

MILIEUDEFENSIE VS. SHELL - SUMMARY OF THE RULING ON APPEAL

On 12 November 2024, the Court of Appeal in The Hague ruled that Shell has an obligation to combat dangerous climate change. Unlike the District Court in 2021, however, the Court of Appeal ruled that it cannot determine by what percentage Shell must reduce its emissions. Nevertheless, the ruling provides a solid basis for new climate lawsuits and policy action. Here are the key points we can build on:

- Protection from dangerous climate change is a human right; [7.17]
- Shell and other large polluting companies have a duty to protect human rights; [7.17 & 7.27]
- Shell and other companies must make an adequate contribution to achieving the Paris climate goals; [7.9]
- New oil and gas fields could conflict with the Paris Climate Agreement; [7.61]
- The Court of Appeal recognises that Shell is aware of the importance of preventing (further) carbon lock-in [7.59, 7.60]
- It is plausible that the supply of fossil fuels should be limited. Companies that produce fossil fuels have a responsibility in this respect that is independent of the demand for their products; [7.61]
- Large companies bear responsibility not only for reducing their operational CO2 emissions and those of their suppliers (Scope 1 and 2), but also for reducing the CO2 emissions of their products (Scope 3); [7.99]
- Large companies that have contributed to causing dangerous climate change have a special duty to others on this planet to help combat it; [7.26]
- The court upholds the right of Milieudefensie and the co-plaintiffs to stand up for the interests of present and future generations in The Netherlands; [6.2]
- The court can intervene if a company fails to fulfil its duty of care to limit CO2 emissions. There is no reason for the court to hesitate to do so; [7.10/7.11]
- Large companies cannot hide behind regulations; [7.53]
- Existing (EU) legislation does not prevent individual companies from having a more far-reaching obligation to reduce their emissions; [7.53]
- International human rights and soft law play a role in the interpretation of social due diligence (horizontal application or reflexive effect); [7.18, 7.24]
- The Court of Appeal recognises the possibility that if Shell restricts its oil and gas production, the gap will not be completely filled by other companies [7.106]

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PURPOSE OF THE CLIMATE CASE

The Climate Case brought by Milieudefensie (Friends of the Earth Netherlands) and co-plaintiffs against Shell is about preventive action. Our aim is to prevent further climate damage caused by companies and to protect people from dangerous climate change. In this way, our approach differs from the climate lawsuits filed in the USA: we are not demanding compensation from a company, but a change of course.

MAIN FEATURES OF THE APPEAL JUDGMENT

This summary by Milieudefensie contains placeholders that refer to paragraphs of [the judgment](#).

Human rights and climate change

[7.6 – 7.27] **The Court of Appeal says that there can be no doubt that protection from dangerous climate change is a human right.** The court confirms that climate change is the biggest problem of our time and states: *“Climate change damages the rights protected by Articles 2 and 8 ECHR, both in the Netherlands and abroad, and will damage them even further.”*

In addition to Articles 2 and 8 ECHR, the Court of Appeal refers to the UN, the Urgenda ruling of the Supreme Court and the KlimaSeniorinnen judgment of the European Court of Human Rights (ECtHR), and also to case law from Pakistan, Colombia, Brazil and the US state of Montana.

[6.2] The court upholds the right of Milieudefensie and the co-plaintiffs to stand up for the interests of present and future generations in The Netherlands and the Waddengebied.

Human rights and large companies

[7.18 – 7.27] **The Court of Appeal has ruled that companies such as Shell have a special obligation to other inhabitants of our planet to limit their CO2 emissions in order to combat dangerous climate change. This is because these companies are major contributors to climate change and they have the power to combat this**

problem. This obligation applies even if it is not explicitly mentioned in the laws of the countries in which the company operates.

The Court confirms that (treaty) provisions on human rights can have an impact on private law relationships. **In this way, human rights can shape open standards, such as the social due diligence standard that determines what can be expected of a company.**

The Court of Appeal relies on **Articles 2 and 8 ECHR** (the right to life and the right to family life) to determine what duty of care applies to Shell. According to the court, the obligation for Shell and other large companies to reduce their emissions also arises from **the OECD Guidelines, the UN Guiding Principles (UNGP) and other (non-binding) regulations** to which Shell is a party.

It is in the hands of the judge (and not just the politicians)

On appeal, Shell put forward various arguments as to why it should not be up to the judge to oblige companies to reduce their emissions. The court struck down all of these arguments.

