 2022 (WEO 2022), since 2015 Russia has supplied a good 40% of the total gas demand in the EU.[17] According to the IEA, in 2022 80% of the supply from Russia dropped off within a period of six months.[18] This means that on balance 32% of the total gas supply to the EU dropped off within half a year (80% of 40% = 32%).

29. The consequences of the court order against Shell are of a much smaller magnitude.

30. First of all, the court order relates to a reduction of Shell's oil and gas supply over a 10-year time frame instead of a half year.[19] The factor of the time in which the reduction of fossil fuels will take

[16] Interlocutory Defence, footnote 53, in which reference is made to COM(2015) 80 final, p. 2.
[17] **Exhibit MD-480**, World Energy Outlook 2022, p. 35
[18] Ibid, p. 92.
[19] The summons in the Shell case is from 2019, the reference year for the reduction order is 2019 and the Judgment is from May 2021. The 45% reduction must have been achieved by the end of 2030. Bearing all of this in mind, for the sake of convenience the calculation was based on a time period of 10 years within which the full 45% reduction compared to 2019 must have been realised.

place is on its own twenty times as great in the case of the Judgment than in the case of the gas crisis. This leaves a great deal more time for states, companies and citizens to adjust to the reduction of the supply of fossil fuels as a result of the Judgment.

31. Secondly, global demand for oil and gas is (naturally) far less dependent on the Shell supply than the EU demand for gas was dependent on the supply from Russia. EU dependence on Russian gas was 40% and fell by 80%. Compare this to Shell, that provides approximately 2.5% of the global oil and gas supply and that this percentage must have been reduced by 45% in 2030.[20] This means that the Judgment will bring about a reduction of 1.1% of the global oil and gas supply (over a period of ten years). The gas crisis involved a reduction in the EU of 32% (over a period of six months). In terms of reduction of the supply of fossil fuels, the Judgment results in a global effect that is many times smaller than the reduction of the gas supply in the EU in the gas crisis.

32. These comparisons by scope and time show that the difference between the Judgment and the gas crisis is very considerable.

33. The above shows that, insofar as M&M did want to make a comparison between the consequences of the Judgment and the consequences of the gas crisis, this comparison is invalid and the fear of drastic and unacceptable price increases of (fossil fuel) energy as a result of the Judgment is not justified.

34. It must be noted that M&M does not indicate what should be understood by drastic and unacceptable price increases. On its website, M&M suggests on the home page (last accessed on 8 October 2023) that the Judgment would put the right of Dutch citizens to a decent standard of living at risk. This is apparently the benchmark it applies when it speaks of drastic and unacceptable price increases of fossil fuels. It nevertheless fails to present facts and substantiation for this assertion in its Statement after Joinder. That, and why, the Judgment would cause such an infringement and a decent standard of living or the human dignity of Dutch citizens would consequently be under pressure, is not clear. In view of the above-presented explanation and the discussion below, this is not the case.

35. The gas crisis not only clarifies the great difference in scope and time between the gas crisis and the Judgment, it also clarifies a number of other issues that are relevant for this lawsuit and for the determination that the (energy) interests that M&M is seeking to protect, are not at risk. Neither because of the Judgment, nor because of the energy transition (which is not as such at issue in these proceedings).

3.5 A rapid, sustainable energy transition benefits the energy interests of Dutch citizens

36. First of all, according to the IEA the gas crisis shows that the energy transition is the solution and not the problem. Had we started the energy transition earlier, energy users would have been better protected against the crisis and the prices of gas (and oil) would not have been as high, according to the IEA.[21]

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[20] This share of Shell of 2.5% of the global oil and gas sales is based on the determination that 2.5% of the global emissions can be attributed to Shell (see para. 627 Defence on Appeal). For the sake of convenience, this calculation – this only concerns an indication of an order of magnitude – assumes that this translates to a 2.5% stake in the global supply of oil and gas.

[21] Exhibit MD-480, WEO 2022, pp. 29 and 35: "*this is a crisis where energy transitions are the solution, rather than the problem*" and "*More rapid deployment of clean energy sources and technologies in practice would have helped to protect*

37. The fact that the energy transition will entail affordability advantages for consumers, is something that in practice already occurs on a large scale. The IEA calculates in this respect that the increased capacity of sustainable energy since the beginning of the gas crisis has already saved 100 billion in costs and that this saving could have even been 15% higher if the EU had put more effort into the capacity expansion of sustainable energy:

"The results show that without PV and wind capacity growth in 2021-2023, average wholesale electricity prices would be higher by about 3% in 2021, 8% in 2022 and 15% in 2023, raising the cost of electricity supply for the entire European Union by roughly EUR 100 billion. […] Accelerating annual renewable energy deployment since 2021 has provided a cost-effective solution to the energy crisis' economic challenges. […] According to the IEA accelerated case forecast, savings could have been about 15% higher if EU capacity had been increased more rapidly […]."[22]

38. In view of the above, Dutch citizens would have been better protected if we were further along in the energy transition, which is based on greater energy efficiency and making the energy supply more sustainable. Precisely by accelerating efforts in this area Dutch citizens will be better protected in terms of energy supply in the future and the affordability thereof.

39. Second, according to the IEA, the gas crisis has again raised awareness among governments across the world of the need for a rapid energy transition. According to the IEA, the gas crisis led to an unprecedented momentum arising whereby countries are opting worldwide for the accelerated scaling up of renewable energy, including in the US, China, India and, of course, the EU.[23] Countries use this strong scaling up of renewable energy for reinforcing energy security.[24] The scaling up is also a result of the fact that wind and solar energy have in the meantime, in the vast majority of countries, become the cheapest energy sources for new electricity generation, according to the IEA.[25] In this context it may not be forgotten that electrification of, inter alia, the heat supply in the built-up environment (such as by means of heat pumps) and the electrification of mobility (EVs) are important components of the energy transition. It shows that citizens throughout the world will benefit from accelerated scaling up of sustainable electricity generation. It improves energy security and ultimately leads to lower costs for electricity generation.

40. The IEA furthermore indicates that in the coming five years it is expected that just as much renewable energy capacity will be added globally as was added in the last 20 years. The global capacity of solar power will almost treble in the period 2022-2027 and become the biggest source of energy in the world. Global wind capacity will almost double during that period.[26] In its 2022 annual report about the renewable energy sector, the IEA therefore adjusted the growth of this sector upward by 30% compared to its annual report for 2021.[27] It shows that year on year the growth expectation of the renewable energy sector will continue to increase. Milieudefensie et al. points out in this respect that over the past 15 years, year after year the IEA had to adjust its

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consumers and mitigate some of the upward pressure on fuel prices."

[22] **Exhibit MD-481**, IEA Renewable Energy Market Update – June 2023, 'How much money are European consumers saving thanks to renewables?', pp. 4-5.

[23] **Exhibit MD-482**, IEA press release of 6 December 2022, 'Renewable power's growth is being turbocharged as countries seek to strengthen energy security', p. 1.

