BarentsKrans

568/138927

Supreme Court of the Netherlands
Hearing of 22 May 2026
Case number: 25/00497

WRITTEN EXPLANATORY SUBMISSION

in the case of:

1. the association with full legal capacity **VERENIGING MILIEUDEFENSIE**, having its registered office in Amsterdam (the Netherlands)

2. the foundation **STICHTING GREENPEACE NEDERLAND**, having its registered office in Amsterdam

3. the association with full legal capacity **LANDELIJKE VERENIGING TOT BEHOUD VAN DE WADDENZEE** (Association for the preservation of the Wadden Sea), having its registered office in Harlingen (the Netherlands)

4. the foundation **STICHTING TER BEVORDERING VAN DE FOSSIELVRIJ-BEWEGING** (Foundation for the promotion of the fossil-free movement), having its registered office in Amsterdam

5. the foundation **STICHTING BOTH ENDS**, having its registered office in Amsterdam

6. the association with full legal capacity **JONGEREN MILIEU ACTIEF,** having its registered office in Amsterdam

appellants in the principal appeal in cassation and respondents in the cross-appeal in cassation
to be jointly referred to hereafter (in the plural) as: “**Milieudefensie et al.**”,
counsel: P.A. Fruytier and J.P. Jas

versus:

the legal entity under foreign law
SHELL PLC,
having its registered office in London (United Kingdom)
respondent in the principal appeal in cassation and appellant in the cross-appeal in cassation,
to be referred to hereafter as: “**Shell**”,
counsel: F.E. Vermeulen and
A.G. Colenbrander

and versus:

the foundation **STICHTING MILIEU EN MENS**,
having its registered office in Zwolle (the Netherlands),
party joining on Shell’s side.
to be referred to hereafter as: “**M&M**”,
counsel: C.S.G. Janssens

I. TABLE OF CONTENTS

LIST OF ABBREVIATIONS....10

I INTRODUCTION....20

II CLIMATE CHANGE AND THE OIL AND GAS INDUSTRY....22

II.1 Climate change as the greatest threat of our time....22

II.1.1 The greenhouse effect, the role of oil and gas and the necessary energy transition....22

II.1.2 The serious consequences and major risks of climate change....26

II.1.3 Relationship between cumulative CO_2 emissions and global warming....30

II.1.4 The carbon budget and the need to limit CO_2 emissions....32

II.1.5 The consequences of overshooting the carbon budget....34

II.1.6 The major uncertainties and risks of negative emissions and CDR technologies....37

II.1.7 The climate system responds with a delay to GHG emissions....42

II.1.8 Too little is being done to prevent dangerous climate change....43

II.2 The widespread recognition that the success of the climate response requires independent climate action by (oil and gas) companies....44

II.2.1 The UN Climate Convention and the Paris Agreement....44

II.2.2 The important role of business enterprises under the UN climate regime....47

II.2.3 The flywheel effect of climate action by non-state actors....50

II.2.4 UN initiatives and other soft law as a basis for non-state climate action....51

II.2.5 The governance gap and the recognition of climate responsibility of business enterprises....55

II.2.6 The special position of Shell....58

II.3 The inhibiting influence of the oil and gas industry on state climate policies....59

II.3.1 Dominant position and ways in which the oil and gas industry exerts influence .59

II.3.2 The IPCC and the UNEP on the inhibiting influence of the fossil-fuel industry....65

II.3.3 The institutional and infrastructural carbon lock-in effect....68
II.4 Shell's policies and activities focus on a future without effective climate action....72
II.4.1 Shell does not wish to reduce its total Scope 3 emissions....72
II.4.2 Shell is obstructing effective climate action....73
II.5 The importance of this court case....75
III PREVENTING (FURTHER) DANGEROUS CLIMATE CHANGE....78
III.1 The actual necessity of limiting cumulative emissions....78
III.1.1 The importance of the carbon budget....78
III.1.2 Background to the 45% standard....79
III.1.3 Translation of the 45% standard into soft law for companies....82
III.2 The role of modelled reduction scenarios....83
III.2.1 Science and modelled reduction scenarios....83
III.2.2 Cost-effectiveness as a central assumption of modelled reduction scenarios....85
III.2.3 IAM models place the heaviest reduction burden on developing countries....86
III.2.4 The IAM models rely very heavily on the hypothesis of large-scale CDR deployment....90
III.2.5 The IAM models use a high discount rate....93
III.2.6 The IAM models do not consider (avoided) climate damage....95
III.2.7 A normative correction of modelled reduction scenarios is necessary....97
III.3 The feasibility of the required emission reductions in relation to energy security 99
III.3.1 Emission reductions are deemed to be feasible without compromising energy security....100
III.3.2 Emission reductions are actually feasible without compromising energy security....104
III.3.3 Energy security will actually stand to benefit from moving away from oil and gas use....108
IV THE DUTY OF CARE TO PREVENT OR LIMIT DANGEROUS CLIMATE CHANGE....114
IV.1 Introduction....114
IV.2 Legal basis of duties of care....115

IV.3 Establishment and concrete determination of duties of care 116
IV.4 The horizontal effect of objective points of reference 118
IV.5 Objective points of reference and climate-related duties of care 121
IV.5.1 The doctrine of hazardous negligence 122
IV.5.2 Human rights 128
IV.5.3 General legal principles 136
IV.5.4 Soft law 164
IV.5.5 Legislation that is not directly applicable 175

V SHELL HAS A DUTY OF CARE TO PREVENT OR LIMIT DANGEROUS CLIMATE CHANGE 178
V.1 Introduction 178
V.2 The oil and gas industry as the primary cause of climate change 179
V.3 Shell's position as a very important actor within the oil and gas industry 180
V.3.1 Shell is one of the largest companies in the world 181
V.3.2 Shell is one of the richest companies in the world 181
V.3.3 Shell generates most of its revenue in wealthier and more developed countries 182
V.3.4 Shell has a large historical CO_2 footprint 183
V.3.5 Shell's present-day and future CO_2 emissions are very high 183
V.3.6 Shell holds a dominant position globally 184
V.3.7 Shell is the world's largest purchaser of oil and gas, with significant purchasing power 185
V.3.8 Shell exerts influence on the supply of and demand for energy products 186
V.3.9 Shell's influence on and control over its very substantial emissions 188
V.3.10 Shell has a substantial historical responsibility for climate change 189
V.3.11 Shell possesses major capabilities, know-how and skills enabling it to change 190
V.4 Application of the objective points of reference to Shell 190
V.4.1 The doctrine of hazardous negligence 191
V.4.2 Human rights 195

V.4.3 General legal principles 198
V.4.4 Soft law 202
V.4.5 Legislation that is not directly applicable 206
V.5 Shell has a duty of care 207
V.6 EU law does not preclude a duty of care on the side of Shell 210
V.6.1 Introduction 210
V.6.2 The relationship between EU policies and national climate policies 215
V.6.3 The EU policies are consistently focused on the transition to sustainable energy 231
V.6.4 The unlikely (legal) consequences of the exhaustive nature of EU policies 237
V.6.5 A duty of care to reduce CO_2 emissions does not lead to the end of oil and gas use 238
V.6.6 Interim conclusion: Shell is starting out from four misconceptions regarding EU law and EU policies 238
V.6.7 Manner of assessing the compatibility of the duty of care with EU law 240
V.6.8 Defence against ground of appeal no. 1 of the conditional cross-appeal in cassation of Shell 247
V.6.9 Further explanation of grounds of appeal nos. 1.35 up to and including 1.45 of the principal appeal in cassation of Milieudefensie et al. 263
V.7 Further explanation of the principal appeal in cassation of Milieudefensie et al. 270
V.7.1 The doctrine of hazardous negligence as an independent assessment framework (grounds of appeal nos. 1.3 up to and including 1.10) 270
V.8 Defence against Shell's conditional cross-appeal in cassation 272
V.8.1 Shell's duty of care and unwritten law (ground of appeal no. 2) 272
V.8.2 Shell's duty of care and Scope 3 emissions (ground of appeal no. 3) 308
VI SHELL'S DUTY OF CARE REQUIRES THE COURT TO IMPOSE A CONCRETE REDUCTION OBLIGATION 330
VI.1 Introduction 330
VI.2 The reduction obligation fleshes out the duty of care in concrete terms 333
VI.2.1 Concrete obligations under Article 6:162 DCC and the role of consensus 333

VI.2.2 Contents and relevance of the Common Ground method and the role of consensus 336
VI.3 Determination of Shell's concrete reduction obligation 341
VI.3.1 Introduction 341
VI.3.2 The oil and gas industry as the primary cause of climate change 342
VI.3.3 Duty of care as the starting-point for a concrete reduction obligation 343
VI.3.4 Doctrine of hazardous negligence and legislation that is not directly applicable 344
VI.3.5 Human rights, effective protection and effective remedy 345
VI.3.6 Soft law 349
VI.3.7 General legal principles in relation to the modelled reduction scenarios 353
VI.3.8 Conclusion 370
VI.4 There are no circumstances that detract from Shell's concrete reduction obligation 370
VI.4.1 The substitution of coal does not justify an increase in gas production 371
VI.4.2 Shell's customer base does not justify a lower reduction percentage 372
VI.4.3 The climate targets can be achieved with the operation of existing oil and gas fields 376
VI.5 Shell has a concrete reduction obligation 378
VI.6 Further explanation of the principal appeal in cassation of Milieudefensie et al. 379
VI.6.1 The global reduction standard and Shell's concrete obligation (grounds of appeal nos. 1 and 3) 379
VI.6.2 The sectoral reduction standard and the concrete reduction obligation for Shell (grounds of appeal nos. 1 and 4) 388
VI.6.3 The minimum reduction standard and the concrete reduction obligation for Shell (grounds of appeal nos. 4.52 up to and including 4.55) 403
VI.6.4 The only remedy and concrete reduction obligation for Shell (ground of appeal no. 5) 408
VI.7 The potential variability of reduction scenarios and reduction percentages does not preclude a concrete reduction obligation for Shell 414
VI.7.1 The reasons for the differences in the reduction percentages *necessitate* a fixed reduction percentage 415

VI.7.2 Shell's stringent obligation of means offers room to allow for other compelling interests 416

VI.7.3 Court injunctions may be lifted or lapse under certain circumstances 418

VI.8 Conclusion 420

VII THE EFFECTIVENESS OF THE REDUCTION OBLIGATION 422

VII.1 Introduction 422

VII.2 The interest criterion in the context of duties of care 424

VII.2.1 Duties of care presuppose the possibility of effective compliance 424

VII.2.2 Obligation of courts to establish a legal duty (Article 3:296 DCC) 428

VII.2.3 It is sufficient that an injunction can contribute to the protection against danger 429

VII.2.4 The existence of one potentially ineffective mode of compliance is irrelevant ... 433

VII.3 What third parties might do is irrelevant under Article 3:303 DCC 434

VII.4 Issuing a reduction injunction against a company and against Shell is effective 437

VII.5 The injunction can be effectively complied with and is, in principle, effective ... 439

VII.5.1 The UN climate regime, soft law and the Court of Appeal start out from the effectiveness of non-state climate action 440

VII.5.2 A reduction injunction will lead to a smaller carbon lock-in effect 445

VII.5.3 Milieudefensie et al. have identified various effective modes of compliance 447

VII.5.4 The compliance with the reduction injunction via Shell Trading is highly unlikely 449

VII.6 The Court of Appeal is not bound by the decision of the District Court whenassessing the effectiveness of the injunction 450

VII.7 The duties of care established by the District Court and the Court of Appeal require an actual reduction in atmospheric CO_2 emissions 452

VII.7.1 Interpretation of court judgments 453

VII.7.2 The duty of care established by the Court of Appeal is aimed at an *actual* CO_2 reduction 454

VII.7.3 The duty of care established by the District Court is aimed at an *actual* CO_2 reduction 454

VII.7.4 The interpretation of the District Court's considerations is insufficiently reasoned

456

VII.8 Restriction of sales and the effectiveness of the reduction obligation 457

VII.8.1 The role of Shell Trading 458

VII.8.2 Downsizing Shell Trading would lead to the loss of other services provided by Shell Trading 463

VII.8.3 The finding of the Court of Appeal regarding the downsizing of Shell Trading goes beyond the scope of the legal dispute 464

VII.8.4 The role of Shell Trading envisaged by the Court of Appeal still concerns Shell's Scope 3 emissions 464

VII.8.5 Relevance of the comparison between Shell Trading and Enron 466

VII.8.6 Effectiveness of a restriction of the sale of oil and gas products produced by Shell 468

VII.8.7 The Erickson et al. report *does* address the effectiveness of a sales restriction 468

VII.9 Sufficient interest and indirect effects of a reduction obligation 470

VII.9.1 The interest requirement encompasses the effectiveness of an injunction in view of the action of third parties 471

VII.9.2 The judgment of the Court of Appeal is incorrect, is insufficiently reasoned or is reasoned in an incomprehensible manner 473

VIII OTHER TOPICS 476

VIII.1 Explanation to the principal appeal in cassation of Milieudefensie et al. 476

VIII.1.1 Emissions with respect to Scope 1 and 2 (ground of appeal no. 2) 476

VIII.1.2 No decision on the requested declaratory decision (ground of appeal no. 9) 484

VIII.1.3 Follow-up complaint (ground of appeal no. 10) 489

VIII.2 Defence against Shell's conditional cross-appeal in cassation 489

VIII.2.1 Admissibility of the Court of Appeal's considerations regarding new oil and gas fields (ground of appeal no. 4) 490

VIII.2.2 Shell's duty of care and the role of courts in law-making (ground of appeal no. 5) 496

LIST OF ABBREVIATIONS

1.5°C Business Playbook	the 1.5°C Business Playbook drafted by the ERI
50% protocols and soft law	the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook and the SBTi Report
ABRvS	the Administrative Jurisdiction Division ("*Afdeling Bestuursrechtspraak*") of the Dutch Council of State ("*Raad van State*")
ACCR	Australasian Centre for Corporate Responsibility
AFIR	Alternative Fuels Infrastructure Regulation contained in Regulation (EU) 2023/1804 of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU
Judgment	the judgment of the Court of Appeal of The Hague, Civil Division, Commercial Team, of 12 November 2024, case number: 200.302.332/01
ACHR	American Convention on Human Rights
BECCS	Bio-Energy with Carbon Capture and Storage
Big Oil Report	the report "Denial, Disinformation, and Doublespeak: Big Oil's Evolving Efforts to Avoid Accountability for Climate Change" prepared by the Oversight Committee of the U.S. House of Representatives from April 2024
BVerfG	Bundesverfassungsgericht, the Federal Constitutional Court of Germany
CBAM	the Carbon Border Adjustment Mechanism contained in Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism
CBDR Principle	the principle of Common but Differentiated Responsibilities
CCS	Carbon Capture and Storage
CDR	Carbon Dioxide Removal

Clean Vehicles Directive	Directive (EU) 2019/1161 of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles
COP	Conference of the Parties, the highest decision-making body of the UN Framework Convention on Climate Change (Article 7(2) of the UN Framework Convention on Climate Change) and the Paris Agreement (Article 16(4) of the Paris Agreement)
CRC	Convention on the Rights of the Child
CSDDD	The Corporate Sustainability Due Diligence Directive contained in Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859
CSRD	the Corporate Sustainability Reporting Directive contained in Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting
DCFR	Draft Common Frame of Reference
Druce Report	the Expert Report by Richard Druce of NERA Economic Consulting dated 15 December 2023
ECB	European Central Bank
EEA	European Environment Agency
EED	the Energy Efficiency Directive contained in Directive (EU) 2023/1791 of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast)
EC	European Community
ECtHR	European Court of Human Rights
Enron	Enron, a major commodities trader
FP ECHR	First Protocol to the European Convention on Human Rights
ERI	Exponential Roadmap Initiative
Erickson et al.	climate scientists P. Erickson and F. Green

ESABCC	European Scientific Advisory Board on Climate Change, which was established under Article 3 of the European Climate Law
ESR	the Effort Sharing Regulation contained in Regulation (EU) 2023/857 of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet the commitments under the Paris Agreement, and Regulation (EU) 2018/1999
ESRS	the European Sustainability Reporting Standards contained in Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU as regards sustainability reporting standards
EU	European Union
EU ETS	the EU Emissions Trading System set out in Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61/EC
EU-ETS 2	the new version of the EU Emissions Trading System set out in Directive (EU) 2023/959 of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission allowance trading system
EU Charter	Charter of Fundamental Rights of the European Union
European Climate Law	Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality, and amending Regulations (EC) No 401/2009 and (EU) 2018/1999
Eurovignette Directive	Directive 1999/62/EC of 17 June 1999 on the charging of heavy-goods vehicles for the use of certain infrastructures
ECHR	European Convention on Human Rights
FuelEU	Regulation (EU) 2023/1805 of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC

Gas Directive	Directive (EU) 2024/1788 of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast)
Gas Regulation	Regulation (EU) 2024/1789 of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast)
General Court	the General Court of the European Union
GHG Protocol	Greenhouse Gas Protocol
Global Trends Report	the annual report "Global Trends in Climate Change Litigation" by the Grantham Research Institute on Climate Change and the Environment and the London School of Economics and Political Science
Gt	Gigatonne
Hawkes Report	the Expert Report by A. Hawkes dated 15 December 2023
Court of Appeal	the Court of Appeal of The Hague
ECJ	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
IACtHR	Inter-American Court of Human Rights
IAM models	Integrated Assessment Models
ICCI	International Cryosphere Climate Initiative
ICPR	International Commission on Radiological Protection
IEA	International Energy Agency
ICJ	International Court of Justice
IISD Report	the report "Lighting the Path" by the International Institute for Sustainable Development from June 2022
IMF	International Monetary Fund

Impact Assessment	Impact Assessment Report for the CSDDD dated 23 February 2022, COM(2022) 71 final - SWD(2022) 42 final
IPCC	Intergovernmental Panel on Climate Change
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
Climate Plan	Climate Plan 2021-2030 of the Dutch Ministry of Economic Affairs and Climate ("*Ministerie van Economische Zaken en Milieu*")
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change
LNG	Liquefied Natural Gas
Low Demand Scenario	the IPCC's Low Demand Scenario included in the IPCC AR6 report
LULUCF	Land Use, Land-Use Change, and Forestry as set forth in Regulation (EU) 2018/841 of 30 May 2018 on the inclusion of GHG emissions and removals from land use, land-use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, as amended by Regulation (EU) 2023/857 of 19 April 2023
M&M	the foundation Stichting Milieu en Mens
Maastricht Principles	The Maastricht Principles on the Human Rights of Future Generations
Methane Regulation	Regulation (EU) 2024/1787 of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation (EU) 2019/942
Milieudefensie et al.	Vereniging Milieudefensie, Stichting Greenpeace Nederland, Landelijke Vereniging tot Behoud van de Waddenzee, Stichting ter Bevordering van de Fossielvrij-Beweging, Stichting Both Ends and Jongeren Milieu Actief
Environmental Directive	Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

Mt	Megatonne
MSR	Market Stability Reserve as set out in Decision (EU) 2023/852 of 19 April 2023 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability reserve for the Union greenhouse gas emission trading system until 2030
NATO	North Atlantic Treaty Organization
NAZCA	Non-State Actor Zone for Climate Action
Net Zero Guidelines	the Net Zero Guidelines developed by ISO
NSA	non-state actor
NVDE	Nederlandse Vereniging voor Duurzame Energie (Netherlands Association for Sustainable Energy)
NZIA	the Net-Zero Industry Act set forth in Regulation (EU) 2024/1735 of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724
NZE Scenario	the Net Zero Emissions scenario in the IEA's "Net Zero Roadmap 2023" report
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	Guidelines for Multinational Enterprises on Responsible Business Conduct prepared by the OECD
Omnibus	Directive 2026/470 of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainbility due diligence requirements
OPGCC	the Oslo Principles on Global Climate Change
Paris Agreement	the international climate agreement of 12 December 2015, concluded by 194 member states of the United Nations and the European Union
Oxford Report	the 2020 report "Mapping of current practices around net zero

	targets" by the University of Oxford
PCOE	Principles on Climate Obligations of Enterprises
PETL	Principles of European Tort Law
Race to Zero Initiative	the Race to Zero Initiative set up under the auspices of the UN
Recommendation	Recommendation on the European Commission's compliance with "Better Regulation" rules and other procedural requirements in preparing legislative proposals that it considered to be urgent by the European Ombudsman (983/2025/MAS - the "Omnibus" case, 2031/2024/VB - the "migration" case, and 1379/2024/MIK - the "CAP" case)
RED III	Renewable Energy Directive III set out in Directive (EU) 2023/2413 of 18 October 2023, amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Directive (EU) 2015/652
ReFuelEU	Regulation (EU) 2023/2405 of 18 October 2023 on ensuring a level playing field for sustainable air transport
RePowerEU	the RePowerEU Plan for Joint European Action for more affordable, secure and sustainable energy from the European Commission of 8 March 2022 (COM(2022) 108 final) and 18 May 2022 (COM(2022) 230 final - SWD(2022) 230 final)
Directive 2009/119	Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products
Unfair Terms Directive	Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
Critical Entities Resilience Directive	Directive (EU) 2022/2557 of 14 December 2022 on the resilience of critical entities and repealing Directive 2008/114/EC
Rome II	Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
SBTi	Science Based Targets Initiative

SBTi Report	the 2018 report “Best practices in scope 3 greenhouse gas management” of the SBTi
Scope 1 emissions	Scope 1 emissions as defined by the GHG Protocol, namely direct emissions that occur from facilities that are wholly or partly owned or operationally controlled by a company
Scope 2 emissions	Scope 2 emissions as defined by the GHG Protocol, namely indirect emissions that occur from facilities of third parties from which a company purchases electricity, steam or heat for its business operations
Scope 3 emissions	Scope 3 emissions as defined by the GHG Protocol, namely the other indirect emissions (not included in Scope 2) occurring in the value chain of a company, including emissions resulting from the use or consumption of products that are supplied by a company to third parties, such as other organisations or consumers
Scope 3 Standard	the Corporate Value Chain (Scope 3) Accounting and Reporting Standard
SDG	Sustainable Development Goal
SEC	Securities and Exchange Commission
Shell	Shell plc (formerly Royal Dutch Shell plc)
Shell Trading	Shell's trading division
SR1.5 Report	the IPCC’s Special Report “Global Warming of 1.5°C” from 2018
Radiation Directive	Directive 80/836/Euratom of 15 July 1980 amending the Directives laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionizing radiation
Taxonomy Regulation	Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088
TNO	Netherlands Organisation for Applied Scientific Research
Truck Regulation	Regulation (EU) 2024/1610 of 14 May 2024 amending Regulation (EU) 2019/1242 as regards strengthening the CO_2

	emission performance standards for new heavy-duty vehicles and integrating reporting obligations, amending Regulation (EU) 2018/858 and repealing Regulation (EU) 2018/956
Tyndall Report	the 2022 report "Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets" of the Tyndall Centre for Climate Change Research, written by D. Calverley and K. Anderson
UNEP	United Nations Environment Programme
UNGP	UN Guiding Principles on Business and Human Rights
TEU	Treaty on European Union
Regulation 2017/1938	Regulation (EU) 2017/1938 of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010
Regulation 2023/851	Regulation (EU) 2023/851 of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO_2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition
Decision	the judgment of the District Court of The Hague, Trade Team, of 26 May 2021 under case and cause-list number: C/09/571932 / HA ZA 19-379
UN	United Nations
UN Expert Group	United Nations High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities
UN Expert Report	the 2022 report "Integrity matters: net zero commitments by business, financial institutions, cities and regions" by the UN Expert Group
UN Charter	the Charter of the United Nations
UN Climate Convention	the United Nations Framework Convention on Climate Change
UN Human Rights Council	the Human Rights Council of the United Nations
TFEU	the Treaty on the Functioning of the European Union

WIBON	Dutch Above-Ground and Underground Networks Information Exchange Act
WION	Dutch Underground Networks Information Exchange Act

I INTRODUCTION

1 Through a Notice of Appeal in Cassation ("*procesinleiding*") filed on 11 February 2025, Milieudefensie et al. took an appeal from the Judgment rendered by the Court of Appeal of The Hague on 12 November 2024 to the Dutch Supreme Court.[1] On 25 April 2025, M&M filed a Motion ("*incidentele vordering tot voeging*") requesting leave to join the proceedings on Shell's side,[2] which leave was granted in a judgment dated 10 October 2025.[3] Shell subsequently filed a conditional cross-appeal in cassation ("*voorwaardelijk incidenteel cassatieberoep*") challenging the Court of Appeal's Judgment in its Statement of Defence in Cassation ("*verweerschrift*") filed on 7 November 2025.[4] On 5 December 2025, Milieudefensie et al. concluded that Shell's conditional cross-appeal to the Supreme Court should be dismissed.[5] On the same date, M&M did not move, in the conditional cross-appeal, that the judgment should be overturned, but deferred to the judgment of the Supreme Court.[6] In this Written Explanatory Submission ("Explanatory Submission"), Milieudefensie et al. will use the definitions and abbreviations included in the list of abbreviations.[7]

2 In the present lawsuit, Milieudefensie et al. and Shell are essentially arguing about the question whether Shell can be required to have reduced its CO_2 emissions by a certain percentage by 2030 to prevent the serious threat of climate change. In the view of the Court of Appeal, Shell has a duty of care to contribute, in line with the Paris Agreement, to limiting global warming and thereby to combating dangerous climate change. Nevertheless, the Court of Appeal dismissed the relief sought by Milieudefensie et al., in particular because (i) the Court of Appeal was unable to determine a percentage by which Shell should reduce its CO_2 emissions, and (ii) Milieudefensie et al. have no interest within the meaning of Article 3:303 DCC, according to the Court of Appeal, in a reduction injunction to be issued against Shell.

3 The principal appeal in cassation of Milieudefensie et al. and the conditional cross-appeal in cassation of Shell together cover virtually all the aspects of the reasoning of the Court of Appeal. For a clear understanding of the issues that are relevant in this context, the relief sought by Milieudefensie et al., the reasoning of the Court of Appeal and the objections raised against it, this Explanatory Submission is structured as follows:

(a) Chapter II describes the serious threat of climate change as well as the role of the oil and gas industry in the emergence, perpetuation and prevention of

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1 Notice of Appeal in Cassation of Milieudefensie et al. dated 11 February 2025.
2 Motion requesting leave to join the proceedings on Shell's side of M&M dated 25 April 2025.
3 Judgment of the Dutch Supreme Court, HR 10 October 2025, ECLI:NL:HR:2025:1534.
4 Statement of Defence in Cassation of Shell.
5 Statement of Defence in Shell's conditional cross-appeal in cassation of Milieudefensie et al. dated 5 December 2025.
6 Statement of Defence in Shell's conditional cross-appeal in cassation of M&M dated 5 December 2025.
7 For a list of abbreviations, see pages 10 up to and including 19 of this Explanatory Submission.

dangerous climate change. Building on this, Chapter III explains that and why global CO_2 emissions must have been reduced by 45% in 2030 and also discusses the substance, background, relevance and limitations of reduction scenarios modelled by climate science, particularly for companies such as Shell. This essentially constitutes the necessary factual background to the issue to be decided by the Supreme Court.

(b) Chapter IV then describes the legal framework for establishing and fleshing out the duty of care to prevent or mitigate dangerous climate change. Chapter V explains that, and for which reasons, Shell has such a duty of care as well as that the judgment of the Court of Appeal is, to that extent, right. Chapter VI sets out that the Court of Appeal should have imposed a concrete reduction obligation on Shell, building on this duty of care. In this context, grounds of appeal nos. 1, 3, 4 and 5 of the principal appeal in cassation of Milieudefensie et al. and grounds of appeal nos. 1, 2 and 3 of the conditional cross-appeal in cassation of Shell will be addressed.

(c) Chapter VII is then devoted to the effectiveness of, and the interest of Milieudefensie et al. in, a concrete injunction to be issued against Shell to reduce its CO_2 emissions. In this connection, the substance and scope of Article 3:303 DCC and the position of Shell Trading, among other things, will be discussed. Grounds of appeal nos. numbers 6, 7 and 8 of the principal appeal in cassation of Milieudefensie et al. relate to this.

(d) Finally, Chapter VIII will address a number of more isolated aspects of the reasoning of the Court of Appeal that are less related, or unrelated, to the subjects discussed in the preceding chapters. This applies, for example, to the failure by the Court of Appeal to decide on the declaratory decision requested by Milieudefensie et al., and the respective roles of the judiciary on the one hand and the legislature on the other. Grounds of appeal nos. 2, 9 and 10 of the principal appeal in cassation of Milieudefensie et al. will be discussed here, along with grounds of appeal nos. 4 and 5 of the conditional cross-appeal in cassation of Shell.

4 For the sake of the readability of this Explanatory Submission, some topics will be discussed somewhat briefly below. Milieudefensie et al. have presented more detailed arguments on these matters to the lower courts. For more information on the relevant subjects, the reader is referred to the case documents of Milieudefensie et al. in the first-instance proceedings and on appeal.

II CLIMATE CHANGE AND THE OIL AND GAS INDUSTRY

5 To fully understand the judgment of the Court of Appeal and the objections to it as raised by Milieudefensie et al., a clear picture is required of (i) the factual aspects of the climate problem, (ii) the broad recognition that corporate climate action is necessary to mitigate the great dangers and risks of climate change and to protect human rights, and (iii) the findings within both the scientific community and the international community that the oil and gas industry, including Shell, constitutes a major obstacle to addressing climate change and to making society more sustainable. This particular set of facts is one of the reasons why both the District Court and the Court of Appeal found that Shell has a duty of care to help prevent dangerous climate change. This particular set of facts also necessitates and justifies the issue of a reduction injunction against Shell. The fact that combating climate change requires urgent action is, incidentally, not in dispute between Milieudefensie et al. and Shell.[8]

6 The alarming observation is that, 34 years after the adoption of the UN Climate Convention, the world has reached a critical juncture, in which the acts and omissions of the most influential states and companies in particular will determine the future that society will be facing in the years to come. The law plays an indispensable role everywhere in the world when it comes to establishing the obligations and duties (of care) that states and companies have in connection with the prevention of dangerous climate change. Following the *Urgenda* judgment[9] , the ECtHR[10], the IACtHR[11] and the ICJ[12] recently also held that climate change is a highly urgent and existential problem; in the interest of human rights and the preservation of a liveable environment, people must be offered protection against this problem.

7 According to Milieudefensie et al., it is of great importance to also highlight the above in the proceedings before the Supreme Court. With a view to this, Milieudefensie et al. will base themselves in the following on the facts found by the District Court and the Court of Appeal as well as on the extensive factual substantiation provided by Milieudefensie et al. themselves in their case documents submitted to the lower courts, in which they relied on findings of authoritative and undisputed sources, such as the IPCC, the UN (and UN bodies), the UNEP and the IEA.

II.1 Climate change as the greatest threat of our time

II.1.1 The greenhouse effect, the role of oil and gas and the necessary energy transition

8 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 3 and 5.
9 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
10 ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).
11 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights).
12 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change).

8 Since the Industrial Revolution, humanity has been producing and burning fossil fuels on an ever-increasing scale to meet its energy needs. During the combustion of fossil fuels, greenhouse gases are released into the atmosphere. The most important gas is CO_2, which remains in the atmosphere for hundreds of years or longer. In this way, the use of fossil fuels leads to climate change. This climate change is *anthropogenic*, meaning it is caused by humans.

9 The characteristic feature of greenhouse gases such as CO_2 is that they trap this heat in the atmosphere. As the CO_2 concentration in the atmosphere increases, the atmosphere, land, ice masses and oceans slowly warm up and the average temperature on Earth rises.[13] There is a direct and almost near-linear relationship between CO_2 emissions and global warming.[14]

10 Due to the continued burning of fossil fuels, the CO_2 concentration in the atmosphere continues to increase. In 2024, the CO_2 concentration was 423 ppm.[15] That CO_2 concentration is 40% higher than the highest concentration level of 300 ppm measured over a period of 800,000 years prior to the Industrial Revolution.[16]

11 This means that humans have lived and survived for 300,000 years since their origins in a world in which the CO_2 concentration never exceeded 300 ppm.[17] In the 8,000 years leading up to the Industrial Revolution in 1850 - the period following the last ice age - the CO_2 concentration in the atmosphere, according to the IPCC, never fell below 260 ppm and never rose above 280 ppm.[18] That is a range of just 20 ppm during a period of 8,000 years. That stable and moderate climate of the past 8,000 years has created relatively stable conditions for the planet's ecosystems and biodiversity, and thus for life on Earth.

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13 For a more detailed description of the effects of greenhouse gases, see the judgment of the Court of Appeal, grounds 3.3 and 3.4, and of the District Court, grounds 2.3.1 up to and including 2.3.4.

14 Exhibit MD-476 (IPCC AR6 WGI SPM), p. 28. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 311 with further references. See also the judgment of the Court of Appeal, ground 3.4, and of the District Court, ground 2.3.2.

15 The abbreviation ppm stands for parts per million. It is a unit used to express the concentration of CO_2 (or other greenhouse gases) in the atmosphere. It indicates how many particles of CO_2 (or other greenhouse gas) are present in every million particles in the atmosphere. The average CO_2 concentration level for 2024 was 422.7 ppm (rounded to 423 ppm), which was 3.75 ppm higher than in 2023. See https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide.

16 During this period of 800,000 years, the CO_2 concentration never exceeded 300 ppm (warmest periods) and never fell below 180 ppm (coldest ice ages). This period is graphically represented and further explained in the Summons of Milieudefensie et al. dated 5 April 2019, paras. 320 up to and including 328. The updated version of this graph (up to and including 2024) can be viewed at https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide.

17 At the start of the Industrial Revolution in 1850, the CO_2 concentration level was 280 ppm. Relative to that baseline, the CO_2 concentration had already increased by 50% up to and including 2024. See https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide.

18 Exhibit MD-104 (IPCC AR4 WGI Technical Summary), p. 25. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 320.

12 However, since the Industrial Revolution in 1850 - and particularly since the explosive economic growth starting in the 1950s - the chemical composition of the atmosphere has changed drastically and at an unprecedented rate as a result of the use of fossil fuels: over the past 75 years, the CO_2 concentration has risen by more than 110 ppm.[19]

13 As a result of this drastic atmospheric change, the global average temperature has already risen by nearly 1.3°C compared to pre-industrial levels,[20] while at the time of the proceedings before the Court of Appeal, an increase of 1.2°C was still started out from[21] and at the time of the proceedings before the District Court, an increase of only 1.1°C was even assumed.[22] So in the couple of years spanned by these proceedings, global warming has already increased substantially again. The biggest share of this warming is caused by CO_2 emissions from the most prosperous countries, where a minority of the world's population lives.[23]

14 Per decade, the temperature rise added to this is at least 0.2°C.[24] Moreover, global warming seems to be accelerating. The past ten years are among the warmest on record. The IPCC has determined that climate change poses a threat to the well-being of humans and the health of the planet, and has indicated that the window of opportunity to secure a liveable and sustainable future for all is closing very rapidly:

> *"There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence)."*[25]

15 At the end of 2024, a coalition of 15,000 scientists warned again for an irreversible climate disaster and described the resulting precarious and dangerous situation as a "climate crisis". They called on the global community to rapidly phase out the use of fossil fuels and make this a top priority.[26]

16 This call from the scientific community for a rapid phase-out of fossil fuels is understandable, as the climate crisis is, in essence, a fossil-fuel crisis. No less than

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19 As much as 40% of the total quantity of greenhouse gases since the Industrial Revolution was even emitted after 1990. See the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 2 with further references.

20 According to the EEA on 16 June 2025. See https://www.eea.europa.eu/en/analysis/indicators/global-and-european-temperatures.

21 Judgment of the Court of Appeal, ground 3.4. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 16 with further references.

22 Decision of the District Court, ground 2.3.2.

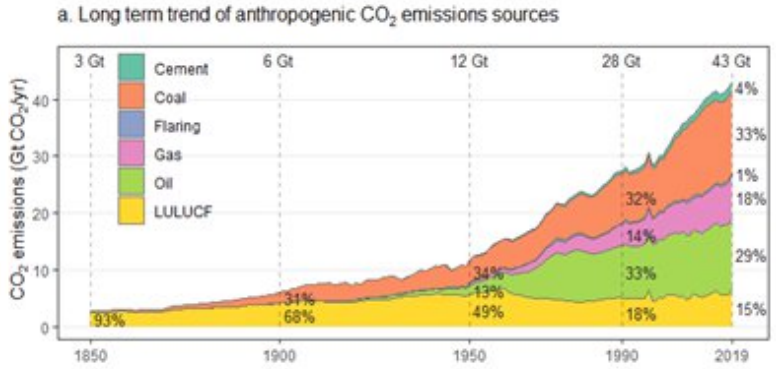
23 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (25), 525 up to and including 528 and 583; Summons of Milieudefensie et al. dated 5 April 2019, para. 374.

24 According to the EEA on 16 June 2025. See https://www.eea.europa.eu/en/analysis/indicators/global-and-european-temperatures. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 340 with further references.

25 Exhibit MD-495A (IPCC SR 2023), p. 24. See also the judgment of the Court of Appeal, ground 3.8 under C.1.

26 W.J. Ripple et al., "The 2024 State of the Climate Report: Perilous Times on Planet Earth," *BioScience* 2024/12/74, pp. 812 up to and including 824, available at https://academic.oup.com/bioscience/article/74/12/812/7808595.

81% of the world's annual CO_2 emissions is caused by the production and combustion of oil, coal and gas. The figure below from the IPCC in 2022 clearly illustrates this:[27]



17 This IPCC figure shows that the use of oil, coal and gas accounts for 29%, 33% and 18% of global CO_2 emissions respectively. An additional 1% of the CO_2 emissions is caused by the flaring of gases that are released during the extraction and processing of oil and gas. The remaining CO_2 emission sources are cement production (4%) and land use (15%). Land use is referred to by the acronym LULUCF (Land Use, Land Use Change, Forestry), which includes, for example, the CO_2 impact of global deforestation.[28] With this total share of 81%, emissions from the fossil-energy sector account for more than four-fifths of the annual global CO_2 emissions.[29]

18 The fact that more than four-fifths of the annual global CO_2 emissions are linked to the fossil-energy sector makes it clear that the climate crisis can only be resolved by rapidly phasing out the production and use of oil, coal and gas. The CO_2 emissions linked to land use (15% of global CO2 emissions) will also need to decrease. This can be achieved through (re)forestation, restoration of natural areas and other forms of agriculture. At the same time, however, climate change and the prolonged periods of heat and drought caused by it are also leading to more forest fires. These forest fires not only result in the loss of forests (and thus in CO_2 sequestration capacity), but the burning of wood also releases large amounts of CO_2 that further exacerbate global warming.[30] It is only when there are, on balance, no further net emissions of CO_2 into the atmosphere that the temperature on earth will be able to stabilise. Until then, every tonne of CO_2 emissions will contribute to further global warming.

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27 Exhibit MD-349 (IPCC AR6 WGIII Technical Summary), p. TS-16. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 477 up to and including 479 with further references.
28 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 478 with further references.
29 Judgment of the Court of Appeal, ground 7.72.
30 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 776 up to and including 780 with further references.

19 Oil, coal and gas each play their own, specific role in causing global warming. Because Shell only produces and sells oil and gas (and no coal), this court case focuses solely on reducing the CO_2 emissions associated with oil and gas.

20 The figure shown above demonstrates that oil and gas together account for 48% of the annual global CO_2 emissions.[31] That is significantly more than the contribution of coal, which stands at 33%. On balance, the production and use of oil and gas thus make the largest contribution to the climate problem. For this reason, reducing CO_2 emissions from oil and gas - and so phasing out the use of oil and gas - is of great importance to limit global warming.

II.1.2 The serious consequences and major risks of climate change

21 Climate change is the greatest challenge of our time.[32] Its potential consequences are immense. It would be beyond the scope of this Explanatory Submission to list or discuss all the dangers in detail. That is also not necessary, as Shell is also fully aware of these dangers.[33] In outline, the dangers boil down to the following.[34]

22 The IPCC has categorised the major risks associated with climate change into five reasons for concern:[35]

(a) Unique systems are under threat. Both natural and cultural systems are under threat. The global temperature rise will force certain human systems to adapt significantly or cause existing ecosystems to disappear, such as ice sheets and coral reefs.

(b) Extreme weather events. These events will increase in both frequency and intensity. Droughts, extreme precipitation, heat, (tropical) storms and hurricanes are examples of extreme weather events that are expected to increase and will lead to more wildfires (due to drought/heat) and flooding (due to extreme precipitation and storms).

(c) Distribution of the impact. The consequences of climate change will not be uniform across the globe. The risks will be unevenly distributed, and in all countries - regardless of their stage of development – the groups that are already

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31 Oil: 29%, gas: 18%, and flaring (during oil and gas extraction and processing): 1%, so 48% in total.
32 Judgment of the Court of Appeal, ground 7.25.
33 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 3 and 5.
34 See, for more details, the Written Arguments of Milieudefensie et al. dated 18 March 2024. See also the Decision of the District Court, ground. 2.3.
35 Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 68 up to and including 70; Exhibit MD-113 (IPCC AR5 WG II SPM), pp. 11 up to and including 14. See, for example, also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 616 and 617; Summons of Milieudefensie et al. dated 5 April 2019, paras. 420 up to and including 435. See also the Decision of the District Court, grounds 2.3.5.

vulnerable and marginalised now will be hit in particular by climate change impacts and will be the first to see their food and water security compromised.

(d) Consequences that reinforce each other globally. The consequences of climate change extend beyond the direct effects only and also consist of the sum total of several indirect consequences. For example, climate change will also lead to a loss of biodiversity. This has implications not only for the ecological systems, but also for economies, as humans are dependent on this biodiversity (e.g. through fishing and agriculture).

(e) Large-scale singular events. They are also referred to as tipping points. If tipping points are reached, critical thresholds in the climate system are crossed. These are abrupt and drastic changes in physical, ecological or societal systems that, in most cases, are irreversible and therefore have very significant and permanent consequences.

23 In more concrete terms, it is expected that climate change will cause heat waves to occur more frequently, last longer and be more intense in Europe, resulting in more deaths.[36] For Northwest Europe specifically, the low-lying coastal areas there face an increased risk of coastal flooding due to sea-level rise and an increased risk of storm surges. Countries bordering the North Sea are particularly vulnerable. More rainfall in winter will increase the intensity and frequency of river flooding in both winter and spring in Northwest Europe.[37] The IPCC has warned that human-induced climate change has already led to large-scale and rapid changes in the atmosphere, oceans, ice masses and the biosphere in all regions of the world.[38]

24 In the Netherlands, too, heat waves, droughts, floods, damage to ecosystems and threats for food production are expected to become more severe in the future. Further warming means that Dutch summers will become drier and winters will become wetter.[39] Every year, there will be both periods of drought and water scarcity as well as periods of flooding. These changes and uncertainties in the availability of water will have far-reaching consequences for agriculture and biodiversity, but also, for example, for the energy sector and industry.[40] These consequences will be all the greater because the Netherlands will inevitably also be affected by climate impacts in other countries.[41]

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36 Exhibit MD-161 (EEA Report), pp. 1 up to and including 29. See also the Written Arguments of Milieudefensie et al. dated 18 March 2024, paras. 24 up to and including 27, 71 and 77; Summons of Milieudefensie et al. dated 5 April 2019, paras. 342, 477 (footnote 351), and 479. See also the Decision of the District Court, ground 2.3.6.

37 Exhibit MD-161 (EEA Report), pp. 24 and 25. See also the Decision of the District Court, ground 2.3.6.

38 Exhibit MD-495A (IPCC SR 2023), p. 5. See also the judgment of the Court of Appeal, ground 3.8 under A.2.

39 Exhibit MD-066 (KNMI Report), p. 28. See also the judgment of the Court of Appeal, ground 3.12, and the Decision of the District Court, ground 2.3.7.

40 Exhibit MD-164 (Report of "*Algemene Rekenkamer*" (Netherlands Court of Audit)). See also the judgment of the Court of Appeal, ground 3.13, and the Decision of the District Court, ground 2.3.9.

41 Exhibit MD-495A (IPCC SR 2023), pp. 99 up to and including101. See also the Written Arguments of Milieudefensie

25 Living conditions on Earth will change so drastically and negatively as a result of these developments that – also according to the IPCC - large groups of people will be forced to leave their homes; this is also referred to as "displacement".[42] The housing and livelihoods of many millions of people will thus be at risk due to climate change.[43] Consequently, health risks and deaths caused by climate change will increase significantly worldwide.[44] The numbers will therefore be even higher than in 2009, when the UN already determined that dangerous climate change will lead to 300,000 deaths, 325 million people severely affected, 4 billion people placed in a vulnerable position and 500 million people facing extreme risks every year.[45]

26 Crossing tipping points - the fifth reason for concern identified by the IPCC - would only exacerbate the situation described above. In 2019, there was already scientific consensus (as also established by the Dutch Supreme Court in the *Urgenda* case)[46] that the risk of crossing tipping points would increase *"at a steepening rate"* in the case of a temperature rise between 1°C and 2°C.[47] In recent years, the scientific understanding of tipping points has progressed; this has made the risks of dangerous climate change in general - and of crossing tipping points in particular - clearer.[48] These risks are highly diverse and have a major impact on life on Earth. Examples are (life-threatening) health risks, risks related to the collapse of infrastructure and essential services, such as electricity, the water supply and health and emergency services, risks of food insecurity and the risk of losses of ecosystem and biodiversity, also in the sea and inland waters.[49] As global warming continues, these risks will increase in severity and frequency. This will even jeopardise national security, according to recent research

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et al. dated 18 March 2024, paras. 44 and 45.

42 Exhibit MD-495A (IPCC SR 2023), pp. 6 and 51; Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 52 and 64; Exhibit MD-152 (IPCC AR5 WGII H11), p. 713. See also the Written Arguments of Milieudefensie et al. dated 18 March 2024, para. 71; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 616; the Summons of Milieudefensie et al. dated 5 April 2019, para. 450.

43 Exhibit MD-574B (The Global Tipping Points Report 2023), p. 197; Exhibit MD-213 (Resolution 10/4 of the UN Human Rights Council). See also the Written Arguments of Milieudefensie et al. dated 18 March 2024, para. 71; Summons of Milieudefensie et al. dated 5 April 2019, para. 654.

44 Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 50 and 63; Exhibit MD-161 (EEA Report), pp. 1 up to and including 29. Written Arguments of Milieudefensie et al. dated 18 March 2024, para. 70; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 616; the Summons of Milieudefensie et al. dated 5 April 2019, paras. 449 up to and including 452, 477, 478, 495, 522 and 525. See also the Decision of the District Court, grounds 2.3.5, 2.3.6 and 4.4.6.

45 Exhibit MD-214 (UN Report), p. 1. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 270; Summons of Milieudefensie et al. dated 5 April 2019, para. 659.

46 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 4.2 and 4.4.

47 Summons of Milieudefensie et al. dated 5 April 2019, paras. 51, 436 up to and including 448 and 665 with further references.

48 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 615 with further references; Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 4, 5 and 48 up to and including 51 with further references.

49 Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 69 and 70; Exhibit MD-113 (IPCC AR5 WG II SPM), pp. 12 and 13. See also the Written Arguments of Milieudefensie et al. dated 18 March 2024, paras. 42 and 71; Summons of Milieudefensie et al. dated 5 April 2019, paras. 429 up to and including 435. See also the Decision of the District Court, ground 2.3.5.

by the UK's Joint Intelligence Committee (the government committee that oversees the intelligence services MI5 and MI6).[50]

27 Research compiled by the IPCC demonstrates that these climate risks will materialise at lower levels of warming than previously thought, and will even already occur at the current warming levels.[51] This is consistent with the fact that the crossing of five tipping points could even not be ruled out anymore at 1.2°C of warming, the global temperature increase in 2023.[52] These tipping points are (i) the mass die-off of tropical coral reefs, (ii) the melting of the Greenland icecaps and (iii) West Antarctic ice sheets, both of which could result in significant sea level rises, (iv) the collapse of the Gulf Stream, a circular ocean current at the ocean surface south of Greenland that plays a key role in regulating the climate, and (v) the abrupt thawing of parts of the permafrost, causing large amounts of the greenhouse gas methane to be released into the atmosphere, which will accelerate global warming.[53]

28 The risks of crossing tipping points in the climate system will increase proportionally if warming exceeds the 1.5°C threshold, when the danger zone for three additional tipping points will also be reached. These tipping points are (i) the die-off of the boreal forest (the forests in Alaska, Russia, Canada and Scandinavia), (ii) the loss of mangroves and (iii) the loss of seagrass beds.[54] While the die-off of the boreal forest increases the risk of wildfires and negatively impacts weather and precipitation patterns, the loss of mangroves and seagrass beds leads, among other things, to biodiversity and ecosystem losses, reduced food security and the loss of a source of carbon storage.[55] From 2°C of warming onwards, the danger zone for various other tipping points is even reached, including those for the desiccation of the Amazon rainforest and the melting of the East Antarctic marine basin.[56]

29 Because natural systems closely interact with each other, crossing a tipping point in one system can significantly impact the stability of other systems. This can trigger a

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50 See, for example, https://nos.nl/artikel/2599454-britse-inlichtingendiensten-klimaatverandering-raakt-nationale-veiligheid, with reference to https://assets.publishing.service.gov.uk/media/696e0eae719d837d69afc7de/National_security_assessment_-_global_biodiversity_loss__ecosystem_collapse_and_national_security.pdf.

51 Exhibit MD-495A (IPCC SR 2023), p. 75. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 40 and 41 with further references.

52 Exhibit MD-574B (The Global Tipping Points Report 2023), p. 20; Exhibit MD-506 (ICCI Report 2023), p. 31. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 5, 50 and 60.

53 Exhibit MD-574B (The Global Tipping Points Report 2023), pp. 20, 61 up to and including 65, 72 up to and including 76, 85, 105 up to and including 108 and 131 up to and including 134; Exhibit MD-506 (ICCI Report 2023), p. 31. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 5, 50 and 60.

54 Exhibit MD-574B (The Global Tipping Points Report 2023), pp. 20, 82, 89 up to and including 91, 108 up to and including 114 and 255. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 5 and 51.

55 Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 51 (footnote 83).

56 Exhibit MD-574B (The Global Tipping Points Report 2023), pp. 20, 59 and 65; Exhibit MD-506 (ICCI Report 2023), pp. 8, 12, 81, 86 up to and including 89 and 182 up to and including 185. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 5 and 51.

chain reaction. As indicated above, this risk already exists at the current level of warming. In the Global Tipping Points Report 2023, a comprehensive scientific research report on tipping points, this is worded as follows:

> *"Global warming is rapidly approaching levels that could trigger individual tipping points in systems that can interact with and destabilise other tipping systems."*[57]

30 Any increase in global warming will further intensify the dangers that were described above by way of illustration. As a result, climate change poses an existential threat to the well-being of humans and the health of the planet. The potential for adjustment (adaptation) will become less effective as global warming increases. With the current level of global warming, several adaptation thresholds have already been reached. If the Earth's temperature were to rise by more than 1.5°C, even more adaptation thresholds would be reached.[58] The possibility of securing a liveable and sustainable future for all is therefore diminishing very rapidly, according to the IPCC.[59]

31 It follows from the above that there is an urgent need to reduce global GHG emissions to zero as quickly as possible if global warming is to be halted. In this context, it is crucial that global CO_2 emissions decrease as quickly as possible, with the greatest possible emission reductions achieved before 2030. This necessity stems, among other things, from (i) the near-linear relationship between cumulative CO_2 emissions into the atmosphere and global warming, (ii) the need to reduce total CO_2 emissions within the carbon budget to net zero, and (iii) the climate system's slow response to CO_2 emissions, meaning that the damage already inevitably inflicted on the world by the CO_2 already emitted so far is far greater than can now be observed. These subjects will be discussed in the following Sections.

II.1.3 Relationship between cumulative CO_2 emissions and global warming

32 The existential risks and consequences of climate change discussed above make it imperative to achieve the necessary global emission reductions as quickly as possible. Only when global CO_2 emissions have been reduced to zero – and so, on balance, no CO_2 is being added to the atmosphere - can global warming be halted. Until then, global warming will continue, with all the attendant consequences.

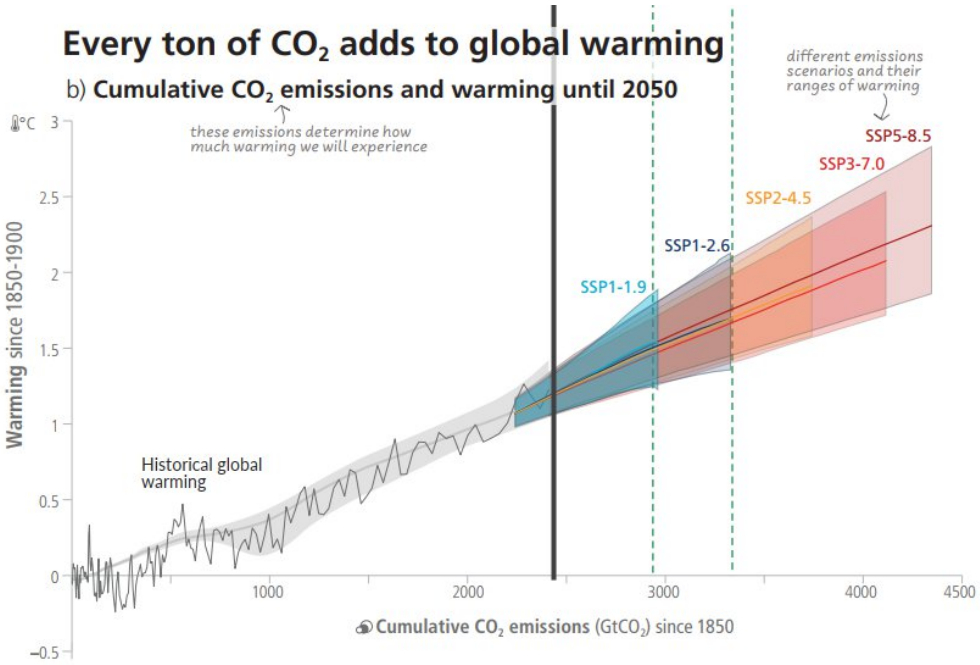
33 CO_2 emissions accumulate in the atmosphere. Once emitted, CO_2 - at least the portion not absorbed by the biosphere and the oceans – stays present in the atmosphere for hundreds of years and, in some cases, even thousands of years, retaining its warming

[57] Exhibit MD-574B (The Global Tipping Points Report 2023), p. 20. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 5, 64 and 65 with further references.
[58] Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 84 and 85. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 89.
[59] Exhibit MD-495A (IPCC SR 2023), p. 24. See also the judgment of the Court of Appeal, ground 3.8 under C.1.

effect. Therefore the historical emissions since the Industrial Revolution in 1850 still have an impact on today's climate and will continue to influence the climate of the future for a long time to come. Similarly, the current CO_2 emissions and those of the coming decades will further influence and change the climate for millennia.[60]

34 As a result of this cumulative effect of CO_2 emissions, climate change is, by its very nature, a form of insidious damage. The full extent of the damage does not occur overnight, but increases gradually. It is comparable to a situation in which workers are constantly exposed to a hazardous substance and develop pneumoconiosis gradually, but to an increasingly severe degree. The health of their lungs will deteriorate further and further in an insidious manner.[61] The same applies to climate damage caused by climate change: because CO_2 emissions accumulate in the atmosphere, the CO_2 concentration there rises, the Earth continues to warm and the consequences and climate damage for humans, animals and nature become increasingly severe.

35 This is linked to the fact that the relationship between cumulative CO_2 emissions into the atmosphere and global warming is virtually linear. As a result, every additional tonne of CO_2 emissions will add to further global warming. This is also clearly demonstrated by the IPCC graph shown below:[62]



60 Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 2 and 20; Summons of Milieudefensie et al. dated 5 April 2019, paras. 8 and 318, with further references. See also the judgment of the Court of Appeal, ground 3.3, and the Decision of the District Court, ground 2.3.1.

61 Summons of Milieudefensie et al. dated 5 April 2019, para. 18.

62 Exhibit MD-495A (IPCC SR 2023), p. 83.

36 The CO_2 concentration will therefore continue to rise as long as CO_2 is emitted. The higher the CO_2 concentration becomes, the greater global warming will be.[63] From this scientific fact alone it follows that the emission of CO_2 into the atmosphere must be reduced to net zero as quickly as possible and that the cumulative CO_2 emissions must be limited as much as possible within that context.

II.1.4 The carbon budget and the need to limit CO_2 emissions

37 Due to the near-linear relationship between the cumulative emission of CO_2 into the atmosphere and global warming, the IPCC has introduced the concept of the "carbon budget". The carbon budget indicates the maximum amount of CO_2 that may still be added to the atmosphere before a CO_2 concentration is reached that results in a certain degree of global warming due to the near-linear relationship between the two.[64] In other words: the carbon budget indicates the maximum amount of CO_2 that may still be emitted in order to limit global warming to a specifically determined target temperature. That chosen target temperature determines the size of the remaining carbon budget. The lower the target temperature, the smaller the carbon budget will be.

38 The carbon budget still left to limit global warming to 1.5° - which is necessary to prevent or limit dangerous climate change[65] - has been significantly depleted over the past 30-plus years due to the lack of adequate climate action taken since the adoption of the UN Climate Convention in 1992.

39 To maintain a 50% chance of limiting warming to a maximum of 1.5°C, the carbon budget was 580 $GtCO_2$ as per the end of 2017, according to the IPCC.[66] The annual average global CO_2 emissions have amounted to approximately 40 $GtCO_2$ per year since 2018 (and to date). This means that, at the time of the Decision of the District Court in 2021, the carbon budget had already decreased to 460 Gt due because three years with 40 $GtCO_2$ of emissions per year had passed.[67] Since then, the available carbon budget has decreased further because another five years have expired in which the global CO_2 emissions have not been reduced. If the current annual emissions of approximately 40 $GtCO_2$ continue and the annual global CO_2 emissions do not decrease steeply and substantially, this budget will be exhausted by around 2030.[68]

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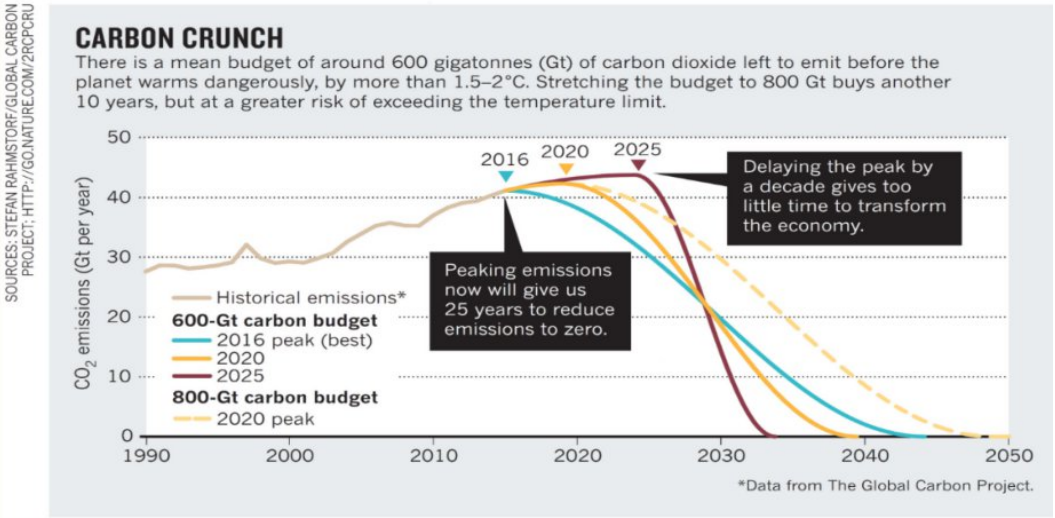
63 Summons of Milieudefensie et al. dated 5 April 2019, para. 311 with further references. See the judgment of the Court of Appeal, ground 3.4, and the Decision of the District Court, ground 2.3.2.
64 Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 1 up to and including 18 with further references; Summons of Milieudefensie et al. dated 5 April 2019, paras. 380 up to and including 382 with further references.
65 See, in this regard, Section III.1 of this Explanatory Submission for further details.
66 Judgment of the Court of Appeal, ground 3.1; Decision of the District Court, ground 2.3.4.
67 Judgment of the Court of Appeal, ground 3.1; Decision of the District Court, ground. 2.3.4.
68 Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 35 with further references.

40 In the *Urgenda* case, the following graph was used to warn of this situation:[69]



41 This figure illustrates three reduction pathways in which a remaining carbon budget of 600 $GtCO_2$ is distributed over time, starting in 2016. The figure clearly shows that if emission reductions are further delayed, emission reductions must be achieved more rapidly in the future in order to succeed in limiting global warming to 1.5°C. After all, in such a situation, the available carbon budget will be used up more quickly, so that CO_2 emissions must be reduced more rapidly over time to remain within that budget. The red line shows that postponing emission reductions until 2025 effectively means that the point of net zero CO_2 emissions must be reached as early as 2035. This figure thus underscores the great importance and urgency of rapid and deep emission reductions.

42 The IPCC already recognised this in 2018:

> *"If emissions do not start declining in the next decade, the point of carbon neutrality would need to be reached at least two decades earlier to remain within the same carbon budget."*[70]

43 This demonstrates the unprecedented urgency of climate action. After all, globally, the carbon budget left to limit global warming to 1.5°C is only very limited. With immediate and deep emission reductions, the current rate at which the carbon budget is being depleted can still be slowed down and more time can be created for society to transition

[69] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 4.66.
[70] Exhibit MD-136 (IPCC SR 2018), p. 96.

to a sustainable energy system. What this actually requires is that global CO_2 emissions follow a trajectory towards net zero and that this net-zero point is reached before the carbon budget is exhausted.

44 Due to the lack of adequate climate action over the past 30-plus years, the timely reduction of CO_2 emissions has now become a virtually impossible task. If the achievement of the reduction target for 2030 is further delayed, this will inevitably cause the Earth to warm by more than 1.5°C. The consequences and dangers of exceeding the carbon budget will be discussed in the following Section. In that regard, it should already be noted here that the life-threatening and even existential risks of climate change discussed in Section II.1.2 of this Explanatory Submission immediately make it clear that every effort must be made to keep any carbon budget exceedance as small as possible at all times.

II.1.5 The consequences of overshooting the carbon budget

45 The linear relationship between the cumulative CO_2 emissions and the rapidly shrinking carbon budget makes it clear that the path to net-zero emissions - and the total emissions up to that point – will determine the risks and damage caused by climate change. These factors also have far-reaching consequences for the future course of climate action, both for the period from 2030 to 2050 and for the period from 2050 to 2100.

46 As will be discussed in detail in Section III.1 of this Explanatory Submission, it is crucial that global CO_2 emissions have been reduced by 45% by 2030; otherwise, global warming will overshoot 1.5°C by a large margin. This has to do with the carbon budget and the consequences of exceeding it. This can be easily understood using a visualised example taken from a report by Carbon Tracker, a research organisation that studies the impact of climate change.[71] In that example, use is made of a hypothetical carbon budget of 1,000 $GtCO_2$, starting in 2020. Given the current emissions of 40 $GtCO_2$ per year, a budget of 1,000 $GtCO_2$ will be exhausted in 25 years.[72] Against this backdrop, the figures used show what the consequences will be if different reduction pathways are followed from 2020 onwards in order to reach the same net-zero point in 2050. These figures illustrate why it is so important that the largest reductions occur specifically in the period between 2020 and 2030. The following two figures are relevant.[73]

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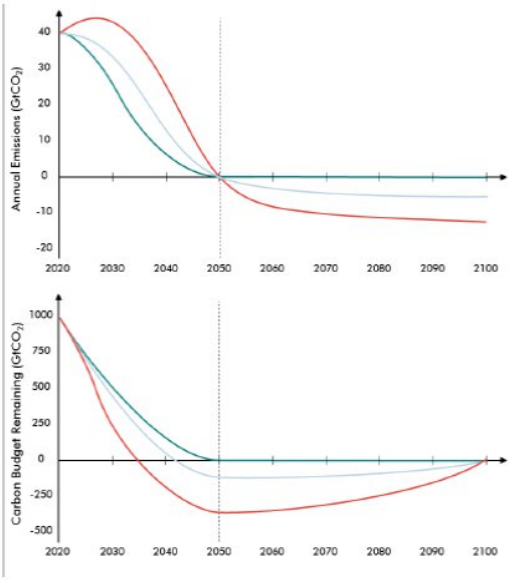
71 Exhibit MD-282 (Carbon Tracker Report 2020), p. 7. See also the Notes of the Oral Arguments (8) in the first-instance proceedings of Milieudefensie et al. dated 15 December 2020, paras. 7 up to and including 18 with further references.

72 In reality, the carbon budget for a 50% chance of limiting global warming to 1.5°C was approximately 580 $GtCO_2$ from 2018 onwards, which amounts to approximately 500 $GtCO_2$ from 2020 onwards.

73 The points made in these figures also follow from the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), grounds. 4.57 up to and including 4.67. See also the Decision of the District Court of The Hague of 24

Figure 2. a) Global annual net carbon emissions (Top), and b) Remaining carbon budget (bottom) to 2100, for three illustrative scenarios reaching net zero in 2050.



Source: Carbon Tracker analysis. Notes: Schematic diagrams with approximate y-axis values.

47 These two figures (Figures 2a and 2b) must be considered in relation to each other. The upper figure shows the annual emissions from 2020 onwards for three scenarios. The lower figure shows what will happen to the carbon budget in each of those scenarios. The three scenarios are represented by dark green, light blue and red lines respectively.

48 In the upper figure (Figure 2a), the dark green line indicates the first emission scenario. In this green emission scenario, reductions begin immediately in 2020, and the period up to 2030 is used to already significantly reduce CO_2 emissions. The net-zero point is reached in 2050. The area under the green line represents the cumulative amount of CO_2 emitted in the period from 2020 to 2050. The cumulative emissions in this scenario stay within the maximum carbon budget of 1,000 $GtCO_2$ used in this example. The fact that this carbon budget is not exceeded can be seen in the lower figure, which shows that the dark green line never goes below the zero point. In this scenario, the zero point is therefore reached in a timely manner by 2020 within the given carbon budget.

49 The second scenario is shown in the upper figure by the light blue line. In the light blue scenario, emissions are reduced to a much lesser degree in the early years up to 2030 and the reduction only accelerates after 2030. In this scenario, net zero is also reached

June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), grounds 2.32 and 4.32 up to and including 4.34.

in 2050, but as the lower figure demonstrates, the carbon budget is already exhausted shortly after 2040. Consequently, in this scenario, the cumulative emissions on the pathway to net zero in 2050 exceed the carbon budget. The area in the upper figure between the green and blue lines represents the cumulative CO_2 emissions that exceed the green scenario in this scenario over the period from 2020 to 2050.

50 The light blue scenario therefore results in greater warming than the green scenario. This additional warming could only be reversed if the excess CO_2 emissions between 2020 and 2050 could be removed from the atmosphere again after 2050. These emissions are called “negative CO_2 emissions”. This explains why the light blue line crosses below and continues to be under the horizontal zero axis after 2050. The excess emissions released into the atmosphere prior to 2050 would then have to be removed from the atmosphere after 2050. That is actually not possible at this point in time.

51 The red line in the upper figure shows a third scenario, in which CO_2 emissions continue to rise until 2030. As shown in the lower figure, the carbon budget will then already be exhausted by around 2035[74] and the cumulative emissions until 2050 will be much higher than in the case of the light blue line. As a result, global warming will rise much further than in the light blue scenario. This will inevitably lead to the crossing of tipping points and the occurrence of major risks to humans, animals and nature.[75]

52 These far-reaching consequences will occur unless technologies are developed in the future that are feasible, affordable and globally scalable and can be operationalised over a longer period of time, and that allow for the removal of enormous amounts of emissions from the atmosphere after 2050 and for their permanent and safe storage underground. It is not obvious that this will happen; on the contrary, it is highly likely that such a result can never be achieved with such negative emissions in reality. This will be discussed in great detail in Section II.1.6 of this Explanatory Submission.

53 It follows from the above that the CO_2 reductions achieved between 2020 and 2030 will be crucial for the room for emitting CO_2 between 2030 and 2050 within the carbon budget. Even though the three scenarios shown above all result in net-zero emissions by 2050, the differences in the cumulative emissions - and so the differences in global warming and the associated climate risks caused by them - are substantial.

54 Moreover, in the light blue and red scenarios, the task of removing enormous amounts of CO_2 from the atmosphere will most likely be impossible. This task will also largely be the result of insufficient emission reductions achieved until 2030. In this way, the

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74 As explained above, this example is based on a hypothetical carbon budget of 1,000 $GtCO_2$ from 2020 onwards. In reality, the carbon budget, as explained in Section II.1.4 of this Explanatory Submission, is 500 $GtCO_2$ from 2020 onwards, meaning that at the current rate of annual global CO_2 emissions, the carbon budget will be exhausted much sooner than in 2035.

75 See, in this regard, Section II.1.2 of this Explanatory Submission.

emission reduction result achieved until 2030 influences not only the further warming of the Earth, but also what climate action must be taken as a whole for the rest of this century (or centuries) and which generations will bear the consequences.

II.1.6 The major uncertainties and risks of negative emissions and CDR technologies

55 The example discussed in Section II.1.5 of this Explanatory Submission illustrates why it is so crucial that very substantial emission reductions are achieved by 2030. It is only in this way that the carbon budget will not be exceeded and that a chance of limiting global warming to 1.5°C will remain. If the carbon budget is exceeded, it is certain that the Earth will warm by more than 1.5°C.

56 If this greater warming is limited to a very slight overshoot, then it could theoretically be reversed in the second half of this century again through the hypothetical scenario of negative emissions. As a result, warming could potentially be brought down to 1.5°C again by around 2100. A scenario in which the target temperature is exceeded temporarily is called an “overshoot scenario”.