[6.8] According to Shell, the question of whether or not companies should reduce their emissions is a matter for politicians, not the courts. The Court of Appeal ruled against Shell. **The fact that politicians have to make decisions about how to tackle climate change, and that not everyone agrees with these decisions does not alter the fact that the courts can decide the question of whether companies are legally obliged to reduce their CO2 emissions.**

[7.53] Shell's argument that an obligation on individual companies to reduce CO2 emissions does not fit into the legal system has also failed. Shell argues that companies that comply with existing rules to combat climate change cannot be additionally obliged to further limit their CO2 emissions. This is incorrect, says the Court of Appeal, because the legislator (both in Europe and in the Netherlands) has not stipulated that the legislation in this area is exhaustive. **Therefore, the courts have the possibility to impose a duty of care and oblige companies to further reduce their CO2 emissions.**

[7.10-7.11] In the KlimaSeniorinnen judgment, the ECtHR stated that states have a wide margin of discretion as to the question of what means they use to combat climate

change. Shell argued that this ruling means that civil courts should exercise restraint on the issue of combating climate change. Again, the court ruled against Shell. **The Court of Appeal has made it clear that national courts have the power to impose a specific legal duty on Shell to tackle climate change.**

New investments in oil and gas

[7.58–7.62] The Court of Appeal emphasises that global CO₂ emissions must be drastically reduced by 2030 in order to achieve the goals of the Paris Climate Agreement. According to the court, it is plausible that this goal cannot be achieved by reducing the demand for fossil fuels alone: **Supply must also be limited. Shell and other producers of fossil fuels must therefore fulfil their responsibility in this respect.** The court derives this from the legal social standard of care as defined by the best available science and by Articles 2 and 8 ECHR as well as soft law such as the UNGPs and the OECD Guidelines.

According to the Court of Appeal, oil and gas companies must take into account the negative impact that their investments may have on the energy transition. **The investments that Shell intends to make in new oil and gas fields may conflict with its responsibility to keep within reach the goals of the Paris Climate Agreement.** The court recognises that Shell is aware of the importance of preventing a further carbon lock-in: according to the court, the energy transition will be “seriously slowed down” if fossil energy is forced onto the market for years to come because, as a result, sustainable alternatives will be unable to effectively compete with oil and gas.

The court says it cannot answer the question of whether Shell’s proposed investments in new oil and gas fields conflict with Shell’s duty of care in this case, as this was not expressly required: Milieudefensie’s and the co-plaintiffs’ claims concern the imposition of a reduction percentage.

EU Regulation (CSDDD, CSRD & ETS)

EU ETS and EU ETS-2 (European Emissions Trading System)

[7.28 – 7.38] The Court of Appeal clarifies that EU ETS-1 and EU ETS-2 do not stand in the way of a finding of due diligence and its interpretation by the courts.

CSDDD/CSRD

[7.40, 7.43 and 7.46] The Court of Appeal points out that Shell has a (reporting) duty to draw up and implement a climate transition plan on the basis of the CSRD (Reporting Directive) and the CSDDD (Due Diligence Directive). Such a plan must ensure that Shell's business model and strategy are compatible with the 1.5 degree target of the Paris Climate Agreement. In addition, Shell's business model and strategy must be compatible with the European Union's goal of being climate neutral by 2050.

In any event, as mentioned above, the Court considers that the CSRD/CSDDD does not preclude the determination of more far-reaching measures by a civil court on the basis of companies' duty of care to reduce their CO2 emissions.

The Court of Appeal did not impose a specific reduction obligation

Duty to reduce Scope 1 & 2

[7.63 – 7.66] Shell's emissions in scopes 1 and 2 represent a relatively small proportion of its total emissions (around 5%). The Court of Appeal held that Shell was not in imminent breach of its duty of care in relation to its Scope 1 and 2 emissions. Shell plans to reduce these emissions by 50% by 2030 compared to 2016. Milieudéfensie argued in court that these plans offer no guarantee because experience shows that Shell frequently rejects or weakens its targets. The court disagreed and found that Shell was sufficiently committed to this target.

Shell has a responsibility in relation to Scope 3 emissions

[7.99] **Unlike Shell, the Court of Appeal considers that Shell does have control and influence over its customers' Scope 3 emissions.** Various legal instruments (e.g. the OECD Guidelines, the CSRD, the CSDDD and the EU ETS-2) assume that companies are responsible for their Scope 3 emissions. **The Court of Appeal confirms that the responsibility for Scope 3 emissions lies with Shell itself. In other words: Shell cannot hide behind the consumer.**

The Court of Appeal did not set a specific percentage for Scope 3

[7.73] On the question of the percentage by which Shell should reduce its emissions in 2030, the Court assumes that there is a broad consensus that global emissions must be reduced by 45% in 2030 compared to 2019. The Court emphasises that this 45% is a global average and considers: *"This means that there are sectors and companies in countries that need to reduce more and there are companies and sectors in countries that are required to reduce less."* **The Court then goes on to say that it is not in a position to determine the specific reduction obligation applicable to Shell**, for several reasons:

[7.74/7.75] The Court notes that while oil and gas account for a higher proportion of global emissions than coal, the greatest *short term* gain can be achieved by phasing out coal combustion. Here, the Court accepts Shell's argument that a switch from coal to gas will lead to lower emissions worldwide. In the Court's view, this example alone shows that the general standard of a 45% reduction is "not sufficiently case-specific" to be applied to Shell.