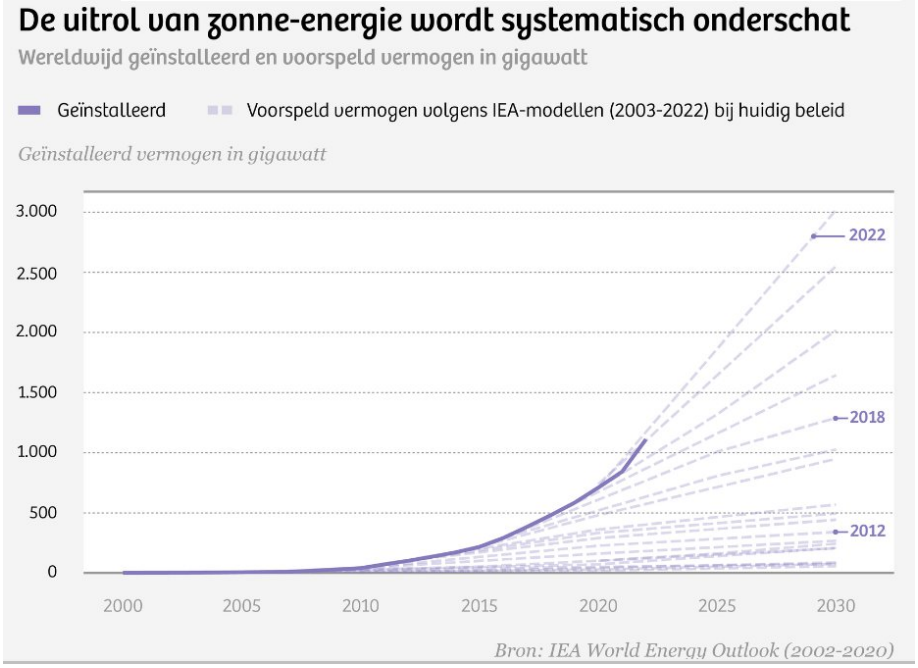
[24] Ibid, p. 1.

[25] Ibid, p. 1.

[26] Ibid, p. 1 (for solar power) and p. 2 (for wind power).

[27] Ibid, p. 1.

forecasts upward as a result of a structural undervaluation of the growth capacity of the renewables sector, as is strikingly represented for solar power in the figure below.[28] This figure shows that the actual installed capacity of solar power was persistently greater over the past 15 years than had been predicted by the IEA. For example, it can be seen that the installed capacity in 2022 was already two times greater than the IEA had predicted in 2015 for the year 2030.



41. An analysis by Bloomberg regarding the way in which the EU countries responded to the gas crisis, concludes in line with the findings of the IEA that the gas crisis showed that the sustainable energy transition can take place more quickly and that the phasing out of the dependence on Russian gas occurred much quicker than expected. The article has the following to say: *"[W]hat the past year has shown is that it's possible to go harder and faster in deploying solar panels and batteries, reducing energy use, and permanently swapping out entrenched sources of fossil fuel."*[29] According to this analysis, in the EU in 2022 (compared to 2021) 35% more capacity in solar energy had been added, battery storage increased by 79% and preliminary figures show that possibly up to 38% more heat pumps were sold in the EU (that heat a house far more efficiently than gas and consequently use less energy and therefore reduce the energy costs for citizens).[30]

42. Third, the gas crisis shows that countries learn quickly in case of an energy crisis, naturally precisely because the matter concerns a crisis situation. This resulted in the topic of energy immediately being higher on the political and societal agenda. For the EU, the Netherlands and other countries it has consequently become clearer and more urgent that the stability of the energy supply benefits from more diversification of energy sources and suppliers. For many people this led to expanding their perspective of the energy transition and made clear that it is not only important

[28] Figure on the basis of data of the IEA. The figure comes from an article in De Correspondent of 9 May 2023, 'Zelfs optimisten zijn te pessimistisch: schone energie wordt spotgoedkoop' [Even optimists are too pessimistic: clean energy will be incredibly cheap], available on https://decorrespondent.nl/14477/zelfs-optimisten-zijn-te-pessimistisch-schone-energie-wordt-spotgoedkoop/7207da32-0828-04b1-2c67-69741dee4163.

[29] **Exhibit MD-483**, Bloomberg Green 21 February 2023, How Europe Ditched Russian Fossil Fuels With Spectacular Speed, p. 3.

[30] Ibid, p. 4 and p. 9.

for climate protection, but also from the perspective of energy security and the securing of affordable energy for the future.

43. The gas crisis, a teachable moment, put the importance of a governmental approach to promoting good insulation in houses on the agenda again in the EU, so that houses can be heated using (considerably) less energy and in that manner also (considerably) reducing the monthly energy costs of citizens. This will make society and the government more resilient to these kinds of price shocks of fossil fuel energy. Financial support from the government during the gas crisis (by means of, inter alia, price ceilings for gas and electricity) of society and in particular the vulnerable energy users in the EU – those with a low income in combination with a high gas bill or a very poorly insulated home – cost the EU countries hundreds of billions of euros extra.[31] An amount that would have been considerably lower if, among other things, houses had been better insulated. This increased awareness on the part of the government and society of the great importance of insulation and (associated) energy efficiency is an important pillar for the acceleration of the energy transition and also helps the interests of the Dutch citizens that M&M is seeking to represent. The national government contributes to this by means of, among other things, providing subsidies for insulating houses and by providing low interest loans to insulate homes in the Netherlands.[32]

44. Fourth, the gas crisis shows that there is no immediate and perfect substitution if and as soon as the gas supply from a specific supplier is reduced. The gas crisis shows that the supply shortfall is not entirely and immediately picked up by other gas suppliers. Contrary to the assumption made by Shell in its substitution defence, which is only based on the substitution of fossil fuels with other fossil fuels, the IEA shows that during the gas crisis and because of the low costs and rapid upscaling of renewable energy there is rather substitution of fossil fuels with renewable energy, with large price benefits for consumers:

"In 2021 and 2022, the European Union added nearly 90 GW of PV and wind capacity. This capacity has displaced almost 10% of hard coal and natural gas generation, pushing the most expensive power plants out of the market and effectively reducing the price for all consumers. In addition, another 60 GW of solar PV and wind is expected to come online in 2023, increasing displacement to almost 20% this year. [Emphasis added by counsel]"[33]

45. Naturally, part of the EU demand for gas was ultimately satisfied by means of gas supplies from suppliers in countries other than Russia. The higher gas price also saw to it, however, that part of the demand for gas within the EU disappeared, now and for the future, due to the above-discussed scaling up of solar and wind power and, inter alia, government insulation programmes. These renewable energy sources and the focus on energy efficiency consequently partly took the place

[31] Ibid, p. 2.
[32] See https://www.rijksoverheid.nl/onderwerpen/energie-thuis/vraag-en-antwoord/subsidie-isolatie-huis.
[33] Exhibit MD-481, p. 4. See also p. 1: "*Low-cost new wind and solar PV installations have displaced an estimated 230 TWh of expensive fossil fuel generation since Russia's invasion of Ukraine, leading to a reduction in wholesale electricity prices on all European markets.*"

of gas.[34] In view of the acceleration of sustainable investments in the Netherlands, Europe and worldwide, including China, the US and India, this effect cannot be underestimated.

46. In summary, the above-discussed consequences of the gas crisis show that the dependency on fossil fuel energy makes society vulnerable, that the sustainable energy transition is the solution and not the problem, that the sustainable energy transition makes society more resilient, that this consequently results in the affordability of energy and energy security increasing, that when limiting the supply of gas, there is no perfect substitution and that governments can address the negative impact of the crisis and learn from it.

47. As has also been explained above, the acute loss of gas supplies from Russia to Europe is incomparable to the limiting of the supply that will be the result of the Judgment. M&M thus cannot claim, referring to the gas crisis, that as a result of the Judgment, the energy interests of Dutch citizens would be at risk and that a proper standard of living or human dignity are at issue. M&M did not present any substantiation for this.