57 An overshoot scenario resulting from a carbon budget exceedance poses two major risks. First, the technologies for achieving negative emissions are now only available on a very limited scale, and it very much remains to be seen whether they can be deployed on the scale and in the manner required for this purpose in future. If this does not happen, global warming will remain too high without the possibility of doing anything about it anymore. Second, even if it turns out later this century that an overshoot can be successfully reversed, the Earth will still have warmed up too much in the meantime, with all the negative consequences described above. Furthermore, excessive global warming (even temporarily) will lead to other major climate risks, including the crossing of tipping points, which in turn will also have irreversible consequences. Both of these aspects will be discussed in greater detail below.

Feasibility (or infeasibility) of CDR technologies

58 If global warming exceeds 1.5°C because the carbon budget is exceeded and the CO_2 concentration therefore becomes too high, a part of that additional warming could potentially be reversed if it becomes possible from 2050 onwards to generate very substantial negative emissions globally. This means that CO_2 would need to be removed from the atmosphere on a large scale and be stored permanently and safely underground. This is also referred to as “negative emission technologies” or “CDR technologies”.

59 There are various types of CDR technologies. One of them is CCS, a process whereby emissions are captured, transported and are stored underground, safely and permanently, using newly developed infrastructure. This prevents emissions from re-

entering the atmosphere. When CCS is applied in combination with the large-scale planting of specific plant and tree species (biomass) that absorb as much CO_2 as possible from the atmosphere while they grow, this is referred to as BECCS. At regular intervals, when the growth process and (consequently) the uptake of CO_2 by the biomass decreases, it is harvested and new biomass planting takes place, after which the same process is followed. The biomass that has been harvested is then burned as an energy source and the CO_2 released during its combustion must subsequently be stored.[76]

60 It is far from obvious that these types of CDR technologies will actually be applicable and scalable in the short and long term.[77] So at this point in time, it is unclear to anyone whether this concept of negative emissions will work (on a large scale). The Dutch government, among others, already stated at an early stage that a lack of climate action is making society dependent on these unproven technologies related to negative emissions.[78] Considerable uncertainty also remains about other types of CDR technologies. For this reason, the IPCC has emphasised that CDR is not a mature technology, has technical limitations and entails significant side effects and long-term consequences on a global scale.[79]

61 The IPCC has also pointed to another risk. Even if BECCS technologies could be applied on a large scale in the (distant) future, their effects would be partially undone by biochemical processes in the climate system. After all, the additional CO_2 emitted since the Industrial Revolution has, in fact, been partially absorbed by the oceans. This absorbed CO_2 will be released back into the atmosphere by the oceans as soon as CO_2 is removed from the atmosphere using CDR technologies. At that point in time, the natural carbon cycle will seek a new balance between the CO_2 levels in the oceans and those in the atmosphere. According to the IPCC, this natural phenomenon will partially undo the potential benefits of applying BECCS.[80]

62 The assumption of negative emissions is therefore accompanied by very significant uncertainties and risks. This is also the central message of the report issued by the European Academies Science Advisory Council in 2018 and titled *"Negative emission*

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76 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 67 up to and including 69 with further references; Summons of Milieudefensie et al. dated 5 April 2019, para. 758 with further references.

77 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 57, 58, 9 and 105 with further references; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 11 with further references; Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 94 with further references; Summons of Milieudefensie et al. dated 5 April 2019, para. 758 with further references.

78 Dutch Parliamentary Records *("Kamerstukken")* II 2013/14, 31 793, no. 91, p. 2. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 759 with further references.

79 Exhibit MD-117 (IPCC AR5 WGII H1), p. 191. See also the summons of Milieudefensie et al. dated 5 April 2019, paras. 760 and 761, with further references.

80 Exhibit MD-103 (IPCC AR5 WGI H6), p. 469; Exhibit MD-234 (IPCC AR5 WGI H7), p. 633. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 96 with further references; the Summons of Milieudefensie et al. dated 5 April 2019, para. 762 with further references.

technologies: What role in meeting Paris Agreement targets?" This report also played a role in the *Urgenda* case. Consequently, the Court of Appeal did not take the possibility of achieving negative emissions into account when it determined the emission reductions to be implemented by the State in the *Urgenda* case:

> *"49.* (…) *Therefore, the Court assumes that the option to remove CO2 from the atmosphere with certain technologies in the future is highly uncertain and that the climate scenarios based on such technologies are not very realistic considering the current state of affairs*. (…)*."*[81]

63 There is also other case law in which big question marks were placed with regard to the potential use of CDR technologies. In the *KlimaSeniorinnen* judgment, for instance, the ECtHR highlighted various risks associated with CDR technologies:

> *"117.* (…) *the IPCC stressed that if warming exceeded a specified level such as 1.5°C, it could gradually be reduced again by achieving and sustaining net negative global CO_2 emissions, which would require additional deployment of carbon dioxide removal, compared to pathways without overshoot. This would, however, lead to greater feasibility and sustainability concerns as overshoot entails adverse impacts, some irreversible, and additional risks for human and natural systems, all growing with the magnitude and duration of overshoot (high confidence).*"[82]

64 The UNEP[83] and the IPCC[84] have also pointed out that CDR technologies are not very realistic. At present, CDR technologies are still only in the demonstration phase of the development, and no removal of emissions from the atmosphere worth mentioning is taking place. For this reason, the scalability of these techniques is still highly uncertain, even today.[85]

65 Even if the hypothesis regarding the deployment of CDR technologies is borne out to some extent over the next few decades and these technologies therefore do become available to some degree, is important to note that sustainability constraints apply for the extent to which CDR can be scaled up. After all, the scale-up of CDR will involve

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81 Judgment of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 49. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 87 with further references; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 11 with further references; Summons of Milieudefensie et al. dated 5 April 2019, para. 764 with further references.

82 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).

83 Exhibit MD-211 (UNEP Emissions Gap Report 2013), p. 21. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 758. See also the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 7.2.9 and 7.2.10.

84 Exhibit MD-136 (IPCC SR 2018), p. 95; Exhibit MD-117 (IPCC AR5 WGII H1), p. 191; Exhibit MD-110 (IPCC AR5 WGIII SPM), p. 21. See also the Summons of Milieudefensie et al. dated 5 April 2019, paras. 750, 760 and 761.

85 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 58 with further references.

significant environmental and socio-economic risks in the areas of food production, biodiversity, water availability and the energy and finances required for such a scale-up. If allowance is made for such real-world constraints, it becomes clear that CDR technologies have only limited potential anyway. These limitations of CDR are also widely recognised within the scientific community.[86]

66 Furthermore, there are significant geographical, practical, logistical and financial limits to the potential of CDR. Research by the IEA shows that capturing just 2 $GtCO_2$ per year alone - namely, 1/20th of the annual 40 $GtCO_2$ of emissions – will require 135 million hectares of land to grow biomass for BECCS. That is roughly the total land surface area of Peru, the 20th largest country in the world.[87] With this, only 5% of the current annual global CO_2 emissions would therefore be removed.

67 According to the IEA's research, the possibilities for growing crops for bioenergy are also limited. Also, the areas where such crops could be grown are scattered across the globe. Consequently, the same applies for the possibilities of BECCS. After all, the regions in which the crops could be grown and burned in biomass power plants are generally not the same regions in which CO_2 could be stored underground. According to the IEA, connecting biomass power plants scattered across the globe with CO_2 storage sites would require an enormous infrastructure for the transport of CO_2 that must still be created. Removing 2 $GtCO_2$ from the atmosphere via BECCS every year would therefore present a massive logistical challenge.[88]

68 There are also other studies that indicate that capturing and storing 5 $GtCO_2$ per year would require a new, globally operating industry with roughly the size of the entire current global oil industry.[89] Such an industry must have been established by around 2050 and then operate successfully for 44 consecutive years - which is virtually the entire period between 2050 and 2100 - in order to reduce global warming by a maximum of 0.1°C. After all, according to the IPCC, 220 $GtCO_2$ must be removed from the atmosphere and stored safely and permanently for every 0.1°C by which global warming must be reduced.[90] By way of comparison: in 2022, 0.002 $GtCO_2$ (2 $MtCO_2$) was removed from the atmosphere in the energy sector using these types of CDR technologies.[91]

69 In line with this, the UNEP has found the following:

86 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 59 with further references.
87 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 153. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 70 with further references.
88 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 153. Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 71, with further references.
89 Exhibit MD-517 (Article by S. Hollnaicher from 2022), p. 2. Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 72 with further references.
90 Exhibit MD-360, pp. 3 up to and including 77 (IPCC AR6 WGIII H3); Exhibit MD-495A (IPCC SR 2023), p. 87. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 92 with references.
91 Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 92 with further references.

> *"Direct removals through novel CDR methods* (…) *are currently miniscule at 0.002 GtCO2 annually."*[92]

70 Then there are also financial obstacles. To remove 5 $GtCO_2$ from the atmosphere annually, an enormous amount of money will have to be spent each year. According to the IEA, the amount involved is USD 1.3 trillion per year.[93] That amount is 50% larger than the amount invested in fossil fuels in 2022.[94] Much more must therefore be invested in mitigating excessive CO_2 emissions than the amount that is currently being invested in the supply of fossil energy in total.[95] According to the IEA, raising that USD 1.3 trillion every year would actually be a massive international challenge. It would require close global cooperation for the remainder of this century.[96] So without close international cooperation over several decades, a climate strategy using CDR technologies will not be possible at all.

71 The need for international cooperation also applies to the energy transition in general. That need will not become less if the energy transition is not accelerated now or is even delayed. If the energy transition is not accelerated now, society will become dependent to an even greater degree on stable and concerted global cooperation, in which countries and companies are and remain willing to work together for the rest of this century to clean up the excess CO_2 emissions between now and 2050. That cooperation will then be one for which the chance of success has become much lower, because the world will have made itself dependent on uncertain CDR technologies and global warming will already have exceeded 1.5°C.[97] Moreover, countries and companies would then also have to invest EUR 1.3 trillion annually in uncertain projects. It is not very likely that it will be possible to get this over the line.

72 From the above it follows why it is of great importance to limit the amount of cumulative CO_2 emissions on the path to net-zero emissions by 2050 as much as possible, so that the dependence on major uncertainties surrounding overshoot scenarios and CDR technology deployment becomes as small as possible.

Major climate risks of overshoot scenarios

73 The second reason why it is of great importance to minimise the chance of a temporary overshoot is that even if the 1.5°C is exceeded temporarily, major climate dangers could

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92 Exhibit MD-523 (UNEP Emissions Gap Report 2023), p. XXVI. See also the Written Arguments of Milieudefensie on Appeal et al. dated 19 March 2024, para. 93 with further references.

93 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 154. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 73 with further references.

94 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 154. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 73 with further references.

95 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 73 with further references.

96 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 154. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 74 with further references.

97 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 75 with further references.

already occur. These dangers can be prevented if global warming does not (temporarily) overshoot 1.5°C.

74 Overshooting the 1.5°C global warming threshold will also increase all the other risks associated with climate change, including the chance of passing tipping points. This is also evident from recent findings by the IPCC.[98] According to the IPCC, exceeding the 1.5°C threshold will in any case lead to irreversible adverse consequences for various ecosystems.[99] This was discussed in detail in Section II.1.2 of this Explanatory Submission.

75 Overshooting the 1.5°C threshold will also lead to a substantial increase in the risk of additional GHG emissions due to natural "feedback loops".[100] One example of this is the thawing of permafrost, which will cause the methane gas stored in it to be released into the atmosphere and accelerate global warming. Moreover, an overshoot will reduce the possibilities for adaptation. At the current level of global warming, the limits for adaptation have already been largely reached. If global warming exceeds 1.5°C, even more adaptation limits will be reached. This is also confirmed by research performed by the IPCC.[101] Even a temporary overshoot is therefore particularly dangerous.

II.1.7 The climate system responds with a delay to GHG emissions

76 Furthermore, it is important to note that the danger of climate change is far greater than people generally think or experience, because the climate system responds with a delay to the emission of greenhouse gases. The greenhouse gases that are emitted today will affect the Earth's climate for many decades.[102] As a result, the full extent of the damage already inflicted on the world with the current CO_2 concentrations will only be experienced after a number of decades have passed. Consequently, the damage already caused to the world is far greater than people can currently experience.[103]

77 The fact that CO_2 emissions will continue to affect the Earth's climate for decades is not only linked to the delay occurring in the warming of the atmosphere and land masses. The warming of the oceans and ice masses also contributes to climate change with a delay. After all, the rise in the global temperature will continue to affect the further

98 Exhibit MD-495A (IPCC SR 2023), p. 87. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 86 with further references.
99 Exhibit MD-495A (IPCC SR 2023), p. 87. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 87 with further references.
100 Exhibit MD-347 (IPCC AR6 WG II Technical Summary), p. 69. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 88 with further references.
101 Exhibit MD-347 (IPCC AR6 WG II Technical Summary), pp. 84 and 85. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 103; the Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 89 and 90 with further references.
102 Judgment of the Court of Appeal, ground 3.4; Decision of the District Court, ground 2.3.2.
103 Summons of Milieudefensie et al. dated 5 April 2019, paras. 14, 15 and 343 with further references.

warming of the oceans and ice masses - and their role within the climate system - for hundreds to thousands of years.[104] This requires some explanation.

78 The oceans and ice masses are the slowest-responding component of the climate system, meaning that the delay in these components of the climate system is far greater than that of the atmosphere and land masses. This applies, for example, to the melting of ice masses, the thawing of permafrost, the warming of the oceans and sea-level rise.[105] After all, the warming of the atmosphere will initially only lead to a warmer ocean surface, the upper layer of the ocean water. This warmed upper layer will subsequently slowly give off its heat to a deeper layer of water, which in turn slowly gives off its heat to an even deeper layer. Today's emissions will therefore have an impact for many centuries and cast their shadow far into the future.[106] An increased CO_2 concentration therefore has aftereffects lasting for decades, centuries and even millennia. These effects are already inevitable with every increase in the CO_2 concentration, even though they are not yet immediately experienced by humans.

79 As a result, ending the global CO_2 emissions will certainly not stop the consequences of global warming. It is comparable to an ocean-going tanker: the engines propel the ship and give the ship speed. Once the engines are shut down, the ship will maintain its speed for tens of kilometres. The same is true of the CO_2 concentration: once its increase has been halted because, on balance, no additional CO_2 is being added to the atmosphere anymore, the consequences of global warming will continue for tens, hundreds and even thousands of years.

80 In light of the above, the damage already inflicted on the climate and our living environment by the current 1.3°C of global warming is far greater than can be observed today. The true extent of the damage can only be established later this century, and, partly, even later than that. This means that the effects of climate change that can now be observed offer only a glimpse of the damage and dangers still lying ahead for the world. Therefore even if no further CO_2 was emitted at all, so that the atmospheric CO_2 concentration would not increase any further, these extensive consequences could not be entirely prevented anymore. In reality, however, CO_2 emissions continue unabated, and the atmospheric CO_2 concentration will therefore continue to rise for a long time. If no action is taken, the temperature will therefore keep rising, and the damage to the climate and our living environment will increase exponentially.

II.1.8 Too little is being done to prevent dangerous climate change

[104] Summons of Milieudefensie et al. dated 5 April 2019, paras. 343, 348 up to and including 350, 355 and 359 with further references.
[105] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 2; Summons of Milieudefensie et al. dated 5 April 2019, paras. 339 up to and including 351 with further references.
[106] Summons of Milieudefensie et al. dated 5 April 2019, footnote 236.

81 The preceding discussion has focused extensively on the serious consequences and major risks of climate change as well as on the fact that climate change cannot be prevented by CDR technologies. Far too little is being done to combat dangerous climate change, despite the urgent need to reduce global CO_2 emissions and achieve the highest level of emission reductions possible before 2030.

82 The gap between the necessary climate action and the pledged emission reductions is called the "emissions gap". Because of this emissions gap, the world is now heading towards 3.1°C or even nearly 4.0°C of warming.[107] Such warming will be accompanied by catastrophic consequences.[108] An unprecedented acceleration of climate action is necessary to keep the Earth habitable and fertile for humanity. It is therefore no coincidence that the ICJ refers to climate change as an:

> *"456.* (…) *existential problem of planetary proportions that imperils all forms of life and the very health of our planet."*[109]

83 Governments have long recognised that the emissions gap cannot be bridged without climate action taken by non-state actors, which specifically includes business enterprises. Only with the independent and proactive participation of business enterprises will it be possible to bridge the emissions gap and achieve the temperature target that will keep the Earth habitable. Within the context of the UN, the recognition of the need for non-state climate action has also been institutionalised and principles have been formulated that credible corporate climate policies must meet. Milieudefensie et al. will discuss this in the following Sections.

II.2 The widespread recognition that the success of the climate response requires independent climate action by (oil and gas) companies

II.2.1 The UN Climate Convention and the Paris Agreement

84 The climate regime based on treaty law as established at UN level consists of three legally binding instruments: the UN Climate Convention, the Kyoto Protocol and the Paris Agreement. These are very important sources of climate obligations. Although these instruments only create direct obligations for states, they also assign an important role to business enterprises in preventing and mitigating dangerous climate change. This will be discussed in great detail in Section II.2.2 of this Explanatory Submission. However, they are not the only sources of climate obligations; numerous other laws and treaties also create climate obligations. Recently, the ICJ confirmed, as far as the nature

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[107] See the Emissions Gap Report 2024: No more hot air...please! With a massive gap between rhetoric and reality, countries draft new climate commitments, UNEP, p. 34, available at https://wedocs.unep.org/20.500.11822/46404. Figure 4.2 shows that current national policies result in a 66% probability that global warming will reach 3.1°C during the 21st century, but the margins indicate that a temperature increase of 4.0°C could also be reached.

[108] See, in this regard, Sections II.1.2 and II.1.5 of this Explanatory Submission.

[109] ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 456.

of climate obligations is concerned, that they are based on customary law;[110] these obligations must be incorporated by states, also according to the UN Human Rights Council, into their legislation and policy frameworks.[111] In this Section, however, Milieudefensie et al. will limit themselves to discussing the above-mentioned treaties established at UN level, which jointly form the UN climate regime.

85 In 1992, virtually all states in the world concluded the UN Climate Convention, which contains a framework of principles and obligations with the central goal of preventing dangerous climate change. The UN Climate Convention seeks to protect the planet's ecosystems and humanity and is aimed at achieving sustainable development to protect the present and future generations.[112] Article 2 UN Climate Convention reads as follows:

> Article 2 UN Climate Convention
> *The ultimate objective of this Convention* […] *is to achieve* […] *stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system* […] *within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*

86 The UN Climate Convention thus makes it clear that dangerous climate change must be prevented and that this must be done in a timely manner to protect ecosystems, food production and sustainable development. Article 3 UN Climate Convention then sets out the fundamental principles to be adhered to by the parties in fulfilling their treaty obligations. These include:

(a) the principle of intergenerational equity (Article 3(1));

(b) the CBDR principle (Article 3(1)); and

(c) the precautionary principle (Article 3(3)).

The contents, scope, application and relevance of these principles in horizontal relationships will be discussed in Section IV.5.3 of this Explanatory Submission.

87 Furthermore, the UN Climate Convention explicitly recognises that climate change has been caused to a significant extent by the richest or developed countries, while the least prosperous countries in particular are the most vulnerable to the adverse effects of

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[110] See, e.g., ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 272 up to and including 279.

[111] See GE 25/20965, Fifth session of the Forum on Human Rights, Democracy and the Rule of Law of the UN Human Rights Council, available at https://digitallibrary.un.org/record/4101838/files/A_HRC_61_64-EN.pdf. See also ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 427 up to and including 430.

[112] UN Climate Convention, preamble (first and last recitals).

climate change. One of the fundamental principles is therefore that the richest countries and the historically largest emitters must take the lead in addressing climate change.[113]

88 This is, essentially, an application of the CBDR principle[114], which has been worded as follows in Article 3 UN Climate Convention:

> Article 3 UN Framework Convention on Climate Change
> 1. (…) *the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*

89 To implement the obligations under the UN Climate Convention, the Kyoto Protocol was subsequently adopted in 1997. The Kyoto Protocol aims to oblige the developed countries that are parties to the UN Climate Convention to limit and reduce their GHG emissions. The Kyoto Protocol entered into force in 2005.[115]

90 A breakthrough in the UN climate regime was the adoption of the Paris Agreement in 2015. Under this agreement, nearly all countries in the world once again committed to keeping global warming well below 2°C and, preferably, to limiting it to 1.5°C. Limiting global warming to 1.5°C is the central temperature target of the Paris Agreement.[116] This has also recently been confirmed by the ICJ:

> *"224* (…) *the Court considers the 1.5°C threshold to be the parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement. The Court adds that this interpretation is consistent with Article 4, paragraph 1, of the Paris Agreement, which requires that mitigation measures be based on the "best available science."*[117]

91 Therefore the Paris Agreement includes a concrete temperature target to prevent dangerous climate change, while giving due regard to general legal principles that are also enshrined in the UN Climate Convention[118]. Article 4(4) Paris Agreement once again emphasises the importance of developed countries taking the lead in combating climate change and committing to absolute economy-wide emission reduction targets.

92 A defining feature of the Paris Agreement is that it opts for a regime requiring the parties themselves to fulfil their share of the responsibility and to always have the highest possible ambitions in nationally determined contributions. The target of limiting global

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113 UN Climate Convention, preamble (eighteenth recital).
114 See, in this regard, Section IV.5.3.3 of this Explanatory Submission.
115 Kyoto Protocol to the United Nations Framework Convention on Climate Change (with Annexes), Kyoto, 11 December 1997, *Trb.* 2005, 1.
116 Judgment of the Court of Appeal, grounds 3.9 and 7.69; Decision of the District Court, grounds 2.2.3, 4.4.29 and 4.4.38.
117 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 224.
118 Paris Agreement, preamble (third recital), Article 2 and Article 4.

warming to 1.5º C serves as a minimum in that connection.[119] Both prior to, during and after the conclusion of the Paris Agreement, the parties to the treaty recognised that companies, among other parties, have a crucial role to play in preventing dangerous climate change. This broad recognition was even the basis for the conclusion of the Paris Agreement.[120] Milieudefensie et al. will explain this below.

II.2.2 The important role of business enterprises under the UN climate regime

93 Within the UN climate regime, business enterprises play a key role in preventing dangerous climate change. All 198 parties to the UN Climate Convention recognise that it is of great importance, in parallel with their own efforts, that the private sector proactively and independently proceeds to undertake emission reductions.[121] After many years in which insufficient climate action was taken globally and the fossil-fuel industry even actively opposed such action,[122] the importance of non-state climate action has only increased.

94 Within international environmental law, attention was paid at an early stage to the role of private law - and to civil-liability law in particular - in achieving environmental policy objectives.[123] This was first formulated in Principle 22 of the 1972 Stockholm Declaration:

> *Principle 22*
> *States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.*

95 Since then, the important role of civil-liability law in relation to the environment has been confirmed on multiple occasions. This happened, for instance, in Article 23 of the World Charter for Nature adopted by the UN General Assembly in 1982:

> *Article 23*
> *All persons* (…) *shall have access to means of redress when their environment has suffered damage or degradation.*

96 The final declaration of the Toronto Climate Conference in 1988 was the first to call on industry to take immediate action to combat the looming climate crisis.[124] The

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119 See ICJ 23 July 2025, no. 187 (Obligations of States in respect of climate change), para. 245.
120 See the Summons of Milieudefensie et al. dated 5 April 2019, para. 708.
121 Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 130 up to and including147 with further references.
122 See, in this regard, Section II.3 of this Explanatory Submission.
123 A.S. Hartkamp et al. in "*De invloed van het Europese recht op het Nederlandse privaatrecht*" (The influence of European Law on Dutch private law), Deventer: Kluwer 2014, pp. 554 and 555.
124 Summons of Milieudefensie et al. dated 5 April 2019, paras. 356 up to and including 362.

institutional recognition of the need for non-state climate action subsequently gained momentum between 2012 and 2015, in the run-up to the Paris Agreement. This was linked to the fact that in 2011, during COP17 (the Durban Climate Conference), two workstreams had been launched that were deemed necessary to reach a negotiated agreement in Paris in 2015. One of these workstreams was intended to ensure that much higher emission reductions would be achieved prior to 2020 than those projected at that time based on state climate policies. Within that context, the parties to the Convention concluded in 2012 that closing the emissions gap would also require proactive climate action by non-state actors. From that point on, greater weight also started to be attached to independent climate action by (among other parties) business enterprises.[125]

97 All of this led the UN Secretary-General to organise a major Climate Summit in New York in 2014, which brought together - in addition to UN member states - executives from large corporations and leaders from other public and private sectors.[126] The central goal of this 2014 Climate Summit was to create a flywheel of state and non-state climate action so that the emissions gap could be closed in a timely manner.[127] At UN level, climate action by non-state actors has since been communicated as one of the four pillars for closing the emissions gap. The other three pillars were: reaching an ambitious climate agreement in Paris, ambitious climate action by member states and mobilising public and private finance for climate action.[128]

98 During the 2014 Climate Summit and the subsequent COP20 (the Lima Climate Conference), important non-state initiatives emerged regarding (among other things) renewable energy, energy efficiency and access to more private capital for the transition. At the same time, the NAZCA was established in 2014 under the auspices of the UN to promote and highlight independent climate action by (among other actors) companies in order to also encourage other state and non-state actors to take more far-reaching climate action. In addition, the Lima-Paris Action Agenda was launched to promote important initiatives for accelerating climate action in the run-up to COP21, the Paris Climate Conference. All these developments created a significant momentum that helped to enable the state parties to reach an agreement in Paris.[129]

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125 Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 130 up to and including 136 with further references. An overview of these developments is described in D. Klein et al. in The Paris Agreement on Climate Change. Analysis and Commentary, Oxford University Press: Oxford 2017, p. 45.

126 See https://unfccc.int/news/un-climate-summit-ban-ki-moon-final-summary.

127 D. Klein et al. in The Paris Agreement on Climate Change. Analysis and Commentary, Oxford University Press: Oxford 2017, pp. 45 up to and including 47.

128 Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, para. 137. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (41) and (42). See also D. Klein et al. in The Paris Agreement on Climate Change. Analysis and Commentary, Oxford University Press: Oxford 2017, p. 47.

129 Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, para. 138.

99 The importance of these developments and the role of non-state actors (referred to here as: "non-Party stakeholders") is also explicitly recognised in the Paris Decision in which the Paris Agreement was adopted:

> *"The Conference of the Parties* (…)
>
> *117. Acknowledges with appreciation the results of the Lima-Paris Action Agenda, which build on the climate summit convened on 23 September 2014 by the Secretary-General of the United Nations;*
>
> *118. Welcomes the efforts of non-Party stakeholders to scale up their climate actions, and encourages the registration of those actions in the Non-State Actor Zone for Climate action platform* (…)*;*
>
> *134. Welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities;*
>
> *135. Invites the non-Party stakeholders referred to in paragraph 134 above to scale up their efforts and support actions to reduce emissions* (…) *and demonstrate these efforts via the Non-State Actor Zone for Climate action platform referred to in paragraph 117 above."*[130]

100 On the occasion of the adoption of the Paris Agreement, it was also decided to appoint two UN Climate Change High-Level Champions, who were specifically designated to advance climate action by non-state actors in the coming years.[131] With the Paris Agreement, the importance of non-state action was thus formally recognised and institutionalised within the UN climate regime. That is also what the UNEP wrote:

> *"The Paris Agreement institutionalized the engagement of NSAs in achieving long-term climate goals and created an ongoing process to catalyse climate commitments made by NSAs, including net-zero targets."*[132]

101 During COP22, the climate conference in Marrakesh, the High-Level Champions launched the Marrakesh Partnership and the accompanying vision for scaling up non-state climate action.[133] Since then, climate action by non-state actors has been further encouraged and facilitated under the banner of the Marrakesh Partnership, including

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[130] Exhibit MD-146 (Adoption of the Paris Agreement, 12 December 2015). See also the Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 139 and 140. See also the Decision of the District Court, ground 2.4.7.

[131] Exhibit MD-146 (Adoption of the Paris Agreement, 12 December 2015), paras. 120 and 121.

[132] Exhibit MD-368 (UNEP Emissions Gap Report 2021), p. 28. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 74; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, para. 142.

[133] See https://unfccc.int/climate-action/marrakech-partnership/background.

through the development of soft-law sources.[134] These soft-law sources provide principles for the formulation of independent corporate climate policies in line with the 1.5°C target of the Paris Agreement.

102 The University of Oxford handbook on the Paris Agreement concludes, in light of the above, that non-state actors *"were placed at the heart of the new climate change regime*" and that the importance of non-state action for achieving climate goals has undeniably become significant and crucial (*"a most critical driving force*"):

> *"They* [non-party stakeholders] *represent an essential and unique feature of the climate regime and its ability to generate long-term momentum and ambition: a most critical driving force that can ensure that global efforts to address climate change are capable of achieving the purpose set out in Article 2."*[135]

103 It follows from the above that the basis of the UN climate regime is formed by both state and non-state action. The UN climate regime considers it necessary for both state and non-state actors to contribute independently to the CO_2 emission reductions required to prevent dangerous climate change.[136] In the years that followed, the international initiatives for corporate climate action were further intensified and shaped in light of the UN climate regime. They will be discussed in more detail in the remainder of this Explanatory Submission, in particular in Sections II.2.4 and IV.5.4.

II.2.3 The flywheel effect of climate action by non-state actors

104 Another reason why non-state climate action constitutes an important pillar within the UN climate regime is the "flywheel effect", i.e. the fact that a series of consistent efforts that reinforce each other gradually build momentum, comparable to a heavy flywheel that is being set in motion. In the context of preventing dangerous climate change, this essentially means that the efforts of non-state actors lead other state or non-state actors to also increase their efforts to combat dangerous climate change. As a result, the total effect is many times greater than (just) the efforts undertaken by the non-state actor in question.

105 This can be easily illustrated using the findings of the UNEP. The UNEP also recognises the importance and impact of non-state climate action. In 2018, UNEP dedicated a report to the role of non-state actors in closing the emissions gap.[137] In more recent reports, too, the UNEP has highlighted the increased importance of non-state climate

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[134] See https://unfccc.int/climate-action.
[135] D. Klein et al. in The Paris Agreement on Climate Change. Analysis and Commentary, Oxford University Press: Oxford 2017, pp. 43 and 49.
[136] See also the Decision of the District Court, ground 4.4.52. See also the Decision of the District Court, grounds 2.4.7, 2.4.8 and 4.4.26.
[137] Exhibit MD-271 (UNEP Bridging the Emissions Gap 2018).

action and the significant interaction between state and non-state climate action that can help achieve the positive transformation towards the 1.5°C target.[138] The reverse is also true: if key non-state actors do *not* join the movement towards the 1.5°C target themselves, or even work towards a future in which climate goals are not achieved, a vicious cycle of inaction will arise.

106 The UNEP has described the significant potential of non-state action to close the emissions gap towards 2030. This potential lies in achieving emission reductions and building confidence in governments to pursue more ambitious climate policies and push for more ambitious climate goals themselves:

> *"Non-state and subnational actors make important contributions to climate action beyond their quantified emission reductions. They build confidence in governments regarding climate policy and push for more ambitious national goals."*[139]

107 Climate action by non-state actors not only raises the level of ambition among states, but also contributes to accelerating the implementation of climate policies and mobilising other stakeholders to take action, according to the UNEP:

> *"Businesses, cities, regions, investors, civil society groups, and other non-state and subnational actors (NSAs) play an increasingly important role in raising ambition and accelerating implementation* (…). *Efforts by NSAs toward global net-zero emissions are strengthening and broadening, which helps mobilize stakeholders to achieve net zero* (…). *Actions taken by NSAs can also contribute to achieving net-zero targets set by governments, while at the same time creating more favourable conditions for governments to increase their ambition going forward."*[140]

108 So according to the UNEP, too, non-state climate action generates an important flywheel effect. This important effect is also recognised by soft-law sources that are partly based on the UN climate regime that flesh out the climate action expected of companies in more detail. Milieudefensie et al. will now discuss this.

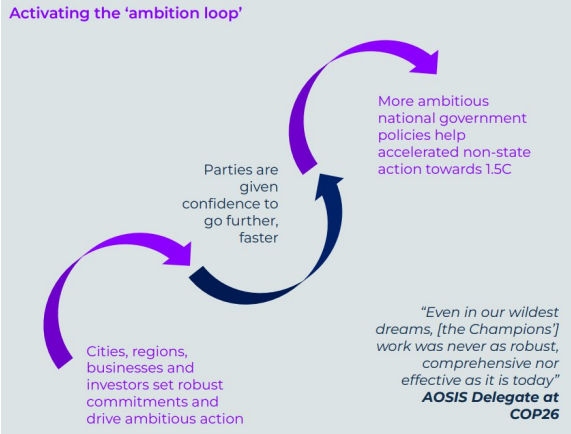
II.2.4 UN initiatives and other soft law as a basis for non-state climate action

109 At UN level, various initiatives have been developed that include principles for the pursuit of credible climate policies by companies. Through the Climate Ambition Alliance, states and non-state actors committed in 2019 to the goal of achieving net-

[138] Exhibit MD-368 (UNEP Emissions Gap Report 2021). See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 76.
[139] Exhibit MD-271 (UNEP Bridging the Emissions Gap 2018), pp. 5 up to and including 7. See also the Notes of the Oral Arguments in the First Instance (1) of Milieudefensie dated 1 December 2020, paras. 142 up to and including 145.
[140] Exhibit MD-368 (UNEP Emissions Gap Report 2021), p. 28. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 74 up to and including 76.

zero emissions by 2050.[141] To expand the group of participating non-state actors as quickly as possible and to give substance to the importance of non-state climate action recognised in the Paris Agreement, the UN Race to Zero Initiative was launched in 2020. The Race to Zero Initiative has brought together global networks that have developed protocols and guidelines regarding emission reductions for non-state actors. Based on scientific findings, these protocols demonstrate what companies must do to reduce the GHG emissions associated with their activities and products.[142] The Race to Zero Initiative thus aims to mobilise non-state actors into taking rigorous and immediate action to halve global emissions by 2030, on the path to net zero by 2050 at the latest.[143]

110 In this context, the Race to Zero Initiative also emphasises the flywheel effect of non-state climate action, for which it uses the term "ambition loop."[144] This important accelerating effect of non-state action is visualised as follows in the Initiative:



111 The soft-law sources that were partly developed on the basis of the UN climate regime reflect widely supported normative principles for the adoption of climate policies for non-state actors in line with the 1.5°C target. These principles are informed by climate science. Logically, the soft-law sources do not contain specific reduction percentages for specific companies or sectors (no top-down allocation), but provide a mechanism for determining an appropriate contribution. In that sense, the mechanism as applicable to non-state actors under the UN climate regime and the soft-law sources partly based

141 Notes of the Oral Arguments in the First Instance (7) of Milieudefensie et al. dated 15 December 2020, para. 14. See also the Decision of the District Court, ground 2.4.8.
142 Exhibit MD-286 (Objectives of Climate Ambition Alliance), pp. 1 and 2. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 858; the Notes of the Oral Arguments in the First Instance (7) of Milieudefensie et al. dated 15 December 2020, para. 15. See also the Decision of the District Court, ground 2.4.8.
143 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 502 up to and including 506.
144 Exhibit MD-491 (Race to Zero Progress Report 2022), pp. 74 and 75. See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 30.

on it is comparable to the mechanism that is applicable to states. For states, there is also no top-down allocation of the global reduction target with predetermined reduction goals. The UN climate regime provides for a bottom-up system, in which states must fulfil their responsibilities based on broadly shared normative principles. These principles are enshrined in, among other sources, the UN Climate Convention and the Paris Agreement.[145]

112 In light of the crucial role of non-state actors in achieving the 1.5°C target, soft-law sources have not only been developed at UN level. This has also been done in numerous other scientific initiatives, such as the OECD Guidelines, the Net Zero Guidelines of the ISO, the 1.5°C Business Playbook of the ERI and the SBTi Report. Section IV.5.4 of this Explanatory Submission will (among other things) discuss these soft-law sources in further detail.

113 However, it should already be noted here that all these sources take as their starting-point that companies must reduce their CO_2 emissions across their entire value chains, meaning that the Scope 1, 2 and 3 emissions must all be reduced:[146]

(a) Scope 1 emissions: direct emissions from facilities that are wholly or partly owned or controlled by a company. For an oil and gas company, for example, these are the CO_2 emissions that are released during the production of oil by that company.

(b) Scope 2 emissions: indirect emissions from facilities from third parties from which the company purchases electricity, steam or heat for its business operations. For an oil and gas company, for example, these are the CO_2 emissions released in connection with the use of electricity by the company concerned, even though that electricity was generated by another company.

(c) Scope 3 emissions: the other indirect emissions (not included in Scope 2) that arise in the value chain of a company, including emissions resulting from the use or consumption of products supplied by the company to third parties, such as other organisations or consumers. For an oil and gas company, this includes, for example, the CO_2 emissions that are released when customers use fuels sold by the company concerned.[147]

114 The above-mentioned sources not only agree on the categories of corporate emissions that must be reduced. They also largely point in the same direction for other points

[145] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 6.8.
[146] See, in this regard, Sections IV.5.4 and V.4.4 of this Explanatory Submission.
[147] Summons of Milieudefensie et al. dated 5 April 2019, para. 810. See also the judgment of the Court of Appeal, ground 3.5 and the Decision of the District Court, ground 2.5.4.

(which will be separately discussed in more detail in Section IV.5.4 of this Explanatory Submission):[148]

(a) Companies must independently work towards the goal of net-zero emissions by 2050.

(b) Companies must demonstrate maximum effort and reduce their emissions as quickly as possible.

(c) The 2030 reduction target must constitute a fair share of the globally necessary halving of emissions by 2030.

(d) In determining the fair share, equity and justice must play a role, including intergenerational justice, in line with Articles 2 and 4 of the Paris Agreement and the preamble, in which the principles of equity and CBDR are incorporated.

(e) Building on these principles, some companies bear greater responsibility than others. In line with the UN climate regime, the most important criteria for a normative assessment of an individual company's fair share are high emission levels, historical responsibility and transition capabilities (including financial capacity, knowledge and expertise).

(f) For many companies, and certainly for those operating in the economies of developed countries and so the economies that must take the lead in combating climate change, making a fair share to the globally required halving of emissions by 2030 means they must reduce their CO_2 emissions by more than 50%.

115 At the end of 2022, the UN Expert Group - a committee that is part of the UN and conducts research on net-zero commitments by non-state actors - made ten recommendations for identifying and assessing such commitments at the request of the UN Secretary-General.[149] These recommendations are set forth in the UN Expert Report.[150] These recommendations - which are therefore also based on the above-mentioned starting-points and general legal principles - aim to accelerate non-state climate action and prevent greenwashing. A credible policy must comply with these recommendations to prevent companies from giving the impression of being on the right track by simply referring to a net-zero target in 2050, while in reality too little action is being taken in the short term.[151] After all, the path to net-zero emissions by 2050 -

[148] See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 26 and 65. See, for example, the Decision of the District Court, grounds 4.4.34 and 4.4.36
[149] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 19.
[150] Exhibit MD-487 (UN Expert Report). See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 20.
[151] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 19.

and so the cumulative emissions in the period leading up to 2050 - will determine the future of the world.[152]

116 The community of states endorsed the recommendations of the UN Expert Group during COP27, the climate conference in Sharm el-Sheikh, in 2022.[153] Subsequently, during COP29, the climate conference in Baku, the UN Secretary-General expressly called on companies in 2024 to give effect to the recommendations of the UN Expert Group by 2025 at the latest (during COP30, the climate conference in Belém). To this end, companies must at a minimum chart a course to fossil-fuel phase-out:

> *"First, I urge all non-state actors to create robust, accountable transition plans by COP30 next year. These must align with the full recommendations of our High-Level Expert Group on Net Zero. They must be consistent with limiting global temperature rise to 1.5 degrees Celsius. They must chart a course to net zero by 2050, through milestones in 2025, 2030, 2035, and beyond. They must disclose how research and development plans, and renewable energy investments, align with those targets. They must chart a course to fossil fuel phase-out - based in the science."*[154]

117 It follows from the foregoing that a large number of soft-law sources, some of which were drafted within the UN framework, take as their starting point that non-state action is crucial to the success of the global climate response. This requires that non-state actors reduce their CO_2 emissions in Scopes 1, 2 and 3 and, within that context, work independently towards net-zero emissions by 2050. Also, *more* is expected from non-state actors that are capable of doing more. Non-state actors, including companies, therefore play a key role in preventing and mitigating dangerous climate change.

II.2.5 The governance gap and the recognition of climate responsibility of business enterprises

118 The recognition that business enterprises play an important role within the UN climate regime runs parallel with the growing notion that business enterprises are also obliged to prevent or mitigate dangerous climate change based on human rights law. Moreover, the size and influence of the international companies have continued to grow in the past decades. At UN level, it was already established 15 years ago that this had created a power vacuum, because these (multinational) companies are difficult to regulate at both

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[152] See, in this regard, Sections II.1.3 and II.1.4 of this Explanatory Submission.

[153] Rejoinder of Milieudefensie et al. dated 12 April 2024, para. 64. See also the Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fourth session held in Sharm el-Sheikh from 6 up to and including 20 November 2022, available at https://unfccc.int/sites/default/files/resource/cma2022_10a01_adv.pdf, paras. 90 up to and including 93.

[154] Remarks of the Secretary-General at the COP29 High-Level Event on the stocktake of "Integrity Matters," 14 November 2024, available at https://www.un.org/sg/en/content/sg/statement/2024-11-14/secretary-generals-remarks-cop29-hlCJ-level-event-the-stocktake-of-integrity-matters-delivered.

the national and the international level. This phenomenon is referred to as the governance gap. These (multinational) companies can, for example, move their activities beyond the scope of regulation. On top of this, they are mobile and can easily relocate from one country to another and use this as a threat when strict (environmental) regulations are in the making in a certain country or region. By extension, they can put states under pressure by threatening to leave. In that power vacuum, the door is opened for human rights violations by companies, without adequate sanctioning or reparation being available to those affected.

119 John Ruggie, the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, summarised this as follows:

> *"The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."*[155]

120 In view of this governance gap, the UNGP were drafted and the OECD Guidelines were updated under Ruggie's leadership. The UNGP are principles specifically focused on business and human rights[156] and have been endorsed by the UN Human Rights Council. The OECD Guidelines contain standards for multinational enterprises for responsible business conduct.[157] The OECD Guidelines now include specific responsibilities for companies in the area of climate change.[158] Both sets of guidelines thus reflect the international community's expectation that companies have their own independent responsibility to respect human rights and take measures if they have a negative impact on the human rights or the environment within their value chain. This responsibility is therefore separate from the obligations of states and goes beyond compliance with national laws and regulations. It concerns a global standard of conduct to which all companies must adhere, regardless of where they operate.[159]

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[155] Exhibit MD-218 (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises dated 7 April 2008). See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 697.

[156] Exhibit MD-220 (UNGP 2011), Principle 11 (Commentary). See also the judgment of the Court of Appeal, ground 7.20.

[157] Exhibit MD-492 (OECD Guidelines 2023), p. 3. See also the judgment of the Court of Appeal, ground 7.21.

[158] Exhibit MD-492 (OECD Guidelines 2023), pp. 33 and 37. See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 80.

[159] Exhibit MD-220 (UNGP 2011), Principle 11 (Commentary). See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 128; Summons of Milieudefensie et al. dated 5 April 2019, para.

121 The UNGP and the OECD Guidelines therefore reflect the widely held view that business enterprises play a crucial role in achieving the climate goals. For example, the OECD Guidelines provide the following:

> OECD Guidelines
> 76. *Enterprises have an important role in contributing towards net-zero GHG emissions and a climate-resilient economy, necessary for achieving internationally agreed goals on climate change mitigation and adaptation*.[160]

122 The UNGP also aim to contribute to accelerating climate action. The UNGP clarify what measures must be taken by states and business enterprises to integrate human rights considerations into their climate policies. This explicitly follows from a recent Information Note drafted under the mandate of the UN Human Rights Council:

> *"Therefore, a decade after the adoption of the Guiding Principles, and especially in light of the legal, scientific and political developments summarised above, it is clear that States and business enterprises have obligations and responsibilities with respect to climate change, and with respect to the impacts of climate change on human rights.* (…) *the severity of the human rights impacts of business activities, such as in regard to climate change, will be judged by their scale, scope and irremediable character."*[161]

123 The UN Special Rapporteur on Human Rights and the Environment has pointed out that a power vacuum exists with regard to the fossil-fuel industry in particular. There are gaps, at both national and international level, in the regulation of carbon-intensive industries and sectors, making the achievement of the climate goals more difficult. The UN Special Rapporteur has also highlighted the fossil-fuel industry's disproportionate access to decision-makers, a phenomenon known as "corporate capture". The UN Special Rapporteur formulated this as follows:

> *"Gaps exist in regulating major greenhouse gas emitting industries and sectors both within and beyond national boundaries, making the achievement of the Paris Agreement goals more difficult* (…)*. Furthermore, it is evident that business elites with interests in the fossil fuel and carbon intensive industries have disproportionate access to*

711. See also the Decision of the District Court, ground 4.4.13.

160 Exhibit MD-492 (OECD Guidelines 2023), p. 37 (Dutch translation). See also the judgment of the Court of Appeal, ground 7.22.

161 Exhibit MD-493 (Information Note on Climate Change and Guiding Principles on Business and Human Rights 2023), p. 3.

> *decision-makers, a phenomenon that is described as "corporate capture."*[162]

124 Therefore the result of the governance gap is that large companies cannot be sufficiently regulated by states. The size and influence of the international businesses therefore stand in the way of limiting global warming and, consequently, of preventing or mitigating dangerous climate change.

II.2.6 The special position of Shell

125 The conclusion from the foregoing is that the crucial role of non-state climate action in limiting global warming to 1.5°C is widely recognised, both by the UN climate regime and by the UNGP, the OECD Guidelines and various other soft-law sources containing recommendations for business enterprises to fulfil their climate responsibilities. It logically follows from these sources that business enterprises with a large CO_2 footprint, which have already caused significant cumulative emissions, have considerable political and social influence and also possess significant transition capabilities, also have a large responsibility.

126 Partly due to its more than 100-year history and its historically established position, Shell is one of the most influential and leading players in the oil and gas industry.[163] Shell is not only a major oil and gas producer, but also the world's largest trader of oil and gas with the largest LNG fleet; Shell sells its products in nearly every country in the world, with the vast majority being sold in the most prosperous countries.[164] Shell's emissions are so substantial that, when compared to nation states, only China, the United States, India, and Russia emit more than Shell.[165] Shell also generates hundreds of billions in revenue and tens of billions in profit every year. In 2022, profits even amounted to nearly USD 40 billion.[166] This makes Shell the fifth-largest oil and gas company in the world.[167] From the above it follows that Shell has a distinct role in relation to the climate problems and is uniquely positioned to contribute a fair share to mitigating the greatest threat humanity has ever faced.

127 Shell is not contributing that fair share, as its policies are focused on maintaining the fossil-energy system. Every year, Shell spends billions on new oil and gas projects and tens of millions on marketing and PR and lobbying activities to protect those fossil-fuel

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[162] Exhibit MD-385 (Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 26 July 2022), para. 74. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 426.
[163] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, paras. 21 up to and including 27 and 92 up to and including 97.
[164] Oral Arguments on Appeal (Part 5) of Milieudefensie et al. dated 4 April 2024, paras. 20 up to and including 23; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 40.
[165] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 26 and 627.
[166] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 102.
[167] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 24.

investments and corporate interests; these activities have an inhibiting effect on governments' climate efforts and undermine public support for the urgently needed climate action.[168] Shell therefore does not contribute to the flywheel effect necessary to accelerate climate action, but rather constitutes a significant barrier to climate action and the sustainable energy transition.[169] In the following Sections, Milieudefensie et al. will address the widely recognised inhibiting influence exerted by the oil and gas industry on state climate policies. Building on this, Milieudefensie et al. will then discuss Shell's special role within all of this.

II.3 The inhibiting influence of the oil and gas industry on state climate policies

II.3.1 Dominant position and ways in which the oil and gas industry exerts influence

128 The current failure to prevent dangerous climate change and take effective global climate action cannot be viewed in isolation from the actions and omissions of the oil and gas industry and its interest groups. After all, climate change is essentially a fossil-fuel problem,[170] yet the oil and gas industry continues to oppose climate action. The inhibiting influence of the oil and gas industry and their interest groups on climate action is, for example, widely recognised by the IPCC,[171] the UNEP,[172] the UN Special Rapporteurs[173] and the UN Secretary-General[174] as well as by many other organisations and scientists who have researched the obstacles to the required climate action.[175]

129 Recently, the above was reiterated in a report published by the UN with support from, among others, the IEA, the IMF, the OECD and the World Bank.[176] The chapter "Barriers and challenges of the current transition" concludes that fossil-fuel companies are obstructing political action at national, regional and international level, that this has

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168 See, for more detail, the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 1 up to and including 98; the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (61 up to and including 67) and 720 up to and including 760; the Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 88 up to and including129; the Summons of Milieudefensie et al. dated 5 April 2019, paras. 593 up to and including 602.

169 See the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 33 and 34 and the Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, para. 147.

170 See, in this regard, Section II.1.1 of this Explanatory Submission.

171 Exhibit MD-496A (IPCC AR6 WGIII H1), p. 170; Exhibit MD-496C (IPCC AR6 WGIII H5), pp. 557 and 558; Exhibit MD-496F (IPCC AR6 WGIII H17), p. 1745. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 14 up to and including 21. See also Section II.3.2 of this Explanatory Submission.

172 Exhibit MD-356 (UNEP Production Gap Report 2020), p. 34. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 26. See also Section II.3.2 of this Explanatory Submission.

173 Exhibit MD-559E (Report of the Special Rapporteur on Extreme Poverty and Human Rights, Climate Change and Poverty dated 17 July 2019), para. 36. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 36 and 87 up to and including 89.

174 Exhibit MD-559B (Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change dated 28 July 2023), para. 22; Exhibit MD-559C (Opening Remarks by the Secretary-General, 15 June 2023), pp. 1 up to and including 4. See also the Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 79 and 80.

175 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 9, 22 and 23.

176 United Nations. Seizing the moment of opportunity: Supercharging the new energy era of renewables, efficiency, and electrification, New York 2025, available at https://www.un.org/en/climatechange/moment-opportunity-2025.

been going on for decades and that it stands in the way of effective climate action. The report, for example, highlights that fossil-fuel companies are spreading disinformation about dependence on fossil fuels, including false claims about renewable energy technologies:

> *"Political action to mitigate climate change has been impeded at the national, regional, and international levels through direct lobbying by fossil fuel companies and through the funding of political actors that remains largely undisclosed. A growing body of academic research and investigative journalism has also documented how, for decades, vested interests have developed strategies to both directly discredit climate science and spread disinformation and misinformation that delay the need to reduce fossil fuel reliance, including false claims about renewable energy technologies to undermine support for them."*[177]

Shell is among the group of obstructive companies identified by the UN, the IPCC and UNEP, and even plays a leading role within that group.[178]

130 The background to the significant political influence of the fossil-fuel industry and Shell is as follows. A large number of oil and gas companies are operating globally. Western oil and gas companies, in particular, are opposing climate action. The seven largest Western oil and gas companies - including Shell, ExxonMobil BP and Chevron - have been active in the global oil and gas market for over 100 years and are collectively referred to as "Big Oil" or the "Supermajors".[179]

131 Big Oil or the Supermajors are unprecedented in size; they each generate annual revenues of hundreds of billions and maintain close ties with governments everywhere in the world at all levels. They are "vertically integrated" companies, meaning that these companies operate at all levels in the fossil value chain, from exploration, production, transportation, trading and marketing to the sale of fossil fuels. In many of these parts of the fossil value chain, they are the largest and most powerful companies.[180] In a global energy system that has run on fossil fuels for over 100 years, these companies have held and continue to hold the most prominent positions, and these companies have the greatest possible commercial interest in protecting their business models.

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[177] United Nations. Seizing the moment of opportunity: Supercharging the new energy era of renewables, efficiency, and electrification, New York 2025, p. 29, available at https://www.un.org/en/climatechange/moment-opportunity-2025.

[178] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 9 and 14 up to and including 32, 87 and 90 with further references.

[179] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, paras. 24, 25, 96 and 97; Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 29; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 740. Together with three state-owned companies from Saudi Arabia and China, these companies constitute the ten largest oil and gas companies in the world.

[180] See, for example, https://guides.loc.gov/oil-and-gas-industry/companies; https://guides.loc.gov/oil-and-gas-industry/companies.

They do this primarily by using their influential economic, political and societal position to maintain dependence on fossil fuels for as long as possible, and to even expand it.[181]

132 In the late 1980s, Shell and its industry peers began leveraging their prominent position to undermine the political and societal support for climate action, particularly in the countries that should have taken the lead in taking global climate action under the UN Climate Convention.[182] Just when global momentum for making binding climate agreements was building around 1988, the oil and gas industry took action on an unprecedented scale to protect its commercial interests.

133 One of the many examples of such actions are the activities of the U.S. Global Climate Coalition, in which Shell USA, Shell's U.S. division, participated both directly and through interest groups for the oil and gas industry.[183] The Global Climate Coalition is one of the organisations that has undoubtedly had the most destructive influence on effective climate action. From the end of the 1980s until well into the 1990s, this organisation actively contributed to undermining climate science, the political-ideological battle against climate legislation, and to undermining public support for effective climate measures.[184]

134 As part of the opposition raised, the Global Climate Coalition, for instance, publicly sowed doubt about climate science, exaggerated the economic consequences of climate policies, ignored climate damage, and, through large-scale PR and lobbying activities, promoted and legitimised the continued use of oil and gas. This contributed to the loss of the global momentum and significantly delayed climate action.[185] The consequences of these activities are in fact irreversible, because they not only effectively blocked (national and international) climate policies in the 1980s and 1990s, but these activities also laid the groundwork for the subsequent resistance to and distrust of climate action. The strategies developed by the Global Climate Coalition at that time are still being used today by the industry and its interest groups.[186]

135 The strategies (including in the area of communication) developed by the oil and gas industry over the years have, however, evolved with the times. For instance, there has been a noticeable shift from an outright and explicit denial of climate change to other strategies that delay climate action.[187] This strategic shift is partly due to developments

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[181] See, for example, with regard to Shell, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 707, 717, 720 and 1158, with a detailed substantiation in the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 627 up to and including 760.

[182] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 1 up to and including 98.

[183] See Section II.4.2 of this Explanatory Submission regarding Shell's inhibiting influence.

[184] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 67; Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 32 up to and including 46.

[185] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 33 up to and including 46 and 49; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 751.

[186] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 32.

[187] See the very comprehensive G. Gentile & J. Gupta, "Orchestrating the narrative: The role of fossil fuel companies in

in climate science; as a result of these developments, it became impossible and very risky from a reputation perspective (particularly in Europe around the turn of the century) to be directly associated with climate science denial and the related lobbying and advertising activities. Companies therefore continued to employ other strategies (including in the area of communication) to prevent accelerated legislation and regulations, reputational damage and other forms of disruption to their oil and gas activities, and to protect their influential position.[188]

136 They involve narratives that accept the existence of climate change and the necessity of an energy transition, yet still contain justifications for the failure to implement the necessary change. In academia, these strategies are also referred to as "discourses of climate delay".[189] Examples include:[190]

(a) shifting responsibilities, for instance onto consumers or governments that are not doing enough to combat climate change;

(b) promoting non-transformative solutions, such as promoting gas as a transition fuel, promoting unfeasible CDR technologies and greenwashing policies;

(c) emphasising the drawbacks of climate policies, such as their costs;

(d) emphasising the importance of a growing supply of fossil fuels for the sake of energy security or energy affordability; and

(e) simply accepting climate change and thus giving up on doing anything to combat it.

137 These are familiar narratives that are almost all told simultaneously by the oil and gas industry in the public debate, in PR, in the direction of policymakers and also in this lawsuit, while the existential risks and costs of climate change for society consistently go unmentioned. These communication strategies and narratives are often even specifically tailored to the different regions of the world.[191] What characterises them is that the used narratives appear plausible on first sight or have been presented so often that they have become conventional wisdom, even though their inaccuracy or incompleteness can be clearly demonstrated with good arguments. Most politicians,

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delaying the energy transition" in Renewable and Sustainable Energy Reviews 2025/212-115359, available at https://www.sciencedirect.com/science/article/pii/S1364032125000322?via%3Dihu.

188 See, for example, the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 52 up to and including 85.

189 Exhibit MD-401 (Article by Lamb et al. 2020), pp. 1 and 2. See also N. Walker-Crawford, "Save the climate but don't blame us: corporate arguments in climate litigation" in Transnational Environmental Law 2026, pp. 1 up to and including 28.

190 Exhibit MD-401 (Article by Lamb et al. 2020), pp. 1 and 2; N. Walker-Crawford, "Save the climate but don't blame us: corporate arguments in climate litigation" in Transnational Environmental Law 2026, pp. 1 up to and including 28. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 45.

191 See the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 65 and 66.

media outlets and citizens are not sufficiently equipped to do so.[192] This is one of the reasons why the fossil-fuel industry has so far been particularly successful in averting a forced phase-out of fossil fuels and in influencing the public debate.

138 On top of all that, the following is also important. The oil and gas industry outsources part of its operations to organisations that exist to serve the commercial interests of the oil and gas industry and to keep society dependent on fossil fuels for as long as possible. It is also a way that allows individual oil and gas companies to lobby indirectly and collectively in a concerted manner to weaken climate policies and evade public and political criticism by hiding behind these organisations. It is estimated, for instance, that at European level, as many as 167 entities are active that each spend between EUR 68.8 million and EUR 82.9 million per year to promote the role of fossil gas.[193] When the industry, at the same time, publicly claims to support the climate goals and keeps promoting projects that are more sustainable, this creates the impression among politicians, the public and the media outlets that oil and gas companies are seriously committed to the energy transition. That image is crucial for maintaining public support. In reality, climate action and the sustainable energy transition are being slowed down as a result of the concerted opposition to virtually all forms of climate regulation.

139 This is, first of all, demonstrated by the fact that the oil and gas sector's investments in renewable energy account for only a fraction of its total investments. A recent study has shown that the 250 largest oil and gas companies, which together account for 88% of global oil and gas production, collectively own only about 1.42% of the global renewable energy capabilities.[194] The share of renewable energy in the Supermajors' total energy production is even less than 0.5%.[195] This symbolic contribution by the oil and gas industry to the transformation of the global energy system stands in stark contrast to its public communications, in which it repeatedly claims the industry is playing a substantial role in the transition to a low-carbon energy system.[196]

140 The above can be easily illustrated in more detail with three recent examples. First, the oil and gas industry has fiercely opposed the introduction of the CSDDD. The industry's objections focused primarily on Article 22 CSDDD. Under this provision, companies would (in summary) become independently required to align their business models and

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192 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 88 up to and including 94.

193 "Behind the Curtains: When the gas and nuclear lobbies reshape the EU sustainable taxonomy" in Reclaim Finance 2020, p. 3, available at https://reclaimfinance.org/site/wp-content/uploads/2020/08/Reclaim-Finance-Media-Briefing-EU-Sustainable-Taxonomy-1.pdf.

194 "Oil and gas industry's marginal share of global renewable energy" in Nature Sustainability 2025, p. 1254, available at https://climateintegrity.org/news/view/big-oil-is-not-a-partner-in-the-energy-transition-new-research-shows.

195 "Oil and gas industry's marginal share of global renewable energy" in Nature Sustainability 2025, pp. 1256 and 1257, available at https://climateintegrity.org/news/view/big-oil-is-not-a-partner-in-the-energy-transition-new-research-shows.

196 "Oil and gas industry's marginal share of global renewable energy" in Nature Sustainability 2025, p. 1256, available at https://climateintegrity.org/news/view/big-oil-is-not-a-partner-in-the-energy-transition-new-research-shows.

strategies with limiting global warming to 1.5°C through time-bound emission reduction targets in five-year steps until climate neutrality would be reached by 2050.

141 Even after the CSDDD had already been adopted, the most influential lobbying organisations in the oil and gas industry began to oppose the climate responsibilities as set forth in Article 22 CSDDD increasingly emphatically and openly. Eurogas (where Shell sits on the Governing Board[197]), the European lobbying arm of the International Association of Oil and Gas Producers (where Shell sits on the board[198]), FuelsEurope (where Shell is a member of the Governing Body[199]) and BusinessEurope (where Shell is part of the Corporate Advisory and Support Group[200]) are examples of organisations that explicitly called for the complete removal or total neutralisation of Article 22 CSDDD before *and* after the publication of Omnibus (a series of the European Commission proposals from February 2025 aimed at simplifying (among other legislation) the CSDDD).[201] The United States and Qatar, countries that are major fossil-fuel exporters, have also exerted (political) pressure on the EU to achieve this.[202]

142 The European Commission recently confirmed that representatives of the oil and gas industry in particular lobbied for the deletion of Article 22 CSDDD:

> *"Others, in particular from the oil and gas industry, called for the deletion of Article 22 CSDDD on combatting climate change."*[203]

143 That opposition has proven to be successful. With Omnibus, the climate obligations arising from Article 22 CSDDD have been removed from the CSDDD, which will also be discussed in Section V.6.2 of this Explanatory Submission. What is in any case

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197 See https://www.eurogas.org/about-us/structure/.

198 See https://iogpeurope.org/about-iogp-europe/; https://iogpeurope.org/about-iogp-europe/board/.

199 See https://www.shell.com/sustainability/advocacy-and-political-activity/our-work-with-industry-associations/_jcr_content/root/main/Section_1864226280/promo_copy_copy_copy/links/item0.stream/1746780534085/28a88218059c0596c24b20cb28f5ee15f38e4da7/shell-climate-and-energy-transition-lobbying-report-24.pdf, p. 34.

200 See https://www.businesseurope.eu/about-us/asgroup-our-partner-companies/.

201 See, for example, "Position Paper Omnibus I: CSDDD, CSRD and Taxonomy" in Business Europe, available at https://www.businesseurope.eu/wp-content/uploads/2025/04/2025-04-Businesseurope-position-paper-on-omnibus-I.pdf, p. 4; "Response to the Omnibus Simplification Package (CSRD, CSDDD, and EU Taxonomy)," Eurogas, available at https://www.eurogas.org/wp-content/uploads/2025/05/240502-Eurogas-Response-to-the-Omnibus-Simplification-Package.pdf, p. 5; "Joint statement: Energy sector outlines recommendations to keep simplification at the core of EU corporate sustainability," FuelsEurope, available at https://www.fuelseurope.eu/uploads/files/modules/publications/1748942037_FuelsEurope%20Press%20Release%20-%20Omnibus%20Joint%20Statement%2002.06.2025.pdf.

202 See, for example, "The secretive cabal of US polluters that is rewriting the EU's human Rights and climate law," Somo, available at https://www.somo.nl/the-secretive-cabal-of-us-polluters-that-is-rewriting-the-eus-human-rights-and-climate-law/; "Top U.S. Oil Lobby API Targets Landmark EU Climate Law, Policy Document Shows', *DeSmog*, available at https://www.desmog.com/2026/01/28/top-u-s-oil-lobby-api-targets-landmark-eu-climate-law-policy-document-shows-american-petroleum-institute-csddd/); 'Qatar threatened to cut EU LNG supplies over sustainability law, letter shows', *Reuters*, available at https://www.reuters.com/sustainability/climate-energy/qatar-threatened-cut-eu-lng-supplies-over-sustainability-law-letter-shows-2025-07-26/.

203 Commission Staff Working Document, 26 February 2025, SWD(2025) 80, p. 33, available at https://commission.europa.eu/document/download/1da93ca2-7911-4e1f-9ce6-cecd09a85250_en?filename=SWD-Omnibus-80-81_En.pdf.

important to note here is that the EU legislator - recognising that corporate climate action is indispensable for achieving the global climate goals - had finally adopted an EU climate obligation after a legislative process spanning many years[204], a development that the oil and gas industry immediately tried to reverse through concerted opposition.

144 The second example of the influence exerted by the oil and gas industry is the withdrawal of oil and gas companies from the process of developing a standard for the oil and gas sector by the SBTi.[205] The aim of this standard was to make the oil and gas industry climate neutral by 2050. After many years, the SBTi, in consultation with the oil and gas industry, had developed a draft standard that provided, among other things, that a credible net-zero climate policy means that no new oil and gas fields would be developed anymore. The oil and gas industry ended its collaboration with the SBTi in 2025. According to the oil and gas companies, the industry's vision was insufficiently reflected in the draft standard, and oil and gas companies should be granted greater flexibility.[206] So this initiative was also blocked by the oil and gas industry.

145 Thirdly, Milieudefensie et al. point to the outcomes of COP30, the climate conference in Belém. Although more than 80 countries had called for a phase-out of fossil fuels, no agreements on this were made during this conference.[207] The final declaration does not even mention the phase-out of fossil fuels at all.[208] This is due to the fact that wealthy oil-producing countries oppose it and Western countries have resigned themselves to this - whether or not under economic and political pressure.[209] The presence of over 1,600 fossil-fuel lobbyists has also contributed to this.[210] All of this underlines that the climate problem will not be solved through international decision-making.

II.3.2 The IPCC and the UNEP on the inhibiting influence of the fossil-fuel industry

146 The IPCC has noted in various reports that the incumbent and dominant fossil-fuel industry is obstructing the necessary climate action in all sorts of ways.[211] For example, the IPCC points out that oil and gas companies exert influence over climate policies

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204 CSDDD, preamble (recital (10)).

205 "Global oil and gas emissions standard put on hold after Shell and others walk away, FT says," *Reuters*, 22 July 2025, available at https://www.reuters.com/business/energy/global-oil-gas-emissions-standard-put-pause-after-shell-others-walk-away-ft-says-2025-07-22/.

206 "'Net zero' emissions standard paused as Shell quits," *Financial Times*, July 22, 2025, available at https://www.ft.com/content/21c8dab8-567b-4926-925e-6f56ba36acb2.

207 See https://www.theguardian.com/environment/2025/nov/18/more-than-80-countries-join-call-at-cop30-for-roadmap-to-phasing-out-fossil-fuels.

208 See https://cop30.br/en/news-about-cop30/documents/cop30-belem_declaration_eng-final.pdf.

209 See, for example, https://nos.nl/collectie/13871/artikel/2591553-toch-een-deal-op-klimaattop-maar-enthousiasme-ontbreekt.

210 See https://globalwitness.org/en/press-releases/fossil-fuel-lobbyists-flood-cop30-climate-talks-in-brazil-with-largest-ever-attendance-share/.

211 Exhibit MD-496A (IPCC AR6 WGIII H1), p. 170; Exhibit MD-496C (IPCC AR6 WGIII H5), pp. 557 and 558; Exhibit MD-496F (IPCC AR6 WGIII H17), p. 1745. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 14 up to and including 21.

both individually and via interest groups.[212] In this context, the IPCC has determined that the incumbent industry has limited governments' ability to pursue ambitious climate policies:

> *"One factor limiting the ambition of climate policy has been the ability of incumbent industries to shape government action on climate change."*[213]

147 According to the IPCC, it is the fossil-fuel industries that have a significant influence on the political agendas in many countries, including all major economies:

> *"Fossil fuel industries have been important agenda-setters in many countries, including the USA, the EU, Australia, China, India, and Mexico, with differing positions and impacts across countries."*[214]

148 The IPCC also notes that fossil-fuel companies in particular oppose climate action through targeted lobbying activities and media strategies:

> *"A good number of corporate agents have attempted to derail climate change mitigation by targeted lobbying and doubt-inducing media strategies. A number of corporations that are involved in both upstream and downstream supply chains of fossil fuel companies make up the majority of organisations opposed to climate action."*[215]

149 According to the IPCC, companies are also attempting to shift responsibility for the climate crisis onto individuals through targeted PR and advertising campaigns.[216] This means that companies often place the focus on personal choices, with which they strategically divert attention from the industry's large responsibility for GHG emissions and the perpetuation of a fossil-based energy system.

150 The IPCC has also discussed studies regarding campaigns by oil and gas companies against climate action in the United States and Australia. These studies demonstrate that these campaigns have been successful.[217] According to the IPCC, parties with established economic and political interests have disseminated and funded disinformation that undermines climate science and ignores the risks and urgency that

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[212] Exhibit S-140 (IPCC AR6 WGIII), p. 1373. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 21.
[213] Exhibit MD-496A (IPCC AR6 WGIII H1), p. 170. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 15.
[214] Exhibit S-140 (IPCC AR6 WGIII), p. 1374. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 27.
[215] Exhibit MD-496C (IPCC AR6 WGIII H5), p. 557. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 28.
[216] Exhibit MD-496C (IPCC AR6 WGIII H5), p. 557. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 30.
[217] Exhibit MD-496A (IPCC AR6 WGIII H1), pp. 170–171. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 24.

follow from it.[218] Furthermore, the oil industry in the United States has contributed to the rise of climate scepticism and its spread abroad.[219]

151 The UNEP describes how legislation and regulations in Western countries remain subject to the political influence of the fossil-fuel sector even today, including through lobbying, campaign financing, PR activities and think tank sponsorship.[220] The political activities of the fossil-fuel sector are even widely recognised as a major barrier to sustainability, according to the UNEP:

> *"*(…) *firms in the sector tend to be highly politically organized, investing considerable resources into lobbying, campaign finance, public relations, and think tank sponsorship, and exerting influence through a 'revolving door' between business and government. This political activity is widely considered to be a major barrier to decarbonization."*[221]

152 In light of the above, the Oversight Committee of the U.S. House of Representatives launched an investigation in 2021 into the historical and present-day obstruction of climate policies by the oil and gas industry and their interest groups. That investigation found that, over the years, the oil and gas industry has shifted its communication from the outright denial of climate science to more subtle forms of obstruction, such as greenwashing, hollow climate goals and misleading public narratives.[222] As the culmination of that investigation, the Big Oil Report was published in 2024, which reconstructs and describes, based on internal company documents, how the big oil and gas companies and their lobbying groups have resisted climate action in many different ways over the years.[223] Scientific publications also acknowledge that the activities of fossil-fuel companies are one of the main reasons why governments' efforts to implement climate policies have failed.[224]

153 So today the oil and gas industry is, admittedly, paying lip service to the global climate goals, yet with its massive fossil-fuel investments, PR messaging across all media and political lobbying activities, it is still a huge obstacle to making society more sustainable. Shell's specific role and activities when it comes to obstructing climate action will be addressed in Section II.4 of this Explanatory Submission. Before doing so,

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[218] This follows from the IPCC AR6 WGII report, pp. 1939 and 1940, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf.