Milieudefensie comes to a different conclusion and pleaded in court, among other things:

- That there is no room in the remaining carbon budget for increased gas use: to prevent dangerous climate change, gas emissions must also be significantly reduced.
- That continued investment in fossil energy perpetuates dependence on the fossil energy system (the problem of carbon lock-in that the Court of Appeal recognises in its ruling) and therefore stands in the way of the transition to sustainable energy.
- Researchers show that gas actually competes with renewable energies rather than coal and thus (again) slows down the growth of renewable energies.
- That when scenarios that focus first on reducing CO₂ emissions from coal are taken as a starting point, the countries in the global South that have contributed the least to causing climate change are burdened the most. This contradicts the principle that the broadest shoulders should bear the greatest burden.

Efficacy/substitution

[7.97 – 7.110] Finally, the Court of Appeal considered the effectiveness of an obligation on Shell to reduce its Scope 3 emissions.

[7.97 – 7.98] Shell explained that if it sold less fossil fuels, other companies would take over these sales (substitution). According to Shell, a reduction order would therefore not be effective.

[7.100 – 110] In 2021, the District Court ruled that Shell is free to determine how it will meet the 45% reduction obligation imposed in the ruling. The Court suggests that Shell could achieve this reduction not by reducing its own production, but by only reducing sales of oil and gas produced by third parties. The Court notes that it has not been demonstrated that should Shell sell less oil and gas, this would lead to a reduction in CO2 emissions: *"In that scenario, the specific company would only disappear from the value chain and the (already produced) fossil fuels would still reach the end consumer via another intermediary."*

The Court makes a clear distinction between sales and production and considers: *"There may be a causal link between limiting production and reducing emissions, as the District Court assumed, but Milieudéfensie has not argued sufficiently to assume that there is (also) a causal relationship between limiting sales and reducing emissions in this case."*

For these reasons, the Court concludes that a reduction obligation for Scope 3 emissions would not be effective and that Milieudéfensie therefore has no interest in the claim regarding Scope 3 emissions.

Milieudéfensie takes a different view and has argued the following in the proceedings, among other things:

- **Irrelevance:** The action brought by Milieudéfensie and the co-plaintiffs is based on the article on unlawful acts (6:162 Dutch Civil Code) which deals with the unwritten standard of care. This action concerns the question of whether Shell has its own legal responsibility to combat dangerous climate change and the question of whether Shell is in breach of this duty of care. In answering these two questions, it is irrelevant what other companies do. This is also clear from previous case law (Urgenda, F35, Pirate Bay). It is about Shell's own responsibility.

- **There is no perfect substitution:** Milieudefensie has argued at length that the gap that Shell would create by selling less oil and gas could never be immediately and completely filled by other fossil fuel companies. It is also not plausible that Shell would only fulfil its reduction obligation through trading activities, as Shell is one of the largest and most integrated system players in oil and gas trading, and this is one of Shell's most profitable activities.

WHERE DO WE GO FROM HERE?

Follow-up actions against Shell

Milieudefensie has three months to file an appeal in cassation with the Supreme Court against the ruling of the Court of Appeal. The deadline is 12 February 2025. Want to know how we're doing? Sign up [here](#) for the English-language legal newsletter of our Climate Case Tool. You will then automatically receive a message when Milieudefensie takes new legal action.

More information: If you have any questions, please contact us at climatecase@milieudefensie.nl

Legal: [Milieudefensie Climate Case Tool](#)

Impact of the ruling on the climate case against ING

Milieudefensie considers many elements of the ruling to be a solid basis for the climate case against ING announced in January 2024. In this case, Milieudefensie is demanding that ING reduce its emissions and stop financing companies developing new fields. Some starting points:

1. The Court of Appeal has ruled that all companies have a duty to reduce their emissions. This applies all the more to Shell because it is one of the "more important players in the market" [7.55]. ING is one of the 30 systemically important banks in the world and, according to its own figures, is responsible for 364 megatonnes of greenhouse gases. And yet, ING has not yet set any reduction targets that guarantee that the bank will reduce its emissions – with the current targets, ING's emissions could even increase.

2. The Court of Appeal ruled that the development of new oil and gas fields may conflict with the energy transition and the duty of care of companies [7.61].
ING continues to finance many companies that extract fossil fuels and continue to launch new projects. According to its own figures, ING currently has EUR 29.5 billion in loans outstanding to fossil fuel companies and even lent more money to fossil fuels last year than in 2016, one year after the Paris Climate Agreement.