48. In this respect, Milieudefensie et al. lastly remarks for the record that the Judgment or the energy transition in general will not lead to an overall loss of fossil fuels, certainly not in the period to 2030. The necessary climate approach does entail that the supply of and the demand for fossil fuels will have to be reduced to the necessary extent in order to reduce the associated CO_2 emissions. As was discussed in the Defence on Appeal, at the same time this provides the incentives (and removes the thresholds) for the necessary further scaling up of energy efficiency and sustainable energy sources.[35]

49. In short, because of all of the above, a rapid energy transition in fact benefits the (energy) interests that M&M claims it wants to protect. In any event, M&M's argument cannot detract from Shell's partial responsibility to help prevent dangerous climate change, nor from the right of Milieudefensie et al. to seek legal protection against the conduct of Shell that is contrary to said partial responsibility.

3.6 It is the market, and not political decision-makers, that primarily determines the price and availability of gas and oil in the Netherlands

50. This brings Milieudefensie et al. to the last point that M&M makes in connection with the energy transition, i.e. that the energy transition must be left up to political decision-makers, because only political decision-makers can guarantee an affordable supply of fossil fuels.[36] The remark creates the suggestion that the Dutch government has full control over the price of the (fossil fuel) energy supply. This is not correct, however. Milieudefensie et al. will explain this below.

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[34] The fact that part of the demand for gas was temporarily substituted by coal does not detract from these findings. This temporary return to reliance on (among other things) coal is connected with the rather unfortunate coincidence of circumstances pursuant to which in 2022 there was not only a gas crisis, but (1) in addition, a substantial part of the aged French nuclear power stations were undergoing maintenance and consequently could not produce any electricity and France became partly dependent on extra electricity generation in neighbouring countries and (2) in 2022 the EU was experiencing the worst drought in over 500 years, so that considerably less hydropower was available than normal for the generation of electricity. As the nuclear power stations and water power are back to previous levels in 2023, a large drop in the use of coal and gas for electricity generation is expected for 2023. See Exhibit MD-483, pp. 11-12.

[35] See with regard to the way in which the Judgment not only contributes to climate protection (the goal of these proceedings) but also to the creation of incentives for the energy transition and the removal of (fossil fuel) thresholds for the transition, pp. 18-22 Defence on Appeal under paras. (126)-(172) and section 8 of the Defence on Appeal.

[36] Statement after Joinder, para. 5.

51. As the gas crisis of 2022 shows, the Dutch government does not control the market prices of gas. Natural gas is a product that is traded partly regionally and partly globally on the basis of supply and demand and associated price forming.[37] This means that the affordability of natural gas is determined to a great extent by regional and global circumstances that have an influence on supply and demand. Think of such things as economic growth or recession or, as the gas crisis has shown, a war at the outer border of Europe. The Dutch government only has a limited influence on these kinds of developments that determine the affordability of natural gas. It is primarily market forces that, responding to developments in the world (in this case a reduction in the supply of Russian gas) is decisive for the price of natural gas at any given time.

52. The gas crisis demonstrated what we have known for a much longer period of time with regard to oil, i.e. that the dependence on oil as a globally traded product can lead to very large price fluctuations due to rapidly falling demand and that the Dutch government has little or no influence on this. The same applies to other countries. This is a result of the choice of governments worldwide to leave the availability of affordable oil primarily up to global market forces and not to implement a coordinated international policy with regard to the supply and the price.

53. In 1973 and 1979 the Netherlands experienced what can happen if the global supply of oil is significantly reduced in a short period of time due to geopolitical reasons. In 1973 the oil price tripled in a short period of time, in 1979 it doubled.[38] The enormous price increases resulting from the sudden decrease in the supply of oil in a short period of time, led to government measures in the Netherlands such as, inter alia, the introduction of car-free Sundays and rationing of petrol by means of petrol vouchers.

54. At the time, just as during the gas crisis in 2022, the Dutch government, could respond to the consequences of the high market prices and limited availability of oil as a result of market forces, but in essence had and has no control over the market prices as such. The situation that played out in relation to the price forming of oil in modern history also clearly show this. That is why Milieudefensie et al. will briefly pay attention to this topic.

55. The first oil crisis in 1973 and the consequences thereof, led in 1974 to the founding of the IEA, which, as is known, is a collaborative body of Western countries with the goal of coordinating problems due to market disruptions, in particular in times of a significant oil shortage. The goal of the IEA since that time has been to ensure the supply of oil (and later gas) to the West as much as possible.[39] This international collaboration led to each of the affiliated countries maintaining a strategic oil reserve, enough for 90 days.[40] This leaves more certainty regarding the availability of oil in case of market disruptions, while at the same time this emergency oil reserve keeps prices down in case of such market disruptions.

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[37] Because gas has traditionally primarily been transported via regional pipelines and is only distributed globally to a limited extent by means of (LNG) ships, gas prices can differ (considerably) per region.

[38] See also **Exhibit MD-484**, House of Commons Library Research Briefing, Oil Prices, 7 November 2022, pp. 19 and 20 ("*prices increased more than three-fold between 1973 and 1974.* […] *The second 'oil shock' happened in 1979-80 […] which caused further large increases in prices.*") The graph on p. 19 shows that the oil crisis of 1979-80 led to a doubling of the oil price.

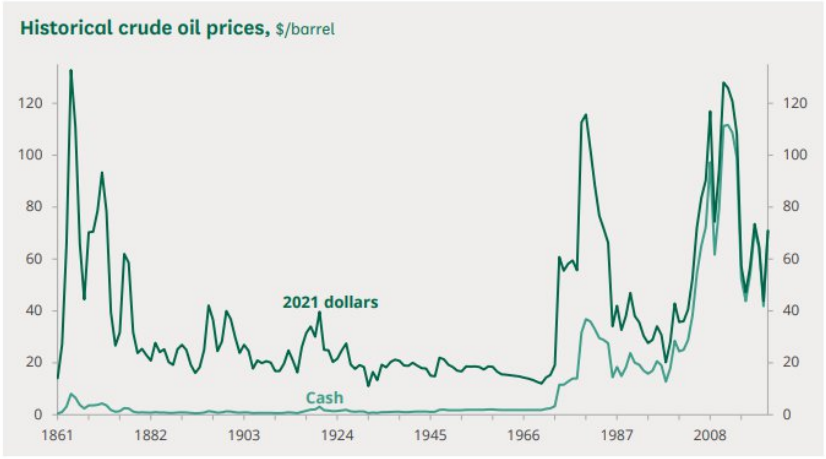
[39] Since its founding, the IEA has been focusing on more tasks, such as the overall energy supply, the energy transition, data processing and climate change. The IEA has in the meantime been maintaining contacts with other countries (non-members), including Russia, China and India.

[40] In the Netherlands this is regulated by the Netherlands Petroleum Stockpiling Agency (COVA).

56. Both of the oil crises in the 1970s arose because governments were taken unawares by a rapidly decreasing availability of oil. The rapid and significant increases in the price of oil in 2008 (comparable to that of the 1970s) show that governments can be caught unawares by another coincidence of circumstances in the market. In 2008 this was a coincidence of the exceptionally rapidly growing demand for oil from China and India combined with other factors, including the fact that because of the financial (banking) crisis and the poorly performing financial products, investors and speculators were increasingly investing their funds in oil and other commodities.[41]

57. That the prices of fossil fuels are extremely volatile and have shown sudden, substantial price fluctuations at other times in history (with far-reaching consequences), is clearly set out in a report on oil prices of 2022 of the British House of Commons Library. Various graphs are presented, that properly illustrate this volatility.