[219] Exhibit S-140 (IPCC AR6 WGIII), p. 1374. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 27.

[220] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 25 with further references; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 49 and 50.

[221] Exhibit MD-356 (UNEP Production Gap Report 2020), p. 34. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 26.

[222] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 739.

[223] Big Oil Report, pp. 2 and 3, available at https://www.budget.senate.gov/imo/media/doc/fossil_fuel_report1.pdf.

[224] See, for example, Exhibit MD-541A (Article by Brulle et al. 2022), pp. 1, 2, 14 and 15. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 23.

Milieudefensie et al. will first discuss another important aspect of fossil-fuel dependence that must be overcome: the carbon lock-in effect.

II.3.3 The institutional and infrastructural carbon lock-in effect

154 In academia, the dominant position and inhibiting influence of the fossil-fuel industry are viewed as part of the carbon lock-in.[225] Carbon lock-in is the umbrella term for a large number of obstacles that stand in the way of the necessary transformation of society from a fossil-based to a sustainable energy system. The political and societal influence exerted by the ruling establishment to maintain the fossil-fuel energy system is referred to in science as the institutional carbon lock-in.[226]

155 The carbon lock-in consists not only of the fossil-fuel industry's dominant institutional position, but is also economic and infrastructural in nature. Through massive investments in fossil projects (such as oil and gas fields, drilling platforms, pipelines, oil tankers, LNG tankers and refineries) with lifespans of decades, oil and gas companies keep committing the world to additional CO_2 emissions and a surplus of fossil fuels.[227]

156 This is due to the fact that the development of new oil and gas fields and the associated infrastructure generally require large initial investments that can only be recouped over a long period of time. Once the investments have been made and a new oil or gas field is producing, an oil and gas company will generally always continue production, even if demand for oil and gas is low and would not justify additional production. This is because the investments must be recouped, and halting production would lead to greater losses.[228]

157 The parties that have invested in (new) fossil-fuel production and the associated infrastructure therefore have an economic and financial incentive to continue producing for as long and as much as possible. As a result, the future production of oil and gas and the CO_2 emissions associated with their combustion are locked in once investments have been made.[229] Moreover, this infrastructural lock-in reinforces the institutional lock-in: after all, the fossil-fuel industry will continue to fight tooth and nail against

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[225] See Exhibit MD-496A (IPCC AR6 WGIII H1), p. 189; Exhibit MD-255 (Seto Carbon lock-in 2016), pp. 425 up to and including 447.

[226] See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 10 and 14 up to and including 18; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (61). See also the judgment of the Court of Appeal, ground 7.59.

[227] The Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 10 up to and including 12; Summons of Milieudefensie et al. dated 5 April 2019, para. 589.

[228] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 105 and 106; Oral Arguments on appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 107 up to and including 110; Notes of the Oral Arguments (3) in the First Instance of Milieudefensie et al. dated 3 December 2020, para. 57; Summons of Milieudefensie et al. dated 5 April 2019, paras. 788 and 789. See also the judgment of the Court of Appeal, ground 7.59.

[229] Summons of Milieudefensie et al. dated 5 April 2019, para. 788. See also the judgment of the Court of Appeal, ground 7.59.

measures that affect the production or use of fossil fuels, because it will not want to write off the investments it has already made.[230]

158 Warnings about the carbon lock-in of fossil-fuel infrastructure have been issued for many years. Overinvestment and the resulting expansion of the fossil-fuel supply lead to downward pressure on oil and gas prices. This, in turn, leads to an additional (unnecessary) demand for these fossil fuels. After all, according to basic economic principles, a greater supply will lead to lower prices, and lower prices lead to a greater demand. In this way, the supply side of the market is forcing the (extensive) use of fossil fuels, which makes the transition to renewable energy alternatives difficult. Thus imposing the use of fossil fuels in this way seriously delays the energy transition.[231]

159 Shell itself also acknowledges the carbon lock-in effect of fossil-fuel investments. When investor anxiety arose in 2014 over the "carbon bubble" - the evaporation of fossil-fuel investments should governments enact ambitious climate legislation – Shell reassured its shareholders that things would not be that bad, because the energy transition would take several decades due to the long lifespan of the fossil infrastructure, multi-decade depreciation periods and the expected lack of laws and regulations regarding CO_2 emissions.[232] Shell also expressed the expectation that the world would not achieve the climate goals anyway.[233] In that light, Shell saw no risks in continuing fossil-fuel investments, partly due to the carbon lock-in effect.

160 The UNEP, the IPCC and the IEA have determined that the expected emissions associated with the already existing (locked-in) fossil projects will exceed the remaining carbon budget by a large margin. This is also evident from the figure below from the UNEP. The oil fields that are already producing or for which an investment decision has been made are already sufficient to overshoot the carbon budget for a maximum global warming of 1.5°C. The expected emissions from oil and gas fields combined are even nearly twice as large as the remaining carbon budget.[234]

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230 Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 105; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 951; Notes of the Oral Arguments (3) in the First Instance of Milieudefensie et al. dated 3 December 2020, para. 57.

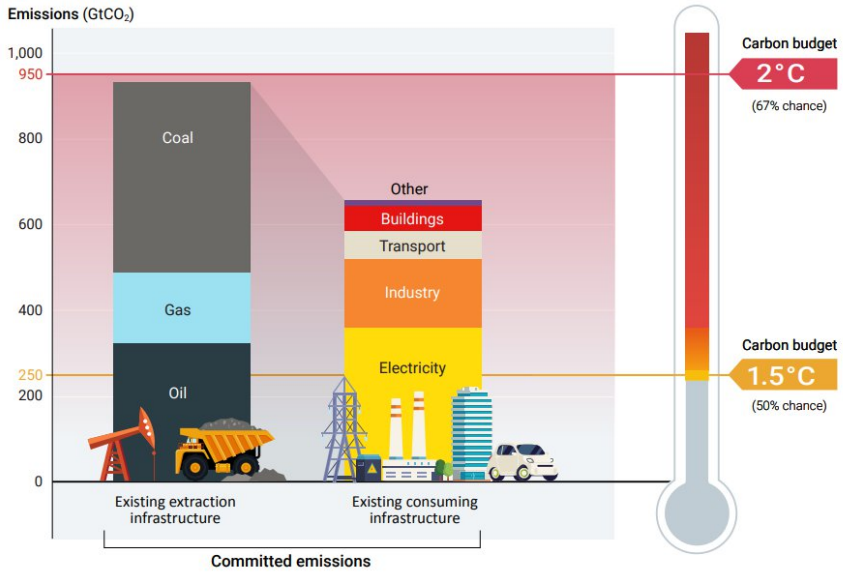
231 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 51; Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 12 up to and including 18; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 106; Summons of Milieudefensie et al. dated 5 April 2019, paras. 789 and 829. See also the judgment of the Court of Appeal, ground 7.59.

232 Exhibit MD-199 (Letter from Shell to investors dated 16 May 2014), pp. 1 and 2. See also the Summons of Milieudefensie et al. dated 5 April 2019, paras. 586 up to and including 588. See also the judgment of the Court of Appeal, grounds 3.27, 3.30 and 7.60.

233 Exhibit MD-199 (Letter from Shell to investors dated 16 May 2014), pp. 1 and 2. See also the Summons of Milieudefensie et al. dated 5 April 2019, paras. 586 up to and including 588. See also the judgment of the Court of Appeal, grounds 3.27, 3.30 and 7.60.

234 Exhibit MD-523 (UNEP Emissions Gap Report 2023), p. XXIII. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 101.

Figure 5.1. Committed CO_2 emissions from existing fossil fuel infrastructure, compared to carbon budgets reflecting the long-term temperature goal of the Paris Agreement



161 This UNEP figure makes it clear that the supply of all three fossil fuels must be phased out as quickly as possible in order to remain within the carbon budget that limits global warming to 1.5°C.

162 It is therefore clear that gas cannot be used as a transition fuel. This would involve that, initially, *more* gas is produced and used to be able to phase out the consumption of coal. In a later phase, the use of gas would then have to be reduced again to be able definitively switch from fossil fuels to cheaper and cleaner renewable energy.[235] However, the figure above clearly shows that no room is left to use more gas, even if only temporarily. The fact that this narrative used by the oil and gas industry has gained such widespread traction in the political and societal energy transition debate is a prime example of the carbon lock-in and the influence exerted by the fossil fuel industry.[236] It is precisely for the above-mentioned reason that not one single reduction scenario provides for the possibility of producing *more* gas. The use of all fossil fuels (including gas) must decrease.

163 The IEA also endorses the view that intervention on the supply side - and so a phase-out of the fossil-fuel supply - is necessary for a successful energy transition. The IEA calls the oil and gas industry's narrative that society should change its demand for oil and gas first as one of the most important misconceptions about the energy transition:

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[235] Statement of Defence on Appeal of Milieudefensie dated 18 October 2022, paras. 581 and 591 up to and including 599; Notes of the Oral Arguments (9) in the First Instance of Milieudefensie et al. dated 17 December 2020, paras. 12 up to and including 15 and 41.

[236] Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 47 up to and including 85.

> *"A productive debate about the oil and gas industry in transitions needs to avoid two common misconceptions. The first is that transitions can only be led by changes in demand. "When the energy world changes, so will we" is not an adequate response to the immense challenges at hand* (...). *In practice, no one committed to change should wait for someone else to move first."*[237]

164 Without an adequate phase-out of fossil fuels, the institutional and infrastructural carbon lock-in will continue to exist, the supply of fossil fuels will remain too high and the fossil-fuel industry will continue to resist the climate action that is so urgently needed.

165 The IPCC also makes it clear that the fossil-fuel industry has a unique position with regard to the climate crisis, because the carbon lock-in advantages the fossil-fuel industry over the renewable energy industry and thus prevents the transition to a sustainable energy system. In the words of the IPCC, the fossil-fuel energy system as such is a particularly significant barrier to the acceptance and implementation of new and cleaner renewable energy technologies:

> *"Still existing locked-in infrastructures and business models advantages fossil fuel industry over renewable and energy efficient end use industry. The fossil fuel energy generation and delivery system therefore epitomises a barrier to the acceptance and implementation of new and cleaner renewable energy technologies."*[238]

166 The IPCC concludes that overcoming the carbon lock-in requires a radical change in the power relations between the fossil-fuel industries and their governments:

> *"Overcoming the carbon lock-in is not simply a matter of the right policies or switching to low-carbon technologies. Indeed, it would mean a radical change in the existing power relations between fossil fuel industries and their governments."*[239]

167 In May 2025, the UN Special Rapporteur on Human Rights and the Environment endorsed the above in the context of climate change:

> *"5.* (…) *The overwhelming evidence of the interlinked, intergenerational, severe and widespread human rights impacts of the fossil fuel life cycle, coupled with six decades of obstruction against effective climate action,*

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[237] Exhibit MD-528 (IEA The Oil and Gas Industry in Net Zero Transitions 2023), p. 16.
[238] Exhibit MD-496C (IPCC AR6 WGIII H5), pp. 557 and 558. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 16.
[239] Exhibit MD-496F (IPCC AR6 WGIII H17), p. 1745. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 17.

> *compels urgent defossilization of our entire economies, as part of a just, effective and transformative transition."*[240]

168 Thus, the UN, the IPCC, the UNEP and the IEA leave no doubt about the fact that the oil and gas industry, through its activities and investments, is obstructing an effective climate response. Its influential position and commercial interests stand in the way of society's collective interest in limiting dangerous climate change through the drastic reduction of emissions in this critical decade.

169 This background illustrates the widely recognised importance of overcoming the carbon lock-in to make way for the transformation of the energy system, in which fossil fuels are replaced by clean, sustainable and affordable energy. To this end, it is necessary to break the dominance of the fossil-fuel business model and phase out fossil fuels.

II.4 Shell's policies and activities focus on a future without effective climate action

II.4.1 Shell does not wish to reduce its total Scope 3 emissions

170 There is no sign of any phase-out of oil and gas on Shell's part. Shell expects to invest approximately USD 100 billion in its oil and gas operations between 2023 and 2030, with 50% to 60% of that amount going to fields that were not yet producing oil and gas in April 2024.[241] Shell expects to increase its LNG sales by 20% to 30% until 2030.[242] Shell has further stated that it does not expect that its total Scope 3 emissions, which account for 95% of its total emissions, will decrease in the period until 2030.[243]

171 Through its policies and investments, Shell is increasing the carbon lock-in and keeping society dependent on fossil fuels for an unnecessarily long time. In that context, Shell does also not hesitate to present LNG as a transition fuel and portray it as an alternative to coal,[244] as Shell made clear once again during its last investor day:

> *"We expect that supplying LNG will be the biggest contribution we will make to the energy transition over the next decade* (…)*."*[245]

172 Milieudefensie et al. explained in the appeal proceedings that Shell's policy actively focuses on a growth of LNG that even far exceeds the IEA Scenario based on the most

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[240] UN Human Rights Council, The imperative of defossilizing our economies, Report of the Special Rapporteur on the promotion and protection of human Rights in the context of climate change dated 15 May 2025, A/HRC/59/42, para. 5, available at https://docs.un.org/en/A/HRC/59/42.

[241] Judgment of the Court of Appeal, grounds 3.49 and 3.51.

[242] Judgment of the Court of Appeal, ground 7.60.

[243] Court Record of the oral hearing on Appeal on 2, 3, 4 and 12 April 2024, p. 29.

[244] See also Section II.3.3 of this Explanatory Submission in this regard.

[245] Shell Capital Markets Day, 25 March 2025, pp. 12 and 13, available at https://www.shell.com/investors/investor-presentations/capital-markets-day-2025/_jcr_content/root/main/Section/promo_1962010312_cop/links/item2.stream/1742946934533/a0469c1b242bab16541ae48f6348a482a3c33d39/cmd25-slides-with-prepared-remarks.pdf.

recent government policies, which projects 2.4°C of global warming.[246] Even in that scenario (which is highly unfavourable for the climate change problem), the CO_2 emissions are lower than in the scenario in which Shell will start to produce more LNG. So Shell's most important contribution to the sustainable energy transition is, in Shell's own words, the increased sale of a polluting fossil fuel. During that same investor day, Shell also indicated that it has no plans to phase out its LNG production even after 2030.[247] All of this is in line with the fact that only 0.35% of Shell's total energy production consists of renewable energy,[248] which is therefore a fraction of its investments in oil and gas.

173 For the period after 2030, Shell has no concrete climate policy either. During the appeal proceedings, Shell even abandoned its goal of reducing the CO_2 intensity of its total energy portfolio by 45% by 2035 relative to the 2016 level.[249] What remains is a goal of reaching net zero by 2050, but to this day, Shell has not indicated in any way that it intends to voluntarily phase out its extensive oil and gas operations and actually reduce its emissions. Shell has no plan to actually work towards net zero.

174 On the contrary: what Shell's acts and omissions show is that its sole objective is to sell as much oil and gas as possible for as long as possible. Shell's goal of achieving net-zero in 25 years' time is therefore, in reality, an empty shell, all the more so because no concrete interim reduction targets have been set and it is precisely the reduction pathway on the way to net zero that is of the utmost importance.[250] This means that Shell's group policy is at odds with the efforts that the UN climate regime and the soft-law sources partly developed within that context expect from companies, and, more specifically, from the oil and gas industry.

II.4.2 Shell is obstructing effective climate action

175 There are also other ways in which Shell is obstructing effective climate action. In this context, it should first be noted that Shell's strategic risk appetite determines the policy and investment decisions made by it. This works as follows. Shell explicitly acknowledges that climate change and the energy transition pose significant risks to its business model. According to Shell itself, the "*rapidly evolving societal concerns and*

[246] This concerns the STEPS scenario. See Exhibit MD-526B (IEA World Energy Outlook 2023). See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 104, and the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 115.

[247] Shell Capital Markets Day, March 25, 2025, pp. 40, 41 and 49, available at https://www.shell.com/investors/investor-presentations/capital-markets-day-2025/_jcr_content/root/main/Section/promo_1962010312_cop/links/item2.stream/1742946934533/a0469c1b242bab16541ae48f6348a482a3c33d39/cmd25-slides-with-prepared-remarks.pdf.

[248] "Oil and gas industry's marginal share of global renewable energy" in Nature Sustainability 2025, pp. 1256 up to and including 1257, available at https://climateintegrity.org/news/view/big-oil-is-not-a-partner-in-the-energy-transition-new-research-shows.

[249] Exhibit S-288 (Shell Energy Transition Strategy 2024), p. 49. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 124. See also the judgment of the Court of Appeal, ground 3.39.

[250] See, in this regard, Section II.1 (and in particular Section II.1.5) of this Explanatory Submission.

developments related to climate change and managing GHG emissions" expose Shell to material risks, such as negative consequences for Shell's brand and reputation, the risk of reduced demand for oil and gas products, capital destruction, shareholders leaving the company, financing risks and liability risks. Shell also acknowledges the risk of negative consequences for its license to operate. This concerns the necessary trust in, or support for, Shell within society. In its annual reports, Shell is very vocal about these risks. Nevertheless, it has made the strategic choice to accept these material risks to its business, while at the same time keeping them manageable as much as possible by means of risk management, such as political lobbying and greenwashing. This allows Shell to continue focusing its policy on maintaining its fossil-fuel business model.[251]

176 Furthermore, Shell - even now – is employing the same strategies (also in the area of communication) and discourses of climate delay as the oil and gas industry in general.[252] They are described in Section II.3.1 of this Explanatory Submission. In this way, Shell is focusing, both directly and indirectly through influential interest groups, on promoting and ensuring the long-term preservation of a fossil-energy system through a broad combination of lobbying and PR activities.[253]

177 InfluenceMap, one of the world's leading non-governmental organisations that researches lobbying activities, has established that Shell is maintaining an extensive network of "highly oppositional industry associations", which has successfully weakened numerous climate policy measures across the globe. Furthermore, it has been found that Shell is continuing to lobby for the expansion of oil and gas extraction. According to InfluenceMap, Shell, along with BP, is among the organisations that have the highest number of memberships of interest groups.[254] In this context, the Big Oil report notes that:

> *"An armada of trade associations, organizations, and coalitions works with and for fossil fuel companies to perpetuate deceptive and misleading industry narratives."*[255]

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[251] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 710 up to and including 714; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 71 up to and including 79.

[252] N. Walker-Crawford, "Save the climate but don't blame us: corporate arguments in climate litigation" in *Transnational Environmental Law* 2026, pp. 1 up to and including 28. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 661 up to and including 664 and 710 up to and including 714; the Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 83 up to and including129.

[253] See the very comprehensive article by G. Gentile & J. Gupta, "Orchestrating the narrative: The role of fossil fuel companies in delaying the energy transition" in *Renewable and Sustainable Energy Reviews* 2025/212-115359, pp. 4 up to and including 6 and 8, available at https://www.sciencedirect.com/science/article/pii/S1364032125000322?via%3Dihu.

[254] Exhibit MD-540A (InfluenceMap: The International Gas Union's Climate Strategy 2022), p. 1. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 49.

[255] Big Oil Report, para. 36, available at https://www.budget.senate.gov/imo/media/doc/fossil_fuel_report1.pdf.

178 Shell is not merely a member of numerous interest groups that lobby against climate policy; in many cases, Shell also sits on their boards. This applies, for example, to the highly influential American Petroleum Institute (API),[256] which receives between USD 10 million and USD 12.5 million from Shell every year.[257] According to its own statement, Shell is also a member of the board of (among other organisations) the US Chamber of Commerce, the International Association of Oil and Gas Producers, the International Gas Union, Offshore Energies UK, the European Fuel Manufacturers Association and the Western States Petroleum Association. All of these organisations represent the interests of the oil and gas industry.[258] This also applies to the Global Climate Coalition discussed in Section II.3.1 of this Explanatory Submission. Due to its involvement with the Global Climate Coalition, Shell is embroiled in dozens of lawsuits in the United States.[259]

179 Shell is also a member of many other interest groups, but has been less transparent about this, particularly when it comes to organisations outside Europe, North America and Australia. The ACCR has investigated this and found dozens of organisations of which Shell is a member and often also serves on the board.[260] This investigation provides insight into Shell's role in influential interest groups in India, the Philippines, Vietnam, China, Mexico and South Africa, where a very active lobbying campaign for LNG and fossil gas is being staged.[261] The report also provides examples of lobbying for the expansion of fossil-fuel projects and infrastructure in Malaysia, Kazakhstan, Nigeria, Tanzania, Brazil, Trinidad and Tobago, Namibia and Colombia.[262]

180 All of the above makes it clear that Shell is still basing its corporate policies and investments today on the expectation that the global climate response will fail. Shell is not only betting on a future without effective climate action, but is also actively helping to create this future through its massive investments in oil and gas operations, its opposition to effective climate legislation, its political lobbying to promote the expansion of oil and gas extraction, and its PR and marketing activities to protect its image. In doing so, Shell has an inhibiting influence on climate action and the energy transition.

II.5 The importance of this court case

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256 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 33 up to and including 46 and 49; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 739 up to and including 752.

257 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 49.

258 Exhibit S-166 (Shell Climate and Energy Transition Lobbying Report 2022), pp. 26 and 27. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 49.

259 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 29.

260 Exhibit MD-573D (ACCR Gaps in Shell's Climate Lobbying Disclosures 2024), pp. 7 and 35 up to and including 37. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 81 and 82.

261 Exhibit MD-573D (ACCR Gaps in Shell's Climate Lobbying Disclosures 2024), pp. 16 up to and including 21. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 81 and 82.

262 Exhibit MD-573D (ACCR Gaps in Shell's Climate Lobbying Disclosures 2024), pp. 24 up to and including 28. See also the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 81 and 82.

181 The factual context described in Sections II.1 up to and including II.4 of this Explanatory Submission outlines the importance of this court case against Shell. The world is facing critical years that will make or break the climate response. The remaining carbon budget needed to keep global warming under the critical 1.5°C danger threshold is being rapidly depleted and will be exhausted this decade without drastic and far-reaching emission reductions. The climate crisis is so severe and so urgent that the IACtHR has called it a "climate emergency".[263]

182 Exceeding the 1.5°C danger threshold - even temporarily – will pose significant risks, including a substantially increased likelihood of crossing one or more tipping points in the climate system, which would exacerbate the climate crisis in an irreversible manner. Due to the lack of adequate climate action in the past decades, the world has already reached a point where substantial risks of very serious damage and losses of human lives and ecosystems are now a reality. These risks will increase significantly, even in the hypothetical scenario where no more CO_2 emissions at all would be emitted tomorrow. All in all, there can be no doubt about the fact that emissions need to be reduced with the greatest possible urgency.

183 The climate response hinges on a drastic curbing of the production and use of fossil fuels, as fossil fuels account for 81% of global CO_2 emissions. Oil and gas account for 48% of all global CO_2 emissions. The UN climate regime and the soft-law sources for companies partly developed within that context therefore proceed on the assumption that corporate climate action is necessary to achieve the goals of the Paris Agreement. This is consistent with companies' human rights responsibilities to prevent and limit dangerous climate change. Moreover, this fair share of companies is necessary because multinational corporations in particular operate in a power vacuum, and it has appeared that (sufficient) regulation is not possible.

184 Shell is a textbook example of a company that is considered by the UN climate regime and the related soft-law sources for companies as a company that must take action to prevent or limit dangerous climate change. Shell will not resort to self-regulation and will continue to undermine regulatory initiatives by states in the way it has done in the past decades. Both through its ongoing substantial investments in the fossil-fuel system - causing a carbon lock-in effect - and through its lobbying and PR activities, with which it aims to protect its investments, Shell is obstructing society's collective ability to limit global warming.

185 Against this backdrop, the District Court and the Court of Appeal rightly held that Shell has a duty of care to prevent or limit dangerous climate change, which requires Shell to reduce its global CO_2 emissions. Unlike the District Court, however, the Court of Appeal

[263] IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), para. 1.

failed to impose a concrete percentage-based reduction obligation on Shell in line with its established duty of care. This means that the Court of Appeal did not determine by what percentage Shell must reduce its CO_2 emissions by 2030. Shell will thus not reduce its CO_2 emissions in the short term. In effect, the Court of Appeal, by not imposing such a reduction obligation, has not offered Milieudefensie et al. any legal protection at all, even though this could have been expected of the Court of Appeal. Milieudefensie et al. therefore ask the Supreme Court to provide the requested legal protection and order Shell to reduce its CO_2 emissions. Only with a concrete percentage-based reduction obligation will Shell be required to take action and make the necessary contribution to combating the grave danger of climate change. Without this, the world is rapidly heading towards major, highly negative and virtually irreversible consequences.

186 The necessity of such a percentage-based reduction obligation to provide protection against dangerous climate change is also evident from the way in which the Decision was received in 2021. Among others, the UN Secretary-General and the UN Special Rapporteurs, such as the UN Special Rapporteur on Human Rights and the Environment, welcomed the Decision with approval and admiration.[264]

187 The annual Global Trends report also devoted considerable attention to the importance and impact of this court case. In 2021, the researchers noted that the Judgment is a "historic ruling" and *"landmark decision"* and sets an important precedent for other pending cases.[265] In 2022, the Global Trends report also highlighted the positive reception of the Decision and the significant impact of the court case:

> *"The recognition by a court of a corporate duty of care for climate change mitigation has been much celebrated. The ruling was hailed as a judgment that would 'change the world'* (…) *by global law firms (such as White & Case) and scholars (Hösli, 2021; Macchi and van Zeben, 2021)."*[266]

188 The UNEP also devoted extensive attention to this court case, noting that climate responsibility lawsuits are increasingly targeting major private CO_2 emitters.[267] The UNEP observed that lawsuits are of great importance in winning this fight:

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[264] Exhibit MD-559B (Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 28 July 2023), paras. 20 up to and including 31. See also the Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 79 up to and including 82.

[265] Global Trends in Climate Change Litigation: 2021 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, pp. 31, 34 and 35, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

[266] Global Trends in Climate Change Litigation: 2022 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 34, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.

[267] Exhibit MD-532A (UNEP Global Climate Litigation Report 2023), pp. 50 and 51.

"Climate litigation represents a frontier solution to change the dynamics of this fight."[268]

189 In recent years, a great deal of attention has been paid, both nationally and internationally, to this court case. This has led to growing public awareness of the role of the oil and gas industry in causing climate change and obstructing climate action. The Global Tipping Points Report 2023 also emphasised that the growing number of climate cases all over the world could lead to a tipping point being reached in society for positive climate action.[269]

190 This court case is part of these dynamics. It is part of a much broader social and legal development regarding the shared responsibility of companies to prevent or limit dangerous climate change that they have helped cause.

III PREVENTING (FURTHER) DANGEROUS CLIMATE CHANGE

III.1 The actual necessity of limiting cumulative emissions

III.1.1 The importance of the carbon budget

191 Chapter II of this Explanatory Submission set out that climate change is the greatest threat of our time, that the production and combustion of fossil fuels are the main causes of climate change and that global warming can only be limited by reducing global CO_2 emissions to net zero as quickly as possible. The total emissions on the road to net zero must be as low as possible.

192 The alarming observation is that the remaining carbon budget that offers a 50% chance of limiting global warming to 1.5°C is being depleted at a very high pace. With the current pace, that carbon budget would already be exhausted around 2030 with the result that dangerous climate change (or its consequences) will set in (or worsen).[270] Unless technologies become available to achieve negative emissions on an unprecedented scale - technologies that are not yet available on a large scale, for which it is highly uncertain whether this will ever be different and which have many other disadvantages[271] - it will not be possible to reverse this overshoot.

193 After decades of delay and far too limited action, very little time is left for the necessary and extensive transition to a clean and sustainable energy system. Even within the seven-year timeframe of this lawsuit, a significant portion of the carbon budget has

[268] Exhibit MD-532A (UNEP Global Climate Litigation Report 2023), p. IX.
[269] Exhibit MD-574B (The Global Tipping Points Report 2023), pp. 348 and 350.
[270] See, in this regard, Sections II.1.4 and II.1.5 of this Explanatory Submission.
[271] See, in this regard, Section II.1.6 of this Explanatory Submission.

been used up again and the global temperature rise has increased from 1.1°C to 1.3°C.[272]

194 In order to remain within the carbon budget nevertheless, the CO_2 emissions must be cut increasingly drastically. Only in that way can the delay in the climate transition be made up for in terms of both time and scale. As a result, the measures to be taken are becoming increasingly far-reaching, costly and risky. The Dutch Supreme Court also found this in its *Urgenda* ruling, referring to findings by the UNEP:

> "*7.4.3 All greenhouse gas emissions lead to a reduction in the carbon budget still available* (…). *Any postponement of the reduction of emissions therefore means that emission in the future will have to be reduced on an increasingly large scale in order to make up for the postponement in terms of both time and size. This means that, in principle, for each postponement of emission reductions, the reduction measures to be taken at a later date will have to be increasingly far-reaching and costly in order to achieve the intended result, and it will also be riskier. The UNEP already warned about this in its 2013 annual report* (…)*."*[273]

195 The ECtHR als found, referring to the findings of the IPCC, that states must design their climate policies with due regard to the carbon budget:

> *"571. In this regard, the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net-zero emissions* (…)*."*[274]

196 The scientific limitation of the carbon budget is therefore crucial for preventing, and for the manner of preventing, dangerous climate change as well as for the measures to be taken in that regard. It is partly on that basis that it is undisputed, both globally and in this court case, that a global CO_2 reduction of at least 45% by 2030 is necessary to maintain a 50% chance of limiting global warming to 1.5°C.[275] That global reduction target also forms the basis for the (principal) demands of Milieudefensie et al. The background to this will be set out in the following Section.

III.1.2 Background to the 45% standard

197 When the Paris Agreement was adopted, the contracting parties invited the IPCC to prepare a special report on the consequences of global warming by 1.5°C and the associated GHG emission pathways. After all, based on climate science, the contracting parties had concluded that a temperature rise of 2°C would be too dangerous. The fact that this is indeed the case was explained in Sections II.1.2 and II.1.5 of this Explanatory

[272] See, in this regard, Section II.1.1 of this Explanatory Submission.
[273] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
[274] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).
[275] See, for example, the Notice of Appeal of Shell dated 22 March 2022, para. 1.2.3(b).

Submission. For this reason, the contracting parties asked the IPCC to map out what emission reduction pathways limiting global warming to 1.5°C would look like compared to pathways in which global warming would remain below 2°C.[276]

198 In response, the IPCC released the SR1.5 Report. The SR1.5 Report compiled a large number of modelled emission reduction scenarios – i.e. pathways based on scientific models in which CO_2 emissions occur[277] – that offer a 50% chance of limiting global warming to 1.5°C with no or only a limited overshoot. According to the IPCC, these reduction pathways provide for a 45% reduction in global CO_2 emissions by 2030 and a 100% reduction (net-zero emissions) by 2050.[278]

199 In the SR1.5 Report, the IPCC also explained that these reduction pathways require fast and far-reaching system transitions in all key sectors.[279] According to the IPCC, robust and timely efforts by both countries and non-state actors are necessary to strengthen climate-resilient development.[280]

200 Since the SR1.5 Report, achieving net-zero CO_2 emissions by 2050 has been internationally recognised as the global reduction target to prevent dangerous climate change. The interim reduction target of 45% by 2030 has also been endorsed by the contracting parties since then. After all, this interim target must be achieved in order to keep cumulative CO_2 emissions up to 2050 within the carbon budget.[281]

201 In this context, the period up to 2030 is viewed as the "critical decade", as the emission reductions achieved between 2020 and 2030 will determine whether global warming can still be limited to 1.5°C *and* whether global warming can still remain below 2°C.[282] On this subject, the European Commission wrote:

> *"We are at a pivotal moment in the world's response to climate and biodiversity emergencies and we are the last generation that can still act in time. This decade is a make-or-break moment for delivering on our commitments under the Paris Agreement, in the interest of the*

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276 Exhibit MD-146 (Adoption of the Paris Agreement, 12 December 2015), para. 21. See also the Summons of Milieudefensie et al. dated 5 April 2019, paras. 414 and 415.

277 For information on the contents, role and limitations of modelled reduction scenarios, see Section III.2 of this Explanatory Submission.

278 Exhibit MD-135 (IPCC SR 2018 Summary for Policymakers), p. 14 (under C.1). See also the judgment of the Court of Appeal, ground 3.9.

279 Exhibit MD-135 (IPCC SR 2018 Summary for Policymakers), p. 17 (under C.2) and p. 24 (under D.6 and D.6.1). See also the judgment of the Court of Appeal, ground 3.8 under B.6.

280 Exhibit MD-136 (IPCC SR 2018), p. 24 (under D.6.2).

281 See also, in this regard, Section II.1.5 of this Explanatory Submission.

282 See also, in this regard, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 607 up to and including 614, 967 and 968; the Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 1 up to and including 16; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 27 and 148 up to and including 159. See also the findings of the UNEP: Exhibit MD-523 (UNEP Emissions Gap Report 2023), p. 1; Exhibit MD-368 (UNEP Emissions Gap Report 2021), p. 1.

> *health, well-being and prosperity of all (…). While the cost of inaction is clearly higher than the cost of fulfilling our climate ambitions, sterile numbers cannot capture the stark consequences of continuing business-as-usual* (...). *What we achieve in the next decade, will determine our children's future* (...)."[283]

202 The modelled emission reduction pathways analysed by the IPCC in its SR1.5 Report already rely heavily on CDR. This means that these pathways also make use of CDR technologies to offset the remaining CO_2 emissions in 2050 and to achieve negative emissions with the aim of bringing global warming back down to 1.5°C after a limited overshoot of the 1.5°C threshold.[284] In this regard, the IPCC notes, as also set out in Section II.1.6 of this Explanatory Submission, that *"CDR deployed at scale is unproven, and reliance on such technology is a major risk in the ability to limit warming to 1.5°C*."[285] The fact that modelled reduction pathways rely on (large-scale) CDR nevertheless is a consequence of the characteristics of scientific models and the underlying modelling choices, as will be explained in Section III.2 of this Explanatory Submission. The consequence of this is that, in reality, global CO_2 emissions must be reduced even faster than in the 45% reduction pathways, because the application of CDR technologies is, at the very least, highly questionable.

203 Nevertheless, the interim global CO_2 reduction target of 45% by 2030 has acquired international and political status since the SR1.5 Report. For example, all countries that are signatories to the Paris Agreement have explicitly confirmed in the Glasgow Climate Pact – that was adopted during COP26, the Glasgow Climate Conference - the necessity of the global CO_2 reduction target of 45% by 2030 and the net-zero target for 2050:

> *"Recognizes that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global GHG emissions, including reducing global carbon dioxide emissions by 45 percent by 2030 relative to the 2010 level and to net zero around midcentury* (…)."[286]

204 Furthermore, the parties to the Convention emphasised at that time – and also later, on the occasion of COP28, the climate conference in Dubai[287] - that the *"critical decade*" for achieving climate ambitions had arrived and that those ambitions should be enhanced:

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[283] Exhibit S-89 (European Commission, Fit for 55, 14 July 2021), pp. 1 and 2. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 968.
[284] Exhibit MD-135 (IPCC SR 2018 Summary for Policymakers), p. 19. See also the Decision of the District Court, ground 2.3.5.3.
[285] Exhibit MD-136 (IPCC SR 2018), p. 96.
[286] Exhibit MD-348 (Glasgow Climate Pact), para. 22. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 474; the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 11.
[287] Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 5.

> *"The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Recalling Article 2 of the Paris Agreement* (…) *stresses the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement."*[288]

205 Incidentally, the IPCC determined in 2022 that the lack of climate action in recent years had at that time resulted in a situation where only a 48% global CO_2 reduction by 2030 would still leave a 50% chance of limiting global warming to 1.5°C.[289] The reason for this was the insufficient achievement of CO_2 emissions in recent years, meaning that a smaller portion of the carbon budget was left. This must be compensated for, as those emissions translate into greater global warming, which in turn translates into a growing dependence on reduction pathways based on an overshoot and, by extension, on the application of uncertain CDR technologies. This underscores that the time available to prevent or limit dangerous climate change is running out.

III.1.3 Translation of the 45% standard into soft law for companies

206 Section III.1.2 of this Explanatory Submission set out that it is widely recognised and accepted that global CO_2 emissions must have fallen by at least 45% by 2030, after which they must have decreased by 100% by 2050. This is necessary to prevent or limit dangerous climate change. It is therefore not surprising that the soft-law sources, which are based on climate science findings and, in part, on the UN climate regime, also take as their starting point that a global CO_2 mission reduction of 45% to 50% must have taken place by 2030. This applies not only to states, but also to companies.

207 One example is the Race to Zero Initiative.[290] In 2020, this Initiative brought together several existing climate protocols and guidelines, based on which criteria were developed that must be met as a minimum in order to be considered as a robust net-zero climate policy. The global halving of CO_2 emissions by 2030 was once again chosen as the central starting point:

> *"Race to Zero is the UN-backed global campaign rallying non-state actors - including companies, cities, regions, financial, educational, and healthcare institutions - to take rigorous and immediate action to halve global emissions within this decade and deliver a healthier, fairer, zero carbon world in time to achieve the goals of the Paris Agreement."*[291]

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[288] Exhibit MD-348 (Glasgow Climate Pact), preamble and recital (5). See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 473.
[289] Exhibit MD-355 (IPCC AR6 WGIII Summary for Policymakers), p. 21 (under C.1.2). See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 513.
[290] See also, in this regard, Section II.2.4 of this Explanatory Submission.
[291] Exhibit MD-353 (Race to Zero Criteria 2022), p. 1. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 502 up to and including 506.

208 It is not only the Race to Zero Initiative that links companies' climate obligations to the global reduction targets directly and on a scientific basis. This is also done in a large number of other soft-law sources from reputable institutions. Examples include the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook and the SBTi Report. The UNGP and the OECD Guidelines also consider science-based, company-specific reduction targets to be necessary. To avoid repetition, Milieudefensie et al. refer here to Section IV.5.4 of this Explanatory Submission, in which these soft-law sources, among other things, are discussed in further detail. For a proper understanding of this, the background, contents, usefulness, limitations and use of modelled reduction scenarios will first be addressed below.

III.2 The role of modelled reduction scenarios

III.2.1 Science and modelled reduction scenarios

209 Within climate science - more specifically: within science modelling - reduction scenarios are developed. In reduction scenarios, a variety of reduction options are mapped out for society, based on different starting-points and assumptions. The IPCC, which systematically compiles and catalogues such reduction scenarios, defines scenarios as:

> *"plausible description[s] of how the future may develop based on a coherent and internally consistent set of assumptions about key driving forces (e.g., rate of technological change, prices) and relationships. Note that scenarios are neither predictions nor forecasts, but are used to provide a view of the implications of developments and actions."*[292]

210 So although scenarios are plausible descriptions of how the future may develop based on certain assumptions, they do not contain any predictions or forecasts. Rather, they are developed to provide insight into the implications of specific developments and actions.[293]

211 Reduction scenarios are developed using computer models known as Integrated Assessment Models ("IAM"). Such IAM models are based on information about a wide range of economic sectors. IAM models also consider the interactions between the various economic sectors and with the economy as a whole. The GHG emissions associated with the various economic sectors also play a role in the development of reduction scenarios.[294] As a result, such reduction scenarios are based on a large

[292] See https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, pp. 1812 and 1813. See also Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 3.

[293] See https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, pp. 1812 and 1813. See also Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 3.

[294] See https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, p. 1805. See also Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 3.

number of highly diverse factual data. The interrelationships and the effects of this data from various economic sectors on global GHG emissions and the climate system are analysed in these reduction scenarios. Since these reduction scenarios are based on IAM models, they are also referred to as “modelled reduction scenarios”.

212 Within climate science, modelled reduction scenarios serve as a tool. For example, reduction scenarios are used to explore the possibilities for distributing emission reductions across (among other things) the regions of the world and different sectors, and over time. They also serve as an instrument for the quantitative exploration of the implications of (expected or potential) developments in global society, such as economic trends and the mitigation choices to be made by society. More specifically, modelled reduction scenarios clarify how much greenhouse gas will, on balance, still be added to the atmosphere in the case of certain economic developments and choices by society, and what temperature effects this will have.[295]

213 However, it is not the case that every modelled reduction scenario can also be directly applied in practice or that it is wise to directly apply every modelled reduction scenario in practice. This is because IAM models rely on certain assumptions that are not (necessarily) in line with findings from climate science and international agreements. On the contrary, in many cases, the modelling based on IAM models actually does not take findings from climate science and international agreements into account.[296] After all, modelling science does not focus on creating modelled reduction scenarios based on any form of consensus or agreements. Nor does the IPCC perform any correction for this. While the IPCC does collect a large number of modelled reduction scenarios, it does not perform any quality control on them; also, the IPCC itself does not develop modelled reduction scenarios based on climate science findings.[297]

214 This does not detract from the fact that modelled reduction scenarios play a very useful role. What modelled reduction scenarios show, for instance (regardless of how unrealistic the specific path prescribed by them may be) to what extent overshoot will occur in the case of certain CO_2 reductions and to what extent CDR technologies will need to be employed. Due to the diversity of reduction scenarios, not all of them are directly applicable, but they *do* provide insight into what should not be done – or should be done – in any event to limit global warming to 1.5°C. Therefore mitigation options can be explored, interpreted, assessed and adjusted based on the wide variety of

[295] Statement of Defence on Appeal of Milieudefensie et al. dated 18 July 2022, para. 532.
[296] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 87; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 11; Summons of Milieudefensie et al. dated 5 April 2019, para. 764.
[297] See Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 7.

modelled reduction scenarios, regardless of whether their prescribed reduction pathways are feasible.[298]

215 To explore, interpret and assess modelled reduction scenarios based on IAM models, the assumptions on which they are based and the limitations associated with them must of course be understood. Otherwise, the true value of these scenarios cannot be properly determined. Furthermore, without an understanding of the characteristics of IAM models that prevent the direct applicability of reduction scenarios based on them, it is impossible to determine how a modelled reduction scenario should be adjusted in order to make it applicable in practice. All of this will be discussed below.

III.2.2 Cost-effectiveness as a central assumption of modelled reduction scenarios

216 Although there is a wide variety of reduction scenarios based on IAM models, there is one important thing they all have in common: IAM models are largely based on the principle of cost-effectiveness. To this end, IAM models examine which climate measures are most cost-effective to implement over a longer time period - typically the period up to 2100[299]. This means that a cost-effectiveness analysis largely determines the model-based distribution of climate measures across the globe and across the oil, gas and coal sectors.[300]

217 The typical outcome of these model calculations is that most emission reductions occur in the countries and sectors where they can be achieved in the most cost-effective manner - and thus at the lowest cost.[301] As an example, reference can be made to the fact that reduction scenarios based on IAM models often place the largest share of the global reduction burden on developing countries, because emission reductions in the coal sector in developing countries are cheaper than emission reductions in the oil and gas sector in developed countries.[302]

218 However, such a cost-effective model distribution is not a fair or real-world distribution. As the IPCC writes:

> *"IAMs necessarily make simplifying assumptions and therefore results need to be interpreted in the context of these assumptions* (...)*. Equity hinges upon ethical and normative choices. As most IAM pathways follow the cost-effectiveness approach, they do not make any additional equity assumptions* (…)*. Regional IAM results need thus to be assessed*

[298] See Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), pp. 3 and 4. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 July 2022, paras. 532 up to and including 534.
[299] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 89.
[300] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5, 6 and 30; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 531 and 534.
[301] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 30; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 535.
[302] See, in this regard, Section III.2.3 of this Explanatory Submission.

> *with care, considering that emission reductions are happening where it is most cost-effective, which needs to be separated from the fact of who is ultimately paying for the mitigation costs. Cost-effective pathways can provide a useful benchmark, but may not reflect real-world developments."*[303]

219 Since IAM models base the distribution of the reduction burden across different countries and sectors on cost-effectiveness, the IPCC states that care must be taken when this distribution is interpreted. After all, reduction scenarios based on IAM models are not aimed at a distribution of the reduction burden that is fair and feasible in the real world. When the reality of the distribution is assessed, allowance must therefore also be made for what constitutes a fair and feasible distribution of the mitigation burden.[304] For this reason, the IPCC reports consistently include disclaimers referring to this issue.[305]

220 The central principle of cost-effectiveness translates into four concrete limitations that are inherent in reduction scenarios based on IAM models:

(a) IAM models place the heaviest reduction burden on developing countries (Section III.2.3 of this Explanatory Submission);

(b) IAM models rely very heavily on the assumption of large-scale CDR deployment (Section III.2.4 of this Explanatory Submission);

(c) IAM models use a high discount rate (Section III.2.5 of this Explanatory Submission); and

(d) IAM models do not allow for (avoided) climate damage (Section III.2.6 of this Explanatory Submission).

221 These limitations, which are also recognised by the IPCC - and which must be understood in order to explore, interpret, assess and adjust modelled reduction scenarios based on IAM models[306] - will each be discussed in turn below.

III.2.3 IAM models place the heaviest reduction burden on developing countries

222 First, the central starting-point of cost-effectiveness means that reduction scenarios based on IAM models place the heaviest reduction burden on developing countries. In those countries, the greatest gains can be achieved in an approach based on cost-

[303] Exhibit MD-360 (IPCC AR6 WGIII H3), pp. 3 up to and including 13 and 3 up to and including 14. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 537 up to and including 539.
[304] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 30; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 534 up to and including 539.
[305] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 539.
[306] See, in this regard, Section III.2.1 of this Explanatory Submission.

effectiveness. The reason for this is that the use of coal is more CO_2-intensive than the use of oil and gas, meaning that more CO_2 emissions are released when using one unit of coal than when using one unit of oil or gas.[307] For this reason, some modelled reduction pathways even require a decrease in the use of coal by more than 75% by 2030.[308]

223 However, it is highly unrealistic to assume that such a reduction in the use of coals in developing countries is actually feasible and efficient without considering a real-world distribution.[309, 310] There are several reasons for this:

(a) Developing countries are heavily dependent on coal for their energy supply. Approximately 80% of the global use of coal occurs in developing countries.[311] Consequently, developing countries are also far more dependent on coal than developed countries, which, in contrast, use much more oil and gas. About 50% of the global oil and gas production is consumed by the approximately 1.3 billion people living in developed (Annex I) countries. The other 50% is consumed by the approximately 6.4 billion people in developing (non-Annex I) countries.[312] As a result, far more oil and gas is used per capita in developed countries than in developing countries. A disproportionate reliance on the accelerated phase-out of coal use would thus place a significantly heavier burden on developing countries and their populations than on the populations of developed countries, which rely more on oil and gas use.[313]

(b) As for the global energy consumption from fossil fuels, two-thirds originates from oil and gas and one-third from coal.[314] The quantity of oil and gas that will need to be reduced globally on the path to net zero is twice as large as the quantity of coal that will need to be reduced.[315] Although coal results in higher CO_2 emissions per unit of energy, as follows from the above, the use of oil and gas is responsible for 48% and the use of coals is responsible for 33% of global CO_2 emissions.[316] On balance, the production and use of oil and gas thus make the largest

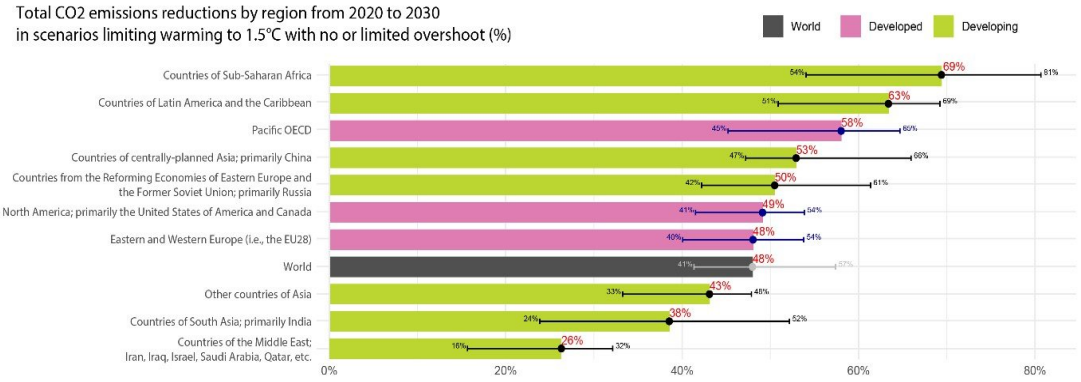
[307] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 530 and 531.
[308] See, for example, Exhibit S-123 (Expert Report by A. Hawkes dated 15 December 2023), p. 36.
[309] See, in this regard, Section III.2.2 of this Explanatory Submission.
[310] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 50 and 53; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 545 and 546.
[311] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5, 6 and 25; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 57; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 526 (including table).
[312] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 525 and 526 (including table).
[313] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 524.
[314] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 528
[315] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 529.
[316] See also, in this regard, Section II.1.1 of this Explanatory Submission.

contribution to the climate problems.[317] This is yet another reason why focusing (solely) on reducing the use of coal cannot result in the emission reductions necessary on a global scale.[318]

(c) Developing countries, which rely heavily on coal for their energy supply, generally have the most limited capabilities for transition. In modelled reduction scenarios emphasising coal reduction, regions such as Sub-Saharan Africa, South America and Asia must take the lead in the mitigation efforts, whereas this cannot be expected of those countries in reality.[319] Countries such as China and India, which rely equally heavily on coal consumption for their energy supply, also have limited transition capabilities to move away from coal quickly.[320] This also follows from findings of the IEA.[321] Since reduction scenarios based on IAM models take little or no account of the social, political and institutional factors that are particularly relevant to the transition capabilities,[322] they cannot be realised in the real world.[323]

224 The above is illustrated by the figure below.[324] This figure shows how 97 reduction scenarios assessed by the IPCC and based on IAM models that start out from limiting global warming to 1.5°C (with no or limited overshoot) distribute the CO_2 emission reduction target across the globe:[325]

[317] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 530.
[318] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 529.
[319] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 10, 22, 30, 31, 33 and 36 up to and including 41; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 467 and 524 up to and including 536.
[320] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5, 6 and 39; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 58 (including the table); Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 523.
[321] Exhibit MD-553 (IEA Coal in Net Zero Transitions 2022), p. 33. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 58 and 59; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 523.
[322] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 39 and 40.
[323] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 41; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 59; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 537.
[324] Shell contested the relevance of this figure on Appeal (Shell's Reply on Appeal dated 12 April 2024, para. 2.2.6). Because the Court of Appeal did not give its opinion on this matter either, that figure and the related submissions of Milieudefensie et al. have a hypothetical factual basis at the very least.
[325] Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 9.



225 In these modelled reduction scenarios, various developing regions must take the lead in reducing CO_2 emissions. Sub-Saharan Africa - one of the poorest regions in the world - faces the largest reduction target and must have reduced its total emissions by as much as 69% by 2030. South America and the Caribbean follow closely behind, with an emission reduction of 63% by 2030. China and Russia are also assigned a greater reduction target than the United States, Canada and Europe, for which the percentages are close to the global average reduction rate.[326]

226 The reductions prescribed in the modelled reduction scenarios for developing countries and the coal sector are not only unrealistic, but also in breach of international agreements. After all, under the UN Climate Convention and the Paris Agreement, it is precisely the developed countries that are obliged to take the lead in combating dangerous climate change and also to limit their GHG emissions economy-wide to that end.[327] Developing countries, on the other hand, have less stringent obligations. They must continue to strengthen their mitigation efforts and are encouraged to gradually transition to economy-wide emission reduction targets.[328] This was reaffirmed by all the countries that are party to the Paris Agreement at COP28, the climate conference in Dubai.[329]

227 These limitations of reduction scenarios based on IAM models are also widely recognised in climate science. Both the IPCC[330] and the UNEP[331] acknowledge that a fair distribution of efforts is essential for a successful implementation of the Paris

326 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 34 up to and including 38.
327 Article 4(2) UN Climate Convention; Article 4(4) Paris Agreement.
328 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 180. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 31 up to and including 34.
329 Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 38.
330 See https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, p. 1468. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 19 and 20.
331 Exhibit MD-523 (UNEP Emissions Gap Report 2023), p. 36. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 15 up to and including 17.

Agreement. This implies that countries with greater transition capabilities and a larger historical responsibility must take more ambitious climate measures. This is an application of the CBDR principle, which will be discussed in more detail in Section IV.5.3.3 of this Explanatory Submission. According to the IPCC[332] and the UNEP[333] , modelled reduction scenarios do not sufficiently allow for this. In those scenarios, the phase-out of coal proceeds at such a high pace that it is neither realistic nor fair for coal-dependent countries. Conversely, the lower reduction rates for oil and gas result in transition paths that are too slow for developed countries. The use of oil and gas will therefore need to decrease much faster, requiring developed countries to make greater efforts. Only in this way can all countries and their industries collectively achieve a feasible pace for the phase-out of coal. According to the IEA, this pace means that developed countries must have reduced their emissions nearly twice as fast as developing countries by 2030.[334]

228 It follows from the above that reduction scenarios based on IAM models often place the reduction burden largely on developing countries and the coal sector. This does not do any justice to the social, economic, political and legal reality. Such reduction scenarios therefore do not result in a fair and legitimate distribution of efforts that is sufficiently grounded in the real world. In that world, the modelled coal reductions cannot and will not take place within the modelled short term. This entails that the emission reductions in developed countries and the oil and gas sector must take place faster and more steeply than the reductions that follow from the modelled reduction scenarios.

III.2.4 The IAM models rely very heavily on the hypothesis of large-scale CDR deployment

229 A second limitation of IAM models relating to the principle of cost-effectiveness is their assumption that CDR technologies will be available on a large scale in future that can remove the excess CO_2 emissions from the atmosphere later in time. After all, in the models, the deployment of CDR technologies leads to an artificial increase in the current carbon budget. IAM models therefore have an inherent tendency not to already incur reduction costs now, but to push back the reduction burden into the future, when the use of CDR technologies will perhaps be possible in the modelled world. This explains why, in modelled reduction scenarios, fewer CO_2 emissions need to be reduced in the short term.[335] This is cost-effective from a modelling perspective.

230 The consequence of this, however, is that the possibility to follow reduction scenarios based on IAM models depends to a large extent on the development and potential use

[332] Exhibit S-140 (IPCC AR6 WGIII), pp. 304 and 305.
[333] Exhibit MD-523 (UNEP Emissions Gap Report 2023), p. 36. See also the Oral Arguments (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 18 up to and including 22.
[334] Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 59. See also the Oral Arguments (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 27.
[335] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 54 up to and including 87.

of CDR technologies. This entails significant risks. After all, if it proves to be impossible in the future – for whatever reason - to remove the excess CO_2 emitted from the atmosphere, the carbon budget will, in hindsight, turn out *not* to be larger than the calculation in the model. This would mean that the global warming would be much higher and that any overshoot could not be reversed.[336]

231 That risk is not merely hypothetical. Section II.1.6 of this Explanatory Submission elaborately discussed the risks and limitations of CDR technologies in detail. In that context, the following points (among others) were addressed.

(a) At this point in time, CDR technologies are available only on a very limited basis. It is highly questionable whether CDR technologies can be deployed in time - or even at all - on the scale and in the manner required for this purpose. At present, CDR technologies are still only in the demonstration phase of development, and no significant removal of emissions from the atmosphere is taking place. For the time being, no one knows whether the concept of negative emissions (on a large scale) will work.

(b) There are sustainability limits that determine the extent to which CDR technologies can be scaled up. After all, scaling up CDR technologies is associated with significant environmental and socio-economic risks related to food production, biodiversity, water availability and the energy and finance required for the scale-up.

(c) There are significant geographical, practical, logistical and financial limits to the potential of CDR. For example, the capture of 2 $GtCO_2$ per year - namely, 1/20th of the annual CO_2 emissions of 40 Gt – would require 135 million hectares of land. That is roughly the total land surface of Peru, the 20th largest country in the world. The annual capture and storage of the required amount of CO_2 would require a new, globally operating industry roughly the size of the current oil industry, which would cost USD 1.3 trillion per year.

(d) Even if it were to turn out later this century that an overshoot could be successfully reversed through the use of CDR technologies, global warming will still exceed the dangerous 1.5°C threshold in the meantime, with multiple negative consequences, such as greater climate damage, but also major climate risks, including the crossing of tipping points in the interim.

232 It is therefore highly uncertain whether the CDR hypothesis will ever prove true. This is now also acknowledged by the fossil-fuel industry itself.[337] Nevertheless, IAM models

[336] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 62.
[337] See, for example, https://argos.vpro.nl/artikelen/fossiele-industrie-lijkt-te-twijfelen-aan-co2-opslag.

rely heavily on CDR technologies. This is confirmed by the IPCC. According to the IPCC, the median of the required CO_2 removal from the atmosphere using CDR technologies in the reduction scenarios based on IAM models which start out from limiting global warming to 1.5°C (with no or limited overshoot) is 670 $GtCO_2$. This is more than 2.5 times the carbon budget now remaining and represents over 17 times the current annual global CO_2 emissions. This 670 $GtCO_2$ would therefore need to be fully captured and safely stored.[338]

233 It is difficult to grasp just how much this is and what an enormous task this entails. If CO_2 capture had begun in 2020 using CDR technologies, 8.4 $GtCO_2$ would have to be removed from the atmosphere and stored every year until 2100 (and so during a period of eighty years). That is an amount of CO_2 per year that exceeds the combined total annual CO_2 emissions of the United States and the EU in 2022. That is not realistic.[339]

234 The IPCC,[340] the UNEP[341] and the OECD[342] have therefore explicitly been warning for a long time against taking modelled reduction scenarios depending on the uncertain scaling up of CDR as a starting-point. The UN Special Rapporteur on Human Rights and the Environment has also warned that many countries and companies are hiding behind unproven CDR technologies in their climate plans and has indicated that they cannot be a substitute for limiting emissions from fossil fuels.[343]

235 Relying on modelled reduction scenarios that depend on CDR technologies is also in conflict with treaty obligations. After all, under the Paris Agreement, countries are required to set reduction targets that represent the highest possible level of ambition and actually lead to rapid CO_2 emission reductions.[344] Reduction scenarios that rely heavily on CDR technologies conflict with these treaty provisions, given the associated risks and uncertainties. After all, emission pathways dependent on CDR technologies kick the reduction can down the road, to the detriment of the present younger and future generations, and do not focus on the highest possible levels of ambition for emission reductions in the short term.[345] This is at odds with the precautionary principle and the principle of intergenerational justice, which will be comprehensively discussed in Sections IV.5.3.1 and IV.5.3.2 of this Explanatory Submission. In line with this, the ICJ

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338 Exhibit S-140 (IPCC AR6 WGIII), p. 353. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 63 and 64.
339 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 65 and 66.
340 Exhibit MD-136 (IPCC SR 2018), p. 95. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 750.
341 Exhibit MD-211 (UNEP Emissions Gap Report 2013), p. 21. See also the Summons of Milieudefensie et al. dated 5 April 2019, para. 758. See also the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 7.2.9 and 7.2.10.
342 Exhibit MD-507 (OECD Climate Tipping Points 2022), pp. 60, 66 and 67. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 98.
343 Exhibit MD-385 (Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 26 July 2022), pp. 18 and 19. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 808(iv).
344 Article 4(2) and (3) Paris Agreement.
345 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 80.

recently reaffirmed that the highest possible ambition of countries should be aimed at limiting global warming to 1.5°C.[346] Following a reduction pathway that makes the achievement of this goal dependent on uncertain future conditions is inconsistent with this and should be avoided as much as possible.

236 It follows from the foregoing that reduction scenarios based on IAM models compensate the lack of short-term emission reductions and the resulting surplus of CO_2 emissions in the model with the highly uncertain hypothesis of CDR. In this way, the reduction efforts are pushed back into the future. This is not only highly risky, but also in breach of the treaty agreements and the general legal principles that they (also) include. The irreversible damage and risks that may arise in the meantime - and that will arise if the necessary CDR technologies fail to become available on a large scale - are completely ignored in such models. The use of oil and gas will therefore need to decline much more rapidly. This also implies that the emission reductions in developed countries and the oil and gas sector must be faster and steeper than those that follow from the modelled reduction scenarios.

III.2.5 The IAM models use a high discount rate

237 A third limitation of IAM models stemming from the central assumption of cost-effectiveness is the fact that IAM models typically use a high discount rate. The discount rate is a percentage allowing costs expected in the future to be converted into a net present value. This makes it possible to compare costs incurred at different points in time with each other. A discount rate essentially describes the extent to which something in the future is viewed as being cheaper compared to the present.[347]

238 The higher the discount rate, the lower the net present value of costs expected in the future will be. Conversely, the use of a high discount rate means that, in the model, taking climate action in the future becomes relatively inexpensive compared to taking climate action immediately. As a result, it is more attractive in the model to implement climate measures in the future rather than in the short term. Said in other words: it is more cost-effective.[348] So using a higher discount rate leads to the postponement of climate action to a later date, while the use of a lower discount rate will actually lead to more climate action in the short term.[349]

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[346] ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 224.
[347] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 88 up to and including 99.
[348] Exhibit MD-517 (Article by S. Hollnaicher, 2022), p. 6; Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 6; Exhibit MD-567 (Expert Statement by L. van Beek dated 29 February 2024), p. 15. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 88 up to and including 90.
[349] Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 6; Exhibit MD-567 (Expert Statement by L. van Beek dated 29 February 2024), p. 15. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 92.

239 This can be illustrated with an example. A large number of reduction scenarios based on IAM models that start out from limiting global warming to 1.5°C (with no or limited overshoot) use a discount rate of 5%.[350] In the hypothetical situation where a climate measure would be implemented in 2076 that would cost EUR 1 billion at that point in time, the conversion of the costs to be incurred in 2076 to 2026 using a discount rate of 5% means that taking a similar climate measure today has a net value of only EUR 90 million. That is 9% of the value that a similar measure would have in fifty years' time. Taking climate measures in the future will therefore be more cost-effective than taking climate measures now. This results in a significant cost advantage in the model calculation.[351] This assumption of IAM models comes on top of the fact that the world is made dependent in this way on CDR technologies for which it is uncertain whether they can ever be used (on the required scale).[352]

240 Furthermore, the consequence of applying a high discount rate is that the present younger and future generations will not only face more severe dangerous climate change, such as global warming of more than 1.5°C and a greater risk that tipping points are exceeded, but they will also be confronted with the practical and financial challenge of cleaning up the pollution caused by the present generations later this century. The present younger and future generations will have to make enormous (financial) efforts to be able to determine whether reducing global warming to less than 1.5°C is possible at all, and will subsequently have to bear high costs to remove the emitted CO_2 from the atmosphere and mitigate any climate risks that have already materialised. This is in breach of both the Paris Agreement (that requires countries to set reduction targets that represent the highest possible level of ambition and lead to rapid CO_2 emission reductions)[353] and the precautionary principle (implied in that Agreement) and the principle of intergenerational justice, which latter principles will be discussed in detail in Sections IV.5.3.1 and IV.5.3.2 of this Explanatory Submission.

241 In this context, climate science proceeds on the assumption that a lower discount rate - such as 2% or 3% - is preferable when modelled mitigation scenarios are developed.[354] In such a situation, the present generations assume greater responsibility for doing what is necessary and possible to help limit global warming to 1.5°C. This prevents greater global warming, reduces the risk that tipping points are exceeded and makes

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350 Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 6. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 91.

351 Exhibit MD-517 (Article by S. Hollnaicher, 2022), pp. 6–7. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 91.

352 For more on the uncertainties surrounding CDR technologies, see Sections II.1.6 and III.2.4 of this Explanatory Submission.

353 Article 4(2) and (3) Paris Agreement. See also, in this regard, Section III.2.4 of this Explanatory Submission.

354 Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 6; Exhibit MD-567 (Expert Statement by L. van Beek date 29 February 2024), p. 15. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 92.

the well-being of the present younger and future generations less dependent on uncertain CDR technologies for the removal of atmospheric CO_2.[355]

242 The above is endorsed by the IPCC:

> *"The modelled cost-optimal balance of mitigation action over time strongly depends on the discount rate used to compute or evaluate mitigation pathways: lower discount rates favour earlier mitigation, reducing both temperature overshoot and reliance on net negative carbon emissions."*[356]

243 The assumption of cost-effectiveness based on a higher discount rate is, for that matter, not entirely accurate. Findings from the UNEP, the ECB and the IMF show that while rapid climate action does require greater investments in the short term, the costs and economic consequences in the longer term are actually more favourable compared to a scenario in which climate action is postponed. Moreover, the costs of climate measures in the case of rapid climate action are lower than the damage that will arise if those measures are postponed.[357] As a result, the costs of postponed climate action are greater, on balance. So in the real world – as opposed to the world of the models - it is not more cost-effective to postpone the reduction efforts and only take the necessary climate measures in the future. The opposite is true.

244 It follows from the above that IAM models often use a high discount rate, which means that it is more cost-effective, in the model, to not already take climate measures now, but to only do so in the future. However, this is not true in the real world, because, there, the postponement of the reduction efforts will increase not only the climate risks, but also the costs of combating dangerous climate change. Moreover, this is in conflict with the precautionary principle and burdens the present younger and future generations in a disproportionate manner. The use of oil and gas will therefore need to decline much more rapidly, meaning that developed countries will have to make greater efforts. This, too, means that the emission reductions required in developed countries and the oil and gas sector must be faster and steeper than those that follow from the modelled reduction scenarios.

III.2.6 The IAM models do not consider (avoided) climate damage

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355 Exhibit MD-567 (Expert Statement by L. van Beek dated 29 February 2024), p. 15. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 97.

356 Exhibit S-140 (IPCC AR6 WGIII), p. 362. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 97.

357 Exhibit MD-522 (UNEP Emissions Gap Report 2022), p. 32; Exhibit MD-531A (ECB Press Release dated 6 September 2023), pp. 1 up to and including 3; Exhibit MD-531B (ECB Occasional Paper Series, the Road to Paris 2023), pp. 6 up to and including 10; Exhibit MD-579F (IMF, Benefits of Accelerating the Climate Transition Outweigh the Costs 2023), pp. 1 up to and including 3. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024.

245 Fourth, IAM models fail to consider the damage that is caused by a lack of rapid climate action. If no climate measures are taken, the costs of such measures are saved in the short term, but there will also be additional damage to the climate. That damage must be undone in the future, to the extent that this is actually still possible then. Inaction will therefore also lead to high and ever-increasing costs, which costs are not factored into IAM models at all. This also works the other way round: if far-reaching climate measures *are* taken straight away, several climate risks with potentially irreversible damage will be avoided and high costs will actually be avoided. For this reason, too, it is tempting in reduction scenarios based on IAM models to push climate measures back into the future as much as possible and to kick climate action down the road.[358]

246 The rationale behind this mechanism is that IAM models typically perform calculations based on a comparison with a reference scenario in which damage caused by climate change does not exist. Therefore the reference framework against which climate action is measured is a world in which the economy continues to function normally and there are no negative impacts from climate change.[359] As a result, every climate measure is viewed solely as a cost item and not as a measure that also saves costs. This presents a misleading picture of the total costs of climate measures for society. If the models *were to* consider the benefits of avoided climate damage, this would lead to an acceleration of climate action in the short term, also in reduction scenarios based on cost-effectiveness.[360]

247 In the real world, however, very significant damage *is* caused by climate change. This damage will increase as global warming continues because climate measures are not timely taken. Furthermore, the longer or higher the global temperature remains above 1.5°C - and overshoot occurs - the greater the risk that tipping points are passed, with all the attendant (potentially irreversible) consequences.[361] Due to these serious consequences, it is of utmost importance that the passing of such tipping points is avoided.[362] IAM models do not account for such effects and the damage caused by them.[363]

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[358] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 100 up to and including 111.

[359] Exhibit MD-522 (UNEP Emissions Gap Report 2022), p. 31; Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), pp. 6 and 7. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 101.

[360] Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), pp. 6 and 7. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 101.

[361] See also Sections II.1.2 and II.1.5 of this Explanatory Submission.

[362] Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 4, 5, 11, 12, 47 up to and including 68 and 98; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 10; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 35 under (5) and (22), 612 up to and including 615; Notes of the Oral Arguments (9) in the First Instance of Milieudefensie et al. dated 17 December 2020, paras. 22 up to and including 37; Summons of Milieudefensie et al. dated 5 April 2019, paras. 13, 436, 464, 492 and 493.

[363] Exhibit MD-495A (IPCC SR 2023), p. 87, Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), p. 12; Exhibit MD-567 (Expert Statement by L. van Beek dated 29 February 2024), pp. 16 and 17. See also the Oral

248 Partly for this reason, many reduction pathways based on IAM models have the character of overshoot scenarios. Since (avoided) climate damage does not play any part in the cost-effectiveness analysis, there is also no incentive in such scenarios to prevent overshoot.[364] However, this *is* necessary to prevent dangerous climate change, as the IPCC has also consistently stressed.[365] Moreover, as also explained in the context of the other limitations associated with IAM models, a reduction scenario in which the climate efforts are pushed back into the future in the model is incompatible with the Paris Agreement; this Agreement requires countries to set reduction targets that represent the highest possible level of ambition and lead to fast CO_2 emission reductions.[366] Such a reduction scenario is also incompatible with the precautionary principle and the principle of intergenerational justice (which are also implied in the Paris Agreement), which principles will be discussed in detail in Sections IV.5.3.1 and IV.5.3.2 of this Explanatory Submission.

249 Therefore the failure to consider (avoided) climate damage in reduction scenarios based on IAM models also means that the reduction efforts are pushed back into the future. This is not only highly risky, but also contrary to the treaty agreements. The use of oil and gas will therefore need to decline much more rapidly compared to what modelled reduction scenarios prescribe, which requires developed countries to make greater efforts. This also implies that the emission reductions in developed countries and the oil and gas sector must be achieved faster and be steeper than what follows from the modelled reduction scenarios.