58. The graph below shows that volatility for the period from 1861 – 2021:[42]



Source: BP Statistical Review of World Energy 2021

59. This second graph zooms in on the volatility over the period 1999 – 2021, which shows that in the past twenty years, the oil price per barrel has known many great fluctuations within the bandwidth of 20 to 150 dollars per barrel:[43]

[41] Exhibit MD-484. See in particular Appendix I (pp. 21-22).
[42] Exhibit MD-484, p. 19.
[43] Exhibit MD-484, p. 8.

60. The above shows that it is the global market and the various influences on the global market, that determine the oil supply and demand and consequently lay the foundation for the affordability or unaffordability of oil, not the Dutch government.[44] The gas crisis shows that this phenomenon also applies to the gas market.

61. That the Dutch government, contrary to M&M's assumption, cannot guarantee that there will always be an affordable and reliable supply of fossil fuels, also ensues from the fact that the Netherlands has a National Oil Crisis Plan.[45] This makes clear why governments do not have any control over the oil market. According to the crisis plan, this is because the oil market is not globally regulated:

    "*At national and international level there is little to no regulation that a government can apply to allocate oil to one specific group of users or process. Market forces mean that stocks can be purchased by the highest bidder, anywhere in the world.*"[46]

62. It comes down to the price of oil being determined by global market forces and the reality that the oil is transported by oil companies and traders to those parties that are willing to pay the highest price.

63. Supply and demand are thus determinative of the oil price. There are many factors that influence supply and demand in the oil market (and thus the oil price) and that contribute to the inherently volatile character of fossil fuel prices, including:[47] the existence (or non-existence) of oil embargoes against oil-producing countries (like Iran and Russia); wars like those in Iraq/Iran (1980), in Iraq (1990 and 2003), Libya (2011) and Ukraine (2022); financial crises such as those in Asia in 1997 or the banking crisis of 2007/2008; unexpectedly strong economic growth such as that in China and India prior to the high oil price of 2008; natural disasters due to extreme weather such as Hurricane Katrina in 2005 in the Gulf of Mexico (which caused the entire oil and gas infrastructure in this region of the United States to temporarily be shut down due to significant damage to oil platforms,

[44] This is without prejudice to the fact that, as discussed further on, the government can then (reactively) take measures to alleviate the market price by means of such things as (temporary) price ceilings or encumbering the market price through taxation (excise).
[45] **Exhibit MD-485**, National Oil Crisis Plan of 3 February 2023.
[46] Exhibit MD-485, p. 6.
[47] See for many of these circumstances the report of the House of Commons Library (Exhibit MD-484), pp. 5 – 20, as well as Appendix 1.

pipelines, refineries, ports and electricity networks); the speculation with oil on financial markets and the speculation with other commodities like metals that are important for the construction of the fossil fuel infrastructure; sabotage of fossil fuel infrastructure like the oil fields in Saudi Arabia (2019) and the Nordstream gas pipeline in the Baltic Sea (2022); production agreements and quota in OPEC context; the exchange rate of the national currency to the US dollar (the currency in which oil is internationally traded); laws and regulations relating to efficiency standards for cars; the electrification of the car fleet; incentivisation packages for sustainable energy; government schemes such as subsidies for the use of fossil fuels; the degree in which there are investments in oil and gas production and/or in sustainable alternatives and the changing demand and preferences of consumers.

64. Just as all these facts and circumstances have an effect on supply and demand and in conjunction with each other determine the price (uncoordinated), the Judgment also falls among those facts and circumstances that determine supply and demand. It is not clear why factors like commercial (investment) decisions, exchange rates, speculation and trade, political decisions, wars and natural disasters could have an influence on market forces and the price and availability of fossil fuels, and why the application of law and jurisprudence, including the Judgment, should be excluded from those market forces, as M&M suggests. In a democratic state based on the rule of law, it is precisely the legal rules and the need to protect human rights that must have a corrective effect where necessary, so that the legally unacceptable consequences of, inter alia, commercial and political decisions are counteracted. If that necessary protection of human rights were to impact the market, this will simply have to be accepted. The mere existence of market effects cannot in itself be a justification for the rejection of human rights protection.

65. Contrary to what M&M apparently presumes, the price forming of fossil fuels is determined by the market and the aforementioned market influences and not, certainly not primarily, by the Dutch government. It is thus the (international) market that determines, by means of supply and demand, the price, the availability and the distribution of goods (in this case of oil and gas). Governments are able to address the unwanted consequences of these international market forces, for example by means of (temporary) consumer protection (e.g. a price ceiling for gas and electricity) and/or discouraging energy use through taxation (excise) and/or increasing strategic storage capacity for oil and gas to increase energy security.

66. The Judgment does not impact this range of tools that governments have to (continue to) address unwanted consequences of market forces. In section 3.9 of the Defence on Appeal a further explanation was given as to why the Judgment does not encroach on the freedom of the state (of the Netherlands) to take action.

3.7 Political decision-makers take action in times of (temporary) energy deficits

67. Milieudefensie et al. has the following to say about the range of tools available to governments to address unwanted consequences of market forces.

68. As appears from the preceding section, volatility is an inherent feature of the existing fossil fuel energy system. The Dutch government therefore has crisis plans to protect society in case of a fossil fuel energy crisis (just like other national governments). These crisis plans have existed far longer with regard to major disruptions in the oil market, but they now also exist for disruptions

in the gas market. These crisis plans are intended to safeguard human dignity in times of large fossil fuel energy shortages. This will be explained briefly below.

69. In the event that for whatever reason there is suddenly a large temporary shortage of oil, countries affiliated with the IEA are obliged to have an Oil Crisis Management Plan.[48] This crisis management plan indicates, inter alia, how the Dutch government will take measures in case of a major oil crisis in order to prevent an excessively large disruption of Dutch society. According to the plan, the impact on society and the economy will in such case be mitigated by, e.g., releasing the strategic oil reserves and/or the use of voluntary or mandatory measures that limit demand. If the market can no longer guarantee that the priority users or the vital sectors can be supplied, supplying these groups will be given priority.[49] A number of the many measures mentioned in the report are: mitigating the use of fuels as much as possible by encouraging fewer transport movements, starting on a voluntary basis; greater steering of what refineries and the chemical industry produce (prioritising what is essential); tapping into the strategic reserve; introducing car-free Sundays; stimulating public transport; working from home as much as possible; reducing car speeds to 80 km per hour during the day and 100 km per hour at night; variations of excise on fuel; expansion of environmental zones; reducing flight movements; postponing maintenance of refineries; recommissioning refineries that had been shut down; increasing storage capacity; combating stockpiling by setting maximum refuelling limits at the petrol station and awareness campaigns. According to the crisis plan, in case of more serious crises there will, if necessary, be a prioritisation of sectors with priority for sectors that are relevant for overall assistance and food supply, such as defence, health care, food chain, communications, emergency service and essential government services (maintenance of vital infrastructure, education, public transport, waste collection). The other consumption outside of the vital sectors will then be realised via rationing.[50]

70. As already mentioned, it is the volatility of the existing fossil fuel energy system that creates the need for crisis plans. There are no indications that the energy transition will lead to a crisis that will force taking the above-mentioned crisis measures in the Netherlands. As regards the Judgment, it is completely evident that this will not lead to such a crisis situation in the Netherlands. Nor does M&M provide substantiation for its assertions. The above shows, however, that the Dutch government can take sufficient measures to protect society in the event of an oil crisis, regardless of the cause of the crisis, and to safeguard human dignity. As regards dealing with a gas crisis, there are comparable plans and options for measures to deal with the associated consequences as best as possible, as appears from the National Gas Crisis Plan.[51] Again, the Judgment will not lead to a crisis, but it seemed useful for Milieudefensie et al. to indicate the existence of crisis plans relating to oil and gas, because this makes it clear that the current fossil fuel energy supply for Dutch citizens is not without risks in relation to energy security and affordability.

71. Although the above-mentioned (temporary) crisis measures, regardless of the circumstance that lead to the crisis, are far-reaching, they safeguard human dignity, and the impact of these (temporary) measures is in no way related to the dangers and risks to life and well-being of people

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[48] Exhibit MD-485, p. 7, with the notice that this obligation to have an Oil Crisis Management Plan also ensues from EU cooperation and the NATO Treaty.
[49] Ibid
[50] Ibid, pp. 7 and 54.
[51] National Gas Crisis Plan, to be consulted on https://open.overheid.nl/documenten/ronl-bd0419942f12ffd4b77b67bb6f23a735ab63037f/pdf.

that is associated with dangerous climate change. Milieudefensie et al. repeats in this respect the findings of the UN Special Rapporteur on Human Rights and the Environment:

Climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture."[52]

72. Dangerous climate change thus undeniably does have a negative impact on human dignity, as appears from the above quote. What Milieudefensie et al. seeks to emphasise with this is that even a (temporary) energy crisis, regardless of what caused it, is in essence a problem that can be solved, contrary to the serious consequences of dangerous climate change that will occur if action is not taken in time. The Netherlands Supreme Court summarised these serious consequences as follows:

"The warming of the earth beyond that temperature limit may have extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now."[53]

73. Finally, the following can be said in this respect. Milieudefensie et al. has paid attention above to the working and volatility of the fossil fuel market. The history that was discussed shows that fossil fuel energy prices are inherently volatile, that society has been held hostage by fossil fuel prices many times already and that the Dutch government also has plans to deal with the associated crisis situations that may arise. It shows that we do not have an energy system in which governments together coordinate (global) supply and demand, let alone coordinate it in such way that consequently at all times there is supply security and affordable energy for citizens in the Netherlands and around the world. When phasing out our dependence on fossil fuels during the energy transition, inherent volatility will continue to exist for that part of society that is still dependent on oil and gas. This is not anything new under the sun and certainly not a reason to delay or postpone the energy transition. It is in fact a reason to accelerate the energy transition, as explained in detail in section 3.5.

3.8 Conclusion with regard to the energy interests of Dutch citizens

74. In conjunction with its earlier court documents, Milieudefensie et al. made it clear with all of this that the Judgment does not entail that consequently the (energy) interests of Dutch citizens are negatively affected, let alone so negatively, that it could stand in the way of establishing the

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[52] Exhibit MDV-23, United Nations Human Rights Special Procedures, *Safe Climate, A report of the Special Rapporteur on Human Rights and the Environment*, 8 April 2019, p. 2 (summary) and p. 18 (para. 26). See also p. 26 (para. 55) and p. 32 (para. 72) on the human rights obligations of companies in relation to climate change.

[53] Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006. Summary, under the heading *Dangerous climate change.*

societal standard of care that Milieudefensie et al. believes applies to Shell. On the contrary, Milieudefensie et al. has shown that those (energy) interests are served by the energy transition and the Judgment.

75. All sources used at first instance and in this appeal point in the same direction with regard to protection against dangerous climate change and the protection of energy interests. The leitmotif is always phasing out fossil fuels at the necessary pace and working on energy efficiency and scaling up sustainable energy sources, which leads to advantages in the area of energy security and affordability and, above all, protecting citizens against dangerous climate change.

4. Finding the unwritten societal standard of care

76. M&M furthermore argues that Shell's reduction obligation is not self-evident and therefore cannot apply to Shell (paras. 35-37), that it ensues from the Urgenda judgment that (only) the legislature can decide on emissions reductions and that no societal standard arises for Shell from that (paras. 38-44) and that it is unclear why human rights should play a role in assessing the duty of care to which Shell is subject (paras. 38-44).

77. Milieudefensie et al. can quickly deal with these assertions, as they are not essentially different from Shell's assertions.

- In response to Shell's grounds of appeal, an explanation is presented in sections 3.4 and 4.1 to 4.4 Defence on Appeal that it is incorrect that an unwritten societal standard of care can only be found in orderly and evident (exactly the same) situations and that Article 6:162(2) of the Dutch Civil Code is also not limited to commonly known cases that are evident to everyone;
- Sections 3.3 and 3.6 of the Defence on Appeal, inter alia, discuss that the decision in the Urgenda case cannot lead to the conclusion that only the State has responsibility with regard to (the manner of) reducing greenhouse gas emissions. After all, the issue in the Urgenda case was not whether private parties could be held liable in addition to the State in connection with their own special position and influence on dangerous climate change;
- Milieudefensie et al. set out in, inter alia, section 4.5 of the Defence on Appeal (with reference to the relevant documents at first instance) that and in what manner human rights apply to Shell's behaviour.

78. The existence of the unwritten societal standard of care was substantiated in detail at first instance by Milieudefensie et al., it was established and explained by the District Court in section 4.4 of the Judgment and was most recently explained in further detail by Milieudefensie et al. in response to Shell's grounds of appeal in the Defence on Appeal (in particular in sections 1 to 5). M&M barely discussed or disputed this substantiation. M&M's argument that the unwritten societal standard of care for Shell cannot be found, cannot succeed for this reason alone.

5. The effectiveness of the Judgment, causality and interest

79. Now, Milieudefensie et al. comes to speak about the arguments that M&M presented in the Statement after Joinder in relation to effectiveness. Milieudefensie et al. will first clarify in this respect within what context the effectiveness of the reduction order in the Defence on Appeal plays a role, to then indicate how this relates to M&M's arguments.

80. Milieudefensie et al. responded to Shell's substitution defence in the Defence on Appeal (section 8). In summary, Milieudefensie et al. uses three 'layers' in its arguments in this respect:

i. First layer: according to Milieudefensie et al., from a legal perspective it is primarily only relevant that Shell is subject to a legal obligation to make a proportional contribution to prevent dangerous climate change and that Shell in case of (threatened) violation of that legal obligation can be ordered to perform that legal obligation. The reduction order will have been effective simply if Shell's emissions are reduced, so that the threatened violation by this party is prevented and protection is offered against the (legally relevant) contribution of Shell to the climate problem. This case is not about the behaviour of other fossil fuel companies and what these companies will do, whether or not in response to Shell. The reduction order will result in a reduction of Shell's emissions, a fact not disputed by Shell, and that is enough for the reduction order to be effective.[54]

ii. Second layer: in response to Shell's substitution defence, Milieudefensie et al. explained in the Defence on Appeal, on the basis of authoritative sources and expert reports, that the substitution defence, insofar as it could be a relevant defence, cannot succeed on a substantive basis. It is likely that the direct (market) effects of the reduction order (via Shell's emissions reduction) will also lead to a reduction of the worldwide supply of fossil fuels and consequently to a reduction in global emissions. In other words: the reduction order will not only be effective in reducing Shell's emissions, it will also be effective in reducing global emissions.[55]

iii. Third layer: Milieudefensie et al., again, on the basis of authoritative sources and expert reports, explained that in addition to these direct effects, the Judgment will have significant indirect effects, which not only have an effect on Shell, but also on accelerating the energy transition as such and which can lead to an additional reduction in global emissions. The substitution defence cannot succeed due to these indirect effects.[56]

81. Milieudefensie et al. has established that M&M in any event does not dispute that the reduction order will reduce the emissions of the Shell Group. In addition, Milieudefensie et al. has noted that M&M has not presented a substantiated, substantive refutation of Milieudefensie et al.'s argument in the context of direct and indirect global effects of the Judgment (the second and third layer referred to above).[57]