III.2.7 A normative correction of modelled reduction scenarios is necessary

250 Cost-effectiveness is therefore often the central premise of IAM models. In concrete terms, this means that IAM models always place cost-effectiveness at the centre in the development of reduction scenarios. For this reason, not every modelled reduction scenario can be directly applied in the real world. This is related to the fact that the principle of cost-effectiveness leads to four concrete limitations in IAM models, namely they (i) place the heaviest reduction burden on developing countries, (ii) rely heavily on the hypothesis of the large-scale availability of CDR, (iii) apply a high discount rate, and (iv) do not consider (avoided) climate damage.

251 The consequence of these limitations is that modelled reduction scenarios generally start out from (much) less climate action in the short term than is necessary and, by extension, from reduction percentages for the various relevant actors that are too low.

Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 102.

364 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 102 up to and including105.

365 Exhibit MD-495A (IPCC SR 2023), p. 87. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 103.

366 Article 4(2) and (3) Paris Agreement. See also, in this regard, Sections III.2.4 and III.2.5 of this Explanatory Submission.

However, this does not mean that reduction scenarios based on IAM models do not have any value. Section III.2.1 of this Explanatory Submission already noted that modelled reduction scenarios provide insight into what should not be done – or what should be done - to limit global warming to 1.5°C. Mitigation options can therefore be explored, interpreted, assessed and corrected, based on the wide variety of modelled reduction scenarios, regardless of whether they prescribe realistic reduction pathways.

252 In this way, it is also possible to determine what climate action must be taken in the short term and, by extension, what reduction percentages apply to the various actors. After all, against the background of the contents of modelled reduction scenarios and the underlying limitations, normative choices can be made fort the reduction pathway to be used as the starting-point in reality.

253 This is in line with the opinion of Procurator General Langemeijer and Advocate General Wissink in the *Urgenda* judgment:

> 6.8 *"*(…) *The division of the reduction efforts needed worldwide cannot be defined in terms of physics, but it can be reasoned using broad, common normative premises that are embedded in the UNFCC, for example*".[367]

254 A *normative correction* must therefore be made of the contents of modelled reduction scenarios that are based on cost-effectiveness. By performing such a correction, the world of the models (on which reduction scenarios are based) and the real world (in which the reductions must be achieved) are aligned. This then leads to a fair reduction scenario that can actually be followed in the real world and, by extension, to concrete reduction percentages for the various relevant actors.

255 This does of course require that the limitations inherent to the IAM models for which a normative correction must be carried out are understood. These limitations have been explained in detail above. When those limitations were discussed, it was also described that they result in modelled reduction scenarios that arrive at reduction percentages for the oil and gas sector that are too low in reality, which means they conflict with normative principles that are embedded in treaty law and adopted in various soft-law sources, such as the precautionary principle, the principle of intergenerational justice and the CBDR principle. A normative correction must therefore be made to allow for them. This correction should result in higher reduction percentages for the oil and gas sector than those prescribed by the modelled reduction scenarios. The manner in which this correction can be made will be discussed in Section VI.3.7 of this Explanatory Submission.

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[367] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*).

256 By performing such a normative correction, the shortcomings in the modelled reduction scenarios consisting of a failure to sufficiently account for, for example, the precautionary principle, the principle of intergenerational justice and the CBDR principle, can be remedied. This implies that faster and steeper emission reductions in developed countries and the oil and gas sector are necessary than those that follow from the modelled reduction scenarios. The manner in which this normative correction is made based on the above-mentioned principles will be explained in more detail when those principles are addressed in Section IV.5.3 of this Explanatory Submission. Chapter VI of this Explanatory Submission will then explain how this all plays out in the determination of a concrete reduction obligation for Shell.

III.3 The feasibility of the required emission reductions in relation to energy security

257 It was discussed in great detail above that the global CO_2 emissions must be significantly reduced in the short term. To be able to limit global temperature warming by 1.5°C, a global CO_2 reduction of 45% must be achieved by 2030, followed by reaching net-zero CO_2 emissions by 2050. This not only requires that rapid and deep emission reductions take place in all sectors within this decade, but also that emissions from all fossil fuels must be scaled down. This also follows from the modelled reduction scenarios, which serve as important tools in determining and shaping the reduction efforts to be made.

258 This necessity, however, raises the question whether the required emission reductions can actually also be achieved in practice without jeopardising our energy security. Energy security encompasses both the uninterrupted access to energy in sufficient quantities (security of supply) and the availability of this energy at affordable and stable prices (affordability).[368] Both aspects may mean that a stable and reliable access to energy is *not available to all*. After all, stable and reliable access to energy will not only be *not available to all* if there is insufficient energy available, but also if energy is so expensive that it is only available to those who can afford it.[369]

259 In Shell's view, however, that is not possible. It has consistently referred to this issue before the lower courts as the "energy trilemma"[370] and does this again in the present proceedings before the Supreme Court.[371] In this view, a balance must be struck between (i) the climate interest, (ii) the interest of security of supply, and (iii) the interest

[368] See, for example, the definition used by the EEA: *"Energy security or security of supply can be defined as the availability of energy at all times in various forms, in sufficient quantities, and at reasonable and/or affordable prices."* See https://www.eea.europa.eu/help/glossary/eea-glossary/security-of-supply.

[369] This has also been found by the IEA: *"Energy security is not just about having uninterrupted access to energy, but also about securing energy supplies at an affordable price*." See Exhibit MD-480 (IEA World Energy Outlook 2022), p. 184.

[370] See, for example, the Speaking Notes on Appeal (Hearing Day 1 – Part 1 of 2) of Shell dated 2 April 2024, paras. 1.4.2 up to and including 1.4.4.

[371] See, for example, the Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 26a, 49, 52, 90, 92, 99, 214 and 228.

of energy affordability. As the use of the word "trilemma" already demonstrates, these interests cannot all be served simultaneously and are even mutually contradictory, according to Shell. To safeguard the security of supply and the affordability of energy, Shell believes that a slower energy transition is called for and that the use of oil and gas must be continued as part of the energy supply. By arguing this, Shell is essentially making a case - as the oil and gas industry in a broader sense has done for a long time - [372] , for *fossil* energy security.

260 This premise of an energy trilemma is false. Contrary to what Shell argues, the climate interest and the interest of energy security - which encompasses both the security of supply and the affordability of energy - can (and must) be pursued simultaneously. This is related to the fact that there are already many alternatives to oil and gas and that these alternatives are being scaled up at a high pace. Moreover, phasing out oil and gas use will not only serve the climate interest, but also the energy security, partly due to the volatility of oil and gas prices and the influence of geopolitical situations. The interests that Shell is pitting against one another thus actually point in the same direction. This is the direction of rapid and deep emission reductions by moving away from fossil fuels and - as a result - making room for widely available alternative, and affordable, energy sources. The climate interest and the interest of energy security are therefore not in conflict with each other, but should be synergistically pursued. From this it also follows that the necessary emission reductions can, in practice, be achieved in an orderly fashion without jeopardising the energy security.

261 Milieudefensie et al. will explain this in more detail below, by referring to three aspects, each of which supports the above conclusion. It will first be discussed that the international goals and agreements regarding the fight against dangerous climate change assume that the required emission reductions should not cause problems in the area of energy security (Section III.3.1 of this Explanatory Submission). Next, it will be explained that it is also otherwise established that renewable energy is and will become available on such a scale that the energy security can be guaranteed (Section III.3.2 of this Explanatory Submission). Finally, Milieudefensie et al. will describe that the energy security is actually served by moving away from the use of oil and gas for several reasons (Section III.3.3 of this Explanatory Submission).

III.3.1 Emission reductions are deemed to be feasible without compromising energy security

262 The fact that the necessary emission reductions can be achieved without compromising the interest of energy security and without in any way compromising energy security follows, first and foremost, from the international goals and agreements regarding the prevention or mitigation of dangerous climate change. These goals and agreements assume that the necessary CO_2 reductions are indeed feasible and can be

[372] See, in this regard, Section II.3.1 of this Explanatory Submission.

accomplished without compromising energy security. If that were not the case, those goals and agreements would in fact be meaningless and serve no real purpose in solving the climate crisis.

263 The assumed feasibility of the reduction efforts clearly follows from the Sustainable Development Goals ("SDGs") adopted by the UN in 2015.[373] These 17 SDGs, which effectively create a universal agenda for sustainable development covering various social, economic and environmental aspects, aim to end poverty, protect the planet and ensure peace and prosperity for all by 2030. The SDGs thus apply to all countries (developed and developing) and form an integrated, indivisible whole, with goals that reinforce each other.[374] Against this backdrop, the Paris Agreement was formed months later. The SDGs and the Paris Agreement thus form a coherent whole.[375]

264 The character of the SDGs as an integrated and indivisible whole with goals that mutually reinforce each other implies that the interests covered by them must be synergistically pursued and achieved. This also follows from the SDGs themselves. For example, SDG 7, which concerns the interest of energy security, reads as follows:

> *"Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all."*[376]

265 According to SDG 7, energy must not only (on the one hand) be *affordable* and *reliable*, but also (on the other hand) *sustainable* and *modern*. This interest of *sustainable* energy is also expressed in one of the sub-goals of SDG 7:

> *"Goal 7.2. By 2030, increase substantially the share of renewable energy in the global energy mix."*[377]

266 The interest of energy security is thus linked in SDG 7 to the climate interest. This is also obvious. A focus on fossil-energy security would mean that other SDGs - such as SDG 13, which calls for urgent action to combat climate change and its impacts[378] - could never be achieved. After all, it is absolutely essential to this end that the global CO_2 emissions – to which the oil and gas industry contributes by no less than 48% - must be reduced in the short term. It is therefore not the case that the SDGs are merely interconnected in a general sense and must be achieved simultaneously. SDG 7

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373 Exhibit MD-335 (UN General Assembly Resolution 70/1). See, for a detailed discussion of this point, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 13 up to and including 26; and the Notes of the Oral Arguments (5) in the First Instance of Milieudefensie et al. dated 3 December 2020, paras. 7 up to and including 44.
374 Exhibit MD-335 (UN General Assembly Resolution 70/1), pp. 1 and 2.
375 Notes of the Oral Arguments (5) in the First Instance of Milieudefensie et al. dated 3 December 2020, paras. 10 up to and including 15.
376 Exhibit MD-335 (UN General Assembly Resolution 70/1), pp. 14 and 19.
377 Exhibit MD-335 (UN General Assembly Resolution 70/1), p. 19.
378 Exhibit MD-335 (UN General Assembly Resolution 70/1), pp. 14 and 23.

(energy security) and SDG 13 (climate change) are linked to each other and must therefore be synergistically pursued all the more.

267 The above is widely recognised. For example, the IPCC has emphasised that achieving energy security and preventing or limiting dangerous climate change go hand in hand:

> *"The sustainable development goal of affordable and clean energy (SDG 7) specifically targets access to renewable energy and energy-efficiency, which are important to ambitious mitigation and limiting warming to 1.5°C."*[379]

268 Within the UN, too, energy security and achieving the goals of the Paris Agreement are increasingly linked to each other:

> *"Participants stressed that accelerating the implementation of Agenda 2030 is critical for more effective climate action. The energy transitions envisaged in SDG 7 on sustainable energy for all in particular will contribute significantly to lowering GHG emissions relative to business-as-usual pathways, thereby contributing to the objectives of the Paris Agreement."*[380]

269 In the context of the UN climate conferences, this is also systematically done. Both during COP26, the Glasgow climate conference,[381] and on the occasion of COP28, the climate conference of Dubai,[382] it was emphasised that limiting global warming to 1.5°C in line with the Paris Agreement is crucial for achieving the SDGs. In this context, the use of fossil fuels must be phased out, while investments must be simultaneously made in sustainable alternatives. From this, the synergy between preventing or limiting dangerous climate change and achieving the other SDGs, which specifically include the protection of energy security, also follows.

270 The background to this is not only formed, as described above, by the circumstances that (i) the SDGs constitute an integrated and indivisible whole that must be achieved simultaneously and (ii) SDG 7, regarding energy security, links up with the fight against climate change. Within the SDGs, the response to dangerous climate change in a general sense has a special status. This explicitly follows from the resolution in which the SDGs were created:

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379 Exhibit MD-136 (IPCC SR 2018), p. 478.
380 Exhibit MD-296 (Summary of the UN Conference, April 2019), p. 2.
381 Exhibit MD-348 (Glasgow Climate Pact), preamble and recitals (22), (23), (36) and (163).
382 Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 6.

> *"Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development."*[383]

271 Subsequently, UN officials provided a further clarification of this passage:

> *"Climate change is more than just one of the 17 Sustainable Development Goals (SDGs) specified in the 2030 Agenda for Sustainable Development* (...). *It is a threat multiplier, with the potential to worsen some of humanity's greatest challenges, including health, poverty, hunger, inequality and ecosystem preservation, among others. Conversely, addressing climate change also offers humanity's greatest chance to positively impact these goals* (…). *In the bigger picture, the 2030 Agenda and the Paris Agreement are really about the same things. They provide our biggest opportunity for positive, systemic change that will ensure a resilient, productive and healthy environment for present and future generations."*[384]

272 This demonstrates that the negative impacts of climate change as such undermine the ability of all countries to achieve sustainable development. Climate change thus stands in the way of achieving the SDGs for all countries. On top of this, the damage and economic losses resulting from climate change limit the financial scope for realising the SDGs.[385] Conversely, combating climate change is a prerequisite for achieving the SDGs. If climate change is actively combated, it will also become possible to achieve (all) other SDGs. Preventing or limiting dangerous climate change is, in other words, an overarching goal of, *and* a necessary precondition for, achieving the SDGs.

273 This interest in combating dangerous climate change for the feasibility of other SDGs - including the interest of energy security – has also been worded by the IPCC:

> *"Ambitious mitigation can be considered a precondition for achieving the SDGs."*[386]

> *"Accelerated and equitable climate action in mitigating, and adapting to, climate change impacts is critical to sustainable development (high confidence)."*[387]

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383 Exhibit MD-335 (UN General Assembly Resolution 70/1), p. 5.
384 Exhibit MD-295 (Article in Nature Climate Change), pp. 495 and 496. See also the Notes of the Oral Arguments 5 in the First Instance of Milieudefensie et al. dated 3 December 2020, paras. 23 and 24.
385 Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 129.
386 Exhibit MD-349 (IPCC AR6 WGIII Technical Summary), p. TS-135. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 81.
387 Exhibit MD-355 (IPCC AR6 WGIII Summary for Policymakers), p. 44. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, footnote 89.

274 A study by the University of Sussex confirms not only that combating dangerous climate change is necessary for achieving other SDGs, but also that clinging to fossil fuels is incompatible with this:

> *"Fossil fuels undermine all 17 SDGs. As the primary driver of climate change and air pollution, and a major contributor to biodiversity loss, fossil fuels have a detrimental impact on all the SDGs."*[388]

275 While dangerous climate change stands in the way of achieving the SDGs, a rapid climate response is helpful and even necessary to achieve them. Phasing out the use of fossil fuels and investing (or continuing to invest) in renewable energy, in this context, does justice to all the interests pursued by the SDGs. This interaction also follows from the Paris Agreement, which is related to the SDGs. After all, achieving the goal set forth in that Agreement of limiting global warming to 1.5°C does not stand alone, but must be accompanied by sustainable development, including the development of low-carbon alternative energy.[389] This demonstrates that combating dangerous climate change is not only intended to save the planet, but also (and actually) to preserve and further realise sustainable economic development with sufficient energy for all.

276 It follows from the above that combating dangerous climate change and safeguarding the energy security can and must be pursued simultaneously and in a synergistic manner. This is recognised not only within the UN framework, but even globally. As will be discussed in detail in Sections V.6.2 and V.6.3 of this Explanatory Submission, EU policies also take this as their starting-point. Moreover, if dangerous climate change is not combated, it may also not be possible to achieve other SDGs. So the interest of energy security, which is also protected by the SDGs, will actually benefit from the phase-out of the use of fossil fuels and the associated scale-up of sustainable alternatives. There is no contradiction here. It follows from this alone that energy security is certainly compatible with the necessary response to the climate problem.

III.3.2 Emission reductions are actually feasible without compromising energy security

277 The fact that the required reductions of emissions from oil and gas use to combat dangerous climate change can actually be achieved without compromising energy security follows not only from the synergistic goals and agreements that have been set or concluded internationally. It is widely acknowledged at both scientific and institutional levels that the current availability and intended expansion of renewable-energy sources already entail that fossil fuels can be moved away from without compromising energy security.

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[388] Exhibit MD-375 (Fueling Failure, University of Sussex), p. 18. See also the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 79; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 23.

[389] Article 2 Paris Agreement. See also the Paris Agreement, preamble (eighth sentence).

278 For instance, during COP28, the climate conference in Dubai, the global community established that feasible, effective and affordable mitigation options to keep the 1.5°C target within reach during this critical decade had become available across all sectors.[390] This is due to the fact that mitigation technologies have become increasingly available over the past decade, while the costs of these technologies – e.g. solar energy, wind energy and energy storage - have steadily decreased.[391] The affordable presence of sustainable alternatives to fossil fuels has thus paved the way for CO_2 reductions in the oil and gas industry without compromising energy security.

279 Partly in view of this relationship between the availability of renewable energy and energy security, a global coalition of companies and investors called on governments during the IEA Energy Security Summit 2025 to further accelerate the scaling up of renewable energy:

> *"A vision of energy security based only on security of fossil-fuel supply is no longer compatible with protecting businesses and consumers or sustaining economic growth* (…)*. The systemic risks of continued fossil fuel dependence are clear. The solutions are too. Accelerating these solutions is now a security and business imperative. The private sector is already acting, delivering 75% of global renewable energy investment in recent years, and we remain committed to scaling a resilient global energy system. A new global poll shows 97% of business executives in mid-to-large companies across major economies support moving away from fossil fuels in the power sector and nearly 78% support a shift to a renewable-based electricity system by 2035. Three-quarters of executives see renewables as critical to energy security."*[392]

280 In its recent Renewables 2025 report, the IEA confirms that both the current and a further scaling up of renewable energy will bring enormous benefits for energy security:

> *"Renewables deployment has already significantly reduced fuel import needs and enhanced electricity supply security* (…)*. Fossil fuel importer countries often stand to gain the most from using renewables, both in terms of enhancing energy security and improving their economic resilience* (…)*. Renewable energy technologies inherently strengthen energy supply security, as they generate electricity without requiring continuous fuel inputs (excluding bioenergy). While critical equipment for renewable energy projects may be imported, the facilities can operate for years with limited external inputs - offering greater resilience during fossil fuel supply disruptions or price volatility* (…)*. By displacing fossil fuel demand, renewables can help countries reduce the overall*

[390] Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 16(c).
[391] Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 30.
[392] See https://eref-europe.org/business-statement-redefining-energy-security-with-renewables-and-energy-efficiency/.

impact of such price shocks, enhancing both energy security and affordability for consumers."[393]

281 A study by the ECB also shows that European households, businesses and the financial sector will benefit greatly from a rapid, sustainable energy transition. Conversely, the longer the energy transition is delayed, the higher the energy costs will become in the long term. Dependence on fossil fuels must therefore be ended as soon as possible, so that the CO_2 emissions associated with the combustion of those fossil fuels can be reduced. Therefore this not only contributes to combating dangerous climate change, but also to energy security.[394]

282 The modelled reduction scenarios also point in this direction. Sections III.2.2 up to and including III.2.6 of this Explanatory Submission discussed various limitations of reduction scenarios based on IAM models. An additional limitation of such reduction scenarios identified by the IPCC is that they (significantly) underestimate the actual potential for feasible and affordable emission reductions until 2030 across various sectors.[395] For example, according to the IPCC, the potential for emission reductions in (among other sectors) the transport and the industrial sectors is greater than the emission reductions that follow from most modelled reduction scenarios for those sectors.[396] This underestimation of the emission reduction potential is caused by the fact that IAM models fail to include various mitigation options in their modelling. For example, IAM models often do not allow for opportunities for efficient material use and recycling,[397] while IAM models also generally start out from costs for solar and wind energy that are far too high.[398]

283 As a result, the reduction percentages calculated by reduction scenarios for the oil and gas sector based on IAM models consistently turn out to be too low (also for this reason).[399],[400] As will be discussed in detail in Chapter VI of this Explanatory Submission, these reduction scenarios nevertheless already prescribe very substantial CO_2 reductions in this context. These prescribed reductions can therefore in any case be achieved without compromising energy security. This applies in particular to the

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393 See https://www.iea.org/reports/renewables-2025, p. 78.
394 Exhibit MD-531A (ECB Press Release dated 6 September 2023), pp. 1 up to and including 3; Exhibit MD-531B (ECB Occasional Paper Series The Road to Paris 2023), pp. 6 up to and including 10, 23, 24, 50 and 51. See also the Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, p. 18; Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 98.
395 This does not (of course) apply to the coal sector. See, in this regard, Section III.2.3 of this Explanatory Submission.
396 Exhibit MD-496E (IPCC AR6 WGIII H12), pp. 1258 up to and including 1260. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 79.
397 Exhibit MD-496E (IPCC AR6 WGIII H12), p. 1260.
398 Exhibit MD-496E (IPCC AR6 WGIII H12), p. 1259.
399 Sections III.2.2 up to and including III.2.7 of this Explanatory Submission have already addressed several other reasons that lead to the conclusion that the CO_2 reductions to be required of the oil and gas sector are in reality higher than those generally prescribed by reduction scenarios based on IAM models.
400 Exhibit MD-496E (IPCC AR6 WGIII H12), p. 1259.

reductions prescribed by the NZE Scenario.[401] After all, this conservative reduction scenario developed by the IEA extensively allows for the interest of energy security and - calculated back to 2019 – already arrives at reduction percentages of 36.2% for oil and 30.1% for gas by 2030.[402] Nevertheless, these CO_2 reductions are beneficial to the affordability and – as a result – the security of energy:

> *"By 2030 in the NZE Scenario, total household energy expenditure in emerging market and developing economies decreases by 12% from today's level, and even more in advanced economies."*[403]

284 As a result, the available renewable energy sources make the necessary reductions of emissions from oil and gas combustion by 2030 very feasible without threatening energy security. In this context, it is important to note that the availability of renewable energy has already increased enormously in recent years.[404] For example, European solar energy capacity has more than doubled since 2020.[405] Partly for this reason, wind and solar energy together for the first time supplied more electricity than fossil fuels in the EU in 2025.[406] Also, an even greater scale-up is expected in the coming years. In its recent Renewables 2025 Report, the IEA projected that global renewable energy capacity in 2030 will be no less than 2.6 times the capacity in 2022.[407] According to the IEA, this capacity growth could *even* be 20% higher by 2030, if countries address short-term challenges in the areas of grid integration financing, and licencing.[408] Ember, a think tank that studies global energy production, has even calculated that the world is on track to triple the availability of renewable energy by 2030 relative to the 2022 level.[409] It is therefore no surprise that the scientific journal Science recently called the scaling up of renewable energy "Science's 2025 Breakthrough of the Year."[410]

285 A further confirmation that the necessary emission reductions can in fact be achieved without jeopardising energy security can be derived from the fact that the existing oil and gas fields are currently more than sufficient to supply the world with energy. Gradually, these oil and gas fields will be depleted, while, as discussed earlier, the

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401 This scenario will be discussed in detail in Chapter VI of this Explanatory Submission.
402 Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 53 and 63.
403 Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 17. Also see the Reply to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, p. 18.
404 "Global renewable energy generation surpasses coal for first time," The Guardian, 7 October 2025, available at: https://www.theguardian.com/environment/2025/oct/07/global-renewable-energy-generation-surpasses-coal-first-time; "Global Electricity Mid-Year Insights 2025," Ember, available at https://ember-energy.org/latest-insights/global-electricity-mid-year-insights-2025/. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 10 October 2023, para. 40 following the joinder.
405 See https://energy.ec.europa.eu/news/focus-solar-energy-shining-star-europes-clean-transition-2026-01-15_en.
406 See https://ember-energy.org/latest-updates/wind-and-solar-generated-more-power-than-fossil-fuels-in-the-eu-for-the-first-time-in-2025/.
407 See https://www.iea.org/reports/renewables-2025, pp. 20 and 21.
408 See https://www.iea.org/reports/renewables-2025, pp. 20 and 21.
409 See https://ember-energy.org/latest-insights/renewable-additions-in-2025-are-once-again-expected-to-surge-putting-tripling-within-reach/tracking-progress-towards-a-global-tripling-of-ren/.
410 See https://www.science.org/content/article/breakthrough-2025.

sustainable alternatives to fossil fuels are already extensively available and will continue to grow rapidly. With sufficient emission reductions, no sector of society will still need investments in new oil and gas fields in this light, not even the harder-to-abate sectors. Everyone can therefore make do with the possibilities for supply from the existing oil and gas fields. This is also confirmed by research performed by the IEA.[411] In this way, energy security will remain ensured, If Shell were to stop investing in new oil and gas fields, the CO_2 emissions in its production division would already drop by nearly 45%.[412]

286 This, in turn, aligns with the broad consensus that the carbon budget – conversely – offers no room for investments in new oil and gas fields either. The CO_2 emissions that would accompany such investments actually stand in the way of the necessary 45% CO_2 reduction by 2030. This is evident, for example, from the findings of the IEA,[413] the IPCC[414] and the UNEP.[415] As shown above, such investments are also unnecessary in light of energy security.

287 All the above again leads to the conclusion that the emission reductions required to combat dangerous climate change can indeed be achieved without compromising energy security. In fact, combating the climate problem will never become more feasible than it is now. As outlined in Chapter II of this Explanatory Submission, rapid and deep CO_2 reductions in this decade will limit the impacts of dangerous climate change. Delaying the climate response, on the other hand, would reduce the practicability and feasibility of the reduction efforts and lead not only to higher costs, greater losses and more harm to people, animals and nature, but also to a further increase in the carbon lock-in effect. A greater dependence on fossil fuels, combined with the need for larger CO_2 reductions, naturally poses much greater risks to energy security. Consequently, there will never again be a moment in time when the certainty that the energy security will not be compromised by the necessary emission reductions is *greater* than it is now.

III.3.3 Energy security will actually stand to benefit from moving away from oil and gas use

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411 Exhibit MD-528 (IEA The Oil and Gas Industry in Net Zero Transitions 2023), p. 64; Exhibit MD-526B (IEA World Energy Outlook 2023), pp. 50 and 51. See also the Oral arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 107.

412 Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 19, 2 and 24; Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 107, 112, 113 and 119; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 95; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 595, 687 and 914.

413 Exhibit MD-528 (IEA The Oil and Gas Industry in Net Zero Transitions 2023), pp. 14, 19, 58, 59 and 61; Exhibit MD-362 (IEA Net Zero Roadmap 2021), p. 21. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 107, 112, 113 and 119; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 593 up to and including 597.

414 Exhibit MD-277 (Global Witness Report Overexposed), p. 2. See also the Notes of the Oral Arguments 7 in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 47.

415 Exhibit MD-276 (UNEP Production Gap Report 2019), p. 4. See also the Notes of the Oral Arguments 7 in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 51 and 52.

288 Finally, it is important to note that the required emission reductions are not only *feasible* without compromising energy security. Energy security even *stands to benefit* if we move away from the use of fossil fuels and switch to sustainable alternatives in the short term, because the access to affordable and reliable energy will significantly improve in the case of rapid climate action.

289 This is closely related to the high volatility of fossil-fuel prices, meaning that there can be big changes in the prices of oil and gas within a short period of time. This is evident from the graph below, which shows the oil price per barrel for the period from 1999 up to and including 2021.[416]

290 During this period, the price of a barrel of oil fluctuated within a range of USD 20 to USD 150. This high volatility is caused by the oil and gas market's sensitivity to external conditions.[417] In recent decades, this has repeatedly led to problems in the area of the energy security. For instance, various oil embargoes, wars, financial crises and natural disasters (among other events) triggered increases in the prices of fossil fuels.[418] A recent example is the Ukraine crisis, which meant that a large part of the EU could not obtain any gas, or could only obtain little gas, from Russia. While Russia was initially responsible for 40% of the total gas supplies in the EU,[419] 80% of that supply suddenly

[416] Exhibit MD-484 (House of Commons Research on Oil Prices 2022), p. 8. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 59.
[417] See, for a detailed discussion of this point, the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, paras. 50 up to and including 66.
[418] Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 63.
[419] Exhibit MD-480 (IEA World Energy Outlook 2022), p. 35. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, paras. 28 and 31.

disappeared.[420] Consequently, 32% of the gas imported into the EU had to come from elsewhere, leading to a sharp rise in gas prices. This was also noted by the IEA in its recent Renewables 2025 report:

> *"Fuel imports can represent a major cost for economies and government budgets. For instance, in 2022, amid the energy crisis triggered by Russia's invasion of Ukraine, EU importers spent close to USD 350 billion on coal and natural gas imports - triple what they spent in 2021 due to a spike in prices."*[421]

291 A similar situation has been occurring since March 2026 as a result of the war in the Middle East. Oil and gas prices rose sharply within a few days, with global implications for the affordability and availability of energy.[422]

292 A relationship therefore exists between the geopolitical situation – via the price volatility of fossil fuels – and the availability and affordability of energy. This leads to significant risks and uncertainties in the area of energy security. This problem can be addressed by reducing dependence on fossil fuels and transitioning to sustainable alternatives.[423] Not only will the world become (much) less dependent on fuel imports in that case, but the price volatility of sustainable energy will also be much smaller.[424] In fact, renewable energy is now the cheapest energy source worldwide.[425] Moreover, the more energy we generate from the sun, wind and other renewable sources, the smaller the chance that geopolitical conflicts, sabotage or market shocks can disrupt energy security.

293 This leads the IEA to conclude that continuing to rely on fossil fuels does not contribute to the affordability of energy.[426] Renewable energy, on the other hand, is the solution to our current dependence on volatile fossil energy. As a result, consumers would also have been better protected against the (financial) consequences of the Ukraine crisis:

> *"The global energy crisis sparked by Russia's invasion of Ukraine is having far-reaching implications for households, businesses and entire economies, prompting short-term responses from governments as well as a deeper debate about the ways to reduce the risk of future disruptions and promote energy security. This is a global crisis, but*

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420 Exhibit MD-480 (IEA World Energy Outlook 2022), p. 92. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, paras. 28 and 31.
421 See https://www.iea.org/reports/renewables-2025, p. 78.
422 See https://nos.nl/collectie/14015/artikel/2605622-energieprijzen-door-het-dak-nu-eind-aan-iran-oorlog-niet-in-zicht-is.
423 See, for a detailed discussion of this point, the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, paras. 36 up to and including 49.
424 See https://www.iea.org/reports/renewables-2025, pp. 211 and 212.
425 Exhibit MD-482 (IEA Renewables 2022 Press Release), p. 1. See also the Statement of Defence of Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 39.
426 Exhibit MD-439B (Financial Times 2022); Exhibit MD-439A (IEA Executive Director 2022). See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 756.

> *Europe is the main theatre in which it is playing out, and natural gas is centre stage - especially during the coming northern hemisphere winter. High energy prices are causing a huge transfer of wealth from consumers to producers, back to the levels seen in 2014 for oil, but entirely unprecedented for natural gas. High fuel prices account for 90% of the rise in the average costs of electricity generation worldwide, natural gas alone for more than 50%. The costs of renewables and carbon dioxide have played only a marginal role, underscoring that this is a crisis where energy transitions are the solution, rather than the problem."*[427]

> *"Climate policies and net zero emissions commitments were blamed in some quarters for contributing to the run-up in prices, but it is difficult to argue that they played a role. More rapid deployment of clean energy sources and technologies in practice would have helped protect consumers and mitigate some of the upward pressure on fuel prices."*[428]

294 The IEA member states also believe that accelerating the energy transition offers a lasting solution to counter price volatility and ensure energy security.[429] As a result of the war in the Middle East and its impact on the affordability and availability of energy, that call has only become stronger since March 2026.[430] The IEA's Executive Director has also emphasised that investing in renewable energy is essential for energy security:

> *"But today's energy crisis - the first truly global energy crisis - has given rise to a false narrative that now is not the moment to invest in clean energy. This could not be further from the truth. We do not have to choose between responding to today's energy crisis and tackling the climate crisis. Not only can we do both, we must do both because they are intimately linked. Massive investment in clean energy - including energy efficiency, renewables, electrification, and a range of clean fuels - is the best guarantee of energy security in the future and will also drive down harmful greenhouse gas emissions."*[431]

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[427] Exhibit MD-480 (IEA World Energy Outlook 2022), p. 29. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 36 and footnote 21.

[428] Exhibit MD-480 (IEA World Energy Outlook 2022), p. 35. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 36 and footnote 21.

[429] Exhibit MD-568D (IEA Ministerial Communiqué 2022), p. 1. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 97.

[430] See, for example, The Guardian, 7 April, 2026, "As Iran war exposes global dependence on fossil fuels, the biggest emitters are reaping the rewards," https://www.theguardian.com/environment/2026/apr/07/iran-war-global-dependence-fossil-fuels-biggest-emitters-reaping-rewards; The Japan Times, 19 March 2026, "Iran war energy shock sparks global push to reduce fossil fuel dependence," https://www.japantimes.co.jp/environment/2026/03/19/energy/iran-war-fossil-fuel-dependence/; New York Times, 15 March 2026, "How war in Iran could remake the global energy landscape," https://www.nytimes.com/2026/03/11/climate/iran-war-oil-clean-energy-coal.html.

[431] IMF, Finance & Development, December 2022, Fatih Birol, "A Call to Clean Energy," available at https://www.imf.org/en/publications/fandd/issues/2022/12/a-call-to-clean-energy-fatih-birol.

295 As will be discussed in detail in Sections V.6.2 and V.6.3 of the Explanatory Submission, this is equally recognised within the EU. Both the ESABCC and the European Commission have emphasised that we must move away from fossil fuels in the short term. This not only contributes to preventing and mitigating dangerous climate change, but also to achieving greater autonomy and stable, affordable energy.[432] In the words of the European Commission:

> *"Reducing dependency on fossil fuels will further strengthen EU energy security and sovereignty in line with the EU's climate neutrality objective."*[433]

296 The Dutch Clingendael Institute has also concluded that dependence on gas is highly unwise both in a geopolitical context and in relation to energy security, necessitating a transition to sustainable alternatives:

> *"*(…) *over 59% of LNG imports* (…) [came] *from the US in 2025. Such dependence exposes Europe to the risk of high costs, price volatility and geopolitical pressures. The principal pathway to strengthening the EU's strategic autonomy in the energy sector is the accelerated transition to an efficient energy system based on indigenous renewables. As long as the EU remains reliant on large amounts of imported energy resources, mitigating the associated risks will require genuine supplier diversification embedded within a broader energy security strategy. Such a strategy must rest on a sound definition of diversification and reflect today's geopolitical realities."*[434]

297 These general findings apply equally to the Netherlands. This is evident not only from the NVDE's recent emergency plan to reduce gas consumption by 10 billion m^3[435] within five years (for the sake of energy security, energy affordability and the climate), but also from a recent study by TNO. That TNO study shows that making the energy system more sustainable will have a strong dampening effect on energy costs compared to the volatility of fossil prices. A rapid energy transition thus offers protection against fossil-fuel price shocks and is therefore beneficial to energy security.[436] After all, reducing

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[432] "Scientific advice for amending the European Climate Law: Setting climate goals to strengthen EU strategic priorities," *ESABCC*, pp. 18 and 19, available at https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-amending-the-european-climate-law-setting-climate-goals-to-strengthen-eu-strategic-priorities; State of the Energy Union Report 2025, European Commission COM(2025) 667 final, p. 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0667.

[433] "Roadmap towards ending Russian energy imports," European Commission COM(2025) 440 final/2, p. 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0440R(01).

[434] "Europe's Selective Blindness on Gas: US LNG and the Limits of Supply Diversification," Clingendael Institute 2026, p. 1, available at https://www.clingendael.org/sites/default/files/2026-01/Policy_brief_Europes_Selective_Blindness_on_Gas.pdf.

[435] "*Spoedplan: naar 10 miljard m³ minder aardgas, binnen vijf jaar*" (Emergency plan: towards 10 billion m^3 less natural gas within five years), NVDE, 13 March 2026, available at https://www.nvde.nl/wp-content/uploads/2026/03/20260313-NVDE-Spoedplan-voor-minder-aardgas-finaal.pdf.

[436] "*Weerbaarheid van het energiesysteem tegen een energiecrisis*" (Resilience of the energy system against an energy crisis)m TNO, pp. 3 and 4, available at https://www.nvde.nl/wp-content/uploads/2025/12/TNO-2025-R11805-

dependence on fossil fuels through the transition to sustainability will lead to economic independence.[437] The sooner this happens, the lower the energy costs will be, as the ECB study discussed in Section III.3.2 of this Explanatory Submission also demonstrates.[438]

298 All of this is already manifest in practice. Section III.3.2 of this Explanatory Submission described that the availability of sustainable energy has increased dramatically in recent years. This has already produced significant benefits in the area of energy security.[439] In its recent Renewables 2025 Report, the IEA calculated that the world in general, and the EU in particular, would have had to spend much more money on volatile fossil fuels without the renewable energy scale-up that has taken place so far:

> *"*(…) *global imports of coal and gas in 2023 would have been around 45% higher – equivalent to over 8,000 TWh of additional fuel inputs – without non-hydro renewable energy developments since 2010. This means roughly 700 million tonnes of coal and 400 billion cubic metres of natural gas, together representing about 10% of total global consumption of these fuels in 2023."*[440]

> *"Energy importers have reduced their fossil fuel bills by an estimated USD 1.3 trillion since 2010 owing to renewables.* (…) *Lower demand for fossil fuel imports proved particularly critical during the 2021–2023 global energy crisis, when war-related disruptions and market volatility pushed prices to historic highs. Without the deployment of non-hydro renewables, import expenditures in 2022 alone would have been over USD 500 billion higher - more than the GDP of many mid-sized economies - and the European Union's record coal and gas import bill in 2022 more than 40% larger."*[441]

299 In line with this, the current investments in renewable energy have already brought significant benefits for European consumers, according to the IEA:

> *"Elevated energy supply costs were the main reason for higher retail bills in Europe. The energy crisis after Russia's invasion of Ukraine caused natural gas prices to rise sharply, pushing EU electricity prices to record highs. In fact, gas prices in 2022 were more than nine times higher than in 2019. Although prices have since declined, they are still*

Weerbaarheid-van-het-energiesysteem-tegen-een-energiecrisis-2.pdf.

437 See https://www.nvde.nl/nederland-met-duurzame-energie-vrijwel-immuun-voor-nieuwe-oekrainecrisis/.

438 Exhibit MD-531B (ECB Occasional Paper Series, The Road to Paris 2023), p. 8. See also the Response of Milieudefensie et al. to questions of the Court of Appeal dated 12 April 2024, p. 18; the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 98.

439 Exhibit MD-481 (IEA Renewable Energy Market Update 2023), pp. 4 and 5. See also the Statement of Defence on Appeal after Joinder of Milieudefensie et al. dated 10 October 2023, para. 37.

440 See https://www.iea.org/reports/renewables-2025, p. 80.

441 See https://www.iea.org/reports/renewables-2025, p. 82.

> *two to three times higher than pre-Covid-19. The rapid expansion of renewables following the crisis prevented much larger increases in European electricity prices. In 2022, in the middle of the energy crisis, natural gas-fired power plants set almost 60% of the wholesale electricity price on average. By 2024, the role of gas had declined to 30–50% owing to a higher penetration of renewables. Thus, over 2021–2023, EU electricity consumers saved an estimated EUR 100 billion thanks to newly installed solar PV and wind capacity."*[442]
>
> *"Since 2019, the energy supply portion of electricity bills has doubled in almost all EU member states. However, countries with a high share of renewables and less reliance on gas-based generation experienced much smaller increases."*[443]

300 What follows from the above is that the interest of energy security in fact requires that we move away from fossil fuels and shift to renewable energy in the short term. After all, this is the only way to prevent (among other things) that the volatility of fossil-fuel prices and geopolitical situations can negatively impact the affordability and availability of energy well into the future. Conversely, scaling up renewable energy will actually lead to cheaper energy and a more stable access to energy. Fossil fuels therefore do not contribute to energy security, but stand in the way of it. In relation to energy security, it is therefore not only entirely possible, but also urgently necessary to achieve the required CO_2 reductions in the short term to limit global warming to 1.5°C.

IV THE DUTY OF CARE TO PREVENT OR LIMIT DANGEROUS CLIMATE CHANGE

IV.1 Introduction

301 Partly in light of what Chapters II and III of this Explanatory Submission set out, non-state actors, including the oil and gas industry in particular, have a duty to reduce their CO_2 emissions and contribute in this way to preventing or limiting dangerous climate change. The reason for this is that Article 6:162 DCC (hereafter: "DCC") imposes a duty of care on them requiring them to prevent or limit dangerous climate change.

302 This Chapter will examine this duty of care in more depth. To that end, Milieudefensie et al. will first discuss the legal basis for duties of care in Section IV.2 of this Explanatory Submission. Section IV.3 is then devoted to the establishment and determination of duties of care in concrete terms. In that context, it will be explained that this must be done on the basis of objective points of reference. Building on this, Section IV.4 will explain how objective points of reference can have a horizontal effect, i.e. have an effect on the duty of care. Finally, Section IV.5 of this Explanatory Submission will finally

[442] See https://www.iea.org/reports/renewables-2025, p. 123.
[443] See https://www.iea.org/reports/renewables-2025, p. 124.

discuss the relevant objective points of reference that are important in establishing and determining the concrete scope of duties of care, and, in particular, the duty of care to prevent or limit dangerous climate change.

IV.2 Legal basis of duties of care

303 Article 6:162 DCC forms the basis of Dutch liability law. Pursuant to this provision, anyone who commits an unlawful act in relation to someone else that can be attributed to them, has the obligation to compensate the other party for the resulting damage. This also gives rise to a legal duty to refrain from committing an unlawful act.[444] This legal duty may require both action and inaction.[445]

304 The rationale behind this is that liability law is founded on a duty to prevent damage. In fact, preventing wrongful damage is even the central function of liability law.[446] After all, the breach of a legal duty is sometimes irreparable, while compensation for the damage suffered as a result of such a breach is not always possible and is often suboptimal. It is therefore better to prevent damage than to pay compensation for it. This is why the compliance with legal obligations is so important.[447] A legal duty to prevent damage can therefore also be enforced in court under Article 3:296 DCC.[448]

305 Pursuant to Article 6:162(2) DCC, three types of wrongful acts or omissions can be distinguished. What is relevant to this case is that any act or omission in breach of what is appropriate in society according to unwritten law is unlawful. This "societal duty-of-care standard" gives rise to legal obligations, viz. duties of care. If such duties of care are breached, an unlawful act will have occurred. This category of unlawfulness accommodates the impossibility of providing for or exhaustively regulating every possible situation in which an unlawful act is performed. After all, an open standard

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444 *Asser/Sieburgh 6-IV* 2023/153; S.D. Lindenbergh, "*Wat is aansprakelijkheidsrecht*?" (What is liability law?) in *NTBR* 2021/14, p. 112; K.J.O. Jansen, "*De rol van art. 6:162 BW in verbods- en bevelsacties*" (The role of Article 6:162 DCC in actions seeking prohibitive and mandatory relief), *NTBR* 2020/40, pp. 295 and 296.

445 *Asser/Sieburgh 6-IV* 2023/36; J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*" (The court injunction as a remedy), Deventer: Wolters Kluwer 2023, para. 37.

446 A.L.M. Keirse, "*Schadevoorkomingsplicht. Rapportage over de mogelijkheden van de schadevoorkomingsplicht via het aansprakelijkheidsrecht*" *(Duty to prevent damage. Report on the possibilities of the duty to prevent damage through liability law*), The Hague: Boom juridisch 2017, p. 18. See similarly L.T. Visscher, "*Waarheen, waarvoor*" (Where to, for what?) in *AV&S* 2024/1; J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 5; S.D. Lindenbergh, "*Wat is aansprakelijkheidsrecht*?", *NTBR* 2021/14, p. 112; E.R. de Jong, "*Risicoregulering via het civiele aansprakelijkheidsrecht*" (Risk regulation through civil-liability law)," *RM Themis* 2020/1, p. 1; E.R. de Jong, "*Urgenda en de beoordeling van macroargumenten*" (Urgenda and the assessment of macro arguments), *MvV* 2019/4; W.H. van Boom, *Efficacious Enforcement in Contract and Tort,* The Hague: Boom Juridische uitgevers 2006, p. 14.

447 J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie"*, Deventer: Wolters Kluwer 2023, para. 1.

448 J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie"*, Deventer: Wolters Kluwer 2023, para. 53; S.D. Lindenbergh, '*Wat is aansprakelijkheidrecht?*', *NTBR* 2021/14, p. 112; C.J.J.C. van Nispen, "*Sancties in het vermogensrecht*" (Sanctions in property law), Deventer: Wolters Kluwer 2018, para. 8; A.L.M. Keirse, "*De schadevoorkomingsplicht*" (The duty to prevent damage) in: E.F.D. Engelhard et al., "*Handhaving van en door het privaatrecht*" (Enforcement of and by private law), The Hague: Boom Juridisch 2009, p. 95; C.J.J.C. van Nispen, "*Het rechterlijk bevel en verbod*", Deventer: Kluwer 1978, pp. 20 and 302.

makes it possible to quickly respond to changes and developments in society (or the dangers caused by them) that the legislator has not addressed - or not timely addressed - in (new) legislation. It sometimes takes decades before foreseeable dangers are (adequately) regulated by law. The "asbestos issue"[449] and the "nitrogen emissions issue"[450] are examples of this. The "climate change issue" also falls into this category.

IV.3 Establishment and concrete determination of duties of care

306 The mere fact that duties of care exist does not yet answer the question how they should be established and determined in concrete terms. To this end, a balancing of interests must be carried out.[451] This essentially involves weighing (on the one hand) the interest in freely participating in society against (on the other hand) the interest in being protected from the harm caused by such conduct.[452] Given the aim and function of liability law to prevent damage as much as possible,[453] that latter interest carries significant weight. In the above-mentioned balancing of interests, significant weight may also be given to the legitimate expectations of the parties.[454] In that regard, an assessment must be made as to whether a party that is pursuing their own interests is considering the interests of third parties "to the extent that people in society can reasonably expect this from each other."[455]

307 This assessment must be based on all the concrete circumstances of the case, geared towards the individual interests of the parties.[456] After all, the societal duty of care is fleshed out in a context-dependent manner. In that connection, all sorts of interests may be taken into account. Interests other than the interest in being protected from (disproportionate) financial or personal harm may also give rise to legally relevant expectations in relation to someone else. For example, legal significance may also be attached to the expectation existing in society that a party will not cause excessive damage to people's living environment, since that environment is intended for sustainable and shared use.[457] Given that a duty of care is established and determined

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449 See, for example, the judgment of the Dutch Supreme Court of 17 February 2006, *NJ* 2007, 285 (*Heesbeen/Van Buuren*).
450 See, for example, the Decision of the District Court of The Hague of 22 January 2025, ECLI:NL:RBDHA:2025:578 (*Greenpeace/Staat*).
451 *Asser/Sieburgh 6-IV* 2023/56 and 75; T.F.E. Tjong Tjin Tai, "*Van zorgvuldigheid naar zorgplicht: een eeuw maatschappelijke zorgvuldigheid*" (From due care to a duty of care: a century of societal due care), *RM Themis* 2019/1, p. 27. See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.18.
452 See the judgment of the Dutch Supreme Court of 23 September 1988, *NJ* 1989, 743 (*Kalimijnen*).
453 See, in this regard, Section IV.2 of this Explanatory Submission.
454 K.J.O. Jansen, "*GS Onrechtmatige Daad*" (Green series on unlawful acts), Art. 6:162 BW, notes 3.1 and 6.1.4.
455 *Asser/Sieburgh 6-IV* 2023/75.
456 *Asser/Sieburgh 6-IV* 2023/75; K.J.O. Jansen, "*GS Onrechtmatige Daad"*, Art. 6:162 BW, notes 3.1 and 6.1.4.1.
457 Judgment of the Dutch Supreme Court of 23 September 1988, *NJ* 1989, 743 (*Kalimijnen*).

in concrete terms based on an individualised balancing of interests, courts must explicitly state which interests they are weighing and how they are being weighed.[458]

308 Unlike specific statutory provisions (for which the specific requirements have been established in advance by the legislature), the application of the societal standard of care thus allows for the establishment of a tailor-made duty of care. It must thus be determined, on a case-by-case basis and starting out from the specific circumstances before the court, what is appropriate in society according to unwritten law.[459]

309 This may mean that courts, when applying Article 6:162 DCC, establish a highly case-specific duty of care that is not necessarily suitable to be applied in a general sense.[460] So a duty of care does not have to be a general, self-evident standard that is already universally known to everyone. The criterion is what is *appropriate* in society, not what is *customary* in society.[461] Also, courts do not have to establish a standard the violation of which is "evidently unlawful".[462]

310 The fact that the determination of a duty of care is made through an individualised and court-reasoned weighing of all the interests relevant to the specific case does not mean that courts operate in a vacuum or elevate their subjective view of what is "appropriate" to having the status of law.[463] In this regard, courts must link up with *objective points of reference* as much as possible. They constitute the sources for determining and fleshing out duties of care.[464] These sources are used both to determine the applicable standard and to determine what this standard entails in concrete terms. Examples of such objective points of reference are:

(a) the doctrine of hazardous negligence;[465]

(b) human rights;[466]

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458 *Asser/Sieburgh 6-IV* 2023/75; K.J.O. Jansen, "*GS Onrechtmatige Daad"*, Art. 6:162 BW, note 6.1.4.2; J.M. Smits, "*Belangenafweging door de rechter in het vermogensrecht: een kritische beschouwing*" (Balancing of interests by courts in property law: a critical analysis)," *RM Themis* 2006/4, pp. 134 up to and including 140.

459 E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*" (Government and what is appropriate in society), Deventer: Wolters Kluwer 2025, p. 79.

460 See, for example, the judgments of the Dutch Supreme Court of 22 April 1994, *NJ* 1994, 624 (*Taxusstruik*), 27 May 1988, *NJ* 1989, 29 (*Veenbroei*) and 8 January 1982, *NJ* 1982, 614 (*Natronloog*).

461 C.C. van Dam, "*Aansprakelijkheidsrecht*" (Liability law*)*, The Hague: Boom Juridisch 2023, para. 206.

462 T. Hartlief et al., "*Verbintenissen uit de wet en schadevergoeding*" *(Law-based obligations and damages)*, Deventer: Wolters Kluwer 2021, para. 43.

463 Opinion of Advocate General Valk prior to the judgment of the Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.1.

464 *Asser/Sieburgh 6-IV* 2023/76; K.J.O. Jansen, "*GS Onrechtmatige daad*", Art. 6:162 DCC, note 6.1.9; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*", Deventer: Wolters Kluwer 2025, p. 73. See also the judgment of the Court of Appeal, ground 7.2.

465 See E.G.A. van der Werf, "Overheid en maatschappelijke betamelijkheid", Deventer: Wolters Kluwer 2025, pp. 71 up to and including 73.

466 *Asser/Sieburgh 6-IV* 2023/78; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.1.13. See E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid"*, Deventer: Wolters Kluwer 2025, p. 76; Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412

(c) general legal principles;[467]

(d) soft law;[468] and

(e) legislation that is not directly applicable to the case to be decided.[469]

311 It is the task of the courts to make use of (among other things) these objective points of reference when the interests are balanced and the relevant duty of care is fleshed out in concrete terms. This will serve legal certainty.[470] The above-mentioned examples of objective points of reference will be discussed in more detail in Section IV.5 of this Explanatory Submission. First, we will explain how objective points of reference can have horizontal effect.

IV.4 The horizontal effect of objective points of reference

312 Some of the objective points of reference to be discussed below primarily concern *vertical* relationships, i.e. between a private party and a state. This applies in particular to human rights and a number of general principles of international law. However, this circumstance does not prevent such objective points of reference from also being relevant in *horizontal* relationships, between private parties, for instance. This applies in particular to the establishment and determination of duties of care.

313 To determine whether a human right or general legal principle has horizontal effect, it is firstly important to consider the basis of and rationale for that horizontal effect. How and why do human rights and general legal principles have horizontal effect? This will also make it clear how courts must determine whether, and if so, to what extent, a particular human right or general legal principle has horizontal effect. Essentially, human rights and general legal principles have horizontal effect in two ways: (i) via the duty of care under Article 6:162 DCC and (ii) via the obligation of courts to also enforce the rights guaranteed by the ECHR in horizontal relationships. These routes will each be discussed in turn below.

(*IS-uitreizigers)*, para. 6.4.

467 *Asser/Sieburgh 6-IV* 2023/78; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.1.13; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid"*, Deventer: Wolters Kluwer 2025, pp. 78 and 79.

468 *Asser/Sieburgh 6-IV* 2023/79; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.1.10; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid"*, Deventer: Wolters Kluwer 2025, pp. 77 and 78; C.C. van Dam, "Aansprakelijkheidsrecht", The Hague: Boom juridisch 2023, paras. 225-4 and 518-2; T. Hartlief et al., "*Verbintenissen uit de wet en schadevergoeding*", Deventer: Wolters Kluwer 2021, para. 41; Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.7.

469 *Asser/Sieburgh 6-IV* 2023/77; K.J.O. Jansen, *GS Onrechtmatige daad*, Art. 6:162 DCC, notes 5.1.5 and 5.5.1; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid",* Deventer: Wolters Kluwer 2025, pp. 74 and 75; T. Hartlief et al., "*Verbintenissen uit de wet en schadevergoeding"*, Deventer: Wolters Kluwer 2021, para. 40; Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.2.

470 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Duch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.19.

314 For the first route, it is important to note that it is generally accepted in the Dutch[471] legal system that human rights and general legal principles can have effect when duties of care are established and determined. For example, in the *Hyatt* decision, the Dutch Supreme Court explicitly ruled that human rights can have effect in legal relationships between citizens (i.e. horizontally).

> *"3.3 It is worth noting that (constitutional) fundamental rights can indeed have horizontal effect in a legal relationship between citizens."*[472]

315 In line with this, the Dutch Supreme Court has also repeatedly accepted the horizontal effect of human rights arising under the ECHR and the ICCPR, for instance.[473] Human rights and general legal principles must therefore also be used as sources for national courts when they flesh out (unwritten) standards of care.[474] This prevailing doctrine is also followed by Procurator General Langemeijer and Advocate General Wissink in their opinion regarding the *Urgenda* judgment.[475] Advocate General Valk also noted in his opinion for the *IS-uitreizigers* judgment that treaty provisions can make themselves felt when courts assess the duty of care, even if such treaty provisions do not have direct effect.[476] According to Brans and Scheltema, the use of fundamental rights to determine the unwritten duty-of care-standard in the Judgment comes as no surprise.[477]

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[471] Horizontal effect is also widely accepted abroad. For example, the German *Bundesverfassungsgericht* has recognised the effect of human rights in horizontal relationships since as early as 1954. See BVerfG 25 May 1954, *BGHZ* 13, 334 (*Schacht/Leserbriefentscheid*). See also BVerfG 24 March 1976, 2 *BvR* 804/75 (*Zwangsversteigerung I*); BVerfG 15 January 1958, 1 *BvR* 400/51 (*Lüth*).

[472] Judgment of the Dutch Supreme Court of 22 November 2019, ECLI:NL:HR:2019:1834 (*X/Hyatt*). See also the judgment of the Dutch Supreme Court of 12 December 2003, ECLI:NL:HR:2003:AL8442 (*Tandarts*). In publications of legal scholars, it is noted that in this latter judgment, the Dutch Supreme Court also accepted the (indirect) horizontal effect of human rights. See D.J. Elzinga et al., "*Handboek van het Nederlandse staatsrecht"* (Dutch Constitutional law handbook*)*, Deventer: Kluwer 2014, p. 285. The legislature has also recognised horizontal effect. See, for example*,* "*Algehele grondwetsherziening, Deel 1a Grondrechten*" (General constitutional revision*,* Part 1a Fundamental Rights), The Hague: *Staatsuitgeverij* (State Publishers) 1979, p. 15.

[473] See, for example, the judgments of the Dutch Supreme Court of 13 July 2012, ECLI:NL:HR:2012:BW3367 (*Leeftijdsontslag KLM*); 8 October 2004, ECLI:NL:HR:2004:AP0424 (*Martinair*); 13 January 1995, *NJ* 1995, 430 (*Leeftijdsdiscriminatie*); 9 January 1987, *NJ* 1987, 928 (*Edamse bijstandsvrouw*). In the latter judgment, the Dutch Supreme Court even accepted the direct horizontal effect of Article 8 ECHR. See, for indirect horizontal effect via the open standard of Article 2:8 DCC, the judgment of the Court of Appeal of Amsterdam of 24 February 2009, ECLI:NL:GHAMS:BH6413 (*Esthéticienne/Waterpark*).

[474] *Asser/Sieburgh 6-IV* 2023/71 and 74; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.1.13.1; E.H.P. Brans & M.W. Scheltema, "*Aansprakelijkheid Shell voor klimaatverandering. Een 'carbon major' geconfronteerd met een reductiebevel*" (Shell's liability for climate change. A "carbon major" confronted with a reduction injunction),' *M en R* 2021/80, para. 8.4; J.W.A. Fleuren, "*Urgenda en niet(?)-rechtstreeks werkend internationaal (klimaat) recht*" (Urgenda and (non?)-directly applicable international (climate) law) in *NJB* 2019/475; T. Barkhuysen & M.L. van Emmerik, "*Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van Lindenbaum/Cohen via Kelderluik en Öneryildiz naar Urgenda?*" (Duties of care according to the Dutch Supreme Court and the European Court of Human Rights: from Lindenbaum/Cohen via Kelderluik and Öneryildiz to Urgenda?) in *RM Themis* 2019-1, p. 54.

[475] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), paras. 2.15 and 2.30.

[476] Opinion of Advocate General Valk prior to the judgment of the Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.2.

[477] E. Brans & M.W. Scheltema, "*Aansprakelijkheid Shell voor klimaatverandering. Een 'carbon major' geconfronteerd met een reductiebevel*" in *M en R* 2021/80, para. 8.4.

316 This effect is easy to explain from a doctrinal perspective. After all, as discussed in Section IV.3 of this Explanatory Submission, the establishment and determination of a duty of care essentially involves a balancing of interests. It is not surprising that interests that are protected by human rights and general legal principles play a part in this process. This is, of course, all the more true if the private party in question is directly contributing to the violation of the human right or general legal principle concerned. In practice, private parties are also able to exercise such significant legal, economic or factual power over individuals that the need for protection against such power may be comparable to the need for protection against the power of public institutions. This, too, explains why human rights and general principles have horizontal effect.[478]

317 The above also sheds light on the weight to be given to those human rights and general legal principles. The greater or more fundamental the interest that the human right or general legal principle seeks to protect, the stronger the horizontal effect of that right or principle will be. This can also happen via soft-law sources in which the human right or general legal principle concerned is deeply embedded. The greater the threat or danger against which the human right or general legal principle concerned seeks to provide protection, or the more fundamental the right or principle concerned is, the more weight will be attached to it when the interests are balanced. So in this context, the extent to which that right or principle is incorporated in international or EU law, whether it has the status of customary law and whether the right or principle constitutes *ius cogens*, can also be relevant, in addition to the extent of the danger or threat against which the human right or general legal principle seeks to offer protection. The more deeply and broadly a human right or general legal principle is enshrined in international or EU law, the stronger its horizontal effect will be and, consequently, the more weight it will carry in the balancing of interests.

318 The second route is based on the obligation following from the ECHR to ensure the indirect horizontal effect of the human rights and general legal principles secured by the ECHR. This obligation is directed at national courts as part of states. Pursuant to Article 1 ECHR, courts must effectively and actively secure ECHR rights in horizontal relationships as positive treaty obligations.[479] This is done, for example, through the application of liability law.[480] As the ECtHR held in 2007:

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478 *Asser/Hartkamp 3-I* 2023/226.

479 See, for example, the judgments of the Dutch Supreme Court of 6 January, 1995, *NJ* 1995, 422 and of 15 April 1994, *NJ* 1994, 576. See also T. Barkhuysen & M.L. van Emmerik, "*Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van Lindenbaum/Cohen via Kelderluik en Öneryildiz naar Urgenda?*" in *RM Themis* 2019-1, p. 43; C.C. van Dam, "*Het EVRM en de aansprakelijkheid van private partijen*" (The ECHR and the liability of private parties) in *VR* 2014/164, paras. 2 and 4; A.J.P. Schild*, "De invloed van het EVRM op het ondernemingsrecht"* (The influence of the ECHR on corporate law), Deventer: Kluwer 2012, para. 2.8; J. Gerards, "*EVRM – Algemene beginselen*" (ECHR – General Principles), The Hague: SDU Publishers 2011, pp. 263, 281 and 282.

480 C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom juridisch 2023, paras. 107 and 820-1.

> *"75. In other contexts, the Court has underlined that it is not in theory required to settle disputes of a private nature. It can nevertheless not remain passive, in exercising the European supervision incumbent upon it, where a domestic court's interpretation of a legal act appeared "unreasonable, arbitrary, or… inconsistent… with the principles underlying the Convention" (Pla and Puncernau v. Andorra, no. 69498/01, § 59, ECHR 2004-VIII). In a case concerning a dispute over the interpretation of patent law, and at the same time as noting that even in cases involving litigation between individuals and companies the State has obligations under Article 1 of Protocol No. 1 to take measures necessary to protect the right of property, the Court reiterated that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, and not to deal with errors of fact or law allegedly committed by a national court unless Convention rights and freedoms may have been infringed* (…)*."*[481]

319 The ECtHR thus requires national courts (among other things) to enforce the rights secured by Articles 2 and 8 ECHR horizontally in the national law and to provide remedies to secure the protection afforded by those rights.[482] It goes without saying that in this mode of operation of the rights, too, the need for the horizontal enforcement of fundamental ECHR rights and ECHR principles will increase in line with the extent to which such rights offer protection against more fundamental interests or against greater threats and dangers. The greater and more fundamental the breach, the greater the need to enforce those rights, and the more Article 1 ECHR requires national courts to do so. For this reason, too, human rights and general legal principles are of great importance when duties of care between citizens are established and determined.

IV.5 Objective points of reference and climate-related duties of care

320 Depending on the specific context, a large number of objective points of reference can be linked up with to establish and determine a duty of care. This Section will look in more depth at the objective points of reference that are relevant to establishing and determining the duty of care to prevent or limit dangerous climate change. These are the following objective points of reference:[483]

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[481] ECHR 30 August 2007, No. 44302/02 (*Pye/United Kingdom*).

[482] ECHR 3 November 2011, No. 28096/04 (*Antonov/Ukraine*); ECHR 14 June 2011, No. 19776/04 (*Ciechonska/Poland*); ECHR 24 May 2011, No. 23302/03 (*Anna Todorova/Bulgaria*); ECHR 24 June 2004, No. 59320/00 (*Caroline von Hannover/Germany I*). For a detailed overview, see C.C. van Dam, "*Het EVRM en de aansprakelijkheid van private partijen*" (The ECHR and the liability of private parties) in *VR* 2014/164, para. 2; J. Vande Lanotte & Y. Haeck, "*Handboek EVRM, deel 1*" (ECHR Handbook, Volume 1), Antwerp: Intersentia 2005, p. 108. See also A.J.P. Schild*, "De invloed van het EVRM op het ondernemingsrecht"*, Deventer: Kluwer 2012, para. 2.9.

[483] See also (without any grouping) the non-exhaustive overview of objective points of reference in the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 31.

(a) the doctrine of hazardous negligence (Section IV.5.1 of this Explanatory Submission);

(b) human rights (Section IV.5.2 of this Explanatory Submission);

(c) general legal principles (Section IV.5.3 of this Explanatory Submission);

(d) soft law (Section IV.5.4 of this Explanatory Submission); and

(e) legislation that is not directly applicable (Section IV.5.5 of this Explanatory Submission).

321 It is worth noting that duties of care are twofold in nature. They not only entail *what* must be done or refrained from, but they must also lead to a *concrete order* to do or refrain from doing something. These are two sides of the same coin. In this context, climate-related duties of care cannot only entail *that* CO_2 emissions must be reduced, but can also indicate *to what extent* this must happen. Both aspects form part of the duty of care and stem from the objective points of reference used to determine it in concrete terms. It is, however, possible that certain objective points of reference (or any of their elements), by their very nature, are relevant only to the question (i) whether a duty of care exists in the case at hand, or the question (ii) what that duty of care requires in that specific case.[484] The fact that the duty of care to prevent or limit dangerous climate change also leads to a concrete reduction percentage for Shell - as the District Court did, but the Court of Appeal did not rule – will be discussed in Chapter VI of this Explanatory Submission.

IV.5.1 The doctrine of hazardous negligence

322 A first objective point of reference that can be used to flesh out duties of care is the doctrine of hazardous negligence. Hazardous negligence occurs when a hazardous situation is created or perpetuated.[485] Hazardous negligence can be unlawful if it results in a breach of a duty of care. Whether this is the case must be judged on the basis of (among other things) the factors set forth in the *Kelderluik* judgment, in which the Dutch Supreme Court held:

> *"*(…) *courts can judge only in light of the circumstances of the specific case whether and to what extent a person who creates a situation that is hazardous for other persons if the required cautiousness and care are not exercised can be required to allow for the possibility that such cautiousness and care will not be exercised and, with that in mind, to take certain safety measures;*

[484] See, in this regard, Sections V.4.1 and VI.2.1 of this Explanatory Submission.
[485] T. Hartlief et al., "*Verbintenissen uit de wet en schadevergoeding"* in *SBR 5,* Deventer: Wolters Kluwer 2021, paras. 38 up to and including 44.

> *in such judgment, consideration must be given not only to the degree of probability with which the failure to exercise the required cautiousness and care can be expected, but also to the likelihood of accidents resulting from such failure, the severity of the potential consequences of such failure and the degree of onerousness of the safety measures to be taken."*[486]

323 The criteria formulated in the *Kelderluik* judgment are known as the *Kelderluik* factors. They are:[487]

(a) the likelihood of damage (or its magnitude);

(b) the nature of the act or omission;

(c) the nature and severity of the damage, if any; and

(d) the onerousness of taking precautionary measures.

324 Therefore the answer to the question whether creating or perpetuating a hazardous situation is unlawful - due to a violation of the care to be exercised in society – is, essentially, determined by whether another person is exposed to a greater risk than is reasonably justifiable under the given circumstances.[488] What the *Kelderluik* factors thus actually embody is a continuous search for a societal balance between (on the one hand) the ability to act freely and (on the other hand) the need to prevent danger and harm to others.

325 By weighing the *Kelderluik* factors, a tipping point can be identified that determines whether or not certain precautionary measures must be taken. There is no further hierarchy among the *Kelderluik* factors. These factors often function as a system of communicating vessels.[489] For instance, precautionary measures are more likely to be considered as not very onerous if the severity of a danger is greater.[490] Consequently, a duty of care in the case of a very serious danger may necessitate very far-reaching precautionary measures. Also, a relatively low likelihood of a relatively limited identifiable risk may still necessitate (far-reaching) precautionary measures if the risk affects a large group of interests and these interests, by their very nature, deserve a

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[486] Judgment of the Dutch Supreme Court of 5 November 1965, *NJ* 1966, 136 (*Kelderluik*).

[487] Judgment of the Dutch Supreme Court of 5 November 1965, *NJ* 1966, 136 (*Kelderluik*). See also the judgment of the Dutch Supreme Court of 14 July 2017, *NJ* 2017, 467 (*JMV/Zürich*), 7 April 2006, *NJ* 2006, 244 (*Der Bildtpollen/Miedema*) and 26 September 2003, *NJ* 2003, 660 (*Waterschap Zeeuwse Eilanden/Royal Nederland Verzekeringen*).

[488] K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.3.5. See, in great detail, the Opinion of Advocate General Hartkamp prior to the judgment of the Dutch the Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*) under 11 et seq. and the literature cited there.

[489] K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.3.9.6.

[490] Opinion of Advocate General Hartkamp prior to the judgment of the Dutch Supreme Court of 28 May 2004, *NJ* 2005, 105 (*Jetblast*), para. 12.

high degree of protection, such as in the case of an (imminent) violation of human rights.[491]

326 Since the *Kelderluik* factors link up with fundamental concepts regarding the handling of risks, it is not surprising that these perspectives have also been widely accepted internationally and are reflected in similar terms in other legal systems.[492] For example, very similar factors can be found in the Principles of European Tort Law,[493] which formulate the key elements of (EU) liability law.[494] The same applies to the Draft Common Frame of Reference,[495] which identifies common principles of private law in the EU and in which the protection of human rights is a primary function.[496] In common-law legal systems, the *Kelderluik* factors can be recognised in the *Learned Hand* formula used by the American judge Billings Learned Hand,[497] in which the "negligence" is judged based on the probability of damage, the severity of the damage and the onerousness of the precautionary measures to be taken.[498] The doctrine of hazardous negligence is therefore rightly considered to have universal effect.[499]

327 In the same vein, Van Maanen concludes after an examination of the *Learned Hand* formula and of English, German, French and Belgian case law:

> *"The line of reasoning is the same everywhere:*
>
> *- the degree of likelihood with which the failure to exercise the required cautiousness and care could be expected by the victim, combined with*
>
> *- the magnitude of the risk that accidents may result from this, and*
>
> *- the severity of the potential consequences of this, in light of*
>
> *- the onerousness of the safety measures to be taken.*
>
> *The determination and weighing of these factors in the circumstances of the case at hand will lead to a particular outcome* (…)*. The technical-legal frameworks are (slightly) different, but the line of reasoning and*

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491 C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 207-1.
492 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.23.
493 Articles 4:102 and 4:103 PETL. See also Article 2:102(1) PETL.
494 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.23; I. Giesen and S.D. Lindenbergh, "*Europese beginselen als bron van inspiratie"* (European principles as a source of inspiration) in *AV&S* 2007, 7.
495 Article VI.-1:102 DCFR. See also Principles 16 and 30 up to and including 33 DCFR.
496 C. von Bar et al., Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich: Sellier 2009, pp. 3 and 7.
497 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.23
498 *United States/Carroll Towing Co.* 159 F.2d 169 (2d Cir. 1947), p. 173. See also C.C. van Dam, European Tort Law, Oxford: Oxford University Press 2013, p. 236.
499 T. Hartlief, "PETL: Basic Norm and Liability Based on Fault" in *AV&S* 2007, 8.

> *the balancing of interests are the same. It is therefore no wonder that these factors could be described in the Principles of European Tort Law as the common core of the European duty-of-care standard: Art. 4:102(1) PETL* (…)*."*[500]

328 The doctrine of hazardous negligence is thus representative of the balancing of interests that must be carried out when duties of care must be established and determined.[501] After all, even within the *Kelderluik* factors, a weighing exercise takes place in which various relevant facts and circumstances must be taken into account and which can each time carry different weight in the balancing exercise. The application of the doctrine of hazardous negligence - which was specifically developed for the purpose of judging (potentially) hazardous situations - can therefore, in and of itself, lead to the establishment and determination of a duty of care.[502] This also applies to what a party can be expected to do in concrete terms, as this concerns the other side of the same coin. For this purpose, courts do not necessarily need to assess other objective points of reference as well.

329 Of course, none of the above detracts from the fact that the doctrine of hazardous negligence in any event serves as an objective point of reference, so that independent meaning must be attached to the *Kelderluik* factors in the general balancing of interests to be carried out when it comes to establishing and determining duties of care. A concrete duty of care can therefore be arrived at via both (i) an assessment against the doctrine of hazardous negligence *per se* and (ii) an assessment against the doctrine of hazardous negligence within the balancing of interests required under Article 6:162 DCC in light of all the other relevant objective points of reference.

330 The doctrine of hazardous negligence can also be readily applied when the duty of care *to prevent or limit dangerous climate change* is established or determined. After all, this is also a hazard - indeed, the greatest conceivable hazard – for which courts must assess (also in light of the likelihood (or magnitude of the likelihood) of damage, the nature of the conduct, the nature and severity of the potential damage and the onerousness of taking precautionary measures) whether a legal duty to help prevent or mitigate the occurrence of that hazard exists.

331 The circumstances that (i) dangerous climate change is being caused by a large number of parties, each of which has a share of the responsibility for this, and (ii) the interests of a large number of parties are being harmed, do not preclude the application of the

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[500] G.E. van Maanen, "*De Nederlandse kelderluikarresten. Al meer dan honderd jaar - rechtseconomisch (!) - op de goede weg in Europa!*" (The Dutch *Kelderluik* judgments. On the right track in Europe - from a legal and economic perspective ! for more than a century now!) in *NTBR* 2008, 5.

[501] See E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*", Deventer: Wolters Kluwer 2025, p. 72.

[502] See the Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.8.

Kelderluik factors. It would be illogical, inconsistent and detrimental to legal certainty if the doctrine of hazardous negligence *would* be applied to cases in which a certain hazard is created for or by one single or just a few persons, but not to cases in which a large number of persons actively contribute to or are threatened by a certain hazard. On the contrary, the higher the number of people that are at risk, the greater the care that may be required.[503] In such situations, too, the application of the doctrine of hazardous negligence - whether as an independent legal concept or as an objective point of reference in the balancing of interests under Article 6:162 DCC – is the starting-point.[504]

332 In case law, the doctrine of hazardous negligence is also applied in situations involving a large number of injured parties or a large number of parties responsible for the damage.[505] An example is the *Mothers of Srebrenica* case, in which the Dutch Supreme Court held the following:

> *"4.2.5 In assessing whether Dutchbat's conduct was unlawful because it acted in violation of the duty-of-care standard set forth in Article 6:162 DCC, the Court must therefore examine whether Dutchbat's leadership, at the time of acting, knew or should reasonably have known that there was a real risk that the rights of the Bosnian refugees protected by Articles 2 and 3 ECHR would be violated and, if so, whether Dutchbat failed to take the measures that - given all the circumstances of the case - could reasonably be expected of Dutchbat in order to avoid that risk."*[506]

333 In the *Urgenda* case, the doctrine of hazardous negligence was applied to establish and concretely determine the duty of care of the Dutch state to prevent or limit dangerous climate change. Referring to the *Kelderluik* factors, the District Court based that duty of care, among other things, on:

> *"4.63* (…)
>
> *(i) the nature and magnitude of the damage resulting from climate change;*
>
> *(ii) the awareness and foreseeability of this damage;*
>
> *(iii) the likelihood that dangerous climate change will occur;*

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503 C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom juridisch 2023, para. 207-2.
504 See ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 276 up to and including 279.
505 See, for example, the judgment of the Dutch Supreme Court of 19 July 2019, *NJ* 2020, 391 (*Aardbevingsschade Groningen*); the judgment of the Dutch Supreme Court of 19 July 2019, *NJ* 2019, 356 (*Mothers of Srebrenica*); the judgment of the Court of Appeal of The Hague of 24 August 2010, *NJ* 2011, 418 (*Vuurwerkramp Enschede*) and the Decision of the District Court of The Hague of 13 December 2006, *NJ* 2007, 197 (*Vuurwerkramp Enschede*).
506 Judgment of the Dutch Supreme Court of 19 July 2019, *NJ* 2019, 356 (*Mothers of Srebrenica*).

(iv) the nature of the state's act (or omission);

(v) the onerousness of taking precautionary measures (…)."[507]

334 The *Kelderluik* factors also recur in international case law relating to climate obligations when duties of care (based on customary law) are established and concretely determined. For example, the ICJ recently held:

> *"275. Whether an activity constitutes a risk of significant harm depends on "both the probability or foreseeability of the occurrence of harm and its severity or magnitude" and should therefore be "determined by, among other factors, an assessment of the risk and level of harm combined"* (…). *It is necessary to take into account the risks that current activities might pose in the future, including in the long term. In any case, the degree of a given risk of harm is always an important element for the application of the due diligence standard: the higher the probability and the seriousness of possible harm, the more demanding the required standard of conduct."*[508]

335 Even if it were to be assumed that dangerous climate change (or contributing to dangerous climate change) does not constitute a form of hazardous negligence, the doctrine of hazardous negligence is relevant when the duty of care to prevent or limit dangerous climate change is established and concretely determined. After all, the factors resulting from that doctrine should also be applied as much as possible beyond situations of hazardous negligence.[509] This is related to the fact that the *Kelderluik* factors are the most general test for unlawfulness and their essence can also provide guidance beyond situations of hazardous negligence.[510] Conversely, any breach of a duty of care can, to a certain extent, be regarded as hazardous negligence.[511]

336 It follows from the foregoing that the doctrine of hazardous negligence is relevant when duties of care are established and concretely determined, including duties of care aimed at preventing or limiting dangerous climate change. For this purpose, the *Kelderluik* factors may be linked up with as an independent standard, yet they can also be used as an objective point of reference in the balancing of interests under Article 6:162 DCC.

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[507] Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), ground 4.63. In the judgments of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*) and of the Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), the *Kelderluik* factors do not reappear, because the Court of Appeal independently based the State's duty of care to prevent or mitigate dangerous climate change on a violation of Articles 2 and 8 ECHR.

[508] ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change). See also ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 276 up to and including 279.

[509] K.J.O. Jansen, "*GS Onrechtmatige Daad*", Art. 6:162 DCC, notes 6.3.9.4 and 6.3.9.7. See also the opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.23.

[510] A.J. Verheij, "*Onrechtmatige daad*" (Unlawful acts), Deventer: Wolters Kluwer 2023, p. 61.

[511] T. Hartlief, "*Vooruitgang in het recht*" (Progress in the law), *RM Themis* 2019/1, p. 21.

The doctrine of hazardous negligence is therefore indispensable for determining *"what is appropriate in society according to unwritten law*."

IV.5.2 Human rights

337 Human rights constitute a second objective point of reference that is relevant when duties of care must be determined in concrete terms. A large number of human rights are enshrined in various human rights treaties. The most fundamental human rights are grounded in the ECHR (among other sources of law). Articles 2 and 8 ECHR read as follows:

> Article 2 ECHR
> *1. Everyone's right to life shall be protected by law (…).*
>
> Article 8 ECHR
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

338 Article 2 ECHR protects the right to life. This human right is twofold in nature. It not only establishes a prohibition on killing, but also provides a commandment - a positive obligation - to take measures to protect the right to life.[512] Within that second context, Article 2 ECHR provides general protection to society.[513] Whether or not measures to protect the right to life must be taken in a concrete situation will depend, just as in the doctrine of hazardous negligence,[514] on the circumstances of the case. This also applies to the question which measures are *sufficient*.[515] This follows from the *Osman* judgment, in which the ECtHR found the following:

> *"116.* (…) *For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have*

[512] See, for example, ECHR 30 November 2004, no. 48939/99 (*Öneryildiz/Turkey*). See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.42.

[513] ECHR, Guide on Article 2 of the European Convention on Human Rights, para. 26. See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.43.

[514] T. Barkhuysen & M.L. van Emmerik, "*Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van Lindenbaum/Cohen via Kelderluik en Öneryildiz naar Urgenda?*" in *RM Themis* 2019-1, p. 43. See also the Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.29, and the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.23.

[515] ECHR 9 November 2010, No. 2345/06 (*Deés/Hungary*).

> *knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."*[516]

339 Although all the circumstances may be relevant, the severity of the risk of a violation of Article 2 ECHR[517] in any event carries great weight. For instance, the ECtHR found the following in its *Kotilainen/Finland* judgment:

> *"88. Given the particularly high level of risk to life involved in any misuse of firearms, the Court considers that it is essential for the State to put in place and rigorously apply a system of adequate and effective safeguards designed to counteract and prevent any improper and dangerous use of such weapons* (…)*."*[518]

340 Article 8 ECHR is an extension of Article 2 ECHR. Due to its broad scope – it covers both private and family life - Article 8 offers comprehensive protection that may also apply in situations where Article 2 ECHR is not applicable. Examples include cases where the *quality* of life is impaired, but no life-threatening situation exists.[519] Under Article 8 ECHR, a fair balance must be struck between the interests at stake.[520] So in the context of Article 8 ECHR, too, all the relevant circumstances of the case must be considered in the assessment, which may lead to a requirement to take measures to protect the right to private and family life.

341 It follows from the extensive ECtHR case law that both Article 2 ECHR[521] and Article 8 ECHR[522] also apply in the event of natural or environmental disasters as well as in the context of other "environmental issues," such as dangerous climate change. This is also obvious, since dangerous climate change, as explained in Chapter II of this Explanatory Submission, is the greatest danger of our time and is life-threatening in nature. In this way, the right to a clean, healthy and sustainable environment and the right to a habitable climate are equally covered by Articles 2 and 8 ECHR. These rights are so undisputed that they are recognised even outside the context of the ECHR.[523]

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516 ECHR 28 October 1998, No. 23452/94 (*Osman/United Kingdom*).
517 ECHR, Guide on Article 2 of the European Convention on Human Rights, para. 27.
518 ECHR 17 September 2020, No. 62439/12 (*Kotilainen/Finland*).
519 ECHR, Guide on Article 8 of the European Convention on Human Rights, para. 26 et seq. See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.46.
520 ECHR, Guide on Article 8 of the European Convention on Human Rights, paras. 416 up to and including 418. See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.48.
521 See, for example, ECHR 28 February 2012, no. 17423/05 (*Kolyadenko/Russia*); ECHR 20 March 2008, no. 15339/02 (*Budayeva/Russia*); ECHR 30 November 2004, no. 48939/99 (*Öneryildiz/Turkey*).
522 See, for example, ECHR 10 January 2012, no. 30765/08 (*Di Samo/Italy*); ECHR 10 November 2004, No. 46117/99 (*Taskin/Turkey*); ECHR 9 December 1994, No. 16798/90 (*López Ostra/Spain*).
523 See, for example, Exhibit MD-343 (UN Human Rights Council Resolution 48/13) and Exhibit MD-346 (UN General Assembly Resolution 76/300).

They are even recognised globally, in which context the rights have acquired the status of customary law.[524]

342 In line with this, it is widely recognised that dangerous climate change leads to human rights violations. Not only the ECtHR,[525] but also the IACtHR and the ICJ have recently reaffirmed this in explicit terms.[526] Numerous national (supreme) courts have independently reached the same conclusion. Within Europe, for example, examples are the case law of the Dutch Supreme Court, the German *Bundesverfassungsgericht* and the Court of Appeal of Brussels.[527] Outside Europe, this is no different. For instance, the Lahore High Court in Pakistan, the Supreme Court of Colombia, the Brazilian Federal Supreme Court, the District Court of Montana (United States) and the Supreme Court of India have all held that human rights can be invoked to obtain protection against the consequences of climate change.[528]

343 Although the concrete circumstances of the case are, in principle, always decisive in determining whether any precautionary measures must be taken in a specific situation, the ECtHR has formulated more general rules in a number of court cases concerning the application of Articles 2 and/or 8 ECHR in relation to environmental risks:

(a) If there is a sufficiently real risk of adverse effects on citizens' health, there is an obligation to protect citizens against such adverse effects, even if there is no absolute certainty yet regarding the cause-and-effect relationship between the harmful act (or omission) and the (imminent) harm.[529]

(b) If there is a generally recognised and foreseeable health risk, human rights may be invoked, even if the harm cannot yet be established with certainty because it may only be suffered in the distant future.[530]

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[524] See, for example, ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 393; IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 156, 270, 301, 305 up to and including 313, 394 and 397.

[525] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 434, 436, 537, 538 and 542.

[526] IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 156, 270, 301, 394 and 397; ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 372 et seq.

[527] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), paras. 5.6.2 and 5.7.9; judgment of the *BVerfG* of 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), para. 192; judgment of the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, paras. 211, 213 and 214.

[528] Judgment of the Lahore High Court of 4 September 2015, W.P. No. 25501/2015 (*Leghari/Federation of Pakistan*), para. 7; judgment of the Supreme Court of Colombia of 5 April 2018, No. STC4360-2018 (*Future Generations/Ministry of the Environment*), p. 13; judgment of the Federal Supreme Court of Brazil 7 April 2022 (*PSB et al./Brazil*); judgment of the Montana First Judicial District Court 14 August 2023, CDV-2020-307 (*Held, et al./State of Montana, et al.*), pp. 97 and 98; judgment of the Supreme Court of India 21 March 2024, No. 3570 of 2022 (*Ranjitsinh and Others/Union of India and Others*), para. 20.

[529] ECHR January 27, 2009, No. 67021/01 (*Tatar v. Romania*).

[530] ECHR, November 10, 2004, No. 46117/99 (*Taskin v. Turkey*). See also ECHR 10 January 2012, No. 30765/08 (*Di Samo/Italy*).

(c) If a citizen cannot escape the potential climate hazards, for example by moving to a more environmentally friendly area, then the duty to offer protection is more extensive.[531]

(d) Even if a very large group of people faces a more general public health risk that results in the rights of some citizens being infringed to a greater or actually to a lesser extent, there may still be a sufficiently individualisable interest in being protected.[532]

344 In the *KlimaSeniorinnen* judgment, the ECtHR subsequently held, in general terms, that Articles 2 and/or 8 ECHR[533] imply that a state has a positive obligation to do its part to protect its citizens from the adverse effects of dangerous climate change. In this regard, the ECtHR held:

> *"519.* (…) *Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life* (…).
>
> *544. As stated above, the Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change (see paragraph 519 above).*
>
> *545. Accordingly, the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical*

[531] ECHR 9 June 2005, No. 55723/00 (*Fadayeva/Russia*).
[532] ECHR 10 January 2012, No. 30765/08 (*Di Samo/Italy*); ECHR 12 June 2005, No. 3622/97 (*Okyay/Turkey*).
[533] Although the ECHR bases its judgment on Article 8 ECHR, it also considers judgments rendered under Article 2 ECHR when reaching its decision. See ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 537.

> *and effective, not theoretical and illusory (see, for instance, H.F. and Others v. France, cited above, § 208 in fine* (…)*).”*[534]

345 Articles 2 and/or 8 ECHR thus require, in a general sense, that states contribute to preventing or mitigating dangerous climate change. This aligns very well with the reasoning of the Dutch Supreme Court in the *Urgenda* case, in which Articles 2 and/or 8 ECHR served as the basis for issuing a specific emission reduction injunction against the State as early as 2019:

> *“8.3.4 This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed* (…). *The State is obliged to do ‘its part’ in this context* (…). *Towards the residents of the Netherlands, whose interests Urgenda is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents* (…)*.”*[535]

346 Although Articles 2 and 8 ECHR primarily establish obligations for states, these provisions - as well as the ECtHR case law in connection with these Articles - also have influence on the contents and scope of obligations of private actors. That influence is exerted through the societal duty-of-care standard, as human rights serve as objective points of reference that are used to determine that standard in concrete terms.[536] This is also referred to as the “indirect horizontal effect” of human rights. The fact that human rights have been written for the vertical relationship between a state and its citizens does not preclude the possibility of using them as an objective point of reference to determine rights in horizontal relationships between private parties, as already briefly discussed in Section IV.4 of this Explanatory Submission.[537]

347 That is also obvious. The values embodied in human rights are of such great importance to society as a whole that it is desirable that citizens can also invoke such rights in their relationships with other citizens, and also against private-law organisations. This corresponds with the current reality, in which such organisations are able to exercise such significant legal, economic or factual power over individuals that the need for protection against that power may be comparable to, or even greater than, the need for protection against the power of public institutions.[538] That will therefore lead to a

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[534] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).
[535] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
[536] *Asser/Sieburgh 6-IV* 2023/78; K.J.O. Jansen, *“GS Onrechtmatige daad“*, Art. 6:162 DCC, note 6.1.13. See E.G.A. van der Werf, “*Overheid en maatschappelijke betamelijkheid*”, Deventer: Wolters Kluwer 2025, p. 76.
[537] *Asser/Hartkamp 3-I* 2023/226 et seq. See also the Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.2.
[538] *Asser/Hartkamp 3-I* 2023/226; A.G. Maris, “*Dient de wet bijzondere regelen te bevatten ten aanzien van de civielrechtelijke werking van de grondrechten, en, zo ja, welke?*” (Should the law contain special provisions regarding the civil-law effect of fundamental rights, and, if so, which ones?), Preliminary opinion by A.G. Maris, The Hague, in: A.G. Maris & J.M. Polak, “*Handelingen der Nederlandse Juristen-Vereniging 1969*” (Proceedings of the Netherlands Jurists Association*)* 1969, Zwolle: N.V. Uitgevers-Maatschappij W.E.J. Tjeenk Willink 1969, pp. 16 up to and

stronger horizontal effect. This applies all the more to cases in which the protected interest is primarily harmed by those private parties, such as in the case of dangerous climate change. The Draft Common Frame of Reference therefore views the protection of human rights as the primary objective of liability law.[539] The ICJ and the IACtHR also see an important role for non-state actors in combating dangerous climate change.[540]

348 For these reasons, it is widely recognised that human rights are also relevant - through the application of the standard for the societal duty of care - in relationships between private parties.[541] It also follows from established case law of the Dutch Supreme Court that human rights can have effect in a legal relationship between citizens (so: horizontally).[542] Initially, the Dutch Supreme Court mainly considered human rights to be relevant when other types of open standards based on private law were concretely determined,[543] but nowadays more and more judgments are given in which the societal duty of care under Article 6:162 DCC is established and concretely determined.[544] For example, in 2020, the Dutch Supreme Court found:

> *"3.12.2 In its assessment, the Court of Appeal first considered that the women and children had presented interests that the human rights treaties seek to protect. According to the Court of Appeal, this means that these are interests that must be legally respected and considered in the context of the balancing of interests. However, because the State lacks jurisdiction, this (indirect) effect of human rights is less strong compared to the situation where the State would have had jurisdiction* (…)
>
> *3.13.1 The starting-point to be used is that the women and children cannot directly invoke the ECHR, the ICCPR and the CRC against the State, because the women and children do not fall under the State's jurisdiction (see § 1 above). Therefore in the assessment as to whether*

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including18.

539 Principle 33 DCFR. See also C. von Bar et al., Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich: Sellier 2009, pp. 14 and 81.

540 See, for example, ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 403; IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 345 and 346.

541 *Asser/Hartkamp 3-I* 2023/228; *Asser/Sieburgh 6-IV* 2023/71, 74 and 76; K.J.O. Jansen, "*GS Onrechtmatige Daad"*, Art. 6:162 DCC, notes 4.2.3.2, 5.2.3, and 6.1.13.1; C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, paras. 107 and 820-1; T. Barkhuysen & M.L. van Emmerik, "*Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van Lindenbaum/Cohen via Kelderluik en Öneryildiz naar Urgenda?*" in *RM Themis* 2019-1, pp. 43 and 54. See also the Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.2; Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), paras. 2.15 and 2.30.

542 See, for example, the judgment of the Dutch Supreme Court of 22 November 2019, ECLI:NL:HR:2019:1834 (*X/Hyatt*). See also J.M. Emaus, "*Handhaving van EVRM-rechten via het aansprakelijkheidsrecht"*, (Enforcement of ECHR rights via liability law), The Hague: Boom Juridische Uitgevers 2013, pp. 21–28.

543 See, for example, the judgments of the Supreme Court of 8 April 1994, *NJ* 1994, 704 (*Agfa/Schoolderman*), 2 February 1990, *NJ* 1991, 289 (*Goeree/Van Zijl*) and 18 June 1971, *NJ* 1971, 407 (*Mensendieck*).

544 See, for example, the judgments of the Supreme Court of 26 June 2020, ECLI:NL:HR:2020:1148 (*IS-uitreizigers*) and 19 July 2019, *NJ* 2019, 356 (*Mothers of Srebrenica*).

> *the State is acting unlawfully, the women and children cannot simply rely on the same level of protection that these human rights treaties would afford them if they were subject to the State's jurisdiction. After all, if that were different, the jurisdictional provisions of the human rights treaties would no longer have any meaning.*
>
> *3.13.2 The foregoing does not mean that it is irrelevant that the human rights treaties protect the interests invoked by the women and children, as this circumstance must, in fact, be taken into account in the balancing of interests and means that those interests carry significant weight.*
>
> *3.13.3 The Court of Appeal's ruling set forth in 3.12.2 above is consistent with the considerations set forth in 3.13.1–3.13.2 above."*[545]

349 Although private parties cannot invoke human rights against each other *directly*, the values embodied by them *are* considered in the balancing of interests to be undertaken in respect of the societal duty of care under Article 6:162 DCC. As a result, a violation of vertically applicable human rights may have as its effect – via the societal duty of care based on Article 6:162 DCC – that an unlawful act has been performed in a horizontal relationship. This also follows from the *Mothers of Srebrenica* case, in which the Dutch Supreme Court ruled as follows:

> *"4.2.2.* (…) *However, the* [Court of Appeal] *did rule in ground 38.7 that, even if the ECHR and ICCPR provisions were not applicable to Dutchbat's conduct due to the lack of jurisdiction, this would make no difference to the assessment of the claims, because the standards derived from the ECHR and ICCPR - by which the Court of Appeal refers in particular to the standards seeking to protect the right to life and the integrity of the human body - are also embedded in Dutch law, in the sense that a violation of those standards must be regarded as being contrary to the duty of care to be observed in social conduct. This ruling was not challenged on appeal and must therefore serve as the starting-point. This implies that it is decisive, for the assessment of Dutchbat's conduct in the mini safe area - both inside and outside the compound - whether Dutchbat acted in violation of the standards derived from Articles 2 and 3 ECHR and embodied in the standard of care of Article 6:162 DCC, which seek to protect the right to life and the integrity of the human body* (…).
>
> *4.2.5 In assessing whether Dutchbat's actions were unlawful because they violated the standard of care set forth in Article 6:162 DCC, the court must therefore examine whether the Dutchbat command knew or should reasonably have known, at the time of the actions, that there*

[545] Judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:HR:2020:1148 (*IS-uitreizigers*).

> *was a real risk that the rights of the Bosnian refugees protected by Articles 2 and 3 ECHR would be violated and, if so, whether Dutchbat failed to take the measures that - given all the circumstances of the case - could reasonably be expected of Dutchbat in order to avoid that risk."*[546]

350 In a similar sense, the Court of Appeal in The Hague recently held that cutting off drinking water may be unlawful in relation to minor children, as it may lead to a human rights violation:

> *"6.18 It was already found above that Article 3(1) of the Convention on the Rights of the Child requires, for the State and the drinking water company, that the best interests of the child shall be a primary consideration. This provision has no direct effect when it comes to the precise weight of that interest. However, in the view of the Court of Appeal, it already follows from the societal duty of care under Article 6:162 DCC that the State and the drinking water company must, in any case, do everything that is reasonably possible to prevent (as far as the State is concerned) that minor children in the Netherlands, and (as far as the DWB is concerned) the minor children of their customers in their distribution area, end up in the situation described above (lack of access to sufficient water in accordance with WHO standards). By failing to do everything that is reasonably possible and by deliberately leaving open the possibility that children will indeed end up in that situation, the State and the DWB are acting in violation of that societal duty of care and of Article 3(1) CRC."*[547]

351 The fact that these court cases were brought against the Dutch State is irrelevant in this context, as the cited findings each time concern the application of the societal duty of care of Article 6:162 DCC in a general sense. These court cases also involved the application of Article 6:162 DCC in relation to citizens who cannot directly invoke human rights. The foregoing therefore applies in the same sense to lawsuits between private citizens. This also follows from rulings of lower courts. The following finding from the District Court of Amsterdam serves as an illustration of this point:

> *"4.24.* (…) *It is possible to assess whether the application of the policy is – contractually - unacceptable according to standards of reasonableness and fairness, or - if the legal ground is an unlawful act – is in breach of the societal duty of care expected from* (…)*. These open standards can be fleshed out via the indirect effect of, for example, the right to freedom of expression* (…)*."*[548]

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[546] Judgment of the Dutch Supreme Court of 19 July 2019, *NJ* 2019, 356 (*Mothers of Srebrenica*).
[547] Judgment of the Court of Appeal of The Hague of 19 March 2024, ECLI:NL:GHDHA:2024:363.
[548] Decision of the District Court of Amsterdam of 13 October 2020, ECLI:NL:RBAMS:2020:4966. Similarly: judgments of the District Court of Gelderland of 22 February 2023, ECLI:NL:RBGEL:2023:784 and of 1 February 2023,

352 It follows from the foregoing that human rights may have (indirect) effect on horizontal legal relationships, including those arising from the societal duty of care within the meaning of Article 6:162 DCC. Since dangerous climate change leads to a violation of the human rights under Articles 2 and 8 ECHR, this means that these human rights must also be considered when duties of care to prevent or mitigate dangerous climate change are established and determined.

IV.5.3 General legal principles

353 General legal principles also serve as objective points of reference for establishing and determining duties of care. Three legal principles play a particularly important role in establishing the duty of care to prevent or mitigate dangerous climate change and - by extension - in establishing the concrete reduction obligations stemming from that duty of care. They are (i) the precautionary principle, (ii) the principle of intergenerational justice and (iii) the CBDR principle.

354 In the following, the scope of these general legal principles will each time be discussed on the basis of four questions:

(a) What does the legal principle mean?

(b) What is the legal principle (partly) derived from?

(c) Why does the legal principle have horizontal effect?

(d) How does the legal principle affect the duty of care to prevent or mitigate dangerous climate change and the determination of the resulting concrete reduction obligation?

355 In the context of the horizontal effect, reference will each time be made to the general considerations relevant to it, which were discussed in Section IV.4 of this Explanatory Submission. What will follow from all this is that all these general legal principles point towards a duty of care to prevent or limit dangerous climate change. It will also be explained that these principles are always relevant to determining the concrete reduction obligation (which follows from the duty of care) as well as to assessing the modelled reduction scenarios relevant to this.

IV.5.3.1 The precautionary principle

(a) The meaning of the precautionary principle

356 In the context of liability issues, the precautionary principle aims to accommodate the general notion that all the relevant information and knowledge needed to accurately

ECLI:NL:RBGEL:2023:494.

assess the nature and extent of imminent danger is not always available, or cannot always be available, to people (in a timely manner). It is also not possible in all cases to determine with (scientific) precision which measures are necessary and sufficient to avert or sufficiently limit that danger. It would be unacceptable if such uncertainties would mean that no measures have to be taken at all and that the feared danger actually materialises as a result.[549] This would place the risks and the associated costs entirely on the victims and on society.[550] In this way, the precautionary principle also aims to provide a counterbalance to parties who are only willing to take action against imminent dangers once they have obtained absolute certainty about the effectiveness of such action.[551] Parties actually also bear responsibility for the uncertainties and risks inherent to their actions.[552]

357 Therefore, the precautionary principle essentially means that certain hazards can be so significant or irreversible that (scientific) uncertainties should not be a reason for delaying the implementation of precautionary measures. Parties are therefore not allowed to wait until full (scientific) certainty has been obtained about the magnitude of the danger or the precautionary measures required to avert it. In such cases, the precautionary principle requires, despite the existing uncertainty, that measures be taken which can avert, or contribute to the averting of, the danger.[553] It is precisely the fact *that* there is (scientific) uncertainty about the exact magnitude of the danger or the required measures that necessitates the adoption of adequate measures. The greater the imminent danger, the more strongly the precautionary principle, logically, applies. Various authors therefore summarise the precautionary principle in simplified terms

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549 See, for the scope and purport of the precautionary principle, among other authors, E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's"* (Precautionary obligations. On the setting of standards for uncertain risks based on liability law), The Hague: Boom juridisch 2016, pp. 70–71; A. Trouwborst, "*De harde kern van het voorzorgsbeginsel*" (The hard core of the precautionary principle) in *M en R* 2007, p. 198 ff.; A. Trouwborst, Precautionary Rights and Duties of States, Leiden: Martinus Nijhoff Publishers 2006, pp. 37 up to and including 39 and 71 up to and including 91. See also M. Smits, "*Een steeds bredere toepassing van het voorzorgsbeginsel in het omgevingsrecht"* (An increasingly broad application of the precautionary principle in environmental law) in *TBR* 2023/42, para. 2.2; C.A. Okkerse, "*Volkenrechtelijke aansprakelijkheid voor schadelijke effecten van zeespiegelstijging als gevolg van klimaatverandering"* (State liability under international law for the harmful effects of sea-level rise resulting from climate change) in: E.H.P. Brans et al., "*Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering?*" (Towards liability for climate change (or its consequences)?), The Hague: Boom juridisch 2012, pp. 27 and 28; T. Barkhuysen & F. Onrust, "*De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk"* (The significance of the precautionary principle for the Dutch (environmental) legal practice) in: M.N. Boeve & R. Uylenberg, "*Kansen in het Omgevingsrecht. Opstellen aangeboden aan prof. Mr. N.S.J. Koeman"* (Opportunities in environmental law. Essays presented to Prof. N.S.J. Koeman), Groningen: Europa Law Publishing 2010, pp. 49 and 50.

550 E.R. de Jong, "*Onzekerheid troef?*" (Uncertainty trumps?), *NJB* 2014/305, p. 385.

551 E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's"*, The Hague: Boom juridisch 2016, p. 70.

552 E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's"*, The Hague: Boom juridisch 2016, p. 71.

553 See, for example, E.H.P. Brans, "*Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?*" (Uncertainty and liability for damage caused by climate change: what role does the precautionary principle play?) in E.H.P. Brans et al., "*Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering?"*, The Hague: Boom Juridisch 2012, pp. 119–120; A. Trouwborst, "*De harde kern van het voorzorgsbeginsel"* in *M en R* 2007, p. 198 ff.; A. Trouwborst, Precautionary Rights and Duties of States, Leiden: Martinus Nijhoff Publishers 2006, pp. 71–91.

with phrases such as *"better safe than sorry,"*[554] *"when in doubt, don't cross"*[555] and *"prevention is better than cure."*[556]

358 The nature of the existing uncertainty can, of course, vary from case to case. In some cases, there will be uncertainty about the question what *the actual magnitude of the imminent danger* is, but the measures to address it are sufficiently known. The uncertainty about the imminent danger may necessitate the adoption of such measures in view of the magnitude of the risk. In other cases, the uncertainty will lie primarily in the question *which measures* must be taken to sufficiently avert the imminent danger. In such cases, the precautionary principle may necessitate the adoption of measures that are reasonably sufficient for that purpose in view of the magnitude of the imminent danger. In any event, in all such cases the precautionary principle can "make a correction" for the (scientific) uncertainties associated with the measures to be taken. In all these cases, the precautionary principle essentially overcomes the (scientific) uncertainty about how imminent dangers should be countered.

359 In the context of environmental and climate law, the precautionary principle plays a special role. It will be explained below that the principle has actually gained significant momentum precisely in that context, in which the precautionary principle always operates against the background of the risk of significant and irreversible damage to the environment and the climate. In this regard, the precautionary principle requires, in the face of uncertainty, a choice in favour of the environment and the climate: *in dubio pro natura*.[557]

(b) The foundations of the precautionary principle

360 The precautionary principle is firmly embedded in the climate regimes under international, European and national laws.[558] As for the international climate regime, this follows from Article 3(3) UN Climate Convention:

Article 3 UN Climate Convention

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[554] E.H.P. Brans, "*Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?*" in E.H.P. Brans et al., "*Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering?"*, The Hague: Boom juridisch 2012, pp. 119–120

[555] W.Th. Braams, "*Dank u wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht"* (Thank you, we are already covered! The place of the precautionary principle in environmental liability law) in *AV&S* 2002, p. 171.

[556] W.Th. Braams, "*Dank u wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht"*, *AV&S* 2002, p. 171.

[557] A. Trouwborst, Precautionary Rights and Duties of States, Leiden: Martinus Nijhoff Publishers 2006, p. 29.

[558] The precautionary principle has its origins in international law within the climate regime of the 1980s. See, in this regard, the Ministerial Declaration on the 2nd International Conference on the Protection of the North Sea (1987), under VII. See, for example, also P. Sands and J. Peel, Principles of International Environmental Law, Cambridge: University Press 2012, p. 219 ff.; A. Trouwborst, "*De harde kern van het voorzorgsbeginsel"* in *M en R* 2007, p. 198 ff.; W.Th. Braams, "*Dank u wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht" in AV&S* 2002, p. 171.

> 3. *The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures* (…).[559]

361 The ICJ has also confirmed that the precautionary principle affects the obligations arising from the UN climate regime. In this way, the precautionary principle serves as a guiding principle for the interpretation and implementation of the UN Climate Convention, the Paris Agreement and the related instruments.[560] The precautionary principle even has the status of customary law.[561] For instance, the ICJ has repeatedly held that there is a duty of care based on customary law to prevent significant damage to the environment. This duty also applies to the prevention of damage to the climate system.[562] According to the ICJ, the precautionary principle is significant for the concrete determination of this duty of care, partly because that principle is an integral part of the duty of care based on customary law.[563]

362 In line with the foregoing, ITLOS has considered that the inclusion of the precautionary principle in an increasing number of treaties and other international instruments has set in motion a trend towards making the precautionary principle part of customary international law.[564] ITLOS thus also attributes the status of customary law to the precautionary principle. That status is also recognised in the legal literature. For example, Trouwborst,[565] Barkhuysen and Onrust[566] as well as Sands and Peel[567] have pointed out that the precautionary principle is part of international customary law due to its broad acceptance.

363 At European level, the precautionary principle is also deeply embedded in the legal systems, both as an independent principle and as part of human rights. This has been confirmed by both the ECtHR and the Dutch Supreme Court. For example, in the case *of Tătar/Romania*, the ECtHR ruled that the precautionary principle entails - with a view to providing a high level of protection in the areas of health, safety and the environment

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559 This provision is based on Principle 15 of the 1992 Rio de Janeiro Declaration on Environment and Development.
560 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 146, 158, 161, 172, 178, 180 and 293.
561 See ICJ 9 April 1949, No. 1 (*Corfu Channel*), p. 22.
562 See, for example, ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 272 up to and including 279; ICJ 20 April 2010, No. 135 (*Pulp Mills on the River Uruguay*), para. 101.
563 ICJ 23 July, 2025, No. 187 (Obligations of States in respect of climate change), paras. 281 and 282; ICJ 20 April 2010, No. 135 (*Pulp Mills on the River Uruguay*), para. 101.
564 ITLOS 21 May 2024, No. 31 (Climate Change and International Law), paras. 212, 213, 242, 361, 418, 434 and in the reply to question (b) under (e).
565 A. Trouwborst, "*De harde kern van het voorzorgsbeginsel"* in *M en R* 2007, p. 198 ff.; A. Trouwborst, Precautionary Rights and Duties of States, Leiden: Martinus Nijhoff Publishers 2006, p. 353.
566 T. Barkhuysen & F. Onrust, "*De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk*" in: M.N. Boeve & R. Uylenberg, "*Kansen in het Omgevingsrecht. Opstellen aangeboden aan prof. Mr. N.S.J. Koeman*", Groningen: Europa Law Publishing 2010, p. 51.
567 P. Sands and J. Peel, Principles of International Environmental Law, Cambridge: University Press 2012, p. 228.

- that the lack of certainty based on current scientific and technical knowledge cannot justify delaying the adoption of effective and proportionate measures to prevent significant and irreversible damage to the environment.[568]

364 In its *KlimaSeniorinnen* judgment, the ECtHR subsequently ruled that Article 8 ECHR requires the adoption of effective measures to prevent dangerous climate change.[569] Due to this requirement of effectiveness, the ECtHR no longer needs the precautionary principle as a separate point of view. Within the framework of the protection against dangerous climate change required by Article 8 ECHR, the precautionary principle is therefore fully incorporated into the duty to take effective measures. That duty, which is focused on effectiveness, presupposes that due care is exercised. In this light, it must be assumed that, according to the ECtHR, the precautionary principle plays an even more important role in the prevention of dangerous climate change.

365 Within the framework of Articles 2 and 8 ECHR, the Dutch Supreme Court did, however, attach separate meaning to the precautionary principle in its *Urgenda* judgment.[570] According to the Supreme Court, the positive obligation arising from Articles 2 and 8 ECHR to take preventive measures against a danger applies even if it is not certain whether the danger in question will actually materialise.[571] According to the Dutch Supreme Court, this is consistent with the precautionary principle. Furthermore, if it is clear that there is a *"real and immediate risk*," there is also an obligation to take appropriate (i.e. reasonable and suitable) measures.[572] In light of the impending dangerous climate change, the Dutch Supreme Court held that such a *"real and immediate* risk" already existed at the time of the *Urgenda* judgment, so that the State, partly on the basis of the precautionary principle, was obliged to take appropriate measures.[573] By extension, the precautionary principle implies, according to the Dutch Supreme Court, that more far-reaching measures must be taken to reduce GHG

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568 ECHR 27 January 2009, no. 67021/01 (*Tătar/Romania*), under II-B-h and paras. 60, 70, 109 and 120. See also ECHR 5 December 2013, no. 52806/09, paras. 233 up to and including 244 (*Vilnes et al./Norway*). See also K.J.O. Jansen and E.R. De Jong, "*Rechterlijke toetsing van wetenschappelijke kennis in het aansprakelijkheidsrecht*" (Judicial review of scientific knowledge in liability law) in *NTBR* 2022/2, para. 3.4; T. Barkhuysen & F. Onrust, "*De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk*" in: M.N. Boeve & R. Uylenberg, "*Kansen in het Omgevingsrecht. Opstellen aangeboden aan prof. Mr. N.S.J. Koeman*", Groningen: Europa Law Publishing 2010, p. 62.

569 ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 538 et seq. See also, in this connection, Section IV.5.2 of this Explanatory Submission.

570 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

571 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.2.2 and 5.2.3, citing ECHR 27 January 2009, No. 67021/01 (*Tătar/Romania*); ECHR 20 March 2008, No. 15339/02 (*Budayeva/Russia*); ECHR 30 November 2004, No. 48939/99 (*Öneryildiz/Turkey*). See also E. Bauw, "*GS Onrechtmatige daad"*, note VIII.6.3.10; E.H.P. Brans, "*Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?*" in E.H.P. Brans et al., "*Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering?",* The Hague: Boom juridisch 2012, p. 124 ff.

572 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.3.2.

573 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.6.2.

emissions rather than less far-reaching measures.[574] All of this is, again, consistent with the ECtHR case law discussed above.

366 Within the EU, the precautionary principle has also been accepted as a fundamental principle governing all the environmental policies. This follows explicitly from Article 191(2) TFEU. The precautionary principle is autonomous in nature and must always be applied where necessary to ensure a high level of protection of health, consumers and the environment.[575] Within the EU, the precautionary principle therefore has a broad and fundamental effect in shaping the protection of health, citizens and the environment.[576]

367 The deep embedment of the precautionary principle in relation to dangerous climate change also follows from numerous other legal sources. This applies, for example, to the case law of the German *Bundesverfassungsgericht*[577] and various soft-law sources aimed at business enterprises,[578] such as the OECD Guidelines[579] and the UN Global Compact,[580] which Shell supports and claims to comply with.[581]

368 The precautionary principle is also part of the Dutch legal system and the national liability law. After all, the duty of care arising from Article 6:162 DCC entails that the nature and severity of a particular risk may be so large that measures must be taken against it, even if there is (scientific) uncertainty about the exact magnitude of that risk.[582] This is the essence of the *Natronloog* judgment,[583] in which it was precisely the uncertainty about the exact contents of a bucket of liquid that should have prevented the person that had caused the damage from putting it out on the street as trash without any warning. In the context of liability for asbestos exposure, too, the Dutch Supreme Court found that the risks and the consequences if the risks materialise can be so large that measures must be taken to prevent them, even if there is still scientific uncertainty

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574 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 7.2.10. See also, in this regard, the judgment of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 73.

575 See, for example, CJEU (General Court) 26 November 2002, T-74/00, (*Artegodan/Commission*), paras. 183 and 184.

576 See, for example, Article 1 Regulation 1907/2006 (*Chemicals*) and Article 1(4) Regulation 1107/2009 (*Plant protection products*). In the area of species protection, the CJEU has similarly read the precautionary principle into Article 9 Birds Directive (CJEU 10 October 2019, C-647/17) and Article 16 Habitats Directive (CJEU 23 April 2020, C-217/19). For further examples of the application of the precautionary principle, see CJEU 7 November 2018, C-293/17, CJEU 17 April 2018, C-441/17 and CJEU 7 September 2004, C-127/02.

577 BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), grounds 143 up to and including 150.

578 See, in this regard, Section IV.5.4 of this Explanatory Submission.

579 Exhibit MD-492 (OECD Guidelines 2023), paras. 74 and 75.

580 Exhibit MD-225 (UN Global Compact Mission and Principles).

581 See, for example, Exhibit S-18 (Shell Sustainability Report 2020), p. 76. See also the Decision of the District Court, ground 3.2. See also https://unglobalcompact.org/what-is-gc/participants/8082-Shell-plc; https://www.shell.com/sustainability/people/human-Rights/_jcr_content/root/main/Section_586659054/text/links/item0.stream/1747400535729/b78ec390ead2d2ec1a55c1cbbff7a2a5bedcfa32/shells-approach-to-human-Rights-2025-v2.pdf.

582 See also Section IV.5.1 of this Explanatory Submission.

583 Judgment of the Dutch Supreme Court of 8 January 1982, *NJ* 1982, 614 (*Natronloog*).

about the precise magnitude of the risk and the consequences.[584] That is the essence of the precautionary principle.

369 Legal scholars have therefore rightly pointed out that the precautionary principle has effect on Dutch liability law via the societal duty of care under Article 6:162 DCC, as evidenced by the case law discussed above.[585] According to De Jong, the precautionary principle is a fixed part of Dutch liability law due to the inherently proactive and preventive nature of duties of care.[586] Various other authors have also drawn this conclusion.[587]

370 It follows from the foregoing that the precautionary principle is deeply rooted in the frameworks of international, European and national law, and also that it plays a pivotal role in environmental and climate law in particular. The precautionary principle is deeply incorporated into international law and has even acquired the status of customary law within international law - in any event in the context of climate obligations. Furthermore, the precautionary principle forms part of Articles 2 and 8 ECHR, the TFEU and national liability laws and is recognised as a guiding principle in various soft-law sources.

(c) Horizontal effect of the precautionary principle

371 There are several reasons why the precautionary principle has horizontal effect. As a result, the precautionary principle is *also* relevant in establishing and determining the duty of care to prevent or limit dangerous climate change and also in establishing the concrete reduction obligation that comes with this duty of care.

372 First of all, it was already mentioned above that the precautionary principle is a direct part of national liability law.[588] From this it follows that the precautionary principle has horizontal effect. In addition, the precautionary principle is accepted by both international courts and by legal scholars – in any event in the context of environmental and climate liabilities - as a rule of customary law in view of its broad acceptance. Furthermore, the precautionary principle is accepted within the EU as a general and

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584 Judgments of the Dutch Supreme Court of 25 November 2005, *NJ* 2009, 103 (*Eternit/Horsting*) and 17 December 2004, *NJ* 2006, 147 (*Hertel/Van der Lugt*). See also E.R. de Jong, *"Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*", The Hague: Boom Juridisch 2016, pp. 78 up to and including 80.

585 E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's"*, The Hague: Boom juridisch 2016, pp. 80–81.

586 E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's"*, The Hague: Boom Juridisch 2016, pp. 82, 83, and 87.

587 See, for example, A.Ch.H. Franken, "*Het voorzorgsbeginsel in het aansprakelijkheidsrecht – een verkenning"* (The precautionary principle in liability law – an exploration) in *AV&S* 2010, 25, para. 2; E.H.P. Brans, "*Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel*" in E.H.P. Brans et al., "*Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering?"*, The Hague: Boom Juridisch 2012, p. 119 et seq.; W.Th. Braams, "*Dank u wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht", AV&S* 2002, p. 171; E. Bauw, "*GS Onrechtmatige daad"*, note VIII.6.3.10.

588 See also, in a similar sense, the judgment of the Court of Appeal of 's-Hertogenbosch of 22 July 2025, ECLI:NL:GHSHE:2025:2043 (*Lelietelers*).

autonomous principle. Its customary-law and autonomous status means that the principle is so deeply embedded from a normative perspective that it is also relevant when answering the question what is appropriate in society within the meaning of Article 6:162 DCC, and what care may be expected from a private party in that regard in view of dangerous climate change.

373 The foregoing applies also, and even more strongly, because the precautionary principle is embedded in important soft-law sources and forms part of the obligations under Articles 2 and 8 ECHR. Since those provisions also have (indirect) horizontal effect themselves, as explained in Sections IV.4 and IV.5.2 of this Explanatory Submission, this logically applies in the same sense to the precautionary principle that forms part of them.

(d) Effect of the precautionary principle on the duty of care and reduction obligation

374 The follow-up question is then *what effect* the precautionary principle has on the climate obligations of a private party, particularly in light of the (scientific) uncertainties that exist in this context. Milieudefensie et al. will explain below that the precautionary principle (also) provides a framework for arriving at a duty of care and, by extension, at a concrete reduction obligation through reasoning and while paying attention to modelled reduction scenarios.

375 It should be noted that it already follows from its rationale that the precautionary principle is relevant both to establishing *that* an obligation to prevent or limit dangerous climate change exists, and to determining *which concrete* precautionary measures must be taken in that connection. After all, the purpose of the precautionary principle in the context of climate responsibilities is to ensure that (scientific) uncertainties do not result in no or insufficient action being taken. Justice will only be done to this rationale if the precautionary principle makes its effect felt in both in the acceptance of the duty of care as such and in the manner in which that duty ultimately materialises: in concrete reduction obligations.

376 From a doctrinal perspective, too, it is understandable that the precautionary principle operates in the two above-mentioned ways, as the concrete measures are the obligations that arise from the duty of care itself. From a normative standpoint, they are thus two sides of the same normative coin: the standard and the obligation arising from it.

377 The above is also recognised in the legal literature. De Jong summarises it as follows in his commentary on the judgment:

> *"The precautionary principle actually offers* (…) *a framework for establishing standards in cases where there is scientific uncertainty*

> *about risks. The relevant uncertainties may relate to various aspects of a risk, such as the potential effects, the causes of those effects, the timeframe within which the effects may occur and the measures to be taken to prevent those effects. In the context of climate change in particular, uncertainty and ambiguity about the measures to be taken are always present, while it is abundantly clear that serious and irreversible damage is imminent (and is already occurring).*"[589]

378 Procurator General Langemeijer and Advocate General Wissink also described this normative, correcting effect of widely shared normative principles, which also include the precautionary principle, in their opinion regarding the *Urgenda* judgment:

> *"6.8 (…) The distribution of the globally required reduction effort cannot be determined by natural science, but can be rationalised on the basis of widely shared normative principles that are enshrined in, among other places, the UN Climate Convention."*[590]

379 There is also case law in which courts also apply the precautionary principle when determining the precautionary measures to be taken. To properly understand that mode of application, the nature of the (scientific) uncertainties involved in establishing reduction obligations and reduction targets must be recalled. In this context, modelled reduction scenarios almost always play a prominent role. Such reduction scenarios model how the targets of the Paris Agreement can be achieved through concrete reduction measures and reduction percentages. Section III.2 of this Explanatory Submission described in detail how these models are developed and work. It was explained there that the central principle of cost-effectiveness translates into four specific limitations that are inherent in reduction scenarios based on IAM models. These limitations are that they (i) place the heaviest reduction burden on developing countries, (ii) rely to a very large extent on the assumption of large-scale CDR being available, (iii) use a high discount rate, and (iv) do not take (avoided) climate damage into account.

380 So for these and other reasons, the modelled reduction pathways cannot always be directly implemented in reality. If such a modelled pathway were directly followed, this could actually lead to the occurrence of precisely the climate risks that the duty of care to prevent or mitigate dangerous climate change seeks to offer protection against. It is consistent with the precautionary principle to consider these uncertainties when a concrete reduction obligation is determined. This can be done either by not applying modelled reduction scenarios that rely too heavily on such uncertainties or by

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589 E.R. De Jong, "*Het Klimaattransitieplan in civiele klimaatzaken"* (The climate transition plan in civil climate cases) in *NTBR* 2025/1, p. 3 and footnote 17.

590 Opinion of Procurator General Langemeijer and Advocate General Wissink in the case prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*).

compensating for these uncertainties. In this way, the precautionary principle plays a selecting role.

381 Courts are already applying this approach. The ICJ has observed that in complying with the duty of care to prevent or mitigate dangerous climate change established by it, scientific and technical information must be looked at. This necessitates the use of effective technologies, but also calls for caution if their effectiveness is uncertain:

> *"286. Further, the availability of technological means to prevent or mitigate relevant harm influences what can reasonably be expected of a State. Where a risk can be addressed with readily available technologies, States are expected to use them. However, when technologies pose further risks, States are expected to use them with prudence and caution. In that context, the cost of the relevant technologies may be a crucial factor in determining what can reasonably be expected of a State, depending on its capabilities."*[591]

382 The ICJ thus emphasises that caution must *also* be exercised when technological solutions are relied on. Proven technology must be applied, but relying on unproven technology would conflict with the duty of care. In line with this, unproven technology, such as CDR technologies, should not be relied on when reduction obligations are determined.

383 In its *Urgenda* judgment, the Dutch Supreme Court also applied the precautionary principle in a selecting manner. In response to the 25% reduction obligation imposed by the Court of Appeal for 2020, the State had presented various alternative reduction scenarios involving lower emission reductions. The State argued that it could also take other, less far-reaching measures to comply with its reduction obligations. In that regard, the State contended that the 25% to 40% reduction target for 2020 from the IPCC AR4 report had been superseded by new reduction scenarios from the IPCC AR5 report.

384 The Dutch Supreme Court considered that these new reduction scenarios rely heavily on CDR technologies, while it is clear that there are no technologies yet with which CDR can take place on a sufficiently large scale. According to the Supreme Court, taking these new scenarios as the starting-point would therefore lead to irresponsible risks and conflict with the precautionary principle, which must be observed when applying Articles 2 and 8 ECHR and Article 3(3) UN Climate Convention.[592] The Supreme Court further found that the precautionary principle - due to the uncertainties and risks associated with dangerous climate change - calls for more far-reaching measures

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[591] ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change).

[592] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 7.2.5. See also E.R. de Jong, *"Urgenda en de beoordeling van macro-argumenten"* in *MvV* 2019/4, pp. 139 and 140.

rather than less far-reaching ones.[593] With this finding, the Supreme Court, too, emphasised that the precautionary principle has effect on the determination of the concrete reduction measures and requires that modelled reduction scenarios that rely too heavily on scientific uncertainties should not be used, or should be used with great restraint.

385 The fact that the precautionary principle has a normative effect on the (scientific) uncertainty about the measures to be taken is also used as the starting-point in neighbouring countries. For example, the German *Bundesverfassungsgericht*, citing (among other things) the precautionary principle, has ruled that scientific uncertainties regarding the magnitude of the carbon budget estimate made by the IPCC do not preclude this carbon budget from being taken as the starting-point for Germany's reduction targets.[594] According to the *Bundesverfassungsgericht*, the precautionary principle limits the freedom of the German State to start out from a larger carbon budget due to scientific uncertainties.[595] In addition, the *Bundesverfassungsgericht* considered that the potential of CDR cannot lead to an increase in the national carbon budget to be used, seeing the uncertainties and risks associated with it.[596] In this context, the precautionary principle thus also serves as a normative framework for dealing with scientific uncertainties in relation to the measures to be taken.

386 Recently, the Court of Appeal of 's-Hertogenbosch applied the precautionary principle in a similar manner to answer the question whether lily growers could be required, based on Article 6:162 DCC, to refrain from using pesticides in their cultivation practices. In that case, there was uncertainty about the question whether the way in which lily growers used their pesticides near houses could lead to health hazards. Partly in light of the precautionary principle, the Court of Appeal held that lily growers should be prohibited, based on Article 6:162 DCC, from using the pesticides in question within a certain distance of houses. The Court of Appeal also imposed that prohibition. In this case, the precautionary principle thus also operates horizontally and has effect on the concrete measures to be taken.[597]

387 The precautionary principle is therefore relevant both to establishing the existence of a duty of care to prevent or limit dangerous climate change and to determining the concrete reduction measures to comply with that duty. For this reason, the

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[593] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 7.2.10. See also, in this regard, the judgment of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 73, in which the Court of Appeal found that there are clear indications that the measures intended to be taken by the State will be insufficient to prevent dangerous climate change and that measures should be chosen, partly on the basis of the precautionary principle, that are safe, or at least as safe as possible.

[594] BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), ground 229.

[595] BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), ground 229.

[596] BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), ground 227.

[597] Judgment of the Court of Appeal of 's-Hertogenbosch of 22 July 2025, ECLI:NL:GHSHE:2025:2043 (*Lelietelers*).

precautionary principle *also* influences the way in which a reduction obligation must be established. In this context, the precautionary principle requires that (scientific) uncertainty about the feasibility of modelled reduction scenarios should be factored into the weight assigned to them when the concrete reduction obligation is determined. Modelled reduction scenarios that, for example, rely too heavily on uncertain CDR technologies or place too much of the reduction burden on unrealistic coal reductions in developing countries must be disregarded for that reason. The precautionary principle in any case requires a correction for this purpose in the form of setting a higher reduction percentage than the one prescribed by such modelled reduction scenarios.

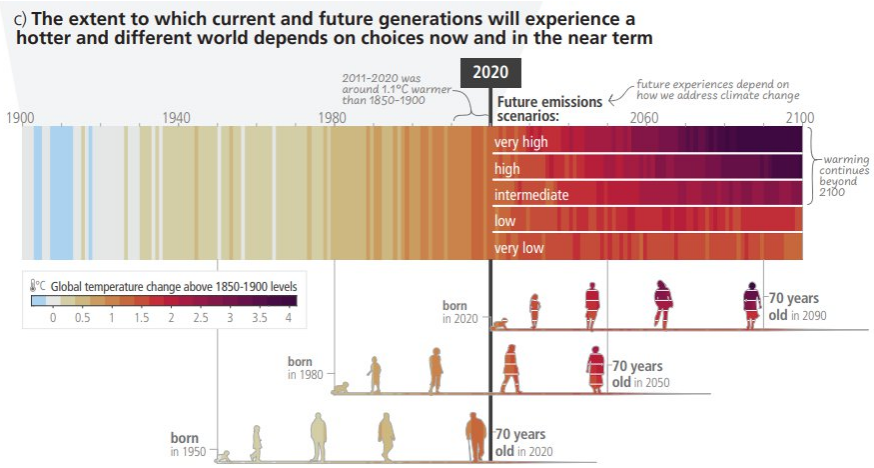
IV.5.3.2 The principle of intergenerational justice

(a) The meaning of the principle of intergenerational justice

388 Dangerous climate change is an inherently intergenerational problem, since the consequences of climate change will unfold gradually, spread over several decades. The action and inaction of the present generations therefore affect younger and future generations in particular. This is all the more true because a further delay of effective action by the present generations will inevitably require the younger and future generations to take even more drastic, costly and risky measures to catch up and limit the damage and risks of dangerous climate change after all, insofar as possible. The consequences of dangerous climate change and the necessity and possibility of taking effective action against it are therefore distributed in a highly disproportionate manner between today's young and old, and between present and future generations. The younger and future generations will face the most severe consequences and bear the heaviest mitigation burdens if insufficient action is taken now, while they have no say in the choices that are now being made to their detriment.

389 The IPCC has illustrated the intergenerational nature of the climate crisis using the image below, which shows that the choices made by the present generations determine the future of the younger and future generations. The image shows the global warming as of 2020 (at the time of the report, this was 1.1°C, but warming has since risen to 1.3°C)[598] and the various future scenarios for different groups within the present generation, depending on the trajectory of future emissions:[599]

[598] See, in this regard, Section II.1.1 of this Explanatory Submission.
[599] Exhibit MD-495A (IPCC SR 2023), p. 7.



390 The IPCC's illustration shows that a child born in 2020 will experience a much warmer world throughout their lifetime - including the associated significant threats and dangers - than someone born in 1950. This applies even more strongly to the future generations.

391 The principle of intergenerational justice addresses this issue. This principle, essentially, means that the obligations of the present generations to prevent or limit dangerous climate change must be partly determined by the effect they will have on the climate in which younger and future generations must live. The reason why the present generations have this obligation is not only that it is particularly the younger and future generations that will suffer the consequences of that climate change, but also that only the present generations can still prevent that dangerous climate change with sufficient chances of success. The present generations are therefore managing the Earth as stewards for the future generations, which means they must take sufficient action to hand over a habitable Earth.[600]

392 In this light, the principle of intergenerational justice must also be understood, dogmatically, as an obligation of the present generations to respect the human right to a clean environment, including a habitable climate, of the younger and future generations. For this reason, the principle is also embedded in human rights.[601] Furthermore, the principle of intergenerational justice is always a fundamental instrument in the context of the climate response.

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600 L. Rajamani & J. Peel, The Oxford Handbook of International Environmental Law, Oxford: Oxford University Press 2021, pp. 339–340.

601 The IACtHR, for instance, also adopts this approach: IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 305 up to and including 313. See, for example, M.J. Wewerinke-Singh and S. Bookman, "*Intergenerationele rechtvaardigheid in besluitvorming over het klimaat: een wereldreis door de zich ontwikkelende jurisprudentie*", (Intergenerational justice in climate decision-making: a round-the-world journey through developing case-law) in *RM Themis* 2023-1, p. 61.

(b) Foundations of the principle of intergenerational justice

393 Due to its close connection with the fight against dangerous climate change, the principle of intergenerational justice is deeply integrated into climate law. In the 1970s[602] and 1980s[603] , the principle had already secured its place in environmental law. Since the late 1980s, the principle has also become an integral part of the international climate obligations. Following the recognition of the intergenerational aspect of climate change in a UN resolution adopted in 1988,[604] the principle was recognised in the Rio Declaration of 1992.[605]

394 At the same time, the principle of intergenerational justice was enshrined in the UN Climate Convention, as Article 3(1) of the UN Climate Convention reads as follows:

> Article 3 UN Climate Convention
> *1. The Parties should protect the climate system for the benefit of present and future generations of mankind* (…).

395 Therefore the principle of intergenerational justice, together with the precautionary principle and the CBDR principle, provides guidance for the steps to be taken to achieve the treaty objective of Article 2 UN Climate Convention: preventing the dangerous disruption of the climate system.

396 The Paris Agreement likewise establishes the principle of intergenerational justice as one of the core principles of the treaty and, thereby, of the UN climate regime.[606] The preamble reads:

> *"*(…) *"Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."*[607]

397 Partly in light of the UN Climate Convention and the Paris Agreement, the principle of intergenerational justice is widely accepted at international level as a relevant

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602 Report on the United Nations Conference on the Human Environment, Stockholm, 5 June up to and including 16 June 1972; Declaration of the United Nations Conference on the Human Environment, Principle I, available at https://docs.un.org/en/A/CONF.48/14/Rev.1.

603 Exhibit MD-170 (UN World Commission on Environment and Development 1987, Our Common Future), Part I, Chapter 2.1, para. 1.

604 Resolution 43/53 of 6 December 1988.

605 Principle 3 of the 1992 Rio Declaration on Environment and Development.

606 See also C. Voigt et al., "The Legal Power of Highest Possible Ambition: Setting Legal and Scientific Indicators to Assess Highest Possible Ambition under Article 4(3) of the Paris Agreement," *Climate Law* 15 (2025) 7–30, p. 28.

607 Paris Agreement, preamble (eleventh recital).

instrument in establishing the obligation to combat dangerous climate change and reduce GHG emissions. Virtually every relevant resolution since the late 1980s has stressed the need for climate protection for the benefit of present and future generations.[608]

398 The ICJ has also recognised the principle of intergenerational justice, in light of, for instance, the UN Climate Convention and the Paris Agreement as a fundamental principle for the purpose of establishing climate obligations. To this end, the ICJ has referred to the underlying starting-point of those treaties, namely that climate change is a common concern of humanity and that the climate system must be protected for the benefit of present and future generations. In light of the intergenerational consequences of climate change, the ICJ has subsequently held that the principle of intergenerational justice serves as a guiding principle for the interpretation and determination of climate obligations. Taking due account of the interests of future generations and the long-term implications of certain conduct are therefore considerations that must be considered when climate policies and climate measures are adopted and implemented.[609]

399 The IACtHR also regards intergenerational justice as one of the fundamental principles in the context of the climate emergency established by the IACtHR,[610] as that principle also seeks to protect the right to a healthy environment and a habitable climate[611] - a fundamental right that is widely accepted under international law[612]. The resulting obligation not to cause irreversible damage to the environment and the climate has even been classified by the IACtHR as *ius cogens*.[613] According to the IACtHR, it is

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608 See, for example, Resolution 44/207 dated 22 December 1989; Resolution 45/212 dated 21 December 1990; Resolution 46/169 dated 19 December 1991; Resolution 47/195 dated 22 December 1992; Resolution 48/189 dated 21 December 1993; Resolution 49/120 dated 19 December 1994; Resolution 50/115 dated 20 December 1995; Resolution 51/184 dated 16 December 1996; Resolution 52/199 dated 18 December 1997; Resolution 54/222 dated 22 December 1999; Decision 55/443 dated 20 December 2000; Resolution 56/199 dated 21 December 2001; Resolution 57/257 dated 20 December 2002; Resolution 58/243 dated 23 December 2003; Resolution 59/234 dated 22 December 2004; Resolution 60/197 dated 22 December 2005; Resolution 61/201 dated 20 December 2006; Resolution 62/86 dated 10 December 2007; Resolution 63/32 dated 26 November 2008; Resolution 64/73 dated 7 December 2009; Resolution 65/159 dated 20 December 2010; Resolution 66/200 dated 22 December 2011; Resolution 67/210 dated 21 December 2012; Resolution 68/212 dated 20 December 2013; Resolution 69/220 dated 19 December 2014; Resolution 70/205 dated 22 December 2015; Resolution 71/228 dated 21 December 2016; Resolution 72/219 dated 20 December 2017; Resolution 73/232 dated 20 December 2018 (see further on the next page), Resolution 74/219 dated 19 December 2019; Resolution 75/217 dated 21 December 2020; Resolution 76/205 dated 17 December 2021; Resolution 77/165 dated 14 December 2022; Resolution 78/153 dated 19 December 2023; Resolution 79/206 dated 23 December 2024.

609 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 155 up to and including 157 and 161.

610 IACtHR, 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), para. 216.

611 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 272, 300, 302 and 305 up to and including 313.

612 As evidenced by Exhibit MD-343, p. 2 (UN Human Rights Council Resolution 48/13) and Exhibit MD-346, pp. 2–3 (UN General Assembly Resolution 76/300). See also the Maastricht Principles, p. 1, available at https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf.

613 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), para. 291.

precisely the interests of the younger and future generations that therefore necessitate the adoption of measures:

> *"194.* (…) *mitigation and adaptation measures need to be increased rapidly. Delays in this regard mean transferring an extraordinary responsibility to future generations, and increase the risk of suffering the negative effects of climate change, particularly for the most vulnerable."*[614]

400 The recognition of the obligation to protect the human rights of future generations also stems from, for instance, the EU Charter,[615] the TEU[616] and the Aarhus Convention.[617] In addition, the principle of intergenerational justice is deeply embedded in numerous other treaties and national constitutions. The Center for International Environmental Law has identified that, to date, at least 42 international environmental protection agreements include or refer to the principle of intergenerational justice, while 81 national constitutions also explicitly refer to future generations.[618]

401 Partly in light of the UN Climate Convention, the ECtHR also considered the principle of intergenerational justice to be relevant in determining ECHR obligations to prevent or limit dangerous climate change in its *KlimaSeniorinnen* judgment.[619] For instance, the ECtHR ruled that Article 8 ECHR creates specific positive obligations in the area of climate change to effectively reduce GHG emissions in order to achieve climate neutrality within the next three decades. To make this realistically possible and prevent a disproportionate burden on future generations, the ECHR held that immediate measures should be taken and adequate interim reduction targets should be set for the period in which climate neutrality is to be achieved, with due observance of the remaining carbon budget.[620]

402 There are also various national (supreme) courts that have recognised the principle of intergenerational justice, partly because it is deeply embedded in international law as one of the guiding principles for establishing obligations to prevent or limit dangerous climate change.[621] This applies, for example, to the German

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614 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights).
615 EU Charter, preamble (sixth recital).
616 Article 3(1) and (3) TFEU.
617 Aarhus Convention, preamble (seventh recital).
618 Center for International Environmental Law, Memorandum on the Rights of Future Generations dated 20 March 2024, paras. 8 and 10 (with reference to Annex 2, p. 44 et seq.), available at https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Rights-Future-Generations.pdf.
619 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).
620 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 548, 549 and 569 up to and including 573.
621 In addition to the decisions to be discussed in the main text, reference may be made to the judgment of the Supreme Court of Colombia of 13 April 2018, pp. 13 and 34, available at https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/ and the judgment of the Supreme Court of Pakistan of 15 April 2021 (D.G. Khan Cement Company/Government of Punjab), para. 19, available at https://climatecasechart.com/non-us-case/d-g-khan-cement-company-v-government-of-punjab/. Both decisions

Bundesverfassungsgericht[622] and the Court of Appeal of Brussels.[623] In the *Urgenda* case, the District Court of The Hague likewise ruled that the interests of future generations are relevant in establishing and determining the duty of care of the Dutch State to prevent or limit dangerous climate change; this means that the principle of intergenerational justice has effect on the measures to be taken pursuant to the duty of care.[624]

403 Unlike the District Court of The Hague, the Dutch Supreme Court mainly derived the obligations from Articles 2 and 8 ECHR directly in its *Urgenda* judgment. When interpreting those provisions, however, the Supreme Court also attached importance to the fact that Article 3(1) UN Climate Convention provides that the contracting parties should protect the climate system for the benefit of present and future generations of mankind. The principle of intergenerational justice thus also plays a role in the interpretation of the obligations under Articles 2 and 8 ECHR.[625] This is consistent with the manner in which the ECtHR applied that principle in the *KlimaSeniorinnen* judgment, as discussed above.

404 It follows from the foregoing that the principle of intergenerational justice is deeply rooted in the frameworks of international, European and national law and plays an important role in the context of duties of care to prevent or limit dangerous climate change. The principle not only serves as guidance for establishing that a duty of care exists, but is also a determining factor in the assessment which concrete measures must be taken in that connection.

(c) The horizontal effect of the principle of intergenerational justice

405 There are several reasons why the principle of intergenerational justice has horizontal effect. The effect of this is that the principle is also relevant in establishing and fleshing out the duty of care to prevent or limit dangerous climate change and also in determining the concrete reduction obligation that follows from this duty of care.

406 First and foremost, a virtually endless stream of international legal instruments, including the UN Climate Convention and the Paris Agreement, identify the principle as a guiding principle in the context of climate liabilities. International and national courts have confirmed this, without exception. This alone points to a deep embedment of the principle within the general normative framework governing climate obligations.

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attach significant importance to the principle of intergenerational justice.

622 BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), grounds 183 and 192.

623 Judgment of the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, grounds 244, 266, 268 and 283.

624 Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), grounds 4.56, 4.57 and 4.76.

625 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.7.3 and 5.8.

407 In addition, the principle of intergenerational justice is also viewed as an obligation of the present generations to protect the living environment of younger and future generations, which is safeguarded by human rights. This further underscores the horizontal effect of the principle. It essentially constitutes a form of human rights protection whose (indirect) horizontal effect is already widely accepted.[626] This is all the more true because the principle of intergenerational justice forms part of the obligations (which also have (indirect) horizontal effect) under Articles 2 and 8 ECHR, as evidenced by the *KlimaSeniorinnen* judgment of the ECtHR and the *Urgenda* judgment of the Dutch Supreme Court. That must therefore also apply to the principle of intergenerational justice forming part thereof. Consequently, the principle is also relevant when answering the question what care (within the meaning of Article 6:162 DCC) may be required of companies in light of dangerous climate change.