82. In essence, M&M's criticism of the Judgment entails that a reduction order against one single party would not be effective in solving the global climate problem, so that the order cannot be awarded. M&M speaks in this context of a lack of causality and about a lack of interest.[58]

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[54] See sections 8.1 and 8.2 of the Defence on Appeal.
[55] See sections 8.3 and 8.4 of the Defence on Appeal.
[56] See section 8.5 of the Defence on Appeal.
[57] It is, moreover, clear to Milieudefensie et al. that M&M in fact fears the indirect effects of the Judgment on the (acceleration of the) energy transition, if this were to lead to other companies also making a greater contribution to preventing dangerous climate change and consequently reducing the supply of oil and gas.
[58] In para. 47 Statement after Joinder, M&M does not explicitly speak of a lack of interest, but a lack of standing. Milieudefensie et al. nevertheless assumes that M&M is referring to the requirement of having an interest in the matter as laid down in Article 3:303 of the Dutch Civil Code. A lack of interest could previously lead to a declaration of a lack of standing. This is no longer the case (see Netherlands Supreme Court 9 July 2010 (ECLI:NL:HR:2010:BM2337), para. 4.1.2). However, if M&M were to be referring to effectiveness that forms part of the (standing) requirement of Article 3:305a Dutch Civil Code, this argument cannot succeed either. Article 3:305a Dutch Civil Code sets out as a requirement of standing that there must

83. The question is, precisely what is M&M referring to when it speaks of causality and the role thereof in the context of this case. The following can be said in this respect.

84. In the first place, there is no discussion between the parties regarding the fact that the CO_2 emissions connected with the Shell Group make a (foreseeable and significant) contribution to dangerous climate change. M&M does not dispute this either (nor can it dispute this). M&M's argument thus does not relate to this causal relationship between Shell's conduct and the (threatened) climate damage.

85. Secondly, this case does not concern causality that must be demonstrated in the context of a lawsuit for compensation (the causal link between a violation of a standard and damage). This matter concerns a claim for an order pursuant to Article 3:296 Dutch Civil Code.

86. Thirdly, for the awarding of an order pursuant to Article 3:296 Dutch Civil Code, no demonstrable or threatened damage is required, nor a causal link with an unlawful act that has already been committed.[59] The threatened violation of the legal obligation is sufficient to pronounce an order or injunction.[60] Milieudefensie et al. has the following to say about that legal obligation.

87. The legal obligation to which Shell is subject is found on the basis of a very large number of objective leads and relevant facts and circumstances. As stated above, the existence of the unwritten societal standard of care was substantiated in detail at first instance by Milieudefensie et al.,[61] it was established and explained by the District Court in section 4.4 of the Judgment and was most recently explained in further detail by Milieudefensie et al. in response to Shell's grounds of appeal in the Defence on Appeal, in particular in sections 1 to 5. These objective leads and relevant facts and circumstances all point in the same direction, i.e. that Shell has its own, independent duty of care to proportionally contribute to preventing dangerous climate change. As previously indicated (section 4 of this Statement after Joinder), M&M has left these bases for the legal standard largely undiscussed and undisputed.

88. Contrary to all these bases, Shell and M&M would like to see the court hold that the character of dangerous climate change – as a global problem with many parties causing it – stands fully in the way of finding an individual legal standard applicable to a specific party, with as (causality) reasoning, that just as one party cannot cause the entire global problem on its own, nor can it solve the entire problem on its own, so that a reduction order against one party would, according to them, not be effective to combat the global problem. The District Court at first instance rightly acknowledged that this global character of climate change does not stand in the way of holding that a legal standard exists, but only leads to there being a partial responsibility and legal obligation that is proportional to the party's individual share in the problem. This does justice to the circumstance that no single country or company is able, on its own, to solve the entire climate

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be similar interests, that lend themselves for being presented together so that efficient and *effective* legal protection can be claimed on behalf of the interested parties. The effectiveness that is referred to here thus relates to the presenting together of interests and bringing a general interest lawsuit to be effective and efficient instead of one or very many individual actions. This means a different effectiveness than the effectiveness of the claimed measure.

[59] Advisory Opinion of P-G Langemeijer and A-G Wissink with the Urgenda case (ECLI:NL:PHR:2019:887), para. 2.10.

[60] Asser/Sieburgh 6-IV 2019/153.4, K.J.O. Jansen in GS Onrechtmatige Daad, art. 6:162 BW, note 3.4.1 and Van der Helm, Het rechterlijk bevel en verbod als remedie 2023/369 (p. 146).

[61] See in this respect also the summary of the objective leads and relevant facts and circumstances at first instance in sections 2.1 and 2.2 of the Defence on Appeal.

problem, but this does not lead to the end conclusion desired by Shell and M&M that there is no legally enforceable responsibility, and that thestandard cannot be found.

89. It arises from the formulation of the legal standard as a partial responsibility to proportionally contribute to preventing dangerous climate change, that the behaviour of other actors and the effect of this behaviour on global emissions is not relevant for the evaluation of this case. This is not strange: the behaviour of these other actors and the damage and (threatened) negative impact on interests arising from there are not at issue here and no protection is being sought in this respect. The following is the issue: if the existence of the legal obligation is demonstrated and Shell breaches the obligation, or threatens to breach it, Milieudefensie et al. is entitled to seek protection in this respect and the court must order Shell, pursuant to the claim of Milieudefensie et al., to perform its legal obligation. The essence of Article 3:296 Dutch Civil Code is that a legal obligation must be performed. In other words: the threatened violation of Shell's legal obligation is sufficient to pronounce an order or injunction. This is what happened at first instance.

90. The effectiveness defences of Shell and M&M fail to note in this respect, moreover, the possibility that for other fossil fuel companies, a standard of care can be found that leads to a(n) (enforceable) legal obligation in relation to climate change and appears to be based on the illogical and improbable premise that such a legal obligation (whether or not equivalent) will not apply to any other company.[62] After all, other companies can only 'legitimately' substitute if they are not subject to a societal standard of care and legal obligation. As the District Court has indicated: "*Other companies also have to respect human rights*".[63] If such a legal obligation can apply to other companies, Shell and M&M cannot defend themselves, in the framework of the causality and finding the unwritten standard of care and the legal obligation, with a reference to the (equally) unlawful conduct of others.

91. Honouring the substitution defence or for similar reasons of effectiveness deeming the standard of care and the legal obligation cannot be found would thus amount to the categorical denial of each and every independent (partial) responsibility to which individual actors are subject, regardless of the large influence of (specific) actors on the climate problem and the solving of that problem. An effective legal remedy against a threatened negative impact on interests because of concrete conduct of specific actors like Shell and the State of the Netherlands would consequently be lacking, as would an effective remedy against a global problem.[64] This is unacceptable, partly in the light of Shell's acknowledgement that there is a societal consensus regarding the fact that individual companies must take measures to reduce their emissions and that doing nothing is unacceptable.[65]

92. The District Court acknowledged the above-described reference framework in para. 4.4.49 of the Judgment and rightly concluded that the substitution defence, even if perfect substitution were possible, cannot stand in the way of finding a societal standard of care and legal obligation applicable to Shell. The circumstance that the District Court dealt with the refuting of this defence of Shell as one of the 14 circumstances that play a role in the elaboration of the unwritten societal

[62] This naturally always concerns a context-bound standard, so that the precise individual responsibilities and obligations can differ from case to case. The more the situation of another company is similar to Shell's situation, the more the standard and the legal obligation to befound will be similar.
[63] Judgment, para. 4.4.50.
[64] Cf. the conclusion of this Court of Appeal in para. 64 of this Court's decision in the Urgenda case of 9 October 2018 (ECLI:NL:GHDHA:2018:2591).
[65] Appeal under para. 7.2.3.a.(iii); see also 2.2.9, 2.3.10, 3.2.17 and 5.2.3.(b).

standard of care,[66] does not mean that in this case there is circular reasoning, as M&M asserts. The placement at this location in the Judgment is due to the fact that Shell presented this defence in the context of finding the standard of care. There is thus no circular reasoning.