408 The Maastricht Principles also point to this horizontal effect. These principles outline the current state of international law when it comes to the human rights of future generations.[627] The Maastricht Principles affirm the binding obligations of non-state actors, including companies, that result from them. For example, it follows from Principle 25(a) that non-state actors must, at a minimum, respect the human rights of future generations and therefore refrain from causing or contributing to adverse human rights impacts via their activities, products or services. Companies must prevent harm, mitigate risks and provide a remedy when adverse impacts occur.[628] The accompanying commentary emphasises that the obligation for companies to respect human rights is not merely a global standard of conduct, but must be viewed as a legally binding obligation.[629] This shows that it is widely accepted that the principle of intergenerational justice also has (indirect) horizontal effect.

409 Finally, in General Comment No. 26, the CRC explicitly emphasises the need for urgent and ambitious action to protect children, with both historical and current major emitters taking the lead in the context of GHG mitigation.[630] Reduction targets and measures must result in net-zero CO_2 emissions at the latest by 2050 in a manner that prevents harm to children. In this connection, the CRC cites the findings of the IPCC, which show that mitigation efforts should be accelerated in the short term.[631] As for the assessment of short-term climate measures, the CRC specifically stresses that delaying the phase-out of fossil fuels will result in higher cumulative emissions and thereby in greater harm

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626 See, in this regard, Sections IV.4 and IV.5.2 of this Explanatory Submission.
627 Maastricht Principles, p. 1, available at https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf.
628 Maastricht Principles, Principle 25(a), available at https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf.
629 G. Basson et al., Commentary to the Maastricht Principles on the Human Rights of Future Generations, Human Rights Quarterly, 2025, pp. 155–156.
630 Exhibit MD-559A (CRC General Comment No. 26, 2023), paras. 95 and 96.
631 Exhibit MD-559A (CRC General Comment No. 26, 2023), para. 97.

to children's rights.[632] According to the CRC, business enterprises have the responsibility to respect children's rights in relation to climate change.[633] So from this, too, it follows that the principle of intergenerational justice impacts the obligations of companies and, more specifically, the obligations of companies that contribute significantly to climate change through their GHG emissions.

(d) The effect of the principle of intergenerational justice on the duty of care and the CO_2 reduction duty

410 The principle of intergenerational justice is therefore not only relevant to establishing *that* an obligation to prevent or limit dangerous climate change exists, but also to the question *what* precautionary measures must be taken. The principle provides guidance in this regard. It will be explained below that the principle of intergenerational justice (also) provides a framework for arriving at a duty of care – with the consideration of modelled mitigation scenarios – on a reasoned basis and, by extension, at a concrete reduction obligation.

411 Section IV.5.3.1 of this Explanatory Submission set forth that and in what manner the precautionary principle makes itself felt in determining the duty of care to prevent or limit dangerous climate change and the concrete reduction obligation that follows from it. In that context, the effect of the precautionary principle on the assessment of the relevant modelled reduction scenarios was also discussed. Those reasons apply *mutatis mutandis* to the meaning of the principle of intergenerational justice when these obligations are determined.

412 The principle of intergenerational justice thus seeks to ensure that younger and future generations can live in a habitable climate and therefore requires a commensurate reduction in GHG emissions. It also requires that these reductions are genuinely and effectively achieved. In this way, the principle of intergenerational justice has a direct impact on concrete reduction obligations. This is also consistent with the fact that the duty of care and the concrete measures that must be taken to comply with it are two sides of the same normative coin. The principle of intergenerational justice is thereby one of the broadly shared normative principles mentioned by Procurator General Langemeijer and Advocate General Wissink[634] on the basis of which the concrete CO_2 reductions to be achieved can be determined.

413 All the international and national court judgments discussed above also indicate that the principle of intergenerational justice is relevant, based on the UN Climate

[632] Exhibit MD-559A (CRC General Comment No. 26, 2023), para. 98(d).
[633] Exhibit MD-559A (CRC General Comment No. 26, 2023), para. 107.
[634] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 6.8. See also, in this regard, Section IV.5.3.1 of this Explanatory Submission.

Convention, the Paris Agreement, the ECHR and national fundamental rights, when determining the concrete reduction measures to be taken. These concrete measures must be able to effectively ensure that younger and future generations are not burdened by the current excessive CO_2 emissions and that the reduction efforts are not shifted to them. What was also explained there is that, for this reason, the principle of intergenerational justice can be a determining factor for the concrete reduction percentage to be achieved.

414 It follows from all of this that the principle of intergenerational justice necessitates the imposition of concrete reduction obligations and precludes the imposition of reduction obligations that, in reality, cannot sufficiently ensure that younger and future generations are protected against dangerous climate change. For the same reason, the reduction efforts cannot be pushed back into the future too much and thereby excessively burden younger and future generations. The principle thus influences the determination of the concrete reduction percentage to which a party is bound in order to comply with its duty of care to prevent or limit dangerous climate change.

415 By extension, the principle of intergenerational justice also has an effect on the assessment of modelled reduction scenarios on which the reduction obligations are based. If the reduction pathways prescribed by them are such that the climate targets cannot realistically be achieved by following them, because younger and future generations would be excessively burdened with the consequences of dangerous climate change and the reduction efforts undertaken, then allowance should be made for this when the concrete reduction obligation is determined. The principle of intergenerational justice thus also determines whether and to what extent modelled reduction scenarios carry any weight.

416 This is consistent with the manner in which the other principles are applied. Section IV.5.3.1 of this Explanatory Submission already noted that, in its *Urgenda* judgment, the Dutch Supreme Court approved - precisely because of this selecting effect of general principles – that court sets aside modelled reduction scenarios that rely too heavily on uncertain CDR technologies when determining reduction obligations. There is no good reason why this selecting effect of principles should not be accepted when testing against the principle of intergenerational justice. After all, the normative effect of both principles is the same to this extent.

417 Section III.2 of this Explanatory Submission explained how reduction scenarios based on IAM models are developed and work. In that context, it was observed that the central principle of cost-effectiveness translates into four specific limitations inherent in such modelled reduction scenarios, i.e. they (i) place the heaviest reduction burden on developing countries, (ii) rely very heavily on the hypothesis of large-scale CDR, (iii)

use a high discount rate, and (iv) do not consider (avoided) climate damage. As a result, the reduction efforts are pushed further into the future in the model.

418 Because the application of modelled reduction scenarios will not lead to the required CO_2 reductions in real life, the climate targets will never be achieved in that case. This means that it is certain that younger and future generations will be exposed to dangerous climate change in that situation and must bear the greatest burden of the reduction efforts. The principle of intergenerational justice therefore requires that the characteristics of modelled reduction scenarios are considered when a concrete reduction percentage is set and are compensated for when a concrete reduction obligation is established. As a result, modelled reduction scenarios that conflict with the principle should either be ignored or a higher reduction percentage must be set than the one prescribed by the modelled reduction scenarios.

419 The principle of intergenerational justice is therefore relevant both to establishing the existence of the duty of care to prevent or limit dangerous climate change and to determining the concrete reduction obligation to comply with it. The principle therefore also affects the assessment and selection of modelled reduction scenarios. Reduction scenarios that push the reduction efforts further into the future - based on uncertain scientific assumptions or unrealistic assumptions about real-world feasibility – will carry no or less weight, or in any event they must be corrected by setting a higher reduction percentage.

IV.5.3.3 The CBDR Principle

(a) The meaning of the CBDR principle

420 Under international law, all countries are formally equal. In substantive terms, however, there are significant differences between countries and their industries. This is partly due to the fact that the number of sovereign states has rapidly increased since World War II. Consequently, the nature of the international community has also changed significantly. Young, new states, particularly in the Global South, have become part of the international community. Compared to older, wealthier, Western countries and industries, these countries and their industries often lag behind in terms of wealth, socio-economic development, organisational capabilities and power.

421 This gap raises issues of justice, particularly in the case of collective (environmental) threats that can only be addressed through joint action, such as dangerous climate change, as these threats are often caused to a greater extent by more developed and wealthier countries and their industries. Moreover, those countries and industries are better equipped, organisationally, socially and financially, to counter the threats. These aspects go hand in hand. Due to their higher level of development, developed countries and their industries emit far greater amounts of greenhouse gases and therefore

contribute to a much greater extent to dangerous climate change. At the same time, this higher level of development enables them to take measures to counter it to a greater extent and more effectively, and to bear the financial burden of such action.

422 It would therefore not sit well with the above if developed and less developed countries and their industries should contribute equally to preventing the threat of dangerous climate change. That would not only be unfair, but would also mean that preventing dangerous climate change would come to nothing. After all, developing countries and their industries simply cannot bear the same burdens as the richer countries. For precisely these reasons, it is logical to distribute the burdens according to the organisational and technical capabilities available to each country or industry and also according to their financial capabilities.[635]

423 Within the framework of obligations to prevent or limit dangerous climate change, the CBDR principle addresses this fundamental inequality and the associated threats to an effective climate response.[636] The principle essentially means that – even though all countries and their industries are formally equal – a distinction must be made, when determining what concrete measures may be required of them, based on the extent to which they are actually capable of implementing such measures. In this context, the level of organisational and economic development of a country and its industries and, by extension, the extent to which the country can effectively implement measures and bear the consequences of certain measures are always relevant. Each country will thereby contribute, according to its own capabilities, to preventing or limiting the threat of dangerous climate change. These are common, but differentiated responsibilities.

(b) The foundations of the CBDR Principle

424 The CBDR principle has been laid down in all relevant international climate agreements and treaties and constitutes one of the central principles of the global climate approach. Article 3(1) UN Climate Convention even prioritises this principle together with the principle of intergenerational justice:

> Article 3 UN Climate Convention
> *1. The Parties should protect the climate system for the benefit of present and future generations, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*

[635] See, for example, L. Rajamani and J. Peel, *Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press 2021, p. 326.
[636] See, for example, L. Rajamani and J. Peel, *Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press 2021, p. 326.

425 Article 4(1), preamble, and subparagraphs (a) up to and including (j) of the UN Climate Convention then essentially set out all the obligations to be complied with to prevent or limit dangerous climate change. The opening sentence explicitly provides that all these obligations must be fulfilled in accordance with the CBDR principle. This underlines the fundamental role of the principle.[637]

426 This cornerstone role of the CBDR principle in international climate action is also clearly reflected in the Paris Agreement:

> Article 2 Paris Agreement
> *2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*[638]

427 In line with this, Article 4 Paris Agreement places the greatest burden of reduction on the richest countries and their industries based on the CBDR principle:

> Article 4 Paris Agreement
> *4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.*

428 The parties to the treaty still endorse this view.[639] It is therefore not surprising that the ICJ recently identified the CBDR principle, referring to (among other things) the provisions cited above, as a key principle in the context of climate obligations.[640] According to the ICJ, the principle reflects the need to fairly distribute the burdens of obligations related to climate change. The principle achieves this fair distribution of the burden by taking into account (among other things) the extent to which states and their economies have contributed to the cumulative GHG emissions and also their different capabilities and national circumstances, including their economic and social development.[641] The lead should be taken by the states and economies that have contributed most to GHG emissions and that possess the greatest economic resources and the technical, institutional and administrative infrastructures and capabilities to implement far-reaching emission reductions. Conversely, states and economies that

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637 See also Article 10, opening sentence, and paragraphs (a) up to and including (g) of the UN Climate Convention, which also sets out obligations and stipulates that parties must always observe the CBDR principle in doing so.
638 See also Article 4(3) and (4), and Article 19 Paris Agreement.
639 Exhibit MD-569B (COP28 Outcome of the First Global Stocktake), para. 6.
640 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 148 and 179.
641 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 148, 179 and 247.

have contributed less to emissions and have fewer opportunities for transformation may also contribute less to the reduction targets.[642]

429 For this reason, according to the ICJ, the CBDR principle is not only relevant for establishing the duty of care (which also stems from customary law) to prevent or limit dangerous climate change, but that duty of care is even governed in part by the CBDR principle.[643] That principle also helps to determine which measures must be taken to prevent or limit dangerous climate change.[644] All of this means that the margin of appreciation of parties when determining their contribution to the global climate response is limited and also that they must ensure that their contributions fulfil the obligations of the Paris Agreement. As a result, they will be collectively capable of limiting global warming to 1.5°C. To this end, each party must make an adequate contribution in accordance with the CBDR principle and demonstrate the highest possible level of ambition.[645]

430 The IACtHR has also found that the CBDR principle plays an important role in assessing the obligations of states based on human rights in the context of climate change.[646] Its considerations are entirely in line with, and essentially identical to, those of the ICJ. This further implies that the CBDR principle plays a pivotal role in establishing the duty of care to prevent or limit dangerous climate change and in determining the concrete reduction measures.

431 In its *KlimaSeniorinnen* judgment, the ECtHR also applied the CBDR principle in the context of Article 8 ECHR when determining obligations relating to climate change based on human rights. To this end, the ECtHR referred (among other things) to the provisions of the UN Climate Convention and the Paris Agreement discussed above.[647] It was partly on the basis of the CBDR principle that the ECtHR subsequently ruled that the contracting parties should deliver their share to preventing or limiting dangerous climate change according to their respective capabilities.[648] The ECtHR also held that the CBDR principle plays a role in *how* a state party must determine its carbon budget and the measures to be taken to remain within that carbon budget. The CBDR principle thus requires state parties, when calculating their own carbon budget and determining

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642 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 150 and 290 up to and including 292.
643 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 137, 151, 247, 290, 291, 457(3)(A)(a) and 457(3)(B)(a).
644 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 290, 291 and 457(3)(B)(a).
645 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 245, 270, 457(3)(A)(e) and 457(3)(A)(f).
646 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), paras. 126, 133, 139 and 216.
647 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 442 and 443.
648 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 442, 443 and 570 up to and including 572.

their reduction pathway, must take their own capabilities to achieve reductions into account. Failure to do so will result in a violation of Article 8 ECHR.[649]

432 National (supreme) courts also consistently rule that the CBDR principle is relevant to the establishment of obligations to prevent or limit dangerous climate change and to the determination of concrete mitigation measures. Examples are the German *Bundesverfassungsgericht*[650] and the Court of Appeal of Brussels.[651]

433 The CBDR principle also played a significant role in the *Urgenda* case. The District Court took the CBDR principle into account when it determined the duty of care of the Dutch State, while referring to the foundation of the CBDR principle in treaty law.[652] The Court of Appeal also ruled in this regard that, partly in light of the CBDR principle, a minimum reduction of 25% by 2020 could be required of the Dutch State, because the Netherlands is considered as a highly developed country capable of meeting such a reduction obligation.[653]

434 In their opinion regarding the *Urgenda* case, Procurator General Langemeijer and Advocate General Wissink subsequently also embedded the climate obligations in the CBDR principle:

> *2.76 Of particular importance is the principle of equity, which means, among other things, that Contracting States must take action against climate change in accordance with their 'common but differentiated responsibilities and respective capabilities'. More specifically, it emerges from this principle that the countries considered to be industrially developed countries at the time the UNFCCC was concluded, including the Netherlands, 'should take the lead' in combating climate change and its adverse consequences (Article 3(1) UNFCCC), as the Court of Appeal also found in ground 9.*"[654]

435 The Supreme Court subsequently ruled, referring to the Court of Appeal's line of reasoning, that the Netherlands must at least achieve a 25% CO_2 reduction by 2020, because the Netherlands is among the countries with very high GHG emissions per capita and it can be assumed that this percentage corresponds with the capabilities and

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649 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 573 and 574.
650 BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), ground 225.
651 Judgment of the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, ground 169.
652 Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), grounds 2.36 and 2.38
653 Judgment of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 66.
654 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*). See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), paras. 4.6 and 4.21.

responsibilities of the Netherlands.[655] This also constitutes an application of the CBDR principle.

436 The UN climate regime, human rights treaties and national law thus all accept the CBDR principle as a cornerstone principle that partly determines the duty of care to prevent or limit dangerous climate change as well as the concrete measures to be taken on that basis.

(c) The horizontal effect of the CBDR principle

437 There are several reasons why the CBDR principle has horizontal effect for. As a result, the CBDR principle is also relevant in establishing and determining the duty of care to prevent or limit dangerous climate change and in determining the concrete reduction obligation required by this duty of care.

438 First and foremost, a virtually endless stream of international legal instruments, including the UN Climate Convention and the Paris Agreement, identify the principle as a guiding principle in the context of climate liabilities. International and national courts have confirmed this without exception. This alone indicates a deep embedment of the principle within the general normative framework governing climate obligations.

439 Furthermore, the CBDR principle has an effect on the interpretation of the obligations under Article 8 ECHR (which also have (indirect) horizontal effect), as evidenced by the *KlimaSeniorinnen* judgment of the ECtHR and the *Urgenda* judgment of the Dutch Supreme Court. This further underlines the horizontal effect of the principle. Essentially, it is a form of human rights protection whose (indirect) horizontal effect is already generally accepted.[656] This must therefore also apply to the CBDR principle forming part of it. Consequently, the principle is also relevant when answering the question what level of care within the meaning of Article 6:162 DCC may be required of companies in view of dangerous climate change.

440 There are also various soft-law instruments targeting business enterprises (which will be discussed in greater detail in Section IV.5.4 of this Explanatory Submission) in which the CBDR principle is also used. One example is the Race to Zero Initiative, which recognises that the CBDR principle is relevant when determining concrete reduction obligations for business enterprises. Under this Initiative, business enterprises must also demonstrate maximum effort in reducing their CO_2 emissions and aim for a

[655] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.7.2 and 7.3.4.
[656] See, in this regard, Sections IV.4 and IV.5.2 of this Explanatory Submission.

minimum CO_2 reduction of 50%; greater flexibility is granted to actors from developing countries in the Initiative.[657]

441 Another example is the Oxford Report.[658] The Oxford Report analyses the various climate protocols for companies that are currently in force. That Report also concludes that these climate protocols are based on the premise that large companies from Western jurisdictions having high GHG emissions and bearing a historical responsibility for the climate crisis must also set the most ambitious reduction targets:

> *"There is broad agreement that all actors should pursue net zero, but also that various factors may lead various actors to adopt targets differentiated by timing and scope. One, there is wide consensus that capacity should be a key factor in determining the scope and timing of commitments, with those with higher capacity (e.g., developed jurisdictions, larger companies) taking more aggressive and expansive targets. Two, several respondents submitted that historical responsibility and past behaviour should also be a relevant consideration* (…)*. Three, respondents also noted that larger emitters should be required to meet more stringent standards than smaller entities."*[659]

442 It therefore also follows from soft-law sources for business enterprises that the CBDR principle has an effect on the obligations of companies and, more specifically, the obligations of companies that are contributing significantly to climate change through their GHG emissions.

(d) The effect of the CBDR principle on the duty of care and the CO_2 reduction duty

443 The CBDR principle is therefore not only relevant for establishing *that* an obligation to prevent or limit dangerous climate change exists, but also for the question *what* precautionary measures must be taken. It will be explained below that the CBDR principle (also) provides a framework for arriving at a duty of care – with due observance of modelled reduction scenarios - and, by extension, at a concrete reduction obligation.

444 Sections IV.5.3.1 and IV.5.3.2 of this Explanatory Submission set forth that and in what manner the precautionary principle and the principle of intergenerational justice help to determine the duty of care to prevent or limit dangerous climate change as well as the concrete reduction obligation following from it. In that context, the influence of the precautionary principle and the principle of intergenerational justice on the value attached to modelled reduction scenarios was also discussed. Those reasons apply

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657 Exhibit MD-354 (Race to Zero Interpretation Guide 2022), p. 6.
658 Exhibit MD-287 (Oxford Report).
659 Exhibit MD-287 (Oxford Report), under "Equity" and 1.4.

mutatis mutandis to the influence of the CBDR principle when these obligations are determined.

445 Thus the CBDR principle seeks to ensure that climate objectives are effectively and fairly achieved by requiring countries and their industries to make a contribution that is commensurate with their economic, technical and societal capabilities and in line with their contributions to global CO_2 emissions. In this way, the CBDR principle has a direct effect on concrete reduction obligations. This is also consistent with the fact that the duty of care and the concrete measures to be taken in order to comply with it are two sides of the same normative coin. As a result, the CBDR principle is one of the broadly shared normative principles referred to by Procurator General Langemeijer and Advocate General Wissink[660] on the basis of which the concrete reductions to be achieved can be determined.

446 All the international and national court judgments discussed above point in the same direction. For example, the ICJ and the IACtHR have held that the CBDR principle is relevant in determining which concrete reduction measures may be required. So from this it already follows that the CBDR principle also affects the way in which a concrete reduction obligation must be determined. The ECtHR applies the CBDR principle in a similar manner. According to the ECtHR, the CBDR principle requires that a party, even in the absence of methodologies, should quantify its own carbon budget and, in doing so, take into account its own capacity to achieve reductions. Failure to do so will constitute a violation of Article 8 ECHR. The Dutch courts and the Court of Appeal of Brussels have also applied the CBDR principle to determine that a 25% reduction may be required of the Netherlands and Belgium respectively. This therefore likewise demonstrates that the CBDR principle is directly relevant to the determination of the concrete reduction obligation.

447 Section III.2 of this Explanatory Submission set out in detail how reduction scenarios based on IAM models are developed and work. Within that context, it was noted that the central principle of cost-effectiveness translates into four specific limitations inherent in such modelled reduction scenarios. One of these limitations is that they place the heaviest reduction burden on developing countries, with the result that the reduction efforts for oil and gas being are being pushed into the distant future in the model. This conflicts with the CBDR principle. After all, in light of their economic and societal capabilities, developing countries and their industries cannot be required – whether practically or normatively - to reduce their CO_2 emissions to the same extent, or even a greater extent, than Western countries and their industries. The CBDR principle therefore requires that these model-based limitations should be taken into account

[660] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 6.8. See also, in this regard, Sections IV.5.3.1 and IV.5.3.2 of this Explanatory Submission.

when a reduction percentage based on modelled reduction scenarios is determined. This will result in a higher reduction percentage for Western countries and their industries than the one prescribed by modelled reduction scenarios.

448 In light of the foregoing, the CBDR principle takes into account the economic and social position in which a company finds itself and the extent to which it is part of the countries and economies from which the greatest reduction may be required. Relevant factors here are the company's historical and current contribution to CO_2 emissions, the regions in which it operates and generates its revenue and profits, the degree of control that a company has over its emissions and its capabilities to reduce those emissions. Simply put: the more carbon-intensive a company is and the more it is part of the Western economies that must achieve the highest reductions, the *more* that company can be required to do. This is in line with the Race to Zero Initiative discussed above and the climate protocols examined in the Oxford Report.

449 The CBDR principle is therefore relevant both to establishing the existence of the duty of care to prevent or limit dangerous climate change and to determining the concrete reduction obligation to comply with it. The principle therefore also affects the value attached to the assessment and the selection of modelled reduction scenarios. Modelled reduction scenarios that rely too heavily on unrealistic coal reductions in developing countries to meet the reduction target carry no or less weight; in any event, a correction must be made for them by setting a higher reduction percentage.

IV.5.4 Soft law

450 A fourth objective point of reference relevant to the establishment and determination of duties of care is soft law. Soft law encompasses various types of alternative and/or private regulations that do not have the character of binding legal standards. In this context, it often involves the adoption of societal standards that are complied with through self-regulation.[661] Soft law also includes non-binding international instruments, such as guidelines, action plans, conference declarations and certain resolutions of international organisations.[662]

451 Partly in light of the fact that the parties involved in creating soft law are highly knowledgeable and that soft law reflects the views within a larger group, such regulations can flesh out the societal standard of care.[663] This actually frequently

[661] See E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*", Deventer: Wolters Kluwer 2025, pp. 77 and 78.

[662] See the opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.31.

[663] See, for example, *Asser/Sieburgh 6-IV* 2023/79; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 6.1.10; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*", Deventer: Wolters Kluwer 2025, pp. 77 and 78; C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom juridisch 2023, paras. 225-4 and 518-2; T. Hartlief et al., "*Verbintenissen uit de wet en Schadevergoeding*", Deventer: Wolters Kluwer 2021, para. 41; Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court

happens in court judgments. For example, violations of the Dutch Code of conduct for personal screenings of the Dutch Insurers Association,[664] the Dutch Guideline for safe excavation (CROW 250),[665] the Dutch Guideline for safe ground disturbance practices (CROW 500)[666] and the Dutch Measurement instructions for determining residential surface areas according to NEN 2580 of the Dutch Real Estate Agents Association[667] were also reasons for the Dutch Supreme Court to find that an unlawful act had occurred. In this connection, there are also judgments of lower courts in the Netherlands in which the unlawfulness of acts and omissions was based on, for example, CROW Publication 74 (Designing for cyclists – design guide for cycle-friendly infrastructure")[668] and the General Comments of UN treaty committees in the field of human rights[669].

452 It is not only in the Netherlands that weight is accorded to soft law. In the interpretation and application of the ECHR, scientific insights and generally accepted standards must also be considered.[670] As a result, the ECtHR therefore explicitly takes soft law into account in its judgments.[671] By extension, weight is also accorded to soft law in a national context when the ECHR is applied.[672] In this way, the case law not only remains grounded in the insights of the time, but soft law can also serve as a precursor to hard law and so function as a building block for the development of the unwritten law.[673]

453 Soft law is also important in establishing and determining the duty of care to prevent or limit dangerous climate change.[674] To illustrate this, the sources of soft law that are most important in this context will be highlighted in more detail below.

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of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.31; Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.7. See in detail C.O. Hoekstra, "*Maatschappelijke normvorming en de ongeschreven zorgvuldigheidsnorm*" (Setting of social standards and the unwritten duty-of-care standard," *WPNR* 2023/7419; C.O. Hoekstra, "*Private regelgeving en haar invloed op de maatschappelijke betamelijkheid*" (Private regulation and its influence on what is appropriate in society) in *AV&S* 2020/38.

664 Judgment of the Dutch Supreme Court of 18 May, 2014, ECLI:NL:HR:2014:942 (*Achmea/R*).

665 Judgment of the Dutch Supreme Court of 25 May 2018, ECLI:NL:HR:2018:772 (*Liander/X*).

666 Judgment of the Dutch Supreme Court of 15 December 2023, ECLI:NL:HR:2023:1750 (*Liander/Krinkels*).

667 Judgment of the Dutch Supreme Court of 13 July 2018, ECLI:NL:HR:2018:1176.

668 Judgment of the Court of Appeal for Arnhem-Leeuwarden of 16 July 2019, ECLI:NL:GHARL:2019:5880.

669 Judgment of the Court of Appeal of The Hague of 19 March 2024, ECLI:NL:GHDHA:2024:353.

670 See M.E. Coenraads and J.E.S. Hamster, "*Verantwoord ondernemen: van soft law naar harde verplichtingen via strategisch procederen"* (Responsible business conduct: from soft law to hard obligations via strategic litigation) in *TOP* 2019/8, pp. 35–36.

671 ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*). See also ECHR 20 May 2010, No. 61260/08 (*Oluić/Croatia*).

672 Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*). See also, for example, the judgment of the Court of Appeal of Brussels of 30 November, 2023, 2021/AR/15gs.

673 Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.32. See also C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 225-4.

674 See ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).

(i) The UNGP

454 In 2011, the UN Human Rights Council - a UN body specifically focused on human rights compliance - adopted the UNGP,[675] the Guiding Principles on Business and Human Rights. These principles aim to close the governance gap[676] and are based on the premise that business enterprises have an independent responsibility to respect human rights. This responsibility constitutes a global standard of conduct that is not dependent on states' ability or willingness to comply with their own human rights obligations (as states).[677]

455 Under the UNGP, the responsibility of business enterprises to respect human rights means they must address the adverse human rights impacts of their activities. They must ensure that their own activities, products and services do not adversely affect human rights.[678] They must also take appropriate measures to prevent, limit and, where necessary, remedy such impacts.[679] This independent responsibility of business enterprises extends to all their business activities and relationships. This means that an enterprise must carry out due diligence in order to identify any adverse human rights impacts that the enterprise causes or contributes to through through its own activities, or which may be directly linked to its operations, products or services by its business relationships.[680] If such an adverse impact occurs, the company must use its leverage to prevent, mitigate or remedy it.[681]

456 This responsibility, which goes beyond compliance with national laws and regulations,[682] applies to all business enterprises, regardless of their size, operational context, ownership and structure.[683] The specific scope of this responsibility, however, depends on the circumstances of the case: the larger the enterprise and the severity of the adverse human rights impact (as can follow from the scale, scope and/or degree of irreversibility of the impact), the greater the enterprise's responsibility to prevent such an impact. Preventive or mitigating measures must also be taken in the case of potential impact.[684]

457 By extension, the UNGP also covers the (potential) consequences of climate change, which have a significant impact on human rights.[685] Under the mandate of the UN Human Rights Council, the UN's Special Working Group on the Issue of Human Rights

675 See also the judgment of the Court of Appeal, ground 7.20.
676 See, in this regard, Section II.2.5 of this Explanatory Submission.
677 Exhibit MD-220 (UNGP 2011), Principle 11 (Commentary).
678 Exhibit MD-220 (UNGP 2011), Principle 13.
679 Exhibit MD-220 (UNGP 2011), Principle 11 (Commentary).
680 Exhibit MD-220 (UNGP 2011), Principle 17.
681 Exhibit MD-220 (UNGP 2011), Principle 19 (Commentary).
682 Exhibit MD-220 (UNGP 2011), Principle 11 (Commentary).
683 Exhibit MD-220 (UNGP 2011), p. 1.
684 Exhibit MD-220 (UNGP 2011), Principle 14 (including Commentary).
685 See, in this regard, Sections II.1.2 and II.1.5 of this Explanatory Submission.

and Transnational Corporations and other Business Enterprises issued an Information Note in 2023 regarding the relationship between the UNGP and the climate problem.[686] This Information Note emphasises that enterprises must develop policies and action plans regarding the climate impact of their activities.[687] With a view to this, these enterprises must identify all their Scope 1, 2, and 3 emissions and incorporate them in their climate policies.[688] The Information Note also explicitly states that business enterprises must phase out the use of fossil fuels and reduce emissions.[689]

(ii) The OECD Guidelines

458 The OECD - a partnership of 38 countries (including the Netherlands) established to discuss, study and coordinate social and economic policies - has also drawn up standards of conduct for businesses regarding human rights: the OECD Guidelines.[690] The OECD Guidelines represent a common position of the 38 OECD member countries and 13 additional countries[691] on the role of multinational enterprises in society and their responsibilities to protect human rights. In this context, the OECD Guidelines serve as an authoritative reference point.[692] The OECD Guidelines date from 1976 and were updated for the last time in 2023.[693]

459 The central principle of the OECD Guidelines is that states and enterprises each have their own responsibility in the area of human rights. Therefore a state's negligence does not relieve an enterprise of its own responsibility.[694] Enterprises must respect human rights, regardless of their size, sector, operational context, ownership and structure.[695] They are expected to carry out due diligence to identify, prevent, limit and remedy adverse human rights impacts.[696] To this end, they must take appropriate measures and use their leverage.[697] This independent responsibility of enterprises themselves extends to all their business activities and relationships. So they must not only identify, prevent, mitigate and remedy any adverse impacts that they cause or contribute to through their own activities, but also any adverse impacts linked with their activities, products or services by business relationships.[698] The concrete scope of the

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686 Exhibit MD-493 (Information Note on Climate Change and Guiding Principles on Business and Human Rights 2023).
687 Exhibit MD-493 (Information Note on Climate Change and Guiding Principles on Business and Human Rights 2023), para. 17(b).
688 Exhibit MD-493 (Information Note on Climate Change and Guiding Principles on Business and Human Rights 2023), para. 17(d), (f), and (g) and para. 19(d).
689 Exhibit MD-493 (Information Note on Climate Change and Guiding Principles on Business and Human Rights 2023), para. 19(b).
690 See also the judgment of the Court of Appeal, grounds 7.21 and 7.22.
691 Exhibit MD-492 (OECD Guidelines 2023), p. 6 and footnote 1.
692 Exhibit MD-492 (OECD Guidelines 2023), p. 10.
693 Exhibit MD-492 (OECD Guidelines 2023).
694 Exhibit MD-492 (OECD Guidelines 2023), pp. 12 and 25.
695 Exhibit MD-492 (OECD Guidelines 2023), p. 25.
696 Exhibit MD-492 (OECD Guidelines 2023), pp. 14, 25, and 33.
697 Exhibit MD-492 (OECD Guidelines 2023), pp. 18 and 26.
698 Exhibit MD-492 (OECD Guidelines 2023), pp. 15, 25 and 26.

responsibility depends on the circumstances of the case, but will in any event be greater if the severity of the negative human rights impact is greater.[699]

460 The OECD Guidelines contain a specific chapter on the protection of the environment by enterprises.[700] Climate change is explicitly identified in the Guidelines as a negative environmental impact related to business activities.[701] Since enterprises play a key role in combating climate change,[702] the OECD Guidelines contain specific expectations of enterprises when it comes to the measures they must take to combat it. These expectations are based on the principle that enterprises should act as soon as possible, and in a proactive way, to avoid adverse environmental impacts.[703] Because achieving environmental objectives requires a whole-of-society approach, the Guidelines set out expectations that enterprises must live up to – via their individual contributions - to make the required contribution to the collective global climate goals.[704]

461 More specifically, the OECD Guidelines require the following of businesses:

> OECD Guidelines
> *76* (…) *Enterprises should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science, including as assessed by the Intergovernmental Panel on Climate Change (IPCC).*
>
> *77. This includes the introduction and implementation of science-based policies, strategies and transition plans on climate change mitigation and adaptation as well as adopting, implementing, monitoring and reporting on short, medium and long-term mitigation targets. These targets should be science-based, include absolute and also, where relevant, intensity-based GHG reduction targets and take into account scope 1, 2 and, to the extent possible based on best available information, scope 3 GHG emissions* (…).[705]

462 Thus, the OECD Guidelines require enterprises to ensure that their GHG emissions are aligned with the global temperature targets. To this end, they must implement science-based, absolute reduction targets for their Scope 1, 2 and 3 emissions for the short, medium and long term.

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699 Exhibit MD-492 (OECD Guidelines 2023), pp. 18, 25 and 35.
700 Exhibit MD-492 (OECD Guidelines 2023), Chapter VI.
701 Exhibit MD-492 (OECD Guidelines 2023), p. 33.
702 Exhibit MD-492 (OECD Guidelines 2023), p. 33.
703 Exhibit MD-492 (OECD Guidelines 2023), p. 37.
704 Exhibit MD-492 (OECD Guidelines 2023), p. 35.
705 Exhibit MD-492 (OECD Guidelines 2023), p. 37 (Dutch translation).

(iii) The Race to Zero Initiative

463 As briefly mentioned in Section II.2.4 of this Explanatory Submission, the UN Race to Zero Initiative was launched in 2020[706] against the background of the need for non-state climate action to prevent or limit dangerous climate change. The Initiative has its origins in the Climate Ambition Alliance established in 2019, in which states and non-state actors committed to the goal set out in the Paris Agreement to achieve net zero emissions by 2050.[707] The Race to Zero Initiative has brought together global networks that have developed protocols and guidelines regarding emission reductions for non-state actors. Based on scientific findings, these protocols outline what enterprises must do to reduce the GHG emissions associated with their activities and products.[708] The Race to Zero Initiative thus seeks to mobilise non-state actors to take immediate action to halve global emissions by 2030 - on the road to net zero by 2050 at the latest.[709]

464 The Race to Zero Initiative now has more than 16,000 members.[710] These members, who together account for 25% to 35% of global CO_2 emissions and represent more than 50% of global gross domestic product,[711] have committed to the minimum criteria included in the Race to Zero Initiative; in this context, they must set the following targets for 2030 and 2050:

> *"Pledge at the head-of-organisation level to reach (net) zero GHGs as soon as possible, and by 2050 at the latest, in line with the scientific consensus on the global effort needed to limit warming to 1.5°C with no or limited overshoot, recognising that this requires phasing down and out all unabated fossil fuels as part of a global, just transition.*
>
> *Set an interim target to be achieved in the next decade, which reflects maximum effort toward or beyond a fair share of the 50% global reduction in CO2 by 2030. Targets must cover all GHG emissions:*
>
> *1. Including scopes 1, 2 and 3 for businesses and other organisations;*
>
> *2. Including all territorial emissions for cities and regions;*
>
> *3. For financial entities, including all portfolio/financed/facilitated/insured emissions;*

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706 See also the judgment of the Court of Appeal, ground 7.23 under d.

707 Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 14. See also the Decision of the District Court, ground 2.4.8.

708 Exhibit MD-286 (Objectives Climate Ambition Alliance), pp. 1 and 2. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 858; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 15. See also the Decision of the District Court, ground 2.4.8.

709 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 502–506.

710 See https://www.climatechampions.net/campaigns/race-to-zero/whos-in/.

711 Motion in Reply to Motion commenting on exhibits of Milieudefensie et al. dated 19 December 2023, para. 46.

4. Including land-based emissions."[712]

465 These criteria make it clear that business enterprises must have achieved net-zero CO_2 emissions as soon as possible - but by 2050 at the latest. According to the Race to Zero Initiative, fossil fuels must be phased down and out to achieve this. Business enterprises must also take immediate action in the short term by setting interim emission reduction targets for Scopes 1, 2 and 3. According to the Race to Zero Interpretation Guide, these should, as a rule, be absolute emission reduction targets.[713]

466 Furthermore, the interim reduction targets of business enterprises must reflect the maximum effort for delivering a fair share to the globally required 50% CO_2 reduction by 2030.[714] For many actors, this means that they are able and required to achieve reductions that go beyond the 50% global average by 2030, and also that net-zero CO_2 emissions must have been reached earlier than 2050.[715] It therefore follows from the Race to Zero Initiative that a 50% CO_2 emission reduction is the starting-point and that many business enterprises must achieve even deeper CO_2 reductions.

(iv) The UN Expert Report

467 In 2022, at the request of the UN Secretary-General, the UN Expert Report was drafted by the UN Expert Group. This report, titled "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions," contains principles and recommendations relating to the net-zero obligations of non-state actors.[716] The background to this is that although non-state actors have committed to a net-zero target in words, concrete initiatives to achieve it are often lacking. As a result, the UN Expert Report aimed to develop stronger and clearer standards for net-zero targets to prevent greenwashing and (further) delays in climate action by non-state actors.[717]

468 For this reason, the UN Expert Report seeks to establish a universal definition of net zero by 2050.[718] To this end, the UN Expert Report has formulated five core principles to be observed by non-state actors:

"1. Ambition which delivers significant near- and medium-term emission reductions on a path to global net zero by 2050;

2. Demonstrated integrity by aligning commitments with actions and investments;

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712 Exhibit MD-353 (Race to Zero Criteria 2022), p. 2.
713 Exhibit MD-354 (Race to Zero Interpretation Guide 2022), p. 8.
714 Exhibit MD-354 (Race to Zero Interpretation Guide 2022), pp. 2, 6 and 7.
715 Exhibit MD-354 (Race to Zero Interpretation Guide 2022), p. 6.
716 See also the judgment of the Court of Appeal, ground 7.23 under e.
717 Exhibit MD-487 (UN Expert Report), p. 15.
718 Exhibit MD-487 (UN Expert Report), p. 12.

> *3. Radical transparency in sharing relevant, non-competitive, comparable data on plans and progress;*
>
> *4. Established credibility through plans based in science and third-party accountability;*
>
> *5. Demonstrable commitment to both equity and justice in all actions."*[719]

469 More specifically, this means that businesses must commit to achieving net zero emissions as soon as possible, but in any case by 2050.[720] The UN Expert Report also sets out how this commitment should be translated into emission reduction targets:

> *"Non-state actors must have short-, medium- and long-term absolute emissions reduction targets and, where appropriate, relative emissions reduction targets across their value chain that are at least consistent with the latest IPCC net zero greenhouse gas emissions modelled pathways that limit warming to 1.5°C with no or limited overshoot, and where global emissions decline at least 50% below 2020 levels by 2030, reaching net zero by 2050* (…). *Targets must include emission reductions from a non-state actor's full value chain and activities, including* (…) *scope 1, 2 and 3 emissions for businesses."*[721]

470 It therefore follows from the UN Expert Report that businesses must adopt short-, medium-, and long-term targets aligned with science, more specifically with the most recent IPCC models that limit global warming to 1.5°C and in which global CO_2 emissions are reduced by 50% - as a minimum requirement [722] - by 2030, so that net zero will be reached by 2050. Setting short-term goals that prioritise immediate reductions is also crucial, according to the UN Expert Report, to prevent that tipping points in the climate system are crossed.[723] The targets must always cover all the emissions of a business, and so its Scope 1, 2 *and* 3 emissions.

(v) The Net Zero Guidelines

471 In 2022, the Net Zero Guidelines[724] were drafted and published by the ISO - an independent international organisation that has been dedicated since 1946 to creating science-based international standards for a wide range of subjects[725]. The Net Zero

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719 Exhibit MD-487 (UN Expert Report), p. 13.
720 Exhibit MD-487 (UN Expert Report), pp. 15 and 16.
721 Exhibit MD-487 (UN Expert Report), p. 17.
722 Exhibit MD-487 (UN Expert Report), p. 16.
723 Exhibit MD-487 (UN Expert Report), p. 17. For a detailed discussion of tipping points, see Sections II.1.2 and II.1.5 of this Explanatory Submission.
724 See also the judgment of the Court of Appeal, ground 7.23 under b.
725 See https://www.iso.org/about.

Guidelines contain guiding principles and recommendations to enable a common, global approach to achieving net zero GHG emissions as fast as possible.[726]

472 As for business enterprises, the Net Zero Guidelines contain concrete guidelines for effectively contributing to global efforts to limit global warming to 1.5°C.[727] For example, the Guidelines require that:

> *"5.3* (…) *Organizations set long-term targets to meet net zero by or before 2050, and interim targets to achieve substantial emission reductions of Scope 1, Scope 2 and Scope 3 emissions by 2030 or earlier. Subsequent targets are no more than five years from the preceding target and support long-term commitments for ongoing action toward and beyond 2050."*[728]

473 Organisations must therefore set concrete reduction targets to achieve net zero GHG emissions by 2050 or earlier. The Net Zero Guidelines then flesh out this obligation. For example, organisations must use maximum efforts to reduce CO_2 emissions in line with the 1.5°C target. A 50% reduction in Scope 1, 2 and 3 emissions by 2030 serves as the starting point here.[729] If organisations have the capacity to move faster, they must do so.[730] When concrete reduction targets are set, consideration must be given to whether an organisation has a historical responsibility or produces high emissions. Such circumstances may, under the Net Zero Guidelines, give rise to more substantial and faster emission reductions.[731]

(vi) The 1.5°C Business Playbook

474 In 2023[732], the 1.5°C Business Playbook was published by the ERI - a joint climate initiative of business enterprises seeking to halve collective CO_2 emissions by 2030.[733] The 1.5°C Business Playbook was specifically developed for businesses wishing to commit to the 1.5°C target. With this in mind, the 1.5°C Business Playbook provides guidelines for business enterprises regarding "strategic planning, business development and target setting."[734]

475 The 1.5°C Business Playbook also emphasises that all business enterprises must at least halve their CO_2 emissions every decade, and that the wealthiest should act more quickly to become net zero by 2040:

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726 Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 1.
727 Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 1.
728 Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 5.3
729 Exhibit MD-488 (ISO Net Zero Guidelines 2022), paras. 8.2.6 and 9.1.2.
730 Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 8.2.6.
731 Exhibit MD-488 (ISO Net Zero Guidelines 2022), paras. 5.3, 5.4 and 12.2.
732 See also the judgment of the Court of Appeal, ground 7.23 under c.
733 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 15. See also https://exponentialroadmap.org/about-exponential-roadmap-initiative/.
734 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 5.

> *"*(…) *we need to keep temperature rise to a maximum of 1.5°C to avoid high risk of catastrophic consequences for people and nature. To do so, the world needs to halve emissions every decade by 2050 from a 2020 baseline, which amounts to a year-on-year reduction rate of 7%. This is called the Carbon Law. As a simple rule of thumb it can be applied to companies, cities, nations and citizens. Since the Carbon Law outlines the global average it must be viewed as a minimum ambition, and the wealthiest should go fastest. Therefore, companies acting in line with the 1.5°C ambition should strive to become net zero by 2040 at the latest, and acknowledge that this is an intermediate step toward absolute zero and net negative emissions."*[735]

476 In the 1.5°C Business Playbook, *"*net zero*"* means that a business enterprise has reduced its Scope 1, 2 and 3 emissions in accordance with science-based reduction pathways.[736] This is related to the fact that *"*reduce your own emissions" (Scope 1 and 2 emissions) and *"*reduce your value chain emissions*"* (Scope 3 emissions) constitute two of the four central pillars of the 1.5°C Business Playbook.[737] By reporting on the intended direction, the emissions of the business enterprises, the concrete emission reduction targets and the emission reductions achieved by business enterprises, they can demonstrate their commitment and progress made in this area.[738]

(vii) The SBTi Report

477 In 2018, the SBTi - a collaborative network dedicated to mobilising business enterprises to set science-based targets in the transition to a low-carbon economy[739] - published the SBTi Report.[740] This Report, titled *"*Best practices in scope 3 greenhouse gas management*"*, relates not only in a general sense to the role to be played by business enterprises in achieving the Paris Agreement climate goals, but also specifically to the need to reduce scope 3 emissions.[741]

478 In that connection, the report contains the following passage:

> *"Companies must help prevent the worst impacts of climate change by reducing their greenhouse gas (GHG) emissions as much and as quickly as possible, including reducing value chain (i.e. Scope 3) emissions. Scope 3 emissions often represent the largest portion of companies' GHG inventories* (…)*. The business community is*

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735 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 5. See also Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 14.
736 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 5.
737 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), pp. 10 and 17 up to and including 22.
738 Exhibit MD-490 (ERI 1.5°C Business Playbook 2023), p. 32.
739 Exhibit MD-322 (SBTi Report), p. 2.
740 See also the judgment of the Court of Appeal, ground 7.70.
741 Exhibit MD-322 (SBTi Report), pp. 5 up to and including 7.

> *responsible for the majority of global emissions and must do its part to meet this goal* (…)*. Best practices in defining scope 3 target ambition would entail setting targets that are, at a minimum, in line with the percentage reduction of absolute GHG emissions required at a global level over the target timeframe."*[742]

479 The minimum CO_2 reductions required of companies by the SBTi Report are therefore absolute in nature and aligned with the global CO_2 reductions required to achieve the Paris Agreement emission reduction targets. If global CO_2 emissions must have been reduced by 45% in absolute terms by 2030, then best practice for business enterprises means they should also reduce their Scope 3 emissions by at least 45% in absolute terms by 2030. To this end, business enterprises must use science-based reduction targets for the short term and the most ambitious scenarios that lead to (on the one hand) the fastest possible reductions and (on the other hand) the lowest cumulative emissions.[743]

(viii) The Oxford Report

480 In 2020, climate scientists at Oxford University published the Oxford Report.[744] This report, titled *"*Mapping of current practices around net zero targets,*"* analyses climate protocols and guidelines for business enterprises that were in force at the time.[745] The Oxford Report holds authoritative status, as it was produced within the Race to Zero Initiative that operates under the flag of the UN.[746] A new version of the Oxford Report was published in 2023.[747]

481 According to the Oxford Report, there is broad consensus among the studied climate protocols and guidelines on various subjects. For example, virtually all of the studied climate protocols and guidelines show that:

(a) it is necessary to reduce CO_2 emissions to zero by 2050;[748]

(b) every party - and so also every business enterprise - has their own, independent responsibility to contribute to achieving net zero CO_2 emissions by 2050;[749]

(c) the CO_2 reductions must cover Scope 1, 2 and 3 emissions;[750]

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742 Exhibit MD-322 (SBTi Report), pp. 5 and 6.
743 Exhibit MD-322 (SBTi Report), pp. 5–7. See also https://files.sciencebasedtargets.org/production/files/SBTi-Corporate-Manual-v2.1.pdf, p. 13.
744 See also the judgment of the Court of Appeal, ground 7.23 under h.
745 Exhibit MD-287 (Oxford Report), p. 1.
746 Exhibit MD-287 (Oxford Report), p. 1.
747 Exhibit MD-489 (Oxford Net Zero et al., Net Zero Stocktake 2023).
748 Exhibit MD-287 (Oxford Report), paras. 1.2 and 1.7.
749 Exhibit MD-287 (Oxford Report), para. 1.4.
750 Exhibit MD-287 (Oxford Report), para. 1.1.

(d) the reduction of CO_2 emissions must start immediately;[751]

(e) business enterprises must set concrete, robust, interim reduction targets for the short and medium term;[752] and

(f) large business enterprises from Western jurisdictions that emit high levels of greenhouse gases and bear historical responsibility for the climate crisis must set the most far-reaching emission reduction targets of all.[753]

Conclusion

482 It follows from the foregoing that all relevant soft-law sources require business enterprises to reduce their CO_2 emissions in Scopes 1, 2 and 3 in line with the global reduction targets and climate science. As a result, virtually all the discussed soft-law sources take as their starting point that businesses must achieve a CO_2 reduction of at least 50% by 2030. These sources thus not only point in the same direction as the doctrine of hazardous negligence, human rights and general legal principles, but are in many cases even based on them, so that they essentially also underscore that corporate climate obligations follow from them.

IV.5.5 Legislation that is not directly applicable

483 Fifth, legislation that is not directly applicable may also serve as an objective point of reference for establishing and determining duties of care.[754] After all, a statutory provision constitutes an objectified reflection of ideas on which the legal system is based and which were envisaged by the legislature.[755] As a result, a statutory duty can have collateral influence on or an indirect meaning for the existence and scope of a duty of care.[756]

484 A well-known example of the above is the *Tandarts* judgment given by the Dutch Supreme Court in 1958.[757] In that judgment, the Supreme Court held that a violation of a legal standard that does not seek to protect the injured party against the damage suffered by them - meaning that there is no liability in the absence of relativity - *can* nevertheless serve as a point of view in answering the question of whether a societal

[751] Exhibit MD-287 (Oxford Report), paras. 1.2 and 1.7.
[752] Exhibit MD-287 (Oxford Report), paras. 1.2 and 1.7.
[753] Exhibit MD-287 (Oxford Report), para. 1.4.
[754] *Asser/Sieburgh 6-IV* 2023/77; K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, notes 5.1.5 and 5.5.1; E.G.A. van der Werf, "*Overheid en maatschappelijke betamelijkheid*", Deventer: Wolters Kluwer 2025, pp. 74 and 75; T. Hartlief et al., "*Verbintenissen uit de wet en schadevergoeding*", Deventer: Wolters Kluwer 2021, para. 40; Opinion of Advocate General Valk prior to the judgment of the Dutch Supreme Court of 26 June 2020, ECLI:NL:PHR:2020:412 (*IS-uitreizigers*), para. 6.2.
[755] D.A. van der Kooij, "*Relativiteit, causaliteit en toerekening van schade*" (Relativity, causality and attribution of damage), Deventer: Wolters Kluwer 2019, p. 279.
[756] See, for example, the judgment of the Dutch Supreme Court of 10 November 2006, *NJ* 2008, 491 (*AstraZeneca/Menzis*).
[757] Judgment of the Dutch Supreme Court of 17 January 1958, *NJ* 1961, 568 (*Beukers/Dorenbos*).

duty-of-care standard has been breached in relation to the injured party. This is also referred to as the "Langemeijer Correction" in view of the identical conclusion reached by Procurator General Langemeijer.

485 In the context of climate law, the CSDDD (which is not directly applicable) is, in any event, relevant as an objective point of reference for establishing and concretely determining the duty of care to prevent or limit dangerous climate change. This will be briefly discussed below.

486 The CSDDD, which will be discussed in greater detail in Sections V.6.2 and V.6.9 of this Explanatory Submission, assumes that business enterprises must take action to limit their CO_2 emissions in order to prevent or limit dangerous climate change. Until Omnibus[758], the core obligation was laid down in Article 22(1) CSDDD:

> *Article 22 CSDDD*
> *1. Member States shall ensure that companies referred to in Article 2(1), points (a), (b) and (c), and Article 2(2), points (a), (b) and (c), adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5° C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities.*
>
> *The design of the transition plan for climate change mitigation referred to in the first subparagraph shall contain:*
>
> *(a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category* (…).

487 The preamble to the CSDDD also stated that the CSDDD aims to ensure that companies implement emission reductions:

> "73. This Directive is an important legislative tool to ensure corporate transition to a sustainable economy, including to reduce the existential harms and costs of climate change, to ensure alignment with 'global net zero' by 2050, to avoid any misleading claims regarding such alignment

[758] Article 22 CSDDD was deleted by Omnibus. See, in this regard, Sections II.3.1 and V.6.2 of this Explanatory Submission.

> and to stop greenwashing, disinformation and fossil fuels expansion worldwide in order to achieve international and European climate objectives. In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5o C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets. The plan should address, where relevant, the exposure of the company to coal-, oil- and gas- related activities. Such requirements should be understood as an obligation of means and not of results. (…)."[759]

488 Article 22(1) CSDDD therefore required the adoption *and* putting into effect of a climate transition plan, containing, "*where appropriate*", absolute emission reduction targets. The CSDDD therefore explicitly required companies to determine and comply with absolute reduction obligations. It followed from the preamble that this is a "best-efforts" obligation. In order to establish and concretely determine the duty of care to prevent or mitigate dangerous climate change, it is therefore important to note that the CSDDD also required companies to set absolute reduction targets and achieve emission reductions in Scopes 1, 2 and 3 as an obligation of means.[760]

[759] CSDDD, preamble (recital (73)).

[760] The scope of Article 22(1) CSDDD remains relevant to this lawsuit, because that provision was still in effect at the time of the judgment. Whether the judgment of the Court of Appeal can be upheld (partly) in light of Article 22(1) CSDDD as applicable at that time must be assessed *ex tunc*. See also, in this regard, Section V.6.9 of this Explanatory Submission.

V SHELL HAS A DUTY OF CARE TO PREVENT OR LIMIT DANGEROUS CLIMATE CHANGE

V.1 Introduction

489 In the preceding Sections, a great deal of attention was paid to the factual background to dangerous climate change. In that context, it was also explained that the oil and gas industry plays (and has played) the largest and most decisive role in the emergence, perpetuation and prevention of dangerous climate change (Chapters II and III of this Explanatory Submission). Subsequently, Milieudefensie et al. outlined, in general terms, the legal framework applicable to the establishment and determination of duties of care and, in particular, the establishment and determination of the duty of care to prevent or limit dangerous climate change. On that basis, it is possible to determine whether a specific party has a duty of care in the area of the climate (Chapter IV of this Explanatory Submission).

490 In this Chapter, which builds to a significant extent on the foregoing, the focus will be shifted to Shell and its specific position as an important player within the oil and gas industry. After all, the Court of Appeal has found, considering the role and characteristics of Shell, that Shell has a duty of care to prevent or mitigate dangerous climate change. With a view to this, the Court of Appeal found – also considering the objective points of reference discussed in Chapter IV of this Explanatory Submission - that Shell must limit its CO_2 emissions *more* than most other companies in order to combat dangerous climate change. That finding is correct, as Milieudefensie et al. will explain in this Chapter. Subsequently, Milieudefensie et al. will describe that the grounds of Shell's conditional cross-appeal in cassation that challenge the duty of care established by the Court of Appeal cannot lead to the setting aside of the Judgment by the Supreme Court.

491 This Chapter has the following structure. In Section V.2 of this Explanatory Submission, Milieudefensie et al. will briefly recall that the oil and gas industry is the primary cause of climate change. This is an important starting-point when answering the question whether Shell has a duty of care to prevent or limit dangerous climate change. The characteristics of Shell and its influential position within the oil and gas industry, which will be discussed in Section V.3 of this Explanatory Submission, are also of great importance in this regard. After the application of the various relevant objective points of reference in Section V.4 of this Explanatory Submission to Shell, they will be brought together and assessed in Section V.5 of this Explanatory Submission. From this it will follow that the Court of Appeal rightly found that Shell has a duty of care to prevent or limit dangerous climate change. This is not altered by the objections to the judgment as formulated by Shell in its conditional cross-appeal under grounds nos. 1 up to and including 3. This will be explained by Milieudefensie et al. in Sections V.6 up to and

including V.8 of this Explanatory Submission, where grounds of appeal nos. 1.3 up to and including 1.10 and 1.35 up to and including 1.45 of the principal appeal in cassation of Milieudefensie et al. will also be explained.

V.2 The oil and gas industry as the primary cause of climate change

492 In answering the question whether Shell has a duty of care to prevent or limit dangerous climate change, it is not only Shell's characteristics (to be discussed in Section V.3 of this Explanatory Submission) that are relevant, but also the characteristics of the oil and gas industry in general. After all, that is the sector in which Shell operates as one of the largest players and of which Shell forms an important part. Those characteristics consequently affect the question whether anything - and, if so, what - can be required of Shell in the context of preventing or limiting dangerous climate change.

493 In earlier chapters of this Explanatory Submission, a great deal of attention was already paid to the conduct, influence and lobbying activities of the oil and gas industry as well as to the significant contribution to the resulting dangerous climate change. To avoid unnecessary repetition, Milieudefensie et al. will merely recall a number of important observations here:

(a) CO_2 emissions. As much as 81% of the world's annual CO_2 emissions are caused by the production and combustion of fossil fuels. Oil and gas account for the largest share of this, i.e. 48%. That is significantly more than the contribution from coal, which stands at 33%. Furthermore, two thirds of the global energy consumption from fossil fuels comes from oil and gas, and one third from coal. The quantities of oil and gas to be reduced globally on the path to net zero are therefore twice as large as the quantities of coal that must be reduced. Since oil and gas thus make the largest contribution to dangerous climate change on balance, it is absolutely essential to reduce their use as fast as possible.[761]

(b) Dominant position. In the global energy system, which has been running on fossil fuels for over 100 years now, international oil and gas companies wield enormous power. The size and influence of these companies are so large that it is not possible to properly regulate them at either national or international level. This has led to a power vacuum, which is also referred to as the governance gap. For example, oil and gas companies can place their activities outside the scope of legislation and put pressure on governments by threatening to leave. Furthermore, they can use their dominant position to maintain and even expand

[761] See, in this regard, Sections II.1.1 and III.2.3 of this Explanatory Submission.

dependence on fossil fuels for as long as possible. All of this is also happening in practice.[762]

(c) Active opposition. Oil and gas companies also have an inhibiting effect on climate action otherwise. There are various ways in which the oil and gas industry actively opposes efforts to combat dangerous climate change. For instance, oil and gas companies engage in lobbying on a large scale and through various interest groups to push back against climate policies. These lobbying efforts are frequently successful. Furthermore, to undermine political and societal support for climate action, they interfere in the public debate with inaccurate and incomplete (counter-)arguments. Additionally, oil and gas companies continue to make massive investments in fossil-fuel projects, meaning that dependence on fossil fuels will persist for longer. In all these ways, oil and gas companies actively contribute to the carbon lock-in effect. As a result, the oil and gas industry constitutes the main obstacle to the necessary societal transition from a fossil-fuel-based to a sustainable energy system.[763] All of this applies in particular to Shell.[764]

494 It follows from these facts and circumstances that the oil and gas industry is the primary cause of dangerous climate change. It also contributes most to it in percentage terms. Conversely, phasing out the use of oil and gas will lead to the fastest reduction in CO_2 emissions, meaning that the danger of climate change will also diminish more rapidly. Yet, no significant CO_2 reductions are currently being achieved in the oil and gas sector. On the contrary, the oil and gas sector is actively obstructing the necessary CO_2 reductions in all kinds of ways. This means that the sector that makes the largest contribution to dangerous climate change has, so far, stood in the way of preventing or mitigating it to a very large extent. This constitutes an important starting-point in answering the question of whether Shell has a duty of care to prevent or limit dangerous climate change.

V.3 Shell's position as a very important actor within the oil and gas industry

495 In addition to the (general) characteristics of the oil and gas industry, the (specific) characteristics of Shell are particularly important in determining whether Shell has a duty of care to prevent or limit dangerous climate change. After all, these characteristics provide relevant information about the type of company Shell is, the activities undertaken by it and the impact Shell has on both causing and preventing or mitigating dangerous climate change. Some of these characteristics were already briefly discussed in Section II.2.6 of this Explanatory Submission. Below, Milieudefensie et al.

[762] See, in this regard, Sections II.2.5 and II.3.1 of this Explanatory Submission.
[763] See, in this regard, Sections II.3.1 up to and including II.3.3 of this Explanatory Submission.
[764] See, in this regard, Sections II.4.1 and II.4.2 of this Explanatory Submission.

will devote considerable attention to eleven characteristics of Shell that are relevant in this context.

V.3.1 Shell is one of the largest companies in the world

496 The first relevant characteristic of Shell is related to its size. Shell is one of the largest companies in the world.[765] In 2023, for example, it generated revenue of no less than USD 323 billion.[766] This has made Shell the fifth-largest oil and gas company in the world for some time now.[767] Moreover, its profits - even according to Shell itself - exceed the combined profits of companies such as Unilever, Philips, AkzoNobel and DSM.[768] In 2022, those profits even amounted to nearly USD 40 billion.[769]

497 Within the oil and gas industry, Shell is part of Big Oil or the Supermajors.[770] This terminology relates to the fact that the size of oil and gas companies that are not among the five largest oil and gas companies in the world cannot be compared to the size of a company like Shell. By way of illustration: TotalEnergies and BP, the 6th and 7thlargest oil and gas companies in the world in 2023, are 33% smaller than Shell in terms of revenue.[771] This means that Shell's enormous size is not only absolute, but also relative in nature. It is therefore not surprising that the Court of Appeal, too, found that Shell is not only a "large and international company,"[772] but even "one of the largest oil and gas companies in the world."[773]

V.3.2 Shell is one of the richest companies in the world

498 In addition, Shell is considered as one of the richest companies in the world.[774] This follows not only from its revenue and profits, which run into hundreds and tens of billions respectively year after year,[775] but also from the dividends it pays out to its shareholders annually. For instance, in 2022, Shell paid out a total of USD 25.8 billion to its shareholders.[776] While the shareholder dividends initially amounted to 20%-30% of the generated cash flows, Shell distributed as much as 42% of them in 2023. As a result,

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765 Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 29 and 39.
766 Judgment of the Court of Appeal, ground 3.21.
767 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 24; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 33.
768 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 33.
769 Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 102.
770 See, in this regard, Section II.3.1 of this Explanatory Submission.
771 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 25.
772 Judgment of the Court of Appeal, ground 7.25.
773 Judgment of the Court of Appeal, ground 3.21. See also the Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 23 and 24.
774 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 141 and 487; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 22.
775 See, in this regard, Section V.3.1 of this Explanatory Submission.
776 Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 103.

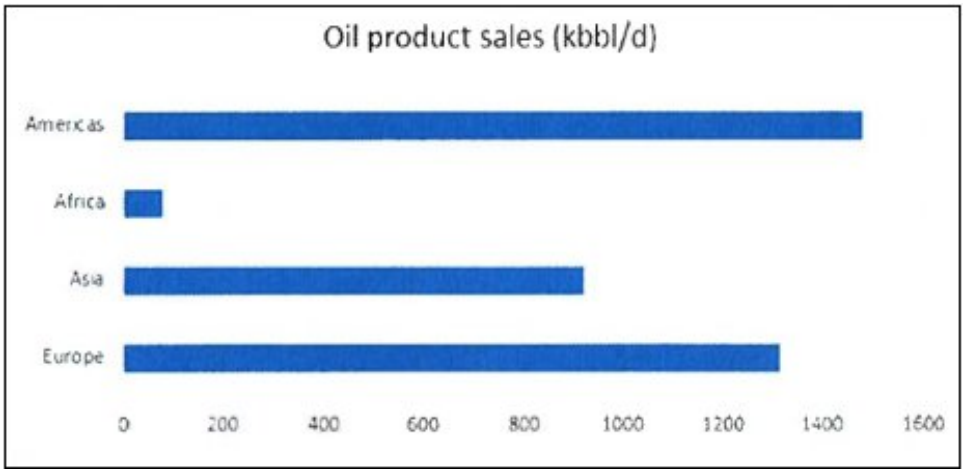
an ever-increasing portion of Shell's profits ends up in the pockets of its shareholders.[777] This is only possible due to Shell's enormous wealth - a fact that has also been acknowledged by the Court of Appeal.[778]

V.3.3 Shell generates most of its revenue in wealthier and more developed countries

499 Although Shell operates in virtually every part of the world, its activities are not distributed equally across the globe. Shell generates the majority of its revenue in the wealthier, more developed and predominantly Western countries.[779] This applies to as much as 69% (in 2020)[780] and 70% (in 2021)[781] of its revenue respectively. The vast majority of Shell's revenue is thus generated in regions of the world where CO_2 emissions will need to decrease much faster than the global average.[782] This is related to the CBDR principle, which was discussed in Section IV.5.3.3 of this Explanatory Submission.

500 The Court of Appeal has also established this.[783] For example, the judgment includes the figure below, which illustrates the regional distribution of Shell's oil sales. This figure also demonstrates that the vast majority of Shell's oil products are sold in America and Europe, so predominantly in the wealthier, more developed, and Western countries.

[777] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 113.
[778] Judgment of the Court of Appeal, ground 3.21.
[779] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 58; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 , 65 and 123; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 21 and 40; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 496.
[780] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 21; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 494.
[781] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 48; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 40.
[782] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 48; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 21 and 40; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 494 and 496.
[783] Judgment of the Court of Appeal, ground 3.53.



V.3.4 Shell has a large historical CO_2 footprint

501 As a globally operating oil and gas company, Shell has been responsible for exceptionally high CO_2 emissions since its founding in 1890.[784] As much as 1.8% of the total global CO_2 emissions since 1880 can be attributed to the oil and gas products produced by Shell; half of them were emitted prior to 1986.[785] Over the period from 1988 to 2015, Shell - as the source of 1.7% of total industrial GHG emissions - was the 9th largest individual climate polluter in the world.[786] In some years, Shell's CO_2 emissions even accounted for 3 to 4% of global CO_2 emissions.[787] Its emissions are thus significantly higher than those of (for example) the Netherlands.[788] Historically, Shell is therefore one of the largest contributors to the increased atmospheric CO_2 concentration.

502 In line with this, the Court of Appeal has found that Shell has a large historical CO_2 footprint. Its judgment includes several tables providing a numerical overview of Shell's emissions in recent years.[789]

V.3.5 Shell's present-day and future CO_2 emissions are very high

503 Even today, Shell is still generating very high CO_2 emissions. The figures from 2023 can be used to illustrate this. After all, these were the most recent emission figures available at the time of the Judgment. The findings of the Court of Appeal show that

[784] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 487; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 22; Summons of Milieudefensie et al. dated 5 April 2019, para. 548.
[785] Summons of Milieudefensie et al. dated 5 April 2019, paras. 5 and 548.
[786] Summons of Milieudefensie et al. dated 5 April 2019, para. 552.
[787] Summons of Milieudefensie et al. dated 5 April 2019, paras. 549 and 550.
[788] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 254 and 627; Summons of Milieudefensie et al. dated 5 April 2019, para. 553.
[789] Judgment of the Court of Appeal, grounds 3.45 and 3.46.

Shell - based on the CO_2 emissions reported by Shell itself - emitted over 1,200 million tCO_2e in 2023.[790] This means that in 2023 alone, Shell added 1,200 million tonnes of GHG concentration to the atmosphere.[791] If Shell's current CO_2 emissions are compared to the CO_2 emissions of countries, only four countries worldwide (China, the United States, India and Russia) have higher emission levels.[792]

504 Furthermore, Shell has no intention of limiting its CO_2 emissions in the short term. On the contrary, the Court of Appeal has established that Shell expects to keep its oil production at the same level (at approximately 1.4 million barrels per day) until 2030; at the same time, Shell intends to increase its LNG sales by 20%-30% between 2022 and 2030.[793] Furthermore, Shell expects to invest USD 100 billion in upstream oil and gas activities between 2023 and 2030 and to start the operation of approximately 80 new oil and gas fields.[794] This means Shell will remain one of the largest investors in new oil and gas fields for many years to come,[795] resulting in higher CO_2 emissions and a (further) reinforcement of the carbon lock-in effect.[796] As things stand, Shell will therefore continue to be responsible for very high CO_2 emissions in the future as well.[797]

V.3.6 Shell holds a dominant position globally

505 Another defining characteristic of Shell is that it holds a very dominant position globally, even from a historical perspective.[798] This is firstly related to the enormous scale of its operations (a fact that has also been acknowledged by the Court of Appeal).[799] As a result, Shell possesses far greater power in the supply chain than most other oil and gas companies.[800] Secondly, Shell's dominant position is related to the monopoly of power in the oil and gas sector.[801] After all, oil and gas have traditionally been widely used everywhere in the world. The oil and gas sector is trying to maintain dependence

790 Judgment of the Court of Appeal, grounds 3.44 and 3.45.
791 Summons of Milieudefensie et al. dated 5 April 2019, para. 31 and footnote 18.
792 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 5; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 23; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 26 and 627.
793 Judgment of the Court of Appeal, grounds 3.47 and 3.48. See also the Annex to the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 114 and 116. See also, in this regard, Section II.4.1 of this Explanatory Submission.
794 Judgment of the Court of Appeal, grounds 3.49 and 3.51. See also the Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 114. See also, in this regard, Section II.4.1 of this Explanatory Submission.
795 Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 53 up to and including 57.
796 Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 59.
797 Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 43.
798 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, paras. 62, 102, 103, 124 and 128; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 24; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 302; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 29 and 39.
799 See, in this regard, Section V.3.1 of this Explanatory Submission.
800 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 125.
801 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, paras. 102 and 103.

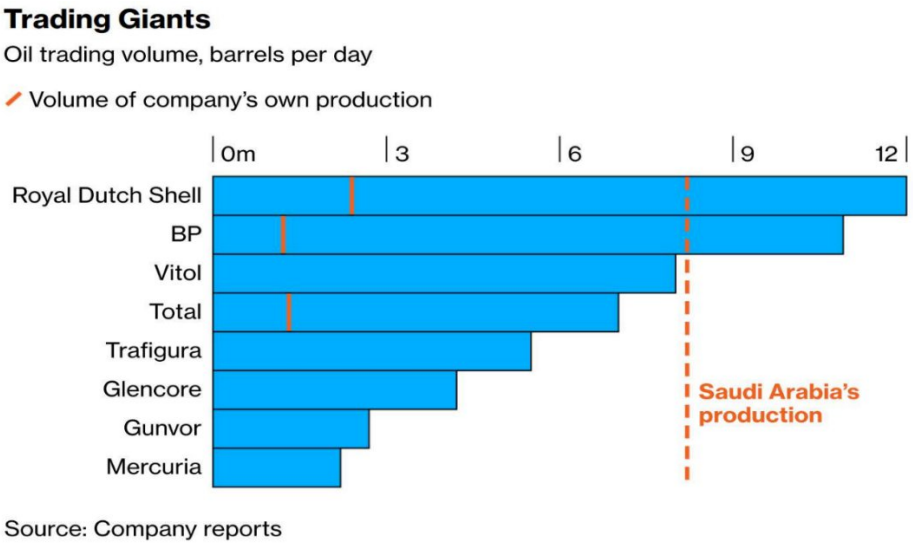
on these fossil fuels as much as possible.[802] As a result, oil and gas companies like Shell also pose a major barrier to the (further) scale-up of renewable energy, meaning there is actually no level playing field in the energy market.[803]

506 Shell exerts its global influence in different ways, for example through ongoing investments in oil and gas[804] and media and lobbying campaigns[805] and by maintaining contacts with national governments.[806] As discussed earlier,[807] Shell is extremely successful in this way at influencing legislation and government policies everywhere in the world.[808] This economic, political and legal dominance of Shell cannot or can hardly be matched by other companies.[809]

V.3.7 Shell is the world's largest purchaser of oil and gas, with significant purchasing power

507 Shell's activities consist not only of producing oil and gas, but also of purchasing and selling these products. Shell Trading even trades approximately 12 million barrels of oil per day. The vast majority of this oil is produced by third parties[810], as the figure below published by Bloomberg also shows:[811]

802 See, in this regard, Sections II.2.5, II.3.1 and V.2 of this Explanatory Submission.
803 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 124.
804 See, in this regard, Sections II.4.1 and V.3.5 of this Explanatory Submission.
805 See, in this regard, Sections II.3.1 and II.4.2 of this Explanatory Submission.
806 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 25.
807 See, in this regard, Sections II.3.1 and II.4.2 of this Explanatory Submission.
808 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 127; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 26; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (67).
809 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 128.
810 Oral Arguments on Appeal *(under "Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 23 and 24.
811 Exhibit MD-563D (Bloomberg article dated 30 March 2021), p. 7. See also the Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 23. See also Section VII.8.1 of this Explanatory Submission.



508 This means that Shell is not only a (very) large purchaser,[812] but even the largest purchaser of oil and gas in the world.[813] The purchasing power associated with this has been primarily achieved by Shell through its massive economies of scale. For example, Shell has significant global capacity to store oil and gas in the form of a large number of refineries and storage terminals. Furthermore, the company has global transportation and distribution capabilities that other oil and gas producers do not have, for instance in the form of its own fleet of oil tankers (the largest fleet in the world), LNG carriers and other types of vessels.[814] Other purchasers of oil and gas do not have such an infrastructure and depend on Shell Trading to bring their products to market.[815] Furthermore, Shell Trading performs a financing function: by providing financing to oil and gas producers, it can make sure that it can continue to purchase oil and gas from them.[816] Milieudefensie et al. will explain this in more detail in Section VII.8.1 of this Explanatory Submission when discussing whether a reduction injunction is effective. However, it already follows from the foregoing that Shell, as a purchaser of oil and gas, holds a unique position that is incomparable to that of other oil and gas suppliers.

V.3.8 Shell exerts influence on the supply of and demand for energy products

[812] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 35 under (159) and 934; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29
[813] Oral Arguments on Appeal *(under "Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 23.
[814] Oral Arguments on Appeal *(under "Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 20, 21 and 24. See also the judgment of the Court of Appeal, ground 7.104.
[815] Oral Arguments on Appeal *(under "Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 22; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 934 and 935.
[816] Oral Arguments on Appeal *(under "Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 25 and 26; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 934 and 935. See also the Judgment of the Court of Appeal, para. 7.104

509 Partly in light of its strong dominant position globally[817] and its substantial purchasing power[818] , it is evident that Shell influences both (on the one hand) the supply of energy products and (on the other) the demand for energy products. Consequently, Shell's conduct essentially affects both facets of the energy market. In line with this, the Court of Appeal also found that Shell has the power to contribute to combating the climate crisis.[819] Milieudefensie et al. will briefly explain this below for both aspects.

(a) Demand for energy products. For decades, Shell has been boosting global demand for oil and gas[820] by actively boosting demand for fossil fuels.[821] To this end, it conducts numerous media and lobbying campaigns, for example.[822] These campaigns are not only aimed at influencing legislation and government policies everywhere in the world in a way that benefits Shell,[823] but also seek to convince the general public that phasing out the use of oil and gas will lead to major problems.[824] These narratives, which are often developed specifically for particular regions of the world, are frequently based on fear and often contain inaccurate and/or incomplete information.[825] The energy trilemma presented by Shell in this lawsuit is a striking example of this.[826]

(b) Supply of energy products. Shell also has an influence on the energy products that are offered to consumers. That is self-evident, as Shell can choose to offer more or less oil and gas.[827] Shell is currently making large-scale investments in oil and gas. It will continue to do so in the future.[828] This means that the supply of energy products will remain stable or even increase, which will put downward pressure on prices. This makes it difficult for sustainable alternatives to compete, perpetuates fossil-fuel dependence and reinforces the carbon lock-in effect.[829] An increase in the supply of energy products consequently leads to an increase

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817 See, in this regard, Section V.3.6 of this Explanatory Submission.
818 See, in this regard, Section V.3.7 of this Explanatory Submission.
819 Judgment of the Court of Appeal, grounds 7.27 and 7.99.
820 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 4, 8, 46 and 90; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 26; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 247.
821 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 13; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 26; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 247.
822 Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, paras. 4 and 81. See also, in this regard, Sections II.3.1 and II.4.2 of this Explanatory Submission.
823 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 26.
824 See, in this regard, Sections II.3.1 up to and including II.4.2 of this Explanatory Submission.
825 See, in this regard, Sections II.3.1 up to and including II.4.2 of this Explanatory Submission.
826 See, in this regard, Section III.3 of this Explanatory Submission.
827 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 247 and 248; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29.
828 See, in this regard, Sections II.4.1 and V.3.5 of this Explanatory Submission.
829 Judgment of the Court of Appeal, grounds 7.59 and 7.61. See, in this regard, Sections II.3.3, II.4.1, III.3 and V.3.5 of this Explanatory Submission.

in demand for energy products,[830] which underscores Shell's large influence on both sides of the energy market.

V.3.9 Shell's influence on and control over its very substantial emissions

510 Closely related to Shell's influence on the demand and supply sides of the energy market[831] is Shell's influence on and control over its very substantial level of CO_2 emissions.[832] For all of its emissions – in Scope 1, Scope 2 and Scope 3 - Shell can, through its own choices and conduct, achieve either higher or lower CO_2 emissions and, consequently, contribute either more or less to dangerous climate change (or preventing or limiting it).[833] This is also a reason why the Court of Appeal has determined that it is within Shell's power to contribute to combating the climate crisis.[834]

511 The above is linked to the fact that Scope 3 emissions - which account for 95% of Shell's emissions[835] - are also, essentially, Shell's own emissions, as they are the direct result of its own decisions. After all, only Shell determines which energy products and how many fossil-fuel products it will bring to market and also whether it will increase or decrease those quantities. It has complete control over this.[836] The more fossil-fuel products Shell offers, the higher its Scope 3 emissions will become.[837] So in this context, it is not about choices that consumers may or may not make, but about Shell's own conduct.[838] For that matter, Shell exerts influence on consumer behaviour in various ways,[839] as discussed in detail above.[840] The fact that Shell has influence on and control over its Scope 3 emissions further follows from the fact that Shell has set certain targets for those emissions itself. Such targets also follow from legal instruments, such as soft-

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830 See the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 12; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 597.

831 See, in this regard, Section V.3.8 of this Explanatory Submission.

832 See Sections V.3.4 and V.3.5 of this Explanatory Submission regarding the level of Shell's CO_2 emissions.

833 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 243 up to and including 251, 254, 628, 853 up to and including 855 and 1138; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 1 up to and including 7 and 27; Summons of Milieudefensie et al. dated 5 April 2019, paras. 612 up to and including 618.

834 Judgment of the Court of Appeal, ground 7.27.

835 Judgment of the Court of Appeal, grounds 3.24 and 3.45. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 649, 662, 811 and 1065.

836 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 122; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 35(83) and (84), 244, 247, 248, 250, 254, 628, 853, 855 and 1138; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 1 up to and including 7 and 27; Summons of Milieudefensie et al. dated 5 April 2019, paras. 612 up to and including 618.

837 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (84); Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 7; Summons of Milieudefensie et al. dated 5 April 2019, para. 612.

838 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 122; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 247, 248, 855 and 1138.

839 Judgment of the Court of Appeal, ground 7.99. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 247.

840 See, in this regard, Sections II.3.1 up to and including II.3.3, II.4.2 and V.3.8 of this Explanatory Submission

law sources. Without influence over its Scope 3 emissions, Shell would never be able to achieve those targets.[841]

512 Similarly, the Court of Appeal has held that the existence of corporate Scope 3 targets presupposes that business enterprises have influence on their Scope 3 emissions. According to the Court of Appeal, Shell also has influence over its Scope 3 emissions:

> *"7.99* (…) *Several of the instruments discussed above presuppose corporate responsibility for scope 3 emissions as well. Examples are the EU ETS2, the CSRD, the CSDDD and the OECD guidelines. Moreover, the reporting of scope 3 emissions takes place on the basis of the GHG Protocol, which is considered the standard worldwide (…). It is therefore too easy to say that Shell has no influence on scope 3 emissions, even though Shell's power in this regard may be somewhat limited. In this context, it is important to note that tools have been developed that can help Shell influence its customers' choices. Examples include ISO's Net Zero Guidelines and the 1.5º C Business Playbook* (…)*. That Shell has some influence regarding the scope 3 emissions also follows from the fact that it has formulated scope 3 targets itself* (…)*. This is incompatible with its argument that it has no influence on them. Finally, contrary to Shell's argument, any reduction obligation regarding scope 3 emissions will not constitute a standard that creates liability of Shell for (lawful) acts of third parties. Shell's responsibility with regard to scope 3 emissions applies to its own actions."*[842]

V.3.10 Shell has a substantial historical responsibility for climate change

513 It follows from the characteristics of Shell as described above that Shell has a significant historical responsibility for climate change.[843] As one of the largest and wealthiest companies in the world, it generates the lion's share of its revenue in the wealthier, more developed and Western regions of the world, where CO_2 emissions will need to decrease much faster than the global average.[844] In generating that revenue, Shell has been emitting enormous quantities of CO_2 since 1890; it is still doing so today and will continue to do so (even according to its own projections) well into the distant future; these are emissions over which Shell has complete control.[845] By keeping the supply of

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841 Judgment of the Court of Appeal, ground 7.99. See also the Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 6.
842 Judgment of the Court of Appeal, ground 7.99.
843 Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 58; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 and 40; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 23; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 487, 488, 490 and 1143; Notes of the Oral Arguments no. 1 in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 155 up to and including158.
844 See, in this regard, Sections V.3.1 up to and including V.3.3 of this Explanatory Submission.
845 See, in this regard, Sections V.3.4, V.3.5 and V.3.9 of this Explanatory Submission.

and demand for energy products as high as possible - in part by leveraging its global dominant position - Shell is keeping the world dependent on fossil fuels and is maintaining its business model, at the expense of the climate.[846]

514 The extent of Shell's historical responsibility for climate change cannot be underestimated. As already observed above, 1.8% of total global CO_2 emissions since 1880 can be attributed to the oil and gas products produced by Shell.[847] The effects of this on the climate have been disastrous. As much as 1.6% of the measured temperature rise and 1.4% of the measured sea-level rise can be attributed to Shell's oil and gas products.[848] It is therefore not surprising that the Court of Appeal has found that Shell is contributing significantly to the climate crisis.[849]

V.3.11 Shell possesses major capabilities, know-how and skills enabling it to change

515 Finally, it is important to note that Shell also has the capabilities, know-how and skills to limit its CO_2 emissions and to thus contribute to preventing or limiting dangerous climate change.[850] It is therefore not the case that all the characteristics mentioned above are unchangeable in themselves, meaning that Shell's CO_2 emissions are unchangeable or otherwise a necessary consequence of being a globally operating oil and gas company. Shell has simply made a conscious choice not to (sufficiently) limit its CO_2 emissions and not to implement any changes to its corporate policy to that end, but has even decided to focus (increasingly) on oil and gas. That is something else. Such a reduction in its CO_2 emissions is therefore, of and in itself, certainly possible for Shell.

V.4 Application of the objective points of reference to Shell

516 To answer the question whether Shell has a duty of care to prevent or limit dangerous climate change in light of its characteristics and features (as described above), an assessment must be made against the objective points of reference that are relevant in this context. After all, these points of reference make it possible to not only establish the applicable standard, but to also determine it in concrete terms.[851] These objective points of reference were already discussed in detail in Section IV.5 of this Explanatory Submission. It was also explained there why and how these points of reference affect

[846] See, in this regard, Sections V.3.6 up to and including V.3.8 of this Explanatory Submission.
[847] See, in this regard, Section V.3.4 of this Explanatory Submission, with reference to the Summons of Milieudefensie et al. dated 5 April 2019, paras. 5 and 548.
[848] Summons of Milieudefensie et al. dated 5 April 2019, para. 548.
[849] Judgment of the Court of Appeal, ground 7.27.
[850] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 58; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 65; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 487; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 29; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 23; Summons of Milieudefensie et al. dated 5 April 2019, para. 628.
[851] See, in this regard, Section IV.3 of this Explanatory Submission.

the duty of care to prevent or limit dangerous climate change. In the following, these objective points of reference will be applied to Shell one by one.

V.4.1 The doctrine of hazardous negligence

517 A first relevant objective point of reference in this context is the doctrine of hazardous negligence. After all, this doctrine was specifically developed for cases in which a dangerous situation is created or perpetuated. Dangerous climate change is one of such situations. In this regard, the assessment must be made in light of the *Kelderluik* criteria, namely (i) the probability of damage (or its magnitude), (ii) the nature of the conduct, (iii) the nature and severity of the damage, if any, and (iv) the onerousness of taking precautionary measures. All of this was discussed in Section IV.5.1 of this Explanatory Submission.

518 If the *Kelderluik* factors are applied to Shell in the context of dangerous climate change, this leads to the following findings.[852]

(a) The probability of damage (or its magnitude).[853] The probability of damage caused by dangerous climate change is very high.[854] If CO_2 is reduced by 45% by 2030, followed by net zero by 2050, then there is a 50% chance that global warming will be limited to 1.5°C.[855] This also means that there is a 50% chance that following this reduction path will lead to greater warming than 1.5°C, resulting in enormous additional and permanent damage to people, animals and nature.[856] The high probability of dangerous climate change was also established in the *Urgenda* case.[857] As a result of the rise in the atmospheric CO_2 concentration, the global average temperature has already risen by nearly 1.3°C compared to pre-industrial levels. To this, a warming of at least 0.2°C per decade is added. During the seven years since the start of this lawsuit, the global temperature rise has even increased from 1.1°C to 1.3°C.[858] The chance of still preventing the

[852] See, for a detailed discussion of this point, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 224 up to and including 265; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 15 up to and including 24 and 77 up to and including 97; Summons of Milieudefensie et al. dated 5 April 2019, paras. 511 up to and including 639.

[853] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 225 up to and including 241; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 21 up to and including 23; Summons of Milieudefensie et al. dated 5 April 2019, paras. 527 up to and including 574.

[854] Summons of Milieudefensie et al. dated 5 April 2019, paras. 527 and 528, with reference to the Summons of Milieudefensie et al. dated 5 April 2019, paras. 415 up to and including 418.

[855] This is the situation that the Court of Appeal had to decide on. Meanwhile, global warming of 1.5°C is already on the horizon. See, for example, the article "*Klimaatdoel dreigt al tegen 2030 te sneuvelen, tien jaar eerder dan voorspeld*" (Climate goal threatens to fail as early as 2030, ten years earlier than predicted) in *AD*, 14 January 2026, https://www.ad.nl/klimaat/klimaatdoel-dreigt-al-tegen-2030-te-sneuvelen-tien-jaar-eerder-dan-voorspeld~a00bab49/.

[856] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 234. See, in this regard, Section III.1.2 of this Explanatory Submission.

[857] Summons of Milieudefensie et al. dated 5 April 2019, para. 528, with reference to the judgment of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*); Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*).

[858] See, in this regard, Section II.1.1 of this Explanatory Submission.

most severe consequences of dangerous climate change is therefore also becoming increasingly smaller,[859] because the time left to achieve large-scale emission reductions is much smaller. This also follows from the fact that the carbon budget for maintaining a 50% chance of limiting global warming to 1.5°C will be exhausted in the short term if CO_2 emissions continue.[860] This underscores the enormous risk of dangerous climate change if action is not taken in the short term. Shell, for that matter, is also aware of the dangers of climate change, and those dangers are foreseeable to it. That knowledge and foreseeability have existed on the part of Shell since the 1980s and 1990s.[861]

(b) Nature of the conduct.[862] Shell is responsible for very high CO_2 emissions in the past and also today and well into the future which directly contribute to the significant risk of dangerous climate change.[863] After all, there is a direct and near-linear relationship between CO_2 emissions and global warming.[864] Although Shell has influence on and control over its very high Scope 1, 2 and 3 emissions,[865] it is not doing enough to prevent or mitigate the associated risk. On the contrary, through continued investments in oil and gas and large-scale media and lobbying campaigns, Shell is keeping demand for fossil fuels as high as possible and, by extension, is keeping the world dependent on fossil fuels to the maximum possible extent.[866] Shell's conduct therefore inherently creates a significant risk and is highly likely to result in harm to people and the environment.[867]

(c) Nature and severity of potential damage.[868] As explained in detail in Sections II.1.2 and II.1.5 of this Explanatory Submission, the consequences and risks of climate change are particularly serious. It is, in fact, the greatest global challenge of our time. For example, ecosystems will disappear, extreme weather events will increase in both frequency and intensity and the living conditions on Earth

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859 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 230 up to and including 236.
860 See, in this regard, Section II.1.4 of this Explanatory Submission.
861 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 225 up to and including 229; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 77 up to and including 97; Summons of Milieudefensie et al. dated 5 April 2019, paras. 530 up to and including 574.
862 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 242 up to and including 256; Summons of Milieudefensie et al. dated 5 April 2019, paras. 609 up to and including 618.
863 See, in this regard, Sections V.3.4 and V.3.5 of this Explanatory Submission.
864 See, in this regard, Section II.1.3 of this Explanatory Submission.
865 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 243 up to and including 254; Summons of Milieudefensie et al. dated 5 April 2019, paras. 612 up to and including 618. See, in this regard, Sections V.3.6 up to and including V.3.9 of this Explanatory Submission.
866 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 247 and 248; Summons of Milieudefensie et al. dated 5 April 2019, paras. 616 and 617. See, in this regard, Sections V.3.6 and V.3.8 of this Explanatory Submission.
867 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 255.
868 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 224; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 17 up to and including 23; Summons of Milieudefensie et al. dated 5 April 2019, paras. 520 up to and including 526.

will undergo profound and negative changes. All of this entails significant risks in areas that include health, housing and economic security.[869] As global warming continues to intensify, these risks, in their turn, will also increase in severity and frequency.[870] The entire global population and all the world's ecosystems will be affected by dangerous climate change in this way.[871] Moreover, the resulting damage is not merely material in nature. In addition to financial losses, large-scale environmental damage and personal injuries will occur.[872] As early as 2009, the UN concluded that every year dangerous climate change leads to 300,000 deaths, 325 million people who are severely affected, 4 billion people who are placed in a vulnerable position and 500 million people who face extreme risks.[873] Since then, the dangers and risks have only increased. Consequently, the nature and severity of the damage resulting from dangerous climate change are virtually unimaginable.

(d) The onerousness of taking precautionary measures. This factor does not yet play a role here. In standard situations of hazardous negligence, the answers to the questions (i) whether a duty of care exists in the case to be decided by the court and (ii) what that duty of care requires in that case, will coincide. After all, these are two sides of the same coin.[874] In this situation, however, it is about the establishment of a duty of care for Shell to reduce its CO_2 emissions by a certain percentage. In such a case, a bifurcated assessment must be made for the questions (i) whether Shell has a duty of care to prevent or limit dangerous climate change, and (ii) what concrete reduction measures can be required of Shell with a view to this. This has implications for the assessment to be made against the *Kelderluik* factors. After all, the potential onerousness of taking precautionary measures is related solely to the question referred to in (ii). By its very nature, the onerousness of the precautionary measures to be taken only says something about the concrete precautionary measures that may or may not need to be taken, as the requirement to take a concrete measure alone can already be onerous for a party. That does not apply, conversely, if a duty of care has not yet been made concrete in any way. The "onerousness factor" can therefore only play a role in the stage where Shell's concrete reduction obligation must be determined. That stage has not yet been reached here.

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869 Summons of Milieudefensie et al. dated 5 April 2019, paras. 520 up to and including 525, with reference to the Summons of Milieudefensie et al. dated 5 April 2019, paras. 419 up to and including 502.
870 Summons of Milieudefensie et al. dated 5 April 2019, para. 526.
871 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 224.
872 Summons of Milieudefensie et al. dated 5 April 2019, para. 520.
873 Exhibit MD-214 (UN Report), p. 1. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 270; Summons of Milieudefensie et al. dated 5 April 2019, para. 659.
874 See also, in this regard, Section VI.2.1 of this Explanatory Submission.

519 All relevant *Kelderluik* criteria thus point towards a duty of care for Shell to prevent or limit dangerous climate change. The Court of Appeal also rightly considered these *Kelderluik* criteria to be relevant in its judgment, as evidenced by ground 7.24, where the Court of Appeal found: "*the severity of the threat of a particular danger, the contribution to the creation of the danger and the capacity to contribute to the combating of the danger*" are factors to be considered in this connection. The *Kelderluik* criteria can be clearly recognised in this wording.

520 In line with this, the Court of Appeal explicitly found in grounds 7.25 up to and including 7.27 – where it established Shell's duty of care to prevent or mitigate dangerous climate change - (i) that the climate crisis is the greatest issue of our time and that the threat posed by climate change is very great (the probability of damage (or its magnitude)),[875] (ii) that the consumption of fossil fuels is largely responsible for creating the climate problem, that Shell contributes significantly to the climate problem and that it is within Shell's power to contribute to combating it, yet Shell fails to do so (the nature of the conduct)[876] and (iii) that the threat caused by climate change could be life-threatening in several places on earth and will start to have a profound and negative impact on human and animal existence in many other places (the nature and severity of the potential damage).[877] The Court of Appeal rightly did not test the potential onerousness of taking precautionary measures, as that factor does not yet play a role at this stage. So according to the Court of Appeal, too, all relevant *Kelderluik* criteria support the acceptance of a duty of care for Shell to prevent or limit dangerous climate change. That finding is correct.

521 It follows from the foregoing that the doctrine of hazardous negligence requires Shell to contribute to the prevention or mitigation of dangerous climate change. The Court of Appeal rightly recognised this and based its judgment on this. As a result, the doctrine of hazardous negligence constitutes a first objective point of reference pointing towards a duty of care for Shell to prevent or mitigate dangerous climate change.

522 Incidentally, the Court of Appeal could already have arrived at a concrete reduction duty for Shell independently based on the doctrine of hazardous negligence in order to determine Shell's duty of care to prevent or mitigate dangerous climate change in concrete terms. However, that is not what the Court of Appeal has done. It even follows from ground 7.3 of the Judgment that the Court of Appeal did not find the doctrine of hazardous negligence to be a suitable standard in that regard. Milieudefensie et al. will raise objections to this in grounds of appeal nos. 1.3 up to and including 1.10, to which further attention will be paid in Section V.7.1 of this Explanatory Submission.

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875 Judgment of the Court of Appeal, ground 7.25.
876 Judgment of the Court of Appeal, grounds 7.26 and 7.27.
877 Judgment of the Court of Appeal, ground 7.25.

V.4.2 Human rights

523 Human rights form a second objective point of reference that is relevant in the context of dangerous climate change. Article 2 ECHR (the right to life) and Article 8 ECHR (the right to private and family life) in particular offer protection against dangerous climate change (and its consequences). Dangerous climate change thus leads to human rights violations, as courts of law both within and outside Europe have widely recognised. This is demonstrated in particular by the *KlimaSeniorinnen* judgment of the ECtHR[878] and recent Advisory Opinions of the ICJ[879] and the IACtHR.[880] Although human rights primarily create obligations for states, they also influence the substance and scope of obligations of private actors through indirect horizontal effect. This stems from the fact that the values embodied in human rights are of great importance to society as a whole and that it is necessary to be protected against the significant legal, economic or factual power that private actors can exert over individuals. This horizontal effect applies even more strongly in the case of private parties that directly contribute to a human rights violation. Milieudefensie et al. have explained all of this in detail in Sections IV.4 and IV.5.2 of this Explanatory Submission.

524 If Shell's conduct is assessed in light of the protection against dangerous climate change offered by human rights, the following picture (essentially) emerges.[881] Shell's historical, present-day and future CO_2 emissions are very high[882], meaning that Shell is making a direct contribution to the grave danger of dangerous climate change for which Articles 2 and 8 ECHR seek to provide protection. Despite its strong dominant position on a global scale, its influence on the demand for and supply of energy products *and* its influence on and control over its very substantial Scope 1, 2 and 3 emissions, Shell has no intention of reducing those emissions in the short term.[883] On the contrary, it is actually employing various strategies to keep demand for fossil fuels as high as possible and to keep the world dependent on fossil fuels by continuing to make new investments in oil and gas and conducting large-scale media and lobbying campaigns to undermine public and political support for climate action, among other examples.[884] While Shell,

878 ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).
879 ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change).
880 IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights).
881 See, for a detailed discussion of this point, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 268 up to and including 464; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 25 up to and including 76; Summons of Milieudefensie et al. dated 5 April 2019, paras. 653 up to and including 728.
882 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 294 and 295; Summons of Milieudefensie et al. dated 5 April 2019, para. 669. See, in this regard, Sections V.3.4 and V.3.5 of this Explanatory Submission.
883 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 24 up to and including 28; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 302 and 1138; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 53 up to and including 56. See, in this regard, Sections V.3.6 up to and including V.3.9 of this Explanatory Submission.
884 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 86; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 25 up to and including 27; Statement of Defence on

as a large and wealthy company with the necessary knowledge, skills and capabilities, is undeniably capable of changing and contributing to the prevention or mitigation of dangerous climate change that it has contributed to itself,[885] it has chosen not to do so.

525 As a result, more and more CO_2 is being added to the atmosphere. The dangerous climate change that is consequently becoming progressively severe has enormous consequences and risks in the areas of, for instance, health, housing and economic security. These consequences and risks are life-threatening in nature and will have a profound and negative impact on the existence of humans and animals[886], as already discussed in detail in Sections II.1.2 and II.1.5 of this Explanatory Submission.

526 Through its conduct, Shell is thus actively contributing to the occurrence of dangers against which, for instance, Articles 2 and 8 ECHR actually seek to offer protection. That is not permitted.[887] Large companies must not engage in (or contribute to) human rights violations[888], as Shell itself[889] also believes. Much rather, they should respect and actively protect human rights.[890] By extension, they must contribute to combating the threats that human rights seek to protect, particularly if such companies themselves have created (or contributed to creating) those threats, such as the threat of dangerous climate change.[891] This is also due to the fact that no one can escape the consequences of dangerous climate change, as these will have impact all over the world.[892] This applies in particular to Shell, as was shown above. Given that Shell's influence on and contribution to dangerous climate change - and, by extension, Shell's influence on people's living conditions - is greater than that of most states,[893] human rights *also* seek

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Appeal of Milieudefensie et al. dated 18 October 2022, paras. 720 up to and including 726; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 53; Summons of Milieudefensie et al. dated 5 April 2019, para. 669. See, in this regard, Sections V.3.6 and V.3.8 of this Explanatory Submission.

885 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 29. See, in this regard, Sections V.3.1, V.3.2, V.3.10 and V.3.11 of this Explanatory Submission.

886 See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 287, 294, 295, 303 and 312.

887 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 99; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 18 up to and including 20; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 1138; Summons of Milieudefensie et al. dated 5 April 2019, paras. 669 and 727.

888 Summons of Milieudefensie et al. dated 5 April 2019, paras. 692 and 693.

889 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 28; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 17.

890 Reply of Milieudefensie et al. dated 12 April 2024, para. 66; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 99; Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 86; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 302; Summons of Milieudefensie et al. dated 5 April 2019, paras. 692, 713 and 727.

891 Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 86; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (101), 294, 295 and 341; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 54 and 55; Summons of Milieudefensie et al. dated 5 April 2019, paras. 713 and 724.

892 Summons of Milieudefensie et al. dated 5 April 2019, paras. 669, 677 and 726.

893 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 24; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (36) and 294 up to and including 296; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 49 and 53 up

to afford protection against Shell's conduct. For this reason, Shell must actively pursue the interests safeguarded by human rights, including the interest in preventing dangerous climate change from happening.

527 Thus the objective point of reference of "human rights" also points towards a duty of care for Shell to prevent or limit dangerous climate change. The Court of Appeal also recognised this and rightly considered it to be significant in its Judgment.

(a) Human rights and dangerous climate change. In grounds 7.6 up to and including 7.17, the Court of Appeal addressed the relationship between climate change and human rights. In this context, the Court of Appeal found that protection against dangerous climate change is regarded as a human right protected under Articles 2 and 8 ECHR or comparable provisions, not only in the Netherlands, but also elsewhere in the world.[894] In the view of the Court of Appeal, there can even be no doubt whatsoever that protection against dangerous climate change is a human right.[895] The Court of Appeal based this finding on (among other things) the *Urgenda* judgment of the Dutch Supreme Court,[896] the *KlimaSeniorinnen* ruling of the ECHR,[897] the case law of (supreme) courts outside Europe[898] and various reports and resolutions of the UN (or UN bodies).[899]

(b) Indirect horizontal effect. Although human rights apply, in principle, only (vertically) in the relationship between citizens and the government, courts of law may also take human rights or the values embodied by them into account in private (horizontal) relationships.[900] This is particularly possible in the case of open standards, such as the societal duty of care.[901] This is the indirect horizontal effect that human rights can have. In the view of the Court of Appeal, this possibility is linked to the fact that the values embodied in human rights are of great importance to society as a whole.[902] This effect can also make itself felt via

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to and including 56; Summons of Milieudefensie et al. dated 5 April 2019, paras. 669, 692, 724 and 727.

894 Judgment of the Court of Appeal, ground 7.6.

895 Judgment of the Court of Appeal, ground 7.17.

896 Judgment of the Court of Appeal, grounds 7.7 and 7.8 with reference to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

897 Judgment of the Court of Appeal, grounds 7.9 up to and including 7.11, referring to ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*).

898 Judgment of the Court of Appeal, ground 7.12, citing the judgment of the Lahore High Court of 4 September, 2015, W.P. No. 25501/2015 (*Leghari.Federation of Pakistan*); judgment of the Supreme Court of Colombia of 5 April 2018, No. STC4360-2018 (*Future Generations/Ministry of the Environment*); judgment of the Federal Supreme Court of Brazil of 7 April, 2022 (*PSB et al./Brazil*); judgment of the Montana First Judicial District Court of 14 August 2023, CDV-2020-307 (*Held, et al./State of Montana, et al.*); judgment of the Supreme Court of India of 21 March 2024, No. 3570 of 2022 (*Ranjitsinh and Others/Union of India and Others*).

899 Judgment of the Court of Appeal, grounds 7.13 up to and including 7.16, with reference to the UN Human Rights Council Resolution 48/13, the Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 26 July 2022, and UN General Assembly Resolution 76/300.

900 Judgment of the Court of Appeal, ground 7.18.

901 Judgment of the Court of Appeal, grounds 7.18 and 7.24.

902 Judgment of the Court of Appeal, ground 7.18.

soft-law sources, because human rights are deeply embedded in soft law.[903] By extension, private companies may also bear a responsibility to take measures against dangerous climate change.[904]

(c) Application to Shell. In grounds 7.25 up to and including 7.27, the Court of Appeal applies the foregoing to Shell. To this end, the Court of Appeal starts out by establishing that climate change in the Netherlands and beyond is infringing the rights protected by Articles 2 and 8 ECHR and will infringe them even further. Those rights partly determine how the standard for the societal duty of care must be fleshed out and how the question what can be required of Shell, as a large and international company, should be answered based on that standard.[905] Seeing that fossil-fuel consumption is largely responsible for the occurrence of the climate crisis and addressing climate change cannot be delayed, companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth.[906] Because Shell contributes significantly to the climate problem and has it in its power to contribute to combating it, the Court of Appeal found - in light of Articles 2 and 8 ECHR - that Shell has an obligation to limit its CO_2 emissions in order to counter dangerous climate change.[907]

528 In view of the foregoing, human rights - and Articles 2 and 8 ECHR in particular - equally require Shell to contribute to preventing or mitigating dangerous climate change. The Court of Appeal rightly found that this was the case. Human rights thus constitute a second objective point of reference that indicates that Shell has a duty of care to prevent or limit dangerous climate change.

529 Incidentally, human rights not only serve as an objective point of reference, but are *also* relevant in other ways when establishing and determining Shell's duty of care to prevent or mitigate dangerous climate change. Based on Article 1 ECHR, courts must effectively and actively enforce the ECHR rights in horizontal relationships as a positive treaty obligation. The ECHR thus requires national courts (among other things) to enforce the rights guaranteed by Articles 2 and 8 ECHR horizontally in national law and to provide remedies to ensure the protection thus afforded. This was explained in Section IV.4 of this Explanatory Submission, to which reference is made here for the sake of brevity. For this reason, too, the Court of Appeal rightly based its judgment on Articles 2 and 8 ECHR.

V.4.3 General legal principles

[903] Judgment of the Court of Appeal, ground 7.19.
[904] Judgment of the Court of Appeal, ground 7.17.
[905] Judgment of the Court of Appeal, ground 7.25.
[906] Judgment of the Court of Appeal, ground 7.26.
[907] Judgment of the Court of Appeal, ground 7.27.

530 General legal principles are the third objective point of reference that is relevant in the context of dangerous climate change. Three legal principles are of particular importance in this regard; all three are deeply rooted in the climate regimes under international, European and national law and, moreover, have horizontal effect in private-law relationships. These are (i) the precautionary principle, (ii) the principle of intergenerational justice, and (iii) the CBDR principle. These principles provide guidance in determining individual climate responsibilities in light of – essentially - uncertainties in the area of climate change (or its consequences) or the measures to be taken to combat it (the precautionary principle), the protection of the younger and future generations (the principle of intergenerational justice) and the required realistic and equitable distribution of burdens (the CBDR principle). All of this was already discussed in detail in Section IV.5.3 of this Explanatory Submission.

531 Applying these general legal principles to Shell leads (in summary) to the following conclusions:

(a) The precautionary principle. If precautionary measures to prevent or limit dangerous climate change are not taken immediately, the risk of the inevitability of dangerous climate change will increase, its consequences will become more severe and largely irreversible (especially if tipping points are passed) and the costs of the necessary measures (for society) will rise. That is why the precautionary principle requires that precautionary measures be taken immediately.[908] Shell, too, which is not only responsible for historical, present-day and future CO_2 emissions on a large scale,[909] but also has the necessary influence and actual capabilities to change this,[910] must immediately take precautionary measures to prevent or limit dangerous climate change pursuant to the precautionary principle.[911] If Shell fails to do so, it is taking on more risk than is socially responsible in light of the precautionary principle.[912] This also follows from Articles 2 and 8 ECHR: when obligations that (partly) stem from these Articles are fulfilled (such as the obligation to take precautionary measures to prevent or limit dangerous climate change[913]), the precautionary principle must also be observed.[914] This is not altered by the fact that there are no (enforceable) agreements, either globally or within the energy sector, about which concrete

[908] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 98; Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 83; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 150; Summons of Milieudefensie et al. dated 5 April 2019, paras. 51, 56 and 665.
[909] See, in this regard, Sections V.3.4 and V.3.5 of this Explanatory Submission.
[910] See, in this regard, Sections V.3.6 up to and including V.3.9 and V.3.11 of this Explanatory Submission.
[911] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 83; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (110) and (167), 483, 520 and 583; Summons of Milieudefensie et al. dated 5 April 2019, paras. 55 and 674.
[912] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 112; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (110) and 508.
[913] See, in this regard, Section V.4.2 of this Explanatory Submission.
[914] Summons of Milieudefensie et al. dated 5 April 2019, paras. 51, 52, 515, 665, 673 and 674.

contribution must be made by which (fossil-fuel) company or which part of the (fossil-fuel) energy sector to preventing or mitigating dangerous climate change. Even then, the precautionary principle requires that action be taken.[915]

(b) The principle of intergenerational justice. Shell's enormous contribution to dangerous climate change[916] has a major impact on human rights and on life and well-being in the Netherlands. The consequences of this pose a threat to the younger and future generations.[917] After all, without sufficient climate action, these generations will not only have to bear a disproportionately heavy reduction burden, but will also suffer more severe consequences of dangerous climate change.[918] Shell also endorses this.[919] Therefore, the principle of intergenerational justice also requires Shell to take measures within this decade to prevent or limit dangerous climate change.[920]

(c) The CBDR principle. Not every country or company is equally responsible for the occurrence of dangerous climate change or equally capable of helping to prevent it. The CBDR principle, which prescribes a fair distribution of the burdens based on capabilities and (historical) responsibility, seeks to accommodate this.[921] In light of the CBDR principle, Shell must take far-reaching precautionary measures to prevent or limit dangerous climate change.[922] That is because Shell is one of the largest players in the oil and gas sector and one of the wealthiest companies

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915 Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 6 and 118; Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 5 and 6; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 56; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 483, 520 and 543; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 26.

916 See, in this regard, Sections V.3.4 up to and including V.3.10 of this Explanatory Submission.

917 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 94 up to and including 96; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 19, 20 and 27 up to and including 29; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 3; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 1150; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 7, 10 and 181; Summons of Milieudefensie et al. dated 5 April 2019, paras. 285 up to and including 295, 372, 373, 410 up to and including 412, 473, 498 up to and including 502, 602, 607 and 669.

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

919 Notes of the Oral Arguments (2) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 10 up to and including12.

920 Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 83. See the Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 3; Summons of Milieudefensie et al. dated 5 April 2019, paras. 602, 607 and 669.

921 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (25), 490 and 503 up to and including 506.

922 Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 57 and 58; Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 48; Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 17; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 21 and 40; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 487, 488, 490 and 496; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 27 up to and including 29.

in the world. Moreover, it generates its revenue primarily in the wealthier and more developed countries, where oil and gas are used to a very significant extent, seen on a global scale. Furthermore, Shell is one of the companies with the largest responsibility for causing the climate problem and possesses the know-how, skills and capabilities to achieve emission reductions.[923] Shell itself also holds this view.[924] The emissions from the oil and gas sector in general, and from Shell in particular, will therefore also need to be reduced more rapidly than the emissions from other actors.

532 The Court of Appeal has paid some attention to two of these general legal principles in its judgment. As for the precautionary principle, the Court of Appeal acknowledged that also in the event of (scientific) uncertainty regarding the occurrence of certain consequences, it may be appropriate to intervene in a certain activity.[925] In the context of the CBDR principle, the Court of Appeal held that a faster reduction path must be followed in the rich, developed countries than in the developing countries, partly because climate change has been largely caused by the rich, developed countries and they have reaped its benefits.[926] Although the Court of Appeal did not base Shell's duty of care to prevent dangerous climate change as established by it on these principles, but discussed them in the context of the reduction percentage applicable to Shell, the Court of Appeal's judgment conveys that both the precautionary principle and the CBDR principle give rise to a reduction of emissions on Shell's part.

533 In light of the foregoing, the general legal principles - in this context: the precautionary principle, the principle of intergenerational justice and the CBDR principle - also require Shell to contribute to preventing or mitigating dangerous climate change. The Court of Appeal's judgment also points in that direction. These general legal principles constitute a third objective point of reference pointing towards a duty of care for Shell to prevent or mitigate dangerous climate change.

534 For that matter, the Court of Appeal could have issued a concrete reduction injunction against Shell based on the general legal principles discussed above in order to give concrete effect to its duty of care to prevent or mitigate dangerous climate change. Using those principles, the Court of Appeal could have differentiated between the various modelled reduction scenarios and/or normatively adjusted the reduction percentages included in them to account for the unrealistic assumptions that are inconsistent with the obligation to provide effective protection against dangerous climate change, as Milieudefensie et al. will discuss in detail in Chapter VI of this Explanatory Submission. However, that is not what the Court of Appeal did. Not only did the Court

[923] See, in this regard, Sections V.3.1 up to and including V.3.11 of this Explanatory Submission.
[924] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (107), 491 and 492.
[925] Judgment of the Court of Appeal, ground 7.95.
[926] Judgment of the Court of Appeal, grounds 7.81 and 7.93.

of Appeal fail to fully give effect to these principles in reaching its decision, but it also applied an overly narrow (and thus incorrect) legal interpretation of the precautionary principle in ground 7.95. The principle of intergenerational justice was not even applied at all by the Court of Appeal. Milieudefensie et al. will raise this issue in grounds of appeal nos. 1.11 up to and including 1.24, to which further attention will be paid in Chapter VI of this Explanatory Submission.

V.4.4 Soft law

535 Soft law is the fourth objective point of reference that is relevant in the context of dangerous climate change. Although soft law essentially concerns the setting of societal standards and so does not have the character of binding legal standards, meaning is often attached to it in judgments of national and international courts. Significant weight is also afforded to traditional soft-law sources (such as non-binding international instruments, private and/or alternative regulations or scientific insights) when obligations to prevent or mitigate dangerous climate change are determined. The UNGP, the OECD Guidelines, the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook, the SBTi Report and the Oxford Report play a particularly significant role in this regard. These soft-law sources were developed against the backdrop of the need for non-state climate action to prevent or mitigate dangerous climate change. They therefore specifically concern the climate obligations of companies. Section IV.5.4 of this Explanatory Submission already discussed the importance and nature of soft law as well as the scope of the above-mentioned soft-law sources in detail.

536 Section V.3 of this Explanatory Submission discussed a large number of specific characteristics of Shell. The soft-law sources that are relevant in this context - the UNGP, the OECD Guidelines, the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook, the SBTi Report, and the Oxford Report attach consequences to these characteristics when it comes to determining what may be required of Shell to prevent or mitigate dangerous climate change.[927] Milieudefensie et al. will briefly illustrate this below.

(a) Shell's size and wealth. Shell is one of the largest and wealthiest companies in the world and generates most of its revenue in the wealthier and more developed countries.[928] Under the UNGP and the OECD Guidelines, this means that Shell has a significant responsibility to prevent any adverse impacts of its actions.[929] To these characteristics, the Race to Zero Initiative and the 1.5°C Business

[927] See also, in this regard, Section IV.5.4 of this Explanatory Submission.
[928] See, in this regard, Sections V.3.1 up to and including V.3.3 of this Explanatory Submission.
[929] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 79; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 416; Summons of Milieudefensie et al. dated 5 April 2019, para. 712.

Playbook attach the conclusion that Shell must not only reduce its emissions, but must also do so at a faster rate than the global average.[930] This is also evident from the Oxford Report: the larger and wealthier a company is, the more it can be expected to do when it comes to preventing or mitigating dangerous climate change.[931]

(b) The scale of Shell's CO_2 emissions. Because Shell has very high historical, present-day and future CO_2 emissions, it bears a significant historical responsibility for climate change.[932] Under the UNGP and the OECD Guidelines, this level of involvement creates an obligation for a company to mitigate the negative impacts of its actions as much as possible.[933] This must also be done quickly, according to the Race to Zero Initiative and the Net Zero Guidelines, if the company's activities are contributing and have contributed to dangerous climate change to a greater-than-average degree. This applies to Shell's activities.[934] The Oxford Report also confirms in this regard that a greater contribution to and responsibility for dangerous climate change results in more extensive climate obligations.[935]

(c) Shell's dominant position and influence. Shell holds a strong dominant position globally, has a significant purchasing power in the oil and gas sector and exerts a central influence on the supply of and demand for energy products.[936] Various soft-law sources also attach consequences to this. For example, the UNGP and the OECD Guidelines state that a company with such a dominant position has its own, special obligation to prevent human rights violations.[937] The UNGP and the OECD Guidelines were even specifically created to compel (multinational) companies that wield significant power – and that cannot be regulated, or can only be regulated to a limited extent, by national states - to take action.[938]

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930 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 and 41.

931 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 35 under (95) and 489; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 29 and 30; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 20–22.

932 See, in this regard, Sections V.3.4, V.3.5 and V.3.10 of this Explanatory Submission.

933 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 79; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 453; Summons of Milieudefensie et al. dated 5 April 2019, para. 712.

934 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 and 40; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 15.

935 Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (95) and 489; Notes of the Oral Arguments (9) in the First Instance of Milieudefensie et al. dated December 17, 2020, para. 6; Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 29 and 30; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 20 up to and including 22.

936 See, in this regard, Sections V.3.6 up to and including V.3.8 of this Explanatory Submission.

937 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 29; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 60; Summons of Milieudefensie et al. dated 5 April 2019, para. 702.

938 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 30; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (38); Notes of the Oral Arguments (6) in the

According to the UN Expert Report, such companies must use their power and lobbying capabilities to prevent and limit dangerous climate change.[939] This also follows from the SBTi Report.[940] The Race to Zero Initiative, the Net Zero Guidelines and the 1.5°C Business Playbook likewise indicate that use must be made of this positive capacity for change.[941]

(d) Shell has the capacity to change. Partly due to Shell's control over its very substantial emissions, it has the capacity to change. It also possesses the necessary capabilities, skills and expertise to do so.[942] Under the Race to Zero Initiative, this capacity to change justifies more ambitious emission reductions: those who *can* do more *must* do more.[943] This maximum effort is also mandated by the UN Expert Report, the Net Zero Guidelines and the 1.5°C Business Playbook.[944] It is therefore not surprising that the Oxford Report also imposes greater climate obligations on companies with a greater capacity for change.[945]

537 It therefore not only follows from the soft-law sources discussed above that Shell must take measures to prevent or mitigate dangerous climate change, but also that *more* can be expected from Shell than from other actors. This means that each of these sources indicates that Shell has a duty of care to prevent or mitigate dangerous climate change. According to all the above-mentioned soft-law sources, this duty on Shell's part explicitly also requires reductions of its Scope 3 emissions in absolute terms. After all, based on the UNGP[946], the OECD Guidelines[947], the Race to Zero Initiative[948], the UN Expert Report [949], the Net Zero Guidelines[950], the 1.5°C Business Playbook[951], the SBTi Report [952] and the Oxford Report[953], this is a corporate responsibility in its own right.

First Instance of Milieudefensie et al. dated 15 December 2020, para. 60; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, para. 121.

939 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 55 and 56.

940 Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 36.

941 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 57.

942 See, in this regard, Sections V.3.9 and V.3.11 of this Explanatory Submission.

943 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 and 37; Motion in Reply to Motion commenting on Exhibits dated 19 December 2023, paras. 42 up to and including 44; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 505 and 604.

944 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 37, 39 and 40.

945 Notes of the Oral Arguments (8) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 29 and 30; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 20 up to and including 22.

946 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 87, 89 and 90; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (93); Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 17.

947 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 84, 89 and 90.

948 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17, 37 and 38; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 504 and 857; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 22.

949 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 37, 38 and 44.

950 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 37, 38 and 44.

951 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 37, 38 and 41.

952 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 64; Notes of the oral arguments

538 In reaching its decision, the Court of Appeal rightly considered virtually all of these soft-law sources to be relevant. For example, in grounds 7.20 up to and including 7.23, the Court of Appeal extensively discussed the role and scope of the UNGP,[954] the OECD Guidelines,[955] the Net Zero Guidelines,[956] the 1.5°C Business Playbook,[957] the Race to Zero Initiative,[958] the UN Expert Report[959] and the Oxford Report.[960] The Court of Appeal also acknowledged the contents of the SBTi Report, albeit in the context of the reduction percentage applicable to Shell.[961] Additionally, the Court of Appeal paid attention to the UN Global Compact,[962] the OPGCC[963] and the PCOE.[964] What follows from this, according to the Court of Appeal (in summary), is that companies that contribute significantly to dangerous climate change and that also have the power and means to take measures to help prevent or limit these negative impacts must do so, *also* in respect of their Scope 3 emissions.

539 In line with this, the Court of Appeal rightly concluded in ground 7.27 that Shell has a duty of care to prevent or limit dangerous climate change; in this context, as the Court of Appeal found in ground 7.55, *more* can be expected of Shell than of most other companies. The above-mentioned soft-law sources play an important role in that duty of care, as, according to the Court of Appeal, it follows:

> *"7.26* (…) *from the instruments discussed above, including the OECD guidelines and the UNGP, to which Shell has subscribed.* (…)*"*

that

> *"7.26* (…) *companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it* (…) *are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so.* (…)*"*

and that

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(7) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 31 up to and including 33.

953 Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 44; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under (89) and 857; Notes of the Oral Arguments (9) in the First Instance of Milieudefensie et al. dated December 17, 2020, para. 6; Notes of the Oral Arguments (7) in the First Instance of Milieudefensie et al. dated 15 December 2020, para. 17.

954 Judgment of the Court of Appeal, ground 7.20.

955 Judgment of the Court of Appeal, grounds 7.21 and 7.22.

956 Judgment of the Court of Appeal, ground 7.23 under b.

957 Judgment of the Court of Appeal, ground 7.23 under c.

958 Judgment of the Court of Appeal, ground 7.23 under d.

959 Judgment of the Court of Appeal, ground 7.23 under e.

960 Judgment of the Court of Appeal, ground 7.23 under h.

961 Judgment of the Court of Appeal, grounds 7.70 and 7.72.

962 Judgment of the Court of Appeal, ground 7.23 under a.

963 Judgment of the Court of Appeal, ground 7.23 under f.

964 Judgment of the Court of Appeal, ground 7.23 under g.

> *"7.26 (…) those instruments place responsibility for protection against dangerous climate change also on (large) companies and call on them to take appropriate measures themselves to counter dangerous climate change."*

540 It follows from the foregoing that the soft-law sources relevant in this context (the UNGP, the OECD Guidelines, the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook, the SBTi Report and the Oxford Report), require individually (and even more strongly collectively) that Shell should contribute to preventing or limiting dangerous climate change. The Court of Appeal rightly acknowledged that this is the case and based its judgment on this view. Soft law is therefore the fourth objective point of reference indicating that Shell has a duty of care to prevent or mitigate dangerous climate change.

V.4.5 Legislation that is not directly applicable

541 A fifth objective point of reference that is relevant in the context of dangerous climate change is legislation that is not directly applicable. This is due to the fact that statutory provisions constitute an objectified reflection of the principles on which the legal system is based and that were envisaged by the legislature. In the context of climate-related duties of care, for instance, the CSDDD is relevant. This was explained in Section IV.5.5 of this Explanatory Submission.

542 Under the CSDDD in force prior to Omnibus[965], large companies were required, also for the protection of human rights,[966] to formulate and comply with absolute reduction obligations with respect to their global Scope 1, 2 and 3 emissions, *where appropriate*".[967] This was a distinct, independent EU climate obligation.[968] This obligation, which was partly based on various soft-law sources explicitly referenced in the CSDDD,[969] would also become applicable to Shell.[970] After all, Shell is one of the world's largest and wealthiest companies[971], has exceptionally high historical, present-day and future CO_2 emissions[972] and possesses the necessary influence and practical capacity to effect change.[973]

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965 Omnibus deleted Article 22 CSDDD. See, in this regard, Sections II.3.1 and V.6.2 of this Explanatory Submission.
966 Rejoinder of Milieudefensie et al. dated 12 April 2024, para. 46.
967 Rejoinder of Milieudefensie et al. dated 12 April 2024, para. 68; Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 14 up to and including 16; Court record of the oral hearing on Appeal dated 2, 3, 4 and 12 April 2024, p. 33.
968 Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 76 and footnote 44.
969 Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, p. 13.
970 Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 13 and 16; Court Record of the oral hearing on Appeal dated 2, 3, 4 and 12 April 2024, p. 39.
971 See, in this regard, Sections V.3.1 up to and including V.3.3 of this Explanatory Submission.
972 See, in this regard, Sections V.3.4, V.3.5 and V.3.10 of this Explanatory Submission.
973 See, in this regard, Sections V.3.6 up to and including V.3.9 and V.3.11 of this Explanatory Submission.

543 Although the CSDDD does not yet formally apply to Shell, this Directive *does* have effect - as legislation that is not directly applicable – on the establishment of its duty of care to prevent or mitigate dangerous climate change. After all, it also followed from this Directive that the EU was also pushing for absolute emission reductions by companies like Shell. The CSDDD was even specifically written for such companies. Generally, large companies - and Shell in particular[974] - contribute at a greater-than-average level to dangerous climate change and therefore also bear a significant responsibility to contribute to preventing or mitigating its consequences.

544 In its judgment, the Court of Appeal did not consider the CSDDD as an objective point of reference when it determined Shell's duty of care to prevent dangerous climate change. Nevertheless, the Court of Appeal did partially acknowledge the substance of this Directive when it answered the question whether EU law precludes a national duty of care.[975] In that connection, the Court of Appeal also found that the EU rules provided that not only Shell, but also Shell's customers would contribute to the EU's emission reduction targets by reducing their CO_2 emissions.[976] This is in line with what has been set out above.

545 In that context, however, the Court of Appeal failed to recognise that the CSDDD already required absolute emission reductions from companies in and of itself.[977] Milieudefensie et al. will challenge this in grounds of appeal nos. 1.37 up to and including 1.45, to which more attention will be paid in Section V.6.9 of this Explanatory Submission.[978] For the remainder, the Court of Appeal essentially found, in grounds 7.28 up to and including 7.54, that EU legislation does not detract from a national duty of care. The objections formulated by Shell in ground of appeal no. 1 of its conditional cross-appeal in cassation are directed at this finding. Milieudefensie et al. will address these objections in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission.

546 It follows from the foregoing that the CSDDD, as a source of legislation that is not directly applicable, required Shell to contribute to preventing or mitigating dangerous climate change. Legislation that is not directly applicable thus constitutes a fifth objective point of reference indicating that Shell has a duty of care to prevent or mitigate dangerous climate change.

V.5 Shell has a duty of care

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974 See, in this regard, Sections V.3.4, V.3.5 and V.3.10 of this Explanatory Submission.
975 Judgment of the Court of Appeal, grounds 7.39 up to and including 7.46, 7.50 and 7.56.
976 Judgment of the Court of Appeal, grounds 7.46, 7.50 and 7.56.
977 Judgment of the Court of Appeal, ground 7.56. See also the judgment of the Court of Appeal, grounds 7.45 and 7.46.
978 Article 22(1) CSDDD continues to be relevant to this court case, because that provision was still in force at the time of the judgment. Whether the judgment of the Court of Appeal can be upheld (partly) in light of Article 22(1) as applicable at that time must be judged *ex tunc*. See further, in this regard, Section V.6.9 of this Explanatory Submission.

547 If the relevant objective points of reference are applied to Shell in order to determine its duty of care to prevent or mitigate dangerous climate change, as was done in Section V.4 of this Explanatory Submission, this results (in summary) in the following picture.

(a) Hazardous negligence. The doctrine of hazardous negligence requires Shell to take measures to prevent or mitigate dangerous climate change. The probability of damage (or its magnitude), the nature of the conduct and the nature and severity of any potential damage justify this. The Court of Appeal also considered these relevant *Kelderluik* factors in its judgment.

(b) Human rights. Various human rights provisions, including Article 2 ECHR and Article 8 ECHR, afford protection against dangerous climate change (and its consequences). These and other interests guaranteed by human rights have (indirect) horizontal effect and must be protected by Shell, as the Court of Appeal has also found.

(c) General legal principles. Several legal principles that are deeply embedded in the climate regimes under international, European and national law - such as the precautionary principle, the principle of intergenerational justice, and the CBDR principle - require Shell to contribute to preventing or mitigating dangerous climate change. The Court of Appeal partly looked at these principles as well.

(d) Soft law. Many soft-law sources - in particular: the UNGP, the OECD Guidelines, the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook, the SBTi Report, and the Oxford Report - point out, each of them individually, that a company with Shell's characteristics must make above-average efforts to help prevent or mitigate dangerous climate change. The Court of Appeal also acknowledged this and based its judgment on this view.

(e) Legislation that is not directly applicable. The CSDDD, which is not directly applicable to Shell, confirmed that Shell should achieve absolute emission reductions. From this, too, it follows that Shell must take measures to prevent or mitigate dangerous climate change.

548 All the objective points of reference that are relevant in this context therefore point in the same direction: each of them shows that Shell must take measures to prevent or mitigate dangerous climate change. In this context, the objective points of reference formed by human rights and general legal principles carry even greater weight because (i) Shell, as a private party, is directly contributing to dangerous climate change and is thereby violating Articles 2 and 8 ECHR itself,[979] (ii) the human rights obligation *not* to

[979] See, in this regard, Section IV.4 of this Explanatory Submission.

cause irreversible damage to the living environment and the climate is *ius cogens*[980] and (iii) climate obligations in general and the precautionary principle in particular have the status of customary law.[981]

549 If the objective points of reference discussed above are weighed against each other, the inevitable conclusion is that Shell has a duty to prevent or limit dangerous climate change. This is in line with the Court of Appeal's findings in grounds 7.24 up to and including 7.27. In ground 7.27, the Court of Appeal expressed all of this very clearly in a summarising consideration:

> *"7.27 In summary, the court of appeal is of the opinion that companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement."*[982]

550 The finding of the Court of Appeal is therefore correct. The Court of Appeal rightly held that Shell has a duty of care to prevent or limit dangerous climate change. It is therefore not surprising that this judgment has met with approval from the legal authors.[983]

551 Nevertheless, what the Court of Appeal failed to do was to also determine a concrete reduction obligation for Shell in line with the duty of care established for Shell. That is something the Court of Appeal *should* actually have done. Milieudefensie et al. will elaborate on these points in Chapter VI of this Explanatory Submission. First, the relationship between EU law and Shell's duty of care will be addressed; in this context, the grounds of the principal appeal and the conditional cross-appeal in cassation

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980 See, in this regard, Sections IV.4 and IV.5.3.2 of this Explanatory Submission.
981 See, in this regard, Sections II.2.1, IV.4, and IV.5.3.1 of this Explanatory Submission.
982 Judgment of the Court of Appeal, ground 7.27.
983 See, for example, M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November, 2024, *JOR* 2025/81; B.A. Kuiper-Slendebroek, "*Tussen papieren ambities en juridische realiteit: de klimaattransitie van ondernemingen en indirecte horizontale mensenrechtenwerking"* (Between paper ambitions and legal reality: the climate transition of companies and indirect horizontal human rights effects) in *SEW* 2025/87; R.E. Kautz, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JA* 2025/27; C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schendingen zonder remedie*" (Shell/Milieudefensie: a standard without an obligation and violations without a remedy) in *AV&S* 2025/13; T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024 in *M en R* 2025/12; A.G. Castermans & J.A. Lukkes, "*Drie arresten over gebod, causaliteit en klimaatschade*" (Three judgments on orders, causality and climate damage) in *AV&S* 2025/7; W.Th. Douma, Commentary on judgment of the Court of Appeal of The Hague of 12 November 2024, *JM* 2025/5; E.M. Appel, "*De uitspraak van het gerechtshof Den Haag in Milieudefensie c.s./Shell*" (The ruling of the Court of Appeal of The Hague in Milieudefensie et al. v. Shell) in *MvV* 2025/4; R. van der Hulle & L.A.J. Spaans, "*De Shell-zaak voor het gerechtshof: wel een verplichting, maar geen reductiepercentage*" (The Shell case before the Court of Appeal: an obligation, but no reduction percentage was established) in *NTE* 2025/1; M.J. Faber, "*Milieudefensie/Shell: tussen verplichting en veroordeling*" (Milieudefensie v. Shell: between an obligation and an injunction) in *MvO* 2024/10&11.

relating to this relationship will be also discussed. Milieudefensie et al. will then further clarify a number of their grounds of appeal in cassation related to Shell's duty of care (Section V.7 of this Explanatory Submission) and discuss the remaining parts of Shell's conditional cross-appeal in cassation in which Shell challenges the existence of its duty of care to prevent or mitigate dangerous climate change (Section V.8 of this Explanatory Submission).

V.6 EU law does not preclude a duty of care on the side of Shell

V.6.1 Introduction

552 In grounds 3.16 up to and including 3.18, 7.28 up to and including 7.54, 7.56 and 7.57, the Court of Appeal ruled, based on the EU instruments discussed by the parties, that EU law does not preclude a national-law duty of care pursuant to Article 6:162 DCC. To that end, the Court of Appeal first examined the European Climate Law, the CSRD and associated ESRS, the CSDDD, the EU ETS and the associated CBAM as well as the EU ETS 2 (grounds 3.16 up to and including 3.18 and grounds 7.28 up to and including 7.46). In addition, the Court of Appeal considered associated climate measures based on EU law for various sub-areas and sub-sectors in ground 7.48. These include Regulation 2023/851 (rules on performance standards for cars and vans), FuelEU (rules on the development and use of cleaner marine fuels), ReFuelEU (rules on the development and use of sustainable aviation fuel), AFIR (rules on infrastructure for renewable energy, including the network for electric vehicles), RED III (rules to promote the use of renewable energy with the goal of reaching a 42.5% share of renewable energy by 2030) and the ESR (rules aimed at achieving a 40% reduction in CO_2 reductions by 2030 relative to the 2005 level in sectors not covered by the EU ETS system, namely road transport, domestic maritime transport, buildings, waste and small-scale industries).

553 In this connection, the Court of Appeal found - in summary - that all these instruments had been established as part of the EU's own contribution to the climate obligations that the EU has under international law, which also include the targets of the Paris Agreement (grounds 3.16 up to and including 3.18). They do not aim to create an exhaustive climate regime and do not stipulate that companies complying with EU rules cannot be subject to any further-reaching *national* duties of care relating to CO_2 reduction. The Court of Appeal further noted that neither the EU legislature, nor the Dutch legislature has determined that companies complying with the existing regulations to combat climate change could not have any further obligations to reduce their CO_2 emissions. On the contrary, governments consistently emphasise that companies also have their own responsibility to limit their CO_2 emissions (grounds 7.53 and 7.57).

554 In ground of appeal no. 1 of its conditional cross-appeal in cassation, Shell is challenging the above-mentioned findings. It should first of all be noted that Shell appears to be assuming that EU law could have an effect on the *complete* reduction injunction sought by Milieudefensie et al. That is not true, as that reduction injunction concerns Shell's *global* CO_2 emissions. Shell's emissions within the EU constitute only a limited portion of these emissions; it is estimated that, in 2019, Shell generated 16.6% of its revenue within the EU. In that light, Shell's emissions within the EU will amount to approximately the same percentage.[984] Shell's grounds of appeal relating to EU law therefore leave more than 83% of the reduction injunction sought unaffected. This means that - even if one of Shell's objections were to succeed - Milieudefensie et al. still have more than sufficient interest in the relief sought by them and in the examination of their objections.

555 In ground of appeal no. 1.1 of its conditional cross-appeal in cassation, Shell not only presents objections to the judgment, but also raises a defence in the principal appeal in cassation. The arguments are the same. In essence, Shell argues that a national-law duty of care to reduce CO_2 emissions conflicts with the objectives of the climate and energy regime under EU law as well as with three principles of EU law: energy solidarity, sincere cooperation and proportionality. Furthermore, Shell bases its objections on a number of more general arguments grounded in EU law: the internal market and the level playing field, Europe's competitive position and the negative consequences for the energy transition.

556 To support these arguments, Shell first outlines what it considers to be the applicable framework for assessing the compatibility of national law with EU law,[985] as well as its view of the three above-mentioned principles of EU law (ground of appeal no. 1.1.1).[986] This is followed by a description of a king-size patchwork of EU regulations, ranging from the core of EU climate policy discussed by the Court of Appeal to rules on maintaining emergency oil reserves (ground of appeal no. 1.1.2).[987] Ground of appeal no. 1.1.3 then sets out the objections,[988] which largely link up with the objections formulated in ground of appeal no. 1.1., albeit with some overlap and in a different order.[989] This result of this structure is that the thrust of Shell's objections is not always very clear. Milieudefensie et al. will interpret the objections below and explain why they cannot be successful.

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984 Response to questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 10 and 11. Shell itself declined to answer this question, both in the first-instance proceedings and on appeal.
985 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 31 up to and including 35.
986 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 36 up to and including 42.
987 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 43 up to and including 48.
988 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 49 up to and including 68.
989 Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 28 under (i) up to and including vii).

557 Shell is, essentially, arguing that the EU, with the patchwork of regulations outlined in ground of appeal no. 1.1.2, has struck a careful balance between the objectives pursued by the EU in the areas of the internal market, the EU's competitive position, the environment, the energy transition and energy security. That patchwork of regulations allegedly demonstrates that EU law exhaustively regulates these aspects and, in doing so, also gives oil and gas, including gas as a transition fuel, an important role. A duty of care requiring Shell to reduce its CO_2 emissions would fundamentally upset that balance and the role for oil and gas therein as envisaged by the EU. Furthermore, Shell is arguing that such a duty of care would be inconsistent with the above-mentioned principles of EU law and general arguments.

558 Shell's arguments are based on a highly selective and inaccurate portrayal of EU law and its underlying objectives. This portrayal is essentially based on four crucial misconceptions:

(a) First, Shell is overlooking the fact that, with its climate regime, the EU merely aims to fulfil the international climate obligations incumbent upon the EU itself, which follow from (for instance) the UN Climate Convention and, in particular, the Paris Agreement. In line with this, the EU consistently makes it clear that EU policies constitute a minimum harmonisation and that EU policies do not preclude more far-reaching climate measures based on national law or the application of national liability law. That is understandable. After all, member states are bound not only by EU law, but also, and above all, by the climate obligations under international law and human rights law discussed in Sections II.2, IV.5.2 and IV.5.3 of this Explanatory Submission, which each member state must comply with individually, in addition to EU law. An exhaustive EU climate policy would therefore not be compatible with this and would be unacceptable to member states. This will be discussed in more detail in Sections V.6.2 and V.6.3 of this Explanatory Submission.

(b) Second, Shell is overlooking the fact that the EU's climate and energy policies are, essentially, aimed at phasing out fossil fuels and scaling up renewable energy in line with the UN climate regime[990]. These EU policies are driven not only by the EU's climate obligations, but also by the perspectives of energy security, Europe's competitive position and energy independence. Within the limits of its climate targets, the EU naturally allows for the use of oil and gas up to 2030 and beyond, with such use being phased out until global CO_2 emissions reach net zero by 2050. This means that it cannot be inferred from the EU instruments that regulate the use of oil and gas from various perspectives - as Shell is arguing - that the EU climate policies allow room for a stable or even

[990] See, in this regard, Section III.3 of this Explanatory Submission.

growing supply of fossil fuels. This will also be addressed in Sections V.6.2 and V.6.3 of this Explanatory Submission.

(c) Third, Shell's view of EU law as an exhaustive balancing of the various interests involved in the energy transition would mean that every energy issue that affects the energy mix for the EU is a matter exclusively reserved for EU law. If that were the case, the EU would, for example, also exclusively determine whether more or less emphasis should be placed on solar and wind energy, whether there is room for nuclear energy and to what extent different member states could make use of oil and gas. These far-reaching consequences would be inconsistent with the limited ambitions of EU law and lead to a revolt among the member states. All of this underlines Shell's misconception of the EU's climate policies. This will be discussed in greater detail in Section V.6.4 of this Explanatory Submission.

(d) Finally, throughout its line of reasoning, Shell is suggesting that a duty of care to reduce CO_2 emissions would lead to the virtually complete cessation of oil and gas use within the EU. This assumption is linked by Shell to the possible occurrence of various safety and energy security issues in that case. That suggestion is incorrect. After all, the duty of care demanded by Milieudefensie et al. requires a 45% reduction in CO_2 emissions by 2030 or so much lower as the Supreme Court may determine based on the various relevant objective points of reference.[991] For the remainder, the use of oil and gas will of course continue to be possible, since Shell's duty of care is aimed at gradually reducing the supply of oil and gas in line with limiting global warming to 1.5°C. This, moreover, is again consistent with the obligations of states under treaty law and customary law. This point will be discussed more in-depth in Section V.6.5 of this Explanatory Submission.

559 In addition to these four misconceptions, which are summarised in Section V.6.6 of this Explanatory Submission, Shell, in various respects, is proceeding from an incorrect legal understanding of how the compatibility of national law with EU law must be determined. As a result, Shell's determination of the compatibility of its duty of care with EU law derails. Sections V.6.7 and V.6.8 of this Explanatory Submission are dedicated to this subject. Shell's reliance on the legal principles of energy solidarity, sincere cooperation and proportionality based on EU law and on various other arguments presented as EU-law arguments cannot succeed for several reasons either. All of this will also be addressed in Section V.6.8 of this Explanatory Submission.