93. The arguments that M&M presents in relation to para. 4.4.49 of the Judgment in paras. 48 to 50 of the Statement after Joinder cannot succeed because of the above. M&M appears to be of the opinion that the arguments presented by the District Court regarding the positive effect of any reduction in emissions and the reference to the Kalimijnen case, are arguments of the District Court that lead to 'finding' the standard of care that applies specifically to Shell and to the determination of what is to be deemed unlawful act. This is not the case. The District Court only substantiates here why the substitution defence presented by Shell does not detract from finding the societal standard of care and why an individual party that is being held accountable (a state or a company like Shell) cannot defend itself with a reference to the conduct of other parties that continue emitting CO_2. It is relevant in this respect that no single individual reduction in line with the partial responsibility of a party like Shell or the State of the Netherlands is negligible.[67] The Kalimijnen decision in this respect is a confirmation of the existence of such a partial responsibility, entailing that environmental polluters can each be liable for their individual (threatened) unlawful share in the pollution.[68]

94. The argument that M&M presents in para. 51 with regard to the refutation by the District Court of the Mulder report is based on the same incorrect understanding of the Judgment and the applicable legal framework.

95. First of all, according to established jurisprudence, the substantiation of a court opinion must be viewed in the light of the debate between the parties and the related court documents. The substantive refuting of the Mulder report by the District Court as a statistical 'momentary picture' and as wrongly being based on a 'business as usual' scenario, is based on statements in this respect of Peter Erickson (Senior Scientist, Stockholm Environment Institute and co-author of the Production Gap Report of UNEP et al.),[69] and a statement of Prof. Dr. Ir. J. Rotmans (professor of Transitions & Sustainability at Erasmus University).[70] This does not constitute poor substantiation or support. M&M did not respond to the aforementioned exhibits, nor to the update of Milieudefensie et al.'s arguments in sections 8.3 to 8.5 of the Defence on Appeal.

96. It is furthermore also clear in this respect that the District Court does not deem the substitution defence of the Mulder report to be relevant because "*Other companies also [have to] respect human rights*",[71] which aligns with the reference framework outlined above by Milieudefensie et al.

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[66] As set out by the District Court in section 4.4 of the Judgment.
[67] The Urgenda judgment and the Advisory Opinion with the Urgenda judgment cites this argument in the same context. See Netherlands Supreme Court 20 December 2019 (ECLI:NL:HR:2019:2006), para. 5.7.8 and the Advisory Opinion of P-G Langemeijer and A-G Wissink (ECLI:NL:PHR:2019:887), para. 2.13.
[68] In the Urgenda judgment and the Advisory Opinion with the Urgenda judgment, reference is made to the Kalimijnen judgment in the same context. See Netherlands Supreme Court 20 December 2019 (ECLI:NL:HR:2019:2006), para. 5.7.6. and the Advisory Opinion of P-G Langemeijer and A-G Wissink with the Urgenda case (ECLI:NL:PHR:2019:887), para. 2.12.
[69] Submitted at first instance as Exhibits MD-337 and MD-339.
[70] Submitted as Exhibit MD-338.
[71] Judgment, para. 4.4.50.

97. Milieudefensie et al. cannot follow M&M's position in paras. 52 to 55 that even if the reduction obligation were to lead to fewer emissions, this does not explain how the reduction order actually helps combat dangerous climate change, without further explanation, which has not been given. Every CO_2 emission has a causal link to causing dangerous climate change and every reduction in CO_2 emissions has a causal link in combating dangerous climate change.[72]

98. If M&M seeks to argue with paras. 52 to 55 that Shell's emissions reductions, should these be successfully implemented, due to their minor size at global level will not have a measurable effect on the danger of climate change, this argument cannot succeed. The State of the Netherlands presented a similar argument in the Urgenda case, with the argument that the extra reductions of the Dutch emissions to 2020 would only result in 0.000045 °C less average global warming and would not have a measurable effect on the danger of climate change. This argument was not followed by the Netherlands Supreme Court. Defences entailing that an individual party's own share in global emissions is very small and that a reduction of the emissions makes very little difference on a global scale cannot succeed, as accepting this would lead to the parties (i.e. the parties that have a legal obligation) being able to evade their individual shared responsibility, according to the Netherlands Supreme Court.[73]

99. That theSupreme Court of The Netherlands, as cited by M&M in para. 56, refers in relation to this consideration to the contribution that all countries must make in accordance with the principles laid down in the preamble of the UN Climate Convention, does not mean that such partial responsibility can only be based on convention obligations or that such partial responsibility cannot apply to companies with a significant influence on the climate problem and the solution to this problem. There is such a partial responsibility and legal obligation, in view of, inter alia, the Kalimijnen judgment and the very many facts, circumstances and objective leads that were presented.

100. M&M's argument in para. 55 that not every reduction of greenhouse gases has a positive effect on combating dangerous climate change, because, for example, greenhouse gases are emitted when building nuclear power stations, while nuclear power stations can result in a reduction of greenhouse gases over the longer term compared to other methods of energy generation, also cannot succeed in this respect. M&M has not indicated what activity Shell would carry out that has a positive effect on combating dangerous climate change and which is irreconcilable with the reduction order or entails that Milieudefensie et al. does not have an interest in this reduction order. It is relevant in this respect to state that the emissions that accompany the transformation process of the global energy supply, such as building wind turbines or (as M&M proposes) nuclear power stations, must fit within the existing carbon budget and therefore cannot detract from the need for a global emissions reduction of 45% which must and can take place by 2030. M&M's argument cannot succeed in this respect.

101. In summary, it ensues from the above that M&M's arguments relating to causality cannot succeed. In particular, M&M fails to note the relevant reference framework, on the basis of which Shell, pursuant to Article 3:296 Dutch Civil Code, in the event of a threatened violation of a legal obligation, must be ordered to comply with said obligation.

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[72] With regard to the direct linear connection between emissions caused by humans and the warming of the earth, see para. 2.3.2 of the Judgment (against which no ground of appeal was lodged).

[73] See Netherlands Supreme Court 20 December 2019 (ECLI:NL:HR:2019:2006), para. 5.7.7. See in this respect the Advisory Opinion of P-G Langemeijer and A-G Wissink with the Urgenda case (ECLI:NL:PHR:2019:887), paras. 4.200, 4.215 and 4.216.

102. That the claimed reduction order can contribute to preventing this threatened harming of interests by Shell is indisputably the case, as the order will result in Shell's CO_2 emissions being reduced. This also establishes the interest of Milieudefensie et al. in the reduction order within the meaning laid down in Article 3:303 Dutch Civil Code.

103. In its arguments on the requirement of having an interest in the matter in paras. 57 to 59 of the Statement after Joinder, M&M discusses the Pirate Bay judgment cited by Milieudefensie et al.[74]

104. As explained in the Defence on Appeal,[75] in this case the Supreme Court of the Netherlands rejected the defence that an order to block the torrent website 'The Pirate Bay' by two internet providers was not effective, as reduced traffic to The Pirate Bay site would not reduce copyright infringement overall due to the existence of other torrent websites. In the framework of the effectiveness test it could not be demanded that the underlying end goal (the overall reduction of infringements of IP rights via BitTorrent) be achieved, but only the infringement by the party against whom the claim was brought was relevant. Without further substantiation, the Netherlands Supreme Court could not see why there was no interest deserving of judicial protection in blocking one torrent website. This applied all the more as claimant Stichting Brein had indicated that it would subsequently take action against other torrent websites on a step-by-step basis.

105. For the same reasons, in this case it is not decisive in what degree the total global emissions will be reduced due to the reduction order imposed on Shell. The issue is that the threatened violation (unlawful act) is prevented by Shell.

106. The only argument that M&M presents in relation to the Pirate Bay case is that the unlawful act in that case (copyright infringement) had been established, while that has not been the case with regard to the Shell emissions. With this M&M acknowledges that if the standard of care is deemed to be a legal obligation and there is a(n) (threatened) unlawful act, the requirement of having an interest in the matter pursuant to Article 3:303 Dutch Civil Code does not entail that what is decisive for this matter is the degree in which total global emissions will be reduced due to the Shell reduction order. With regard to effectiveness it is only relevant whether the threatened violation (unlawful act) is prevented by Shell, which the reduction order will achieve.

107. In view of all of the foregoing, M&M's arguments in the framework of effectiveness cannot succeed.

108. This leaves Milieudefensie et al. with one final point regarding M&M's position in paras. 31 and 60 to 63 that its problem with the Judgment is not merely that Shell is made subject to a reduction obligation, but that Milieudefensie et al. is using this judgment to encourage other parties to implement climate policy. According to M&M there cannot be an interest pursuant to Article 3:303 Dutch Civil Code if Milieudefensie et al.'s interest in the reduction order is based on this, as in such case Milieudefensie et al.'s only concern is the Judgment's third-party effect or usefulness as precedent.

109. It should be clear from the above that legally and factually, Milieudefensie is concerned with reducing the emissions of the Shell Group. Milieudefensie et al. is asking the court for effective

[74] Netherlands Supreme Court 13 November 2015, (ECLI:NL:HR:2015:3307), paras. 4.2.2-4.2.3.
[75] Defence on Appeal, paras. 897 to 901.

protection against the threatened violation of the independent legal obligation to which Shell is subject, to make a proportional and adequate contribution to the prevention of dangerous climate change. Contrary to what M&M apparently presumes, Milieudefensie et al. is not concerned with purely creating a legal or societal precedent. Friends of the Earth Netherlands et al. believes it is positive and desirable that the Judgment and the reduction order encompass various direct and indirect effects,[76] which not only have an effect on Shell, but on the energy transition as such and which can lead to an additional reduction of global CO_2 emissions, but it must nevertheless be borne in mind that this case is first of all concerned with acquiring effective protection against the threatened breach of Shell's legal obligation.

110. The circumstance that Milieudefensie et al. will use the Judgment to encourage other parties to make a proportional contribution, does not change the above. Indeed, this aligns well with the fact that prevention and legal development are among the (most important) goals of Dutch liability law and civil procedure law.[77] The Judgement, the legal development ensuing from the judgment and the deterrent effect that the reduction order may (and hopefully will) have for certain parties, contribute in this sense to the preventative function of Dutch liability law. In this respect Milieudefensie et al. can hardly be blamed that it, in line with this intended preventative function, is seeking to reinforce the legal developments and deterrent function it deems to be desirable by drawing the attention of other parties to the Judgment.

6. Final remarks and conclusion

111. The following should be noted before Milieudefensie et al. presents its conclusion.

112. Milieudefensie et al. recognised in section 3.1 of this Defence on Appeal after Joinder that the costs and benefits of the energy transition must be fairly divided. The Judgment does not stand in the way of political decision-makers representing those interests. Milieudefensie et al. and M&M appear to agree with each other on other points as well. According to M&M's objects clause in its articles of association, it is standing up for "*the interests and rights of Dutch citizens in connection with energy, in a broad sense (including democracy, the economy, the environment, climate and health)*".[78] On the basis of that broad description of the objects in the articles of association, Milieudefensie et al. assumes that M&M agrees that dangerous climate change is to be prevented in the interest of itsconstituency. In this respect it looks as if the parties are not so much divided about this objective, but (only) about the resources to be used to achieve this objective, i.e. whether there is a role for the court in this respect.

113. M&M believes that the court has no role to play in answering legal questions that relate to the responsibility of companies in relation to preventing dangerous climate change. M&M asserts that in the trias politica, only the two political wings have a democratic legitimacy and that this Court of Appeal is moving in the direction of a 'dikastocracy' when affirming the Judgment.[79]

[76] As described in sections 8.3 to 8.5 of the Defence on Appeal.
[77] See in this respect E. Langenberg & L. Visscher in NJB 2022/2546, L. Visscher in AVS 2020/34, C.J.J.C van Nispen, Sancties in het vermogensrecht (Mon. BW no. A11) 2018/5 and Van der Helm, Het rechterlijk bevel en verbod als remedie 2023/69, 75 and 87 (paragraphs 3.2 and 3.3).
[78] M&M's Exhibit 4 in the interlocutory proceedings.
[79] Statement of Joinder, para. 65.

114. This is incorrect. The judiciary also has democratic legitimacy, via the laws established by the legislature on which the important constitutional task of the judiciary is based. In, inter alia, sections 3.3 and 3.4 (paras. 57 to 77) of the Defence on Appeal, Milieudefensie et al. already explained that pursuant to Articles 11 and 13 of the General Provisions (Act, the judiciary not only has legitimacy, but is indeed obliged to establish the legal standard that applies between Shell and Milieudefensie et al. that arises from unwritten law, and in the event of (threatened) breach thereof, to impose a court order for performance.

115. Milieudefensie et al. believes that M&M, in view of the broad range of interests it seeks to represent in accordance with its articles of association, should have established that the democracy that it claims to be defending, can only function when respecting and accepting the legal rules on which it is based. In Milieudefensie et al.'s opinion, M&M should in fact want to embrace the role of the court in this context.

116. Nor do M&M's arguments in the Statement after Joinder, in which it narrowed down the interest to be defended by it to the alleged interest of Dutch citizens in maintaining the supply of fossil fuel energy,[80] align with the holistic approach prescribed by M&M's articles of association. It remains unclear how M&M's views on the need it feels to maintain the supply of fossil fuel energy can be reconciled with the interests and rights of Dutch citizens in connection with climate, the economy, the environment and health, as set out in its articles of association. Whatever the case may be in that respect, Milieudefensie et al. has again clarified in this Statement after Joinder that the energy interests of Dutch citizens are not in any way in jeopardy due to the Judgment and indeed are well-served by the Judgment. As far as this is concerned, Milieudefensie et al. would have expected M&M to be on its side rather than on Shell's side.

117. In light of all of the above, Milieudefensie et al. establishes that the grounds presented by M&M fail and therefore cannot lead to a challenge to the Judgment. Milieudefensie et al. maintains its conclusion as formulated in section 12 Defence on Appeal. In supplementation thereof, Milieudefensie et al. asks this Court of Appeal to:

a) Order M&M to pay the costs of these proceedings, and the usual costs arising after the proceedings, to be increased by the statutory interest as referred to in Article 6:119 Dutch Civil Code as of fourteen days after the day when judgment is passed or served and to declare the order for costs to be immediately enforceable.

Counsel

[80] In its earlier correspondence (Exhibit MDV-4) M&M did refer to that broad representation of interests and in the Statement of Joinder, M&M spoke of the interest of energy security and affordable energy for Dutch citizens (see, e.g., para. 30 Statement of Joinder).