560 In ground of appeal no. 1.2, Shell is further arguing that a duty of care to prevent or limit dangerous climate change conflicts with the free movement of goods, because it could

[991] See, in this regard, Chapter VI of this Explanatory Submission

obstruct cross-border trade. In this connection, Shell refers to Articles 34 and 35 TFEU.[992] According to Shell's ground of appeal, the Court of Appeal should have assessed the reliance on Article 35 TFEU *ex officio* under Article 25 of the Dutch Code of Civil Procedure, since that Article was not relied on in the proceedings before the lower courts.[993] This objection already fails because Shell has no interest in it; after all, the Court of Appeal did not impose a concrete reduction obligation on Shell and did not consider Shell's duty of care to be an obstructive measure. This means that there was no requirement for the Court of Appeal to separately assess the reliance on this Article. This will also be discussed in Section V.6.8 of this Explanatory Submission. The same applies to the follow-up objection raised by Shell in ground of appeal no. 1.3.

561 What also follows from the EU legal framework outlined by Milieudefensie et al. is that the Court of Appeal, in a number of instances, demonstrated an incorrect legal view to the detriment of Milieudefensie et al. regarding the meaning of the EU ETS, the EU ETS 2, the CSDDD and the CSRD with respect to Shell's duty of care, and failed to provide sufficient reasoning for its judgment. Grounds of appeal nos. 1.35 up to and including 1.45 of the principal appeal in cassation of Milieudefensie et al. are devoted to this subject. Milieudefensie et al. will explain these grounds of appeal in Section V.6.9 of this Explanatory Submission.

562 In light of the foregoing, there is no reason to refer questions to the CJEU for a preliminary ruling. After all, there can be no reasonable doubt about the answer to the questions raised in the objections in the principal and conditional cross-appeal in cassation. In any event, there is no reason to stay the proceedings, if only because EU law covers only a very limited portion of Shell's total emissions. For the decision on the relief sought by Milieudefensie et al., the answers to all the other questions raised in the objections therefore continue to be relevant, no matter what.

563 Finally, Shell's idea behind combining a lack-of-interest defence with a conditional cross-appeal in cassation is not entirely clear. In any event, Shell is overlooking the fact that the Court of Appeal has found, to the detriment of Shell, that a duty of care under national law does not conflict with EU law. That is therefore something that Shell must challenge with a cross-appeal in cassation. That also determines to what extent Shell can still rely on developments in the EU legal framework after the judgment was given. After all, new legal facts are only permitted to the extent that they are entirely unrelated to factual assessments and to the extent that the Court of Appeal itself should have applied those rules *ex officio* under Article 25 of the Dutch Code of Civil Procedure.[994]

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[992] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 70 up to and including 73.
[993] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 73 and footnote 249.
[994] See, for example, B.T.M. van der Wiel et al., "*Cassatie*" (Cassation proceedings), Deventer: Wolters Kluwer 2019, no. 61.

This means that EU law adopted after the judgment cannot be considered in the review in cassation.

564 In substantive terms, however, the foregoing makes no difference. When Milieudefensie et al. discuss EU climate policies in Sections V.6.2 and V.6.3 of this Explanatory Submission, it will be observed that the new developments in EU law do not in any way detract from the ability of member states to adopt climate measures that are stricter compared to EU law. On the contrary, they point to an even stronger focus on a sustainable European energy supply.

V.6.2 The relationship between EU policies and national climate policies

565 According to Article 3(5) TEU, the EU is bound to the strict observance of international law, including the principles of the UN Charter. This obligation also extends to obligations based on customary law.[995] Furthermore, in addition to the member states themselves, the EU is also a party to, for instance, the UN Climate Convention and the Paris Agreement.[996] This means that the EU is, firstly, required by Article 3(5) TEU to comply with climate obligations under international law, including by the related human rights, and with the climate obligations under customary law that the ICJ has also recognised[997]; secondly, the EU is bound - by virtue of its direct obligations as a treaty party - by the climate obligations under the UN climate regime. Pursuant to Article 216(2) TFEU, these treaties have a higher status than secondary EU law.

566 Both routes require the EU to take independent measures to achieve the objectives of the Paris Agreement. To this end, the EU can essentially make use of Articles 191 and 192 TFEU, which provide the basis for environmental and climate rules, and also of Article 114 TFEU, which provides the basis for internal market rules. This means that the EU each time takes these measures based on its own climate obligations.[998]

567 In addition to the EU, the member states also have their own independent obligations under international law and treaty law. These are not only obligations based on the UN climate regime and customary law, but also the ECHR obligations arising, for example,

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995 CJEU 16 June 1998, C-162/96 (*Racke*), para. 45; CJEU 24 November 1992, C-286/90 (*Poulsen*), para. 9.

996 See, for example, Council Decision (EU) 2016/1841 of 5 October 2016, on the conclusion, on behalf of the European Union, of the Paris Agreement; Council Decision (EU) 2016/590 of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement.

997 See, in this regard, Sections II.2.1 and IV.5.2 of this Explanatory Submission.

998 Incidentally, the climate policies pursued by the EU are insufficient to achieve the objectives of the Paris Agreement and, thus, to limit global warming to 1.5°C. See, in this regard, the Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 26 up to and including 28; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 973, also with reference to Exhibit MD-531B (ECB Occasional Paper Series, The Road to Paris 2023), pp. 6, 7 and 24. See also the ESABCC, 15 June 2023, "Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050," p. 10, available at https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-the-determination-of-an-eu-wide-2040/scientific-advice-for-the-determination-of-an-eu-wide-2040-climate-target-and-a-greenhouse-gas-budget-for-2030-2050.pdf/@@display-file/file.

from the *KlimaSeniorinnen* judgment.[999] Member states must fulfil these obligations themselves. They are independently responsible and liable for this fulfilment. If the EU policies had an exhaustive effect, the member states would become dependent, in that area, on the choices and ambitions of the EU. That is wrong and would be unacceptable to the member states in light of their own obligations.

568 The entire EU climate policy must be viewed in light of this distinct position of the EU and its member states under international law. This perspective first and foremost determines that, and explains why, the EU, when it shapes its own policies, must also consider other general objectives pursued by it, such as the functioning of the internal market, the well-being of citizens and the EU's competitiveness. The fact that the EU aims to fulfil its own obligations under international law also determines and explains the fundamental minimum relationship between EU measures and the climate obligations of the member states as well as the broad discretion that the EU leaves for member states in this regard. Member states remain free – also in view of their own climate obligations under international law - to adopt more far-reaching measures. Such measures can also be based on duties of care based on private law.

569 The foregoing can be illustrated by examining the key instruments (and the history of their development) that were created or further developed by the EU within the context of the European Green Deal and Fit for 55 in order to implement its climate obligations based on international law: (i) the European Climate Law, (ii) the EU ETS and the associated MSR and CBAM, (iii) the EU ETS 2, (iv) the ESR and (v) the CSDDD. In addition, (vi) Omnibus (which was adopted after the Judgment and which essentially weakens the CSDDD) also seeks to implement these policies of the EU itself and is distinct from the member states' own responsibilities. These core instruments are flanked by a series of more specific rules that affect EU climate policies to a greater or lesser extent. Apart from these, there are of course also measures which may touch on energy supply and fossil fuels, but which are unrelated to EU climate policies otherwise. These measures are, essentially, (vii) all kinds of other special EU regulations. Shell has also woven such instruments into its "patchwork of regulations" as outlined in ground of appeal no. 1.1.2. Milieudefensie et al. will discuss these instruments below.

(i) The European Climate Law

570 The European Climate Law provides the general framework for EU climate measures (based on Article 192 TFEU) in order to comply with the EU's obligations under the Paris Agreement[1000]. This Law aims to supplement and strengthen the national policy instruments.[1001] To this end, it sets a binding reduction target to achieve climate

[999] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz /Switzerland*).
[1000] European Climate Law, recitals (paras. 26 and 29 up to and including 31). See also Article 1 European Climate Law.
[1001] European Climate Law, recitals (para. 40).

neutrality by 2050 and provides, as the target for 2030, that CO_2 must be reduced by *at least* 55%.[1002] These are therefore minimum obligations that do not stand in the way of more ambitious climate policies of the member states themselves. On the contrary, they support more ambitious national climate policies. In this light, the European Commission has also pointed out that member states may adopt more ambitious measures if they see fit.[1003]

(ii) The EU ETS and the associated MSR and CBAM

571 The EU ETS is part of the EU's climate policies and aims to reduce corporate CO_2 emissions in the EU through an emissions trading system. The EU ETS is based on (the predecessor of) Article 192 TFEU[1004] and fleshes out the obligations of (at the time) the EC under the UN Climate Convention.[1005] The Directive has been amended in several phases. These amendments aim to align the EU ETS with the objectives of the European Green Deal and, thereby, with the EU's climate obligations under the Paris Agreement.[1006]

572 The directive provides for an emissions trading system for Scope 1 emissions from all installations falling within the scope of the system. This includes installations for heat and electricity production, large energy-intensive industries and European aviation. The associated emission allowances entitle the holders to emit the corresponding quantities of CO_2 solely for the purpose of complying with the requirements of the Directive.[1007] Through a gradual reduction of the emission cap, the permitted CO_2 emissions are progressively reduced.

573 The EU-ETS is based on the principle of minimum harmonisation. The Directive merely grants rights in order to facilitate the created emissions allowance system and therefore permits more far-reaching national CO_2 reduction measures.[1008] According to Advocate General Ćapeta, for example, the EU ETS does not preclude an additional national carbon tax that would increase production costs for companies and would thus also apply to installations that are entitled to free emission allowances under the EU ETS.[1009]

[1002] Article 1, Article 2(1) and Article 4(1) European Climate Law.
[1003] See, for example, https://climate.ec.europa.eu/eu-action/eu-competences-field-climate-action_en under "EU-wide climate neutrality".
[1004] This was previously regulated in Article 175(1) EC Treaty.
[1005] EU ETS, recitals (paras. 3 and 4).
[1006] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, COM(2019) 640 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0005.02/DOC_1&format=PDF.
[1007] Article 3(a) EU ETS.
[1008] See, for example, *Oberlandesgericht Hamm* 28 May 2025, ECLI:DE:OLGHAM:2025:0528.5U15.17.00 (*Lliuya/RWE*). See, for the New Zealand ETS system, Exhibit MD-570A (Supreme Court New Zealand 7 February 2024, SC 149/2021 [2024] NZSC 5 (*Smith/Fonterra*)), grounds 45 and 98 up to and including 101.
[1009] Opinion of Advocate General Ćapeta, 9 October 2025, ECLI:EU:C:2025:773, paras. 67 and 68. In this regard, she refers to J.V. Nysten, "On the legality of national carbon pricing instruments alongside the new EU ETS 2," *npj Climate Action*, vol. 3, no. 91, 2024, pp. 1 up to and including10. See also, in this regard, Section V.6.7 of this Explanatory

In practice, after the EU ETS had taken effect, member states such as Denmark[1010] and Germany[1011] indeed implemented their own, more far-reaching reduction measures that fall within the scope of the EU ETS.[1012] For example, the Danish climate policies now aim for a 70% CO_2 reduction emission by 2030 relative to 1990, meaning that these policies go far beyond the European targets.[1013]

574 Furthermore, the EU ETS does not operate "exclusively". Both the member states and the EU itself are free to take other climate measures - in addition to the EU ETS – for sectors also covered by the EU ETS. For instance, ReFuelEU regulates the reduction of CO_2 emissions from aviation in a manner distinct from the EU ETS. The EU ETS is therefore not a reduction instrument that excludes other reduction measures in the same sectors. Therefore that system has no "immunising" effect and is not designed to preclude third parties from suffering adverse effects from emissions occurring under the EU ETS and from being affected by these emissions.[1014] Nor does the EU ETS preclude a duty of care to reduce CO_2. This also follows from the fact that the EU legislator had accepted a general reduction obligation for companies in the CSDDD - which will be discussed in more detail below – precisely, and even solely, by way of a minimum harmonisation approach. So the EU legislator itself also sees no conflict in this area.

575 The EU ETS is flanked by two corrective instruments.

(a) MSR. The first instrument is the MSR, which has been operational since 2019. The MSR is specifically designed to address the structural imbalance between supply and demand for the emission allowances that are available on the market.[1015] After all, the EU EUTS is characterised by a surplus of emission allowances, which leads to lower prices for emission allowances and so to a reduced incentive for installations covered by the EU ETS to reduce their emissions. The MSR addresses this problem by automatically reducing the auctioning volume in the event of a surplus of emission allowances and storing them in the MSR. This makes it possible to adjust the supply of emission

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Submission.

[1010] "The Danish Climate Policy Plan – Towards a low-carbon society!, August 2013, p. 7, available at https://moodle.polymtl.ca/pluginfile.php/413972/mod_page/content/70/Denmark_Climate_policy_plan_2013.pdf.

[1011] "The National Sustainable Development Strategy – 2012 Progress Report", p. 19, available at https://www.bundesregierung.de/resource/blob/998436/354624/10f6252ececab15eebd81ce84bb40070/2012-06-07-progress-report-2012-english-accessible-data.pdf?download=1.

[1012] See also, in this regard, the Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), ground 4.80.

[1013] European Parliamentary Research Service, "Briefing Roadmap to EU climate neutrality – Scrutiny of Member States", April 2025, p. 1, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/767173/EPRS_BRI(2024)767173_EN.pdf.

[1014] See also E.H.P. Brans & X.W. de Vries, "*De lange arm van het klimaataansprakelijkheidsrecht*" (The long arm of climate liability law) in *MvV* 2026/2, pp. 37 and 38, with reference to *Oberlandesgericht Hamm* 28 May 2025, ECLI:DE:OLGHAM:2025:0528.5U15.17.00 (*Lliuya/RWE*).

[1015] MSR, recitals (para. 9).

allowances to be auctioned within the EU ETS from year to year based on the market conditions, in addition to the linear reduction factor that already reduces the number of emission allowances. Since 2023, emission allowances above a certain threshold in the MSR have been automatically invalidated. In total, 3.2 billion emission allowances have been invalidated via the MSR.[1016] In this manner, the MSR simultaneously prevents what is known as "the waterbed effect", i.e. the effect that extra emission allowances become available on the market as a result of additional emission reductions achieved, for instance because national measures are complied with. Companies in other countries or sectors can then purchase and make use of these allowances, so that *total* European emissions will not necessarily decrease correspondingly. In the *Urgenda* case, the Court of Appeal considered, based on the MSR, that the waterbed effect cannot occur at least until 2050 due to the surplus of emission allowances and the dampening effect that the MSR has over time.[1017] This is consistent with the analysis by the Dutch Minister of Economic Affairs and Climate Policy that a waterbed effect will not occur.[1018]

(b) CBAM. Second, the system is flanked by the CBAM. The CBAM seeks to counteract "carbon leakage" - the rise in emissions in countries outside the EU - resulting from the relocation or outsourcing of production by companies. To this end, the mechanism introduces import duties equal to the price of emission allowances under the EU ETS. This ensures that parties do not move their production to countries outside the EU to circumvent the EU ETS and then re-import their products into the EU. This instrument is therefore closely related to the EU ETS and also to its nature, as a measure providing for minimum harmonisation.

(iii) The EU ETS 2

576 The EU-ETS 2 system is not a separate scheme, but supplements the EU-ETS. The scheme is also based on Article 192 TFEU. It introduces an emissions trading system for suppliers of fuels to the built environment, road transport and certain other sectors, such as small-scale industry. With the EU-ETS 2, the EU again aims to fulfil its own obligations under the Paris Agreement.[1019]

[1016] European Commission, "Report from the Commission to the European Parliament and the Council on the functioning of the European carbon market in 2024", 3 December 2025, COM(2025) 735 final, pp. 16 and 17, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0735.
[1017] Decision of the District Court of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 56. This finding was upheld by the Dutch Supreme Court.
[1018] Dutch Parliamentary Records II ("*Kamerstukken II*") 2017/18, 32 813, no. 191.
[1019] EU ETS 2, preamble (recital (1)).

577 The EU legislator leaves no doubt about the fact that the EU ETS and the EU ETS 2 systems are measures that provide for minimum harmonisation and do not restrict member states in their own climate policies:

> *"12.* (…) *Given the need for urgent economy-wide emission reductions, Member States should be able to act to reduce greenhouse gas emissions that are within the scope of the EU ETS also through policies other than emission limits adopted pursuant to Directive 2010/75/EU."*[1020]

578 Therefore the EU ETS 2 system, just like the EU ETS, does not detract from the ability of the member states to fulfil their climate obligations under international law.

(iv) The ESR

579 Through the ESR, the EU also aims to fulfil its own obligations under the Paris Agreement based on Article 192 TFEU.[1021] The Regulation includes rules for the contributions to be made by member states towards the EU's CO_2 reduction targets in the sectors not covered by the EU ETS and the EU ETS 2. Article 1 ESR explicitly states that it establishes obligations for the member states with respect to their *minimum contributions* for the period from 2021 to 2030 to the achievement of the Union's target of reducing its CO_2 emissions by 40% below 2005 levels as set out in the ESR. The Regulation does not specify how member states should achieve this minimum target. Member states are therefore free to determine how they will achieve the minimum CO_2 reductions required by the ESR. The member states are also allowed to take more far-reaching measures.

(v) The CSDDD

580 The CSDDD, which was adopted in 2024, is the EU's most extensive regulatory due diligence framework. It establishes a wide range of due diligence obligations for companies to safeguard human rights, including social rights, labour conditions and the environment. In addition, the CSDDD lays down specific climate obligations. This broad framework is formally based on Article 114 TFEU, but the recitals also immediately state that the measures are partly being taken in light of the EU's climate obligations under Article 191 TFEU[1022] and the Paris Agreement.[1023] After all, the CSDDD is based on the premises that corporate climate action is crucial to the achievement of the objectives of the Paris Agreement and that companies have an independent obligation

[1020] EU ETS 2, preamble (recital 12)).
[1021] ESR, preamble (recital (1)).
[1022] CSDDD, preamble (recital (2)).
[1023] CSDDD, preamble (recitals (10) and (73)).

to respect human rights.[1024] This obligation does not affect the member states' own obligations under international law.[1025]

581 The legislative history, recitals and contents of the CSDDD make it clearer than any other EU instrument that EU climate policies do not prevent member states from adopting their own climate measures. From this it follows that the EU legislator sees no conflict whatsoever between a national duty of care for companies to reduce CO_2 and EU climate policies, the accompanying measures and related legislation. After all, with the CSDDD, the EU legislator assessed the EU framework that was in place at that time and concluded that it did not sufficiently solve the climate problem. The EU legislator saw both the room and the necessity to require companies to set and achieve absolute reduction targets in Scopes 1, 2 and 3, in addition to the existing EU framework. For this purpose, the EU legislator drew inspiration from national liability regimes that impose such obligations, including this lawsuit between Milieudefensie et al. and Shell. Furthermore, the EU legislator left the member states sufficient leeway to impose corporate CO_2 reduction obligations that are more far-reaching than this EU reduction obligation. This establishes that an obligation to reduce CO_2 emissions under national law does not in any way conflict with EU law. All of this will be discussed in more detail below.

582 The highly detailed Impact Assessment accompanying the CSDDD[1026] and the recitals of the CSDDD first provide insight into the EU's view of the effectiveness of the climate targets set by the EU up to that point and the system created for this purpose by the EU up to that point. That view culminated in the EU's conclusion that it was necessary to impose direct climate obligations on companies. These considerations are very extensive. Within the scope of this Explanatory Submission, justice can only be done to them to a limited extent. For this reason, Milieudefensie et al. will discuss only the EU's most important findings.

583 First of all, the existing frameworks for sustainable business conduct appeared to be insufficient to foster a systematic mitigation of adverse impacts - including dangerous climate change[1027] - and related risks in value chains, according to the EU legislator.[1028] The risks of climate change in a longer time frame, including the consequences for the competitiveness of companies and the economy (among other things) are insufficiently taken into account by companies.[1029] By extension, companies are insufficiently willing to take voluntary climate action to mitigate the risks of dangerous climate change.[1030]

[1024] CSDDD, preamble (recitals (7) and (10)).
[1025] CSDDD, preamble (recital (16)).
[1026] Impact Assessment, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022SC0042.
[1027] The CSDDD defines "adverse effects" in Article 3(1)(d) as adverse environmental impact or adverse human rights impact. This also includes dangerous climate change.
[1028] Impact Assessment, Part 1/2, p. 34.
[1029] Impact Assessment, Part 1/2, pp. 8 and 11 up to and including 14.
[1030] Impact Assessment, Part 1/2, pp. 8, 11 and 14 up to and including 16.

Voluntary due diligence rules are therefore insufficiently effective.[1031] According to the EU legislator, there had been a market failure in this regard.[1032]

584 Furthermore, the EU legislator had found that the EU frameworks were too fragmented to resolve these issues.[1033] Although reporting obligations had been established, such as the CSRD and the Taxonomy Regulation to be discussed below,[1034] and climate legislation with EU-wide objectives and targets had been developed, such as the regulations discussed above, the system had only a limited scope of application. Furthermore, the system hardly applied to activities or value chains outside the EU, where 80% to 90% of the environmental damage is being caused. Nor did the adopted legislation address the civil liability of companies and it rarely included a due diligence obligation requiring companies to assess, prevent and mitigate adverse impacts in the EU or in third countries.[1035] A regulatory failure had therefore also occurred.[1036]

585 These considerations, among others, led the EU legislator to arrange that EU policies - following the UNGP and the OECD Guidelines[1037] - also directly determine companies' obligations in relation to their value chains in order to actually achieve the EU's climate and sustainability goals in a more effective manner.[1038] According to the EU legislator, those sustainability goals can only be achieved with the help of companies.[1039] The Impact Assessment formulates this as follows:

> *"EU and national targets exist in some areas (climate change, renewable energy or energy efficiency, biodiversity, etc.), they are high level and need to be translated into individual corporate targets and, in turn, corporate action. Moving from EU-wide targets to corporate-level action is urgent given how pressing a rapid and deep transformation of the economy is if we are to reach our targets."*[1040]

586 The Impact Assessment also points out that liability based on civil law is necessary for the effective enforcement of European climate and sustainability objectives. Administrative oversight alone would be insufficient to enforce compliance with obligations. Furthermore, victims must have an effective remedy against adverse

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[1031] Impact Assessment, Part 1/2, pp. 26 and 27, and Part 2/2, pp. 184 and 185.
[1032] Impact Assessment, Part 1/2, p. 9.
[1033] Impact Assessment, Part 1/2, p. 35.
[1034] Impact Assessment, Part 2/2, pp. 110 up to and including 122 and the two right-hand columns of the table on pp. 125 up to and including 127, which describe the synergies, interactions and added value of the CSDDD relative to "Other EU environmental legislation." See also the Impact Assessment, Part 1/2, pp. 3 and 4.
[1035] Impact Assessment, Part 2/2, the two right-hand columns of the table on pp. 125 up to and including 127, which describe the synergies, interactions and added value of the CSDDD relative to "Other EU environmental legislation." See also the Impact Assessment, Part 1/2, pp. 3 and 4.
[1036] Impact Assessment, Part 1/2, p. 9.
[1037] See, in this connection, Section IV.5.4 of this Explanatory Submission.
[1038] CSDDD, preamble (recitals (5) and (6)).
[1039] CSDDD, preamble (recitals (2), (4) and (10)).
[1040] Impact Assessment, Part 2/2, pp. 127 up to and including 129. See also the Impact Assessment, Part 1/2, p. 4.

impacts.[1041] Finally, the Impact Assessment explicitly states, just like the recitals of the CSDDD,[1042] that the CSDDD is complementary to national objectives and to the existing and future climate action at EU level, including carbon pricing mechanisms such as the EU ETS and the CBAM.[1043] According to the EU legislator, the CSDDD is therefore a necessary complement to an incomplete and fragmented framework that is insufficiently effective to actually achieve the EU's climate goals. In this regard, the Impact Assessment also considers it relevant that national liability law is increasingly establishing duties of care to counter climate damage and requires companies to intervene throughout their entire value chains,[1044] since they also have control over and influence on these chains.[1045] In this context, the Impact Assessment refers several times, by way of example, to this lawsuit between Milieudefensie et al. and Shell.[1046]

587 The preceding considerations lead to the passage in the preamble of the CSDDD that is most important for due diligence obligations to prevent or mitigate dangerous climate change, in which the EU legislator sets out that companies will be subject to an obligation of means to limit their CO_2 emissions in Scopes 1, 2, and 3 as much as possible in the form of a minimum harmonisation approach and in compliance with the EU's climate obligations:

> *"(73). This Directive is an important legislative tool to ensure corporate transition to a sustainable economy, including to reduce the existential harms and costs of climate change, to ensure alignment with 'global net zero' by 2050, to avoid any misleading claims regarding such alignment and to stop greenwashing, disinformation and fossil fuels expansion worldwide in order to achieve international and European climate objectives. In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5° C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets. The plan should address, where relevant, the exposure of the company to coal-, oil- and gas- related activities. Such requirements should be understood as an obligation of means and not of results. Being an obligation of means, due account should be given to the progress companies make, and the complexity*

[1041] Impact Assessment, Part 1 of 2, p. 39. See also the Impact Assessment, Part 2 of 2, pp. 186 up to and including 189.
[1042] CSDDD, preamble (recital (16)).
[1043] Impact Assessment, Part 2/2, pp. 127 up to and including 129. See also the Impact Assessment, Part 1/2, p. 4.
[1044] Impact Assessment, Part 1/2, p. 34.
[1045] Impact Assessment, Part 1/2, pp. 25 up to and including 26 and footnote 158.
[1046] Impact Assessment, Part 1/2, footnotes 47, 55, 56 and 200.

> *and evolving nature of climate transitioning. While companies should strive to achieve the greenhouse gas emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable. The plan should include time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions.* (…)*."*[1047]

588 This reduction obligation for companies was subsequently codified in Article 22(1) CSDDD.[1048] The article used to provide that large companies[1049] should adopt and put into effect a transition plan for climate change mitigation that would ensure that the company would make every effort to make its business model and strategy consistent with the transition to a sustainable economy, with the aim of limiting global warming to 1.5°C – in line with the Paris Agreement and the climate neutrality objective set out in the European Climate Law, including intermediate and final climate neutrality targets - and with limiting the company's exposure to coal-, oil- and gas-related activities. Article 22(1)(a) of the CSDDD also stipulated that these obligations should, "where appropriate", cover Scope 1, 2 and 3.

589 Because the EU established such a CO_2 reduction obligation in Scopes 1, 2 and 3 after following a very extensive legislative process, it can also be assumed that this obligation, according to the EU legislator, does not conflict with the principles of EU law and primary and secondary EU law. After all, if that *had* been the case, the EU would not have been able to adopt such a reduction obligation.

590 In addition, the CSDDD makes it clear in various ways that it is proceeding on the basis of a minimum harmonisation approach. As a result, the CSDDD does not preclude more far-reaching national climate measures, such as obligations for companies to reduce their Scope 1, 2 and 3 CO_2 emissions.

(a) Article 1(2) CSDDD provides that the Directive shall not constitute grounds for reducing the level of protection of the climate provided for by the national law of the member states.

(b) Article 4(2) CSDDD explicitly allows member states to adopt more stringent provisions that deviate from those of provisions other than Article 8(1) and (2), Article 10(1) and Article 11(1) CSDDD in order to achieve a different level of

[1047] CSDDD, preamble (recital (73)).
[1048] See also Article 1(1)(c) CSDDD, which already anticipates this.
[1049] This concerns companies that meet the requirements of Article 2(1)(a), (b) and (c) and Article 2(2)(a), (b) and (c) CSDDD.

protection of the climate. As Article 22 CSDDD is not excluded in this enumeration, more far-reaching CO_2 reduction obligations are permitted.

(c) Article 29(6) CSDDD provides that the CSDDD shall be without prejudice to Union or national rules on legal liability (civil liability) related to adverse human rights impacts or to adverse environmental impacts that provide for a more stringent liability than the CSDDD. Therefore more stringent liability rules in the area of dangerous climate change may be imposed at national level.

591 With the above provisions, the EU legislator has made it clear that member states are allowed to adopt more stringent measures than those prescribed by Article 22 CSDDD and that EU law does not in any way preclude a national duty of care relating to CO_2 reduction. This means that the EU legislator recognises that member states themselves may impose more far-reaching obligations on companies to reduce their Scope 1, 2 and 3 CO_2 emissions and that EU law does not stand in the way of this. On the contrary, the entire framework actually encourages such CO_2 reduction obligations. They were even one of the reasons for integrating such an instrument into EU climate policies.

(vi) Omnibus

592 As a result of Omnibus, the CSDDD was watered down on a number of points. Consequently, the reduction obligation under Article 22(1) CSDDD is no longer part of EU climate policies. According to the Recommendation of the European Ombudsman, the manner and pace of the adoption of Omnibus compromised the required careful decision-making.[1050] In the Recommendation, the term *maladministration* is used.[1051] To that end, the European Ombudsman pointed out that the Commission had assumed without good reason that an urgent situation existed and[1052] had therefore wrongly failed to prepare an Impact Assessment.[1053] Furthermore, public consultations with relevant stakeholders were, wrongly, not conducted.[1054] The Commission only met with industry representatives.[1055] Moreover, the proposal was only made available for interservice consultation for less than 24 hours over a weekend, which, clearly, excessively limited the possibilities to provide meaningful input on the proposal.[1056] Furthermore, there was no conclusive evidence according to the European Ombudsman, that a "climate consistency assessment" was made, even though this *is*

[1050] Recommendation, available at https://www.ombudsman.europa.eu/en/recommendation/en/215920.
[1051] Recommendation, preamble and para. 97.
[1052] Recommendation, paras. 35 up to and including 79.
[1053] Recommendation, paras. 56 up to and including 79.
[1054] Recommendation, paras. 68 and 69.
[1055] Recommendation, para. 71.
[1056] Recommendation, para. 95.

required under Article 6(4) European Climate Law.[1057] This means that there is a real possibility that the CJEU will declare Omnibus invalid.[1058]

593 Meanwhile, the changes made in the CSDDD through Omnibus - regardless of the questionable manner in which it was adopted - do not alter the relationship between EU policies and national climate policies. They are still separate frameworks, each serving to ensure compliance with their own respective climate obligations under international law. The fact that the EU's own policies have been watered down by the European Commission and the European Parliament in line with this does not detract from the possibility for member states to actually impose corporate CO_2 reduction obligations on companies, partly within the framework of their own climate obligations under international law.

594 Furthermore, the fact that EU climate policies no longer provide for an EU-wide reduction obligation does also not detract from the analysis made during the adoption of the CSDDD that EU climate policies and the flanking measures do not preclude a similar national obligation. On the contrary, the analysis that an effective climate policy requires such an obligation is no less valid. With Omnibus, the EU is therefore leaving the possibility of a CO_2 reduction obligation to the member states, in the same way as before.

595 The above also follows from the system of the proposed amended CSDDD. With the deletion of Article 22 CSDDD, the initial obligation of companies to reduce their CO_2 emissions no longer falls within the scope of the Directive. This already means that the EU policies on companies' reduction obligations are no longer harmonised, so that member states once again have full autonomy in that area. In addition, (i) the amended Article 1(2) CSDDD still provides that the Directive does not justify lowering the level of protection of human rights and protection against climate change provided for under the national laws of the member states, (ii) Article 4(2) CSDDD continues to state that member states may introduce more stringent national rules that are more specific in terms of the objectives or the area concerned in order to achieve a different level of protection of human rights or protection against dangerous climate change, for instance via their law on civil liability; and (iii) Article 29(6) CSDDD – according to which the CSDDD is without prejudice to national liability rules – has remained unchanged. Member states can therefore still adopt more stringent measures through their national (liability) law, such as a duty of care to prevent or mitigate dangerous climate change.

[1057] Recommendation, paras. 87 and 88.

[1058] This is pointed out in various analyses. See, for example, https://cirio.se/wp-content/uploads/2025/05/The-Legal-Validity-of-the-Omnibus-Package-A-Charter-Rights-Analysis-Cirio-law-firm-May-2025.pdf; https://www.clientearth.org/media/yh2dnt0m/20250623_legal_analysis_omnibus-challenges.pdf; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5727822; https://media.business-humanRights.org/media/documents/1762756670459.pdf.

(vii) Various other special EU regulations

596 The key instruments of EU climate policies as discussed above thus solely intend to flesh out the EU's own climate goals and start out from a minimum harmonisation approach. There is no evidence whatsoever for the conclusion that the EU has made an exhaustive balancing, in these instruments, of the various interests involved in the energy transition. On the contrary, they actually provide every reason for assuming that member states may take more far-reaching measures, including the introduction of CO_2 reduction obligations for companies.

597 In addition, the EU has also established all manner of special regulations that Shell has woven into the patchwork presented by it in ground of appeal no. 1.1.2. Some measures do indeed touch upon EU climate policies, while others are further removed from it or, at any rate, do not concern CO_2 reduction obligations for companies. Milieudefensie et al. will also discuss these various frameworks below in a descending order of closeness of their connection with EU climate policies and corporate reduction obligations. In doing so, Milieudefensie et al. will also describe whether the instrument concerned indicates that the EU has conducted an exhaustive balancing of the interests involved in the energy transition.

(a) RED III. RED III provides a common framework for the promotion of renewable energy and, to that end, sets a *binding* target for the EU of *at least* 42.5% by 2030, with a target of *at least* 45% by 2030.[1059] This, too, is therefore a minimum harmonisation approach, which is aimed at increasing the use of renewable energy. It is difficult to see how this could indicate in any way that the EU has conducted an exhaustive balancing of the interests formed by climate concerns, energy security, competition interests and the role of fossil fuels.

(b) The EED. The EED is part of the EU's climate policies for fulfilling its obligations under the Paris Agreement.[1060] The Directive raises Europe's energy efficiency ambition for 2030, consisting of a binding target for member states to collectively achieve an additional CO_2 reduction of *at least* 11.7% in their energy consumption.[1061] It is therefore a form of minimum harmonisation. To this end, the Directive contains all kinds of rules to increase energy efficiency, such as in buildings, in water heating, in gas billing and in the provision of information to consumers. It is difficult to see how this minimum arrangement, which focuses on an efficient energy use, could provide evidence that the EU has exhaustively balanced climate interests, energy security, competition interests and the role of fossil fuels against each other.

[1059] Article 3(1) RED III.
[1060] EEA, preamble (recital (2)).
[1061] Article 4(1) EEA. As part of RePowerEU, this target has been raised to 13%, but the EED has not (yet) been amended accordingly.

(c) FuelEU, ReFuelEU, Regulation 2023/851 and the Truck Regulation. FuelEU, ReFuelEU, Regulation 2023/851 and the Truck Regulation aim to reduce carbon emissions in certain specific transport sectors (aviation, maritime transport and heavy-duty road transport) through specific measures and to increase the share of renewable energy in those sectors. These special measures are also part of EU climate policies. However, these measures have nothing to do with companies' CO_2 emission reduction obligations and are not directed at them, let alone amount to an exhaustive balancing of interests.

(d) Eurovignette Directive and Clean Vehicles Directive. The Eurovignette Directive provides a framework for road pricing for vehicles, toll charges and user charges in the EU. The Clean Vehicles Directive forces governments to green their vehicle fleets in public procurement. These instruments therefore do not concern CO_2 reduction obligations for companies, nor do they imply a broader balancing of interests.

(e) The CSRD and ESRS. The CSRD and ESRS contain reporting obligations for companies regarding their Scope 1, 2 and 3 emissions and require companies with a climate transition plan to provide information on (among other things) the targets they have set for reducing their GHG emissions in the relevant scopes. These Directives do not, in and of themselves, give rise to any absolute reduction obligations.[1062] Rather, these reporting obligations are based on the premise that companies that contribute significantly to climate change must proceed with GHG reductions in all scopes. Furthermore, the CSRD and ESRS contain no evidence whatsoever of any exhaustive balancing of interests.

(f) The Taxonomy Regulation. The Taxonomy Regulation establishes what is known as "technical screening criteria". It provides a classification system for sustainable activities that aims to provide investors with insight into the extent to which their investments are sustainable.[1063] The Regulation does not concern any CO_2 reduction obligations, let alone provide evidence of an exhaustive balancing of interests. Furthermore, energy generated from fossil gas is only considered to be sufficiently sustainable under the Taxonomy Regulation under very stringent conditions. In summary, there may be no technologically and economically feasible low-carbon alternative to fossil gas, it must not hinder the development of such an alternative and it must not cause a carbon lock-in effect.[1064]

[1062] Article 19a(2)(b) and Article 29a(2)(b) CSRD; Annex A to the ESRS explaining Reporting Requirement E4-1. See also the judgment of the Court of Appeal, grounds 7.40 and 7.41.
[1063] Taxonomy Regulation, preamble (recital (18)).
[1064] Article 10(2) Taxonomy Regulation.

Furthermore, fossil gas may only be used for gas-fired power/heat plants, which in, their turn, are subject to strict requirements.[1065]

(g) The LULUCF. The LULUCF is part of the EU's climate policies under the Paris Agreement[1066] and sets targets for member states regarding climate-neutral land use.[1067] This scheme is largely accounting-based[1068] and does not concern CO_2 reduction obligations in the energy sector or any broader balancing of interests either.

(h) Regulation 2017/1938, the Gas Regulation, the Gas Directive, AFIR and NZIA. Shell also mentions several other schemes regarding the regulation of specific energy markets and the functioning of the energy infrastructure. For example, Regulation 2017/1938 aims to ensure a well-functioning internal gas market to guarantee the uninterrupted supply of gas within the EU.[1069] Furthermore, the EU has established a framework for the organisation and functioning of the internal markets for natural gas and renewable hydrogen with its Gas Regulation.[1070] The Gas Directive is specifically aimed at reducing the use of fossil gas and increasing the transit of sustainable, renewable and low-carbon gas and hydrogen.[1071] With the AFIR, the EU has drafted regulations intended to contribute to the provision of new infrastructure for sustainable energy forms, such as infrastructure for electric vehicles.[1072] Finally, the EU has adopted the NZIA, which aims to promote the development of net-zero technologies within the EU. To this end, the NZIA requires producers in the fossil-fuel industry, among other parties, to develop or invest in carbon capture projects.[1073] Thus all the above-mentioned rules aim to realise a well-functioning infrastructure for the various types of energy used in the EU or methods for storing carbon. Although these regulations do touch on EU climate policy in a tangential way, they actually have nothing to do with CO_2 reduction obligations anymore and do certainly not involve an exhaustive balancing of interests.

(i) The Critical Entities Resilience Directive and Directive 2009/119. This leaves a residual category of regulations that no have nothing to do with CO_2 emission reductions or climate policies anymore. The Critical Entities Resilience Directive requires member states to identify critical entities and take measures to ensure,

[1065] See also European Commission, 2 February 2022, "Questions and Answers on the EU Taxonomy Complementary Climate Delegated Act covering certain nuclear and gas activities," available at https://ec.europa.eu/commission/presscorner/detail/nl/qanda_22_712.
[1066] LULUCF, preamble (para. 4).
[1067] Article 4 LULUCF.
[1068] Articles 5 up to and including 10 LULUCF.
[1069] Regulation 2017/1938, preamble (recital (3)).
[1070] Gas Regulation, preamble (recital (3)).
[1071] Gas Directive, preamble (recital (9)).
[1072] AFIR, preamble (recital (9)).
[1073] Article 23(1) NZIA.

as far as possible, that they can continue to provide their services in the event of a disaster.[1074] The accompanying annex lists a long range of potential categories, such as gas, but also, for example, electricity, water and public transport.[1075] Directive 2009/119 falls into the same category; it aims to ensure that member states maintain oil reserves for emergency situations.[1076] With these rules, the EU has taken measures to prevent emergency situations for good reasons. However, there is no relationship with climate rules and there is certainly no evidence of any balancing of interests.

(j) The Methane Regulation. Finally, Shell mentions the Methane Regulation, which requires fossil-fuel companies to record and limit their methane emissions due to the impact of methane on global warming.[1077] This Regulation does not pertain to CO_2, so it is unclear how it could concern CO_2 reduction obligations or a balancing of interests related to them.

Conclusion

598 It was discussed above what the relationship is between EU climate policies and national climate policies and also how the legislation created by the EU should be viewed within that context. The EU, just like its member states, is independently bound by the UN climate regime, including the Paris Agreement. EU policies aim to comply with the EU's own obligations under international law. The member states, separately, must also comply with their own climate obligations under international law. To that end, they must develop and comply with climate policies independently of the EU.

599 With the European Climate Law, the EU ETS (including the MSR and the CBAM), the EU ETS 2, the ESR and the CSDDD, the EU also intended to comply with its own climate obligations by means of reduction measures targeting companies. Because the member states have their own climate obligations, this always involves a minimum harmonisation approach. This leaves room for the member states to pursue their own, more far-reaching national climate policies, also to comply with their own obligations under international law. The CSDDD and its legislative history make it particularly clear that a duty of care for companies to reduce their Scope 1, 2 and 3 CO_2 emissions is fully compatible with all the other EU-law instruments. After all, such a reduction obligation was incorporated into EU policies in the CSDDD and tested against the entire EU framework. From this it follows that member states may also impose more far-reaching CO_2 reduction obligations themselves. This already establishes that EU law does not preclude the duty of care that Shell has. Nor do these instruments provide evidence of

[1074] Article 1(1) Critical Entities Resilience Directive.
[1075] Annex to the Critical Entities Resilience Directive.
[1076] Article 1 Directive 2009/119.
[1077] See, for example, Article 12 Methane Regulation.

an exhaustive balancing of climate interests, energy security, competition interests and the role of fossil fuels to be found in these key instruments.

600 Although the measures adopted by the EU in addition to the framework outlined above were partly established within the context of EU climate policies, they only set rules for a few specific sectors, focus on energy savings or provide for reporting and information obligations. They do not point to any exhaustive balancing of interests. Moreover, they almost always involve a minimum harmonisation approach. The remaining part of the above-mentioned EU measures concerns infrastructural or emergency measures that do touch on various forms of energy use, but are less closely connected with EU climate policies.

V.6.3 The EU policies are consistently focused on the transition to sustainable energy

601 Section V.6.2 of this Explanatory Submission discussed that EU policies aim to fulfil the EU's own climate obligations and are separate from the compliance by member states with their own climate obligations under international law. In that context, it was noted that EU policies contain no evidence for the conclusion that they include an exhaustive balancing of climate concerns, energy security, competition interests and the role of fossil fuels, and there has certainly not been any balancing that favours maintaining, or even increasing, oil and gas consumption.

602 In reality, quite the opposite is true: EU policies as a whole are aimed at moving away from oil and gas use and at accelerating the transition to renewable energy. These objectives are driven not only by the EU's own obligations, but also by the energy security within the EU that will be served by this, the resulting improvement in the EU's competitive position and the reduced dependence on third countries for energy. It is therefore the intention of the EU to move away from fossil fuels in line with the UN climate regime and the findings of, among other organisations, the UN, the IPCC, the IEA and the ECB that propose that this should be done[1078]. Milieudefensie et al. will now explain this.

603 The preamble to the European Climate Law mentions various interests that the EU takes into account in its policies, including the interests of energy security and competitiveness.[1079] The European Climate Law states at the outset that the EU, through its climate policy - in part for the sake of energy security - aims to transition to alternative energy sources and thus away from fossil fuels:

> *"(11). In light of the importance of energy production and consumption for the level of greenhouse gas emissions, it is essential to ensure a transition to a safe, sustainable, affordable and secure energy system*

[1078] See, in this regard, Section III.3 of this Explanatory Submission.
[1079] European Climate Law, preamble (recital (34)).

relying on the deployment of renewables, a well-functioning internal energy market and the improvement of energy efficiency, while reducing energy poverty."[1080]

604 In line with this policy strategy, the various measures that implement the European Climate Law consistently show that the EU aims to move away from fossil fuels, partly with a view to the energy security and a stronger energy position. That ambition has only been reinforced and accelerated following Russia's invasion of Ukraine in February 2022 and its consequences. After all, that invasion, its impact on Europe's energy supply and the sharply rising energy prices made it even more clear that the EU is far too dependent on fossil fuels; moreover, the priced and security of supply of these fuels fluctuate greatly as a result of geopolitical developments. This was also discussed in Section III.3.3 of this Explanatory Submission.

605 For these reasons, the European Commission developed a comprehensive plan to significantly reduce the EU's dependence on Russian fuels and on oil and gas in general at a higher pace in the RePowerEU plan of 8 March 2022[1081] and its elaboration dated 18 May 2022[1082]. To this end, the European Commission stressed that following the invasion, the case for a rapid clean energy transition has never been stronger and clearer, and also that accelerating the green transition will reduce CO_2 emissions, reduce dependency on imported fossil fuels and offer protection against price hikes.[1083]

606 The plan as further developed aims to reduce the demand for gas - through an even more intensive focus on renewable energy - faster than in the original "Fit for 55" policy.[1084] RePowerEU aims for a reduction in gas consumption of more than 50% by 2030, whereas the "Fit for 55" policy in 2020 still projected a 30% reduction by 2030.[1085] For this purpose, the European Commission has outlined a broad policy aimed at a significant scale-up of renewable energy sources, including solar energy, wind energy, biofuels and renewable hydrogen.[1086] The European Commission noted that this shift

[1080] European Climate Law, preamble (recital (11)). Shell also cites this passage in its Statement of Defence in Cassation, para. 45. However, it quotes only up to "*secure energy system*," thereby failing to highlight that the EU finds that energy security in renewable energy, and not in fossil fuels.

[1081] European Commission Communication dated 8 March 2022, COM(2022) 108 final, "RePowerEU: Joint European Action for more affordable, secure and sustainable energy" available at https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52022DC0108.

[1082] European Commission Communication dated 18 May 2022, RePowerEU Plan, COM(2022) 230 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:fc930f14-d7ae-11ec-a95f-01aa75ed71a1.0015.02/DOC_1&format=PDF.

[1083] European Commission Communication dated March 8, 2022, COM(2022) 108 final, "RePowerEU: Joint European Action for more affordable, secure and sustainable Energy," p. 1.

[1084] European Commission Communication dated May 18, 2022, RePowerEU Plan, COM(2022) 230 final, p. 6.

[1085] Commission Staff Working Document, 18 May 2022, SWD(2022) 230 final, pp. 10 and 12, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0230. The measures under the "Fit for 55" policy would lead to a 30% reduction in gas consumption, equivalent to 116 billion cubic meters in 2030. The newly proposed measures aim to reduce gas consumption by 155 billion cubic meters - equivalent to Russian imports - by 2027. This represents a reduction in gas consumption of just over 50%.

[1086] European Commission Communication dated 18 May 2022, RePowerEU Plan, COM(2022) 230 final, pp. 7 up to and including 10.

towards renewable energy will increase the competitiveness of European industry[1087] and strengthen economic growth.[1088] Finally, the European Commission encouraged member states to adopt their own taxation measures to support the RePowerEU objectives, with the aim of incentivising energy savings and reducing fossil-fuel consumption.[1089]

607 The purport of the regulations subsequently developed by the EU - which were already briefly discussed in Section V.6.2 of this Explanatory Submission - becomes much clearer in this context. All these regulations aim to move away from fossil fuel in light of the objectives of energy security, improving Europe's competitiveness and reducing dependence on third countries. It would be beyond the scope of this discussion to provide a complete overview of this. That would take up a very large number of pages. A few examples from the most important EU instruments will already make the above point sufficiently clear.

608 The preamble to the EED, for instance, highlights the core of EU climate policies and the role of fossil fuels within them. The EED describes the rationale for energy efficiency measures as follows:

> *"(14). (…) Improving energy efficiency throughout the full energy chain, including energy generation, transmission, distribution and end-use, will benefit the environment, improve air quality and public health, reduce GHG emissions, improve energy security by decreasing the need for energy imports, in particular of fossil fuels, cut energy costs for households and companies, help alleviate energy poverty, and lead to increased competitiveness, more jobs and increased economic activity throughout the economy."*[1090]

609 Thus, the EU expresses that its policies are aimed at phasing out fossil fuels, partly with a view to the supply security and (therefore) energy security. In line with this, the preamble to the EED emphasises that member states should not promote activities that are not environmentally sustainable such as the use of fossil fuels in their energy-saving measures.[1091] Article 1(1) EED further provides that the aim of the EED is to contribute to the implementation of the European Climate Law and to the security of the EU's energy supply by reducing its dependence on energy imports, including fossil fuels. This brings together all the policy objectives described above.

610 The recitals of RED III equally emphasise all the above-mentioned reasons necessitating the move-away from fossil fuels. The EU legislator first points to the

[1087] European Commission Communication dated 18 May 2022, RePowerEU Plan, COM(2022) 230 final, p. 10.
[1088] European Commission Communication dated 18 May 2022, RePowerEU Plan, COM(2022) 230 final, p. 23.
[1089] European Commission Communication dated 18 May 2022, RePowerEU Plan, COM(2022) 230 final, p. 21.
[1090] EED, preamble (recital(14)).
[1091] EED, preamble (recitals (65) and (69)).

environmental interests that will be served by renewable energy and that necessitate the phase-out of fossil fuels. To this end, the share of renewable energy in the energy mix must increase significantly.[1092] Furthermore, the EU legislator underscores, partly with reference to RePowerEU, that the EU must focus on accelerating the green transition and putting policies in place that reduce emissions. This should reduce dependence on imported fossil fuels and promote fair and affordable prices for EU citizens and businesses across all sectors of the economy.[1093] Fossil fuels must therefore be phased out.[1094]

611 The Truck Regulation notes that it is establishing rules aimed at making the EU independent of Russian fossil fuels and reducing fossil-fuel consumption in the transport sector.[1095] ReFuelEU also emphasises that the transition to sustainable aviation fuels will help reduce dependence on fossil fuel imports from third countries, which will increase the EU's energy security. The international political situation underlines the necessity of this.[1096] The NZIA is also aimed at achieving a significant and rapid reduction of the EU's dependence on fossil fuels as well as on accelerating the transition to sustainable energy.[1097] The obligation to capture and reuse CO_2 therefore intends to reduce fossil-fuel consumption.[1098]

612 Finally, the Gas Directive and Gas Regulation are also aimed at reducing gas consumption. They contribute to the implementation of RePowerEU. Their goal is to enable and facilitate the transition to climate neutrality by scaling up a market for hydrogen and an efficient market for natural gas.[1099] According to the recitals, the Gas Directive aims to promote the penetration of renewable gas, low-carbon gas and low-carbon hydrogen into the energy system and to reduce the role of fossil gas.[1100] In line with this, the Directive seeks to enable renewable gas, low-carbon gas and low-carbon hydrogen to play a significant role in achieving the EU's climate objectives.[1101] Furthermore, the Gas Directive aims to set up a regulatory framework that enables and encourages all market participants to phase out fossil gas and avoid the carbon lock-in effect. It thus aims to ensure a gradual and timely phase-out of fossil gas.[1102] According to Article 1(1) of the Gas Directive, it establishes a common framework for the decarbonisation of the markets for natural gas and hydrogen in order to contribute to

[1092] RED III, preamble (recitals (1) and (2)).
[1093] RED III, preamble (recitals (4) and (5)).
[1094] RED III, preamble (recital (18)).
[1095] Truck Regulation, preamble (recital (7)).
[1096] ReFuelEU, preamble (recital (52)).
[1097] NZIA, preamble (recital (7)).
[1098] NZIA, preamble (recital (50)).
[1099] Gas Directive, preamble (recital (6)).
[1100] Gas Directive, preamble (recital (9)).
[1101] Gas Directive, preamble (recital (9)).
[1102] Gas Directive, preamble (recital (9)).

the achievement of the Union's climate and energy targets. This Directive, too, is therefore strongly focused on reducing the use of fossil gas.

613 These policies, which focus on a strong and accelerated phase-out of fossil fuels, were continued by the EU in the years that followed with even greater intensity. In this context, various financial support measures from the European Commission related to the energy transition costs are worth noting first. Shell is also referring to these measures.[1103] Through various programs and funds, the EU intends to provide financial support to member states, cities, regions, businesses and vulnerable groups in order to achieve the energy transition.[1104]

614 In February 2025, the European Commission presented the Action Plan for Affordable Energy.[1105] In this Plan, the European Commission highlighted - as Shell itself is also rightly noting[1106] - the growing difference in energy prices between the EU and its main competitors and the associated risks to Europe's competitive position. For the European Commission, however, this is actually a reason for accelerating the transition away from fossil fuels. A cornerstone of the EU policies is to decarbonise the energy system. The reasons for this, which can now be predicted, lie in the energy security and the economic benefits thereof:

> *"We will deliver decarbonisation, because decarbonisation delivers not only clean energy, but also quality jobs, growth and energy security. In addition, reducing the share of fossil fuels in the European energy system would further shield consumers from market volatility.* (…).
>
> *In short, only by accelerating investments in clean energy and infrastructure, ensuring rapid acceleration of electrification, increasing energy efficiency and bringing transparency and fairness to gas markets can we make energy affordable. That is why Europe needs this Action Plan: to deliver a fast and firm response that lowers energy costs in the immediate term, to future-proof the energy system, to attract investments and to ensure delivery."*[1107]

615 The European Commission has stressed that Europe's reliance on imported fossil fuels causes energy price volatility and higher supply costs. Moreover, this dependence makes the EU more vulnerable to external (geopolitical) pressure and global market uncertainty.[1108] The plan then outlines a range of measures that will reduce Europe's

[1103] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 48.
[1104] Exhibit S-266 (Impact Assessment Report, 6 February 2024), p. 14.
[1105] Action Plan for Affordable Energy dated 26 February 2025, COM(2025) 79 final, p. 2, available at https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52025DC0079.
[1106] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 48.
[1107] Action Plan for Affordable Energy dated 26 February 2025, COM(2025) 79 final, p. 5.
[1108] Action Plan for Affordable Energy dated 26 February 2025, COM(2025) 79 final, pp. 2 and 3.

dependence on fossil fuels by 2030 at the latest and yield EUR 130 billion of savings per year.[1109]

616 With its REPowerEU Roadmap of May 2025[1110] - which was approved within the EU in December 2025[1111] – the European Commission subsequently presented its strategy to completely end the remaining imports of Russian fuels to strengthen European energy security, its energy independence and its climate policies:

> *"Reducing dependency on fossil fuels will further strengthen EU energy security and sovereignty in line with the EU's climate neutrality objective."*[1112]

617 This policy is also consistent with the recommendations of the ESABCC. The ESABCC endorses the view that the rapid phase-out of fossil fuels and the resulting reduced demand for oil and gas will not only help mitigate climate change, but will also contribute to improving European strategic autonomy, European competitiveness, economic progress, energy affordability and European security.[1113]

618 In the most recent State of the Energy Union of 6 November 2025, the European Commission reiterated that European energy prices are relatively high because the EU is too dependent on fossil-fuel imports. According to the European Commission, a true Energy Union relies on clean energy produced within the EU, based on a strong renewable energy sector and energy efficiency, which is of utmost importance for the EU's security and competitiveness.[1114]

619 Finally, it will be clear that the geopolitical developments in 2025 and 2026 - including, in particular, the markedly shifted U.S. sentiment towards the EU and the war in the Middle East in March 2026, which caused oil and gas prices to rise sharply - [1115] confirm the soundness of these policy choices and compel the EU to continue these policies. In line with this - and partly in light of the Greenland crisis - the European Commission has acknowledged that it should not become dependent on the United States or any other

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[1109] Action Plan for Affordable Energy dated 26 February 2025, COM(2025) 79 final, pp. 5 and 23.
[1110] European Commission 12 May 2025, COM(2025) 440 final/2 "Roadmap towards ending Russian energy imports," available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52025DC0440.
[1111] European Commission Press Release 3 December 2025, "EU agrees to permanently stop Russian gas imports and phase out Russian oil," available at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2860.
[1112] European Commission 12 May 2025, COM(2025) 440 final/2 "Roadmap towards ending Russian energy imports", p. 1.
[1113] ESABCC 2 June 2025, "Scientific advice for amending the European Climate Law Setting climate goals to strengthen EU strategic priorities," pp. 18 and 19, available at https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-amending-the-european-climate-law-setting-climate-goals-to-strengthen-eu-strategic-priorities.
[1114] State of the Energy Union Report 2025, COM(2025) 667 final, p. 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0667.
[1115] See https://nos.nl/collectie/14015/artikel/2605622-energieprijzen-door-het-dak-nu-eind-aan-iran-oorlog-niet-in-zicht-is.

country for its energy supply. European Commissioner Jorgensen stressed that the only right path is a further energy diversification.[1116]

620 It follows from all this that EU policies not only start out from a minimum harmonisation, but also aim for a strong and accelerated phase-out of fossil fuels in the European energy system. There are a large number of good reasons for this. First, it will serve EU climate policies. Second, fossil-fuel prices are highly reliant on geopolitical developments and are therefore volatile in nature. The phase-out of fossil fuels and an accelerated shift towards renewable energy will therefore lead to greater energy security. This will not only improve the European economy and its competitiveness, but will also reduce its dependence on third countries. The picture of EU policies sketched by Shell in this lawsuit in order to justify maintaining or even increasing oil and gas production is therefore incorrect. In reality, EU policies imply the opposite.

V.6.4 The unlikely (legal) consequences of the exhaustive nature of EU policies

621 There are also other reasons why Shell's argument that EU policies constitute an exhaustive balancing of interests, meaning that any CO_2 reduction obligation under national law would conflict with these policies, is invalid. This legal view would, in fact, have implausibly far-reaching consequences for the EU policies and national climate policies in respect of all energy sources. Milieudefensie et al. will now briefly explain this.

622 Essentially, Shell is arguing that EU policies have exhaustively weighed and regulated all the interests in the energy mix within the EU. Shell then only points to the share of fossil fuels within that energy mix, which member states should allegedly not be allowed to alter through a CO_2 reduction obligation. In doing so, Shell is failing to mention the mirror-image consequence of its interpretation of the law: if the balancing of interests in the energy mix to be chosen were an EU matter, that exclusivity would necessarily also extend to the other elements within that mix, such as solar energy, wind energy, renewables and nuclear energy. By extension, that authority would then also extend to how the generation of energy from those sources should be distributed across the EU.

623 Shell's interpretation of the law would also imply that the EU also has exclusive competence regarding related issues, such as the question for which energy sources extraction licenses are granted, to whom such licenses are granted and in which country that extraction must take place. After all, this is a crucial part of the exhaustive policies as argued by Shell. Moreover, these licensing issues would not only extend to renewable energy sources, but would equally apply to the granting of licenses for new oil and gas fields, to the extent that room for this could even exist.

[1116] The Brussels Times, "EU fears new gas dependency on US after Greenland crisis," 28 January 2026, available at https://www.brusselstimes.com/1941431/eu-fears-new-gas-dependency-on-us-after-greenland-crisis.

624 However, the frameworks based on national or EU law offer no support for the suggestion that EU policies aim to regulate the energy mix in this exhaustive manner for all the energy sources. There is no EU policy that determines which countries, regions or parties should focus on a particular form of energy and to what extent they should do so. Nor is there a European licensing system for this purpose. The reason for this is simple: the EU does not have the ambition to exhaustively regulate the entire energy mix within the EU and so has not set up an exhaustive framework for this, neither for renewable energy, nor for fossil fuels. Member states must comply with the EU's minimum policies and are free to adopt more far-reaching measures on their own. A CO_2 emission reduction obligation is within the discretion left to the Member States.

V.6.5 A duty of care to reduce CO_2 emissions does not lead to the end of oil and gas use

625 A final misconception on Shell's part lies in its argument that a duty to reduce CO_2 emissions would mean that oil and gas would not be part – or would only barely be part - of the energy mix within the EU (or globally). In this context, Shell is pointing out, among other things, that natural gas will play a role in the coming years[1117] and that fossil fuels will also be used during the energy transition.[1118] Furthermore, Shell is stressing that the use of oil and gas will continue to be allowed, even according to IAM models.[1119] It is also referring to a judgment of the General Court, which has found - in the context of the principle of energy solidarity - that there must be room for the use of gas as a transition fuel if no low-carbon alternative exists.[1120] This suggestion by Shell that oil and gas would not be permitted as part of the energy mix also keeps seeping through in other parts of its argumentation that the energy security could come under threat.

626 With that position, Shell is overlooking the fact that the duty of care to prevent or mitigate dangerous climate change concerns a CO_2 emission reduction of 45% (or a lower, court-determined percentage) by 2030. This means that until and after 2030, there is still ample room - namely, at least 55% - for the use of oil and gas. The duty of care is aimed at gradually reducing the supply of oil and gas and, by extension, the demand for these products, with the aim of limiting global warming to 1.5°C. This is consistent with the obligations of states based on treaty law and customary law as well as with the EU policies discussed above. The suggestion that oil and gas could no longer play any role due to this duty of care is therefore incorrect.

V.6.6 Interim conclusion: Shell is starting out from four misconceptions regarding EU law and EU policies

[1117] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 47 under o.
[1118] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 43 under d.
[1119] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 52.
[1120] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 41, with reference to the judgment of the General Court (EU) of 10 September 2025, T-625/22.

627 Sections V.6.2 up to and including V.6.5 of this Explanatory Submission described the four main misconceptions underlying all the objections in ground no. 1.1 of Shell's conditional cross-appeal in cassation. These misconceptions concern the substance of EU law and EU policies as well as their relationship with national law. They seal the fate of those objections, i.e. they fail. Milieudefensie et al. will briefly summarise them below.

(a) First, EU climate policies are aimed at ensuring the EU's compliance with its climate obligations under the UN climate regime, including, in particular, the Paris Agreement. Under international law, member states have their own climate obligations. To that end, they pursue their own climate policies. While these policies may naturally overlap with EU climate policies, they are distinct from it. Member states are free to opt for policies that are more far-reaching than those developed by the EU to fulfil its own obligations.

(b) Second, EU policies are consistently aimed at accelerating the phase-out of fossil fuels and the transition to sustainable alternatives. That strategy not only aligns with the climate policies, but also leads to greater energy security, an improved European competitive position and economy and reduced dependence on third countries for energy, which will strengthen the EU's geopolitical position. The opposite view of EU policies as painted by Shell in this lawsuit is fundamentally wrong.

(c) Third, exhaustive EU climate policies would not only have to concern fossil fuels, but necessarily all other energy sources that determine the energy mix as well. The EU would therefore also need to have all sorts of rules in those areas determining to what extent, and from which other sources, energy will be extracted, as well as which countries and parties will focus on this. However, there are no such EU policies at all. This is also a significant indication that the picture of EU policies as painted by Shell is fundamentally wrong.

(d) Shell's fourth misconception is the assumption that a CO_2 reduction obligation means there is no more room for the use of oil and gas. That room obviously still exists. By 2030, oil and gas use must have been reduced by 45% (or a lower court-determined percentage). Only after 2030 will the use of oil and gas be phased out to net zero CO_2 emissions, a goal that must be achieved by 2050. This is consistent with the obligations under international and EU law.

628 In light of the foregoing, all Shell's objections under ground of appeal no. 1.1 already fail. Below, Milieudefensie et al. will, for the sake of completeness, discuss how the Court should assess whether national law conflicts with EU law. In that regard, too, Shell's presentation of the assessment framework, the manner of assessment and its outcome does no justice to the legal reality.

V.6.7 Manner of assessing the compatibility of the duty of care with EU law

629 First and foremost, it is relevant to note for the assessment framework that Shell's objections in ground of appeal no. 1.1 fall into two categories. A limited portion of its objections targets the principles of energy solidarity, sincere cooperation and proportionality.[1121] The vast majority of Shell's objections argue that a duty of care to reduce CO_2 emissions under national law conflicts with secondary EU law.[1122] In the context of the assessment against secondary EU law, Shell is relying in particular on the "circumvention test" or "obstacle test" distinguished in the legal literature, which, according to Shell, must be carried out after it has been found that national measures do not fall, or only partially fall, within the scope of EU law, or after it has been found that it concerns a minimum harmonisation.[1123] It is therefore relevant to examine how a court should assess whether a measure under national law conflicts with principles based on EU law and/or secondary EU law.

General starting-points

630 The manner in which national law is assessed against EU law essentially stems from the relationship between the EU and its member states based on treaty law. Article 4(1) TEU starts out from the principle that member states retain their own sovereignty, unless they have transferred any part of it to the EU under or pursuant to the TEU. In line with this, Article 2(1) and (3) TFEU provide that member states may not adopt rules in areas where exclusive competence has been conferred on the EU. These areas include customs, competition rules, monetary policy, fisheries and commercial policy.

631 In the case of shared competences, Article 2(2) TFEU allows both the member states and the EU to adopt rules, unless the EU has exhaustively exercised its competence in that area. Article 4(2) TFEU further provides that this shared competence - to the extent relevant - covers the internal market, the environment, transport and energy. Protocol No. 25 on the exercise of shared competences clarifies that Article 2(2) TFEU implies that if the EU acts in a specific area where member states and the EU have shared competences, this exercise of competence shall relate only to the matter regulated by the relevant EU act and not to the entire area. The member states attach great importance to this limited derogation by the EU.[1124]

[1121] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 28 under (iii) and (v) up to and including (vii), 36 up to and including 42, 54 and 63 up to and including 65.

[1122] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 28 under (i) up to and including (v), 43 up to and including 48, 51 up to and including 53, 55 up to and including 62, and 66 up to and including 68.

[1123] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 31 up to and including 33.

[1124] P. Craig & G. De Burca, "EU Law", Oxford: Oxford University Press 2024, p. 114. For a further discussion of this framework, see J.R. Torenbosch, "*Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen*" (General private law as an unacceptable obstacle to directives and regulations) in *NTBR* 2024/24, para. 2; J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht*" (The doctrine of servile imitation tested against european law), Amsterdam: Delex 2025, para. 3.2.

632 Citizens may rely on EU law if the provision concerned has direct effect in the national legal system. Regulations have direct effect in the national legal system.[1125] Directives, however, seeing their nature, do not have direct effect, as they are addressed to the member states and require transposition. After the implementation period has expired without any action being taken, they can, at most, have indirect horizontal effect.[1126] As for other EU law, direct effect requires that the relevant law is unconditional and sufficiently precise or specific.[1127] This doctrine essentially requires that the standard based on EU law is suitable for application by a national public authority, including a court of law, in a specific case.[1128] Courts must set aside national law that conflicts with provisions of EU law that have direct effect. This therefore also determines the limits within which principles of EU law can be relied on.

Assessment against secondary EU law

633 The assessment of national law against secondary EU law is complex and multi-layered. The various elements of the assessment system also stem from Article 2(2) TFEU and Protocol No. 25. The starting-point in the case of shared competences is that both the EU and the Member States may adopt regulations in the area concerned. An exception arises only if national legislation conflicts with a competence that is exhaustively exercised by the EU in that area. Secondary EU law then has a displacing effect.[1129]

634 This assessment method means that it must be examined, for every instrument of secondary EU law individually, whether national legislation is restricted or excluded in the relevant area as a result, based on the specific characteristics of that particular instrument.[1130] This must be done in three steps, namely on the basis of (i) the scope of the specific instrument, (ii) the question whether the instrument provides for minimum or maximum harmonisation, and (iii) whether the national legislation interferes with the operation of a specific rule of secondary EU law.

(i) Scope

[1125] Article 288 TFEU. See also *Asser/Hartkamp 3-I* 2023/191; K. Lenaerts & P. van Nuffel, "*Europees recht"* (European Law), Antwerp: Intersentia 2023, pp. 640–643.

[1126] Article 288 TFEU. See also *Asser/Hartkamp 3-I* 2023/155 and 156; K. Lenaerts & P. van Nuffel, "*Europees recht*", Antwerp: Intersentia 2023, pp. 643 up to and including 658. See, for example, CJEU 14 May 2024, C-15/24 (*CH*), para. 51. See also CJEU 5 October 2004, C-397/01 to C-403/01 (*Pfeiffer*), para. 108.

[1127] *Asser/Hartkamp 3-I* 2023/9; T.W.B. Beukers, H.J. van Harten, and S. Prechal (eds.), "*Het recht van de Europese Unie in vijftig klassieke arresten"* (European Union law in fifty landmark judgments), The Hague: Bju 2010, p. 22 et seq. See also CJEU 24 January 2012, C-282/10 (*Dominguez*); CJEU, 5 October 2004, C-397/01 to C-403/01 (*Pfeiffer*).

[1128] R. Schütze, European Union Law, Cambridge: Cambridge University Press 2015, pp. 80–81.

[1129] See, in this regard, F. Amtenbrink & H.H.B. Vedder, "*Recht van de Europese Unie*" (Law of the European Union), The Hague: Boom Juridische uitgevers 2022, p. 71.

[1130] Opinion of Advocate General Ruiz-Jarabo Colomar dated 5 February 2009, C-478/71 (*Budvar*), para. 93 and footnote 49. See also J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, para. 3.2.

635 First, the scope of the EU instrument determines whether the national rule falls within the area in which the EU has exhaustively exercised its competence. A national rule naturally falls within the scope or reach of an EU instrument most readily, if the instrument in question covers the entire area that the national rule addresses. In some cases, it is also sufficient that the national rule falls partially within its scope.[1131] Conflict is, in principle, ruled out if the national rule does not fall within the scope of the secondary EU instrument.[1132] After all, the member states retain their competence in the relevant area in that respect.[1133] The only remaining possibility is then to perform an assessment against primary EU law.[1134]

636 This first step requires the interpretation of a specific instrument of secondary EU law, such as a directive or regulation. To determine its scope of application, one can look at its *formal* characteristics (such as the formal objective or the protected category) and/or its *factual* characteristics, such as certain factual circumstances or acts that give rise to the application of a specific rule of secondary EU law.[1135] The so-called "express saving clauses" are also relevant in this context, as these provisions make it clear that a particular area is not regulated as such in the relevant secondary EU law. This essentially constitutes a specific delimitation of the scope of application of the secondary EU instrument.[1136] Conversely, national courts must[1137] examine the scope of application of national law in order to assess whether the national-law provision concerns a matter regulated by the EU.[1138] If the national-law provisions fall outside the scope of application of secondary EU law, there can, in principle, be no conflict.

(ii) Level of harmonisation

637 If the national provision falls within the scope of application of a specific instrument of secondary EU law, a conflict may exist in and of itself. Whether this is actually the case will depend primarily on the level of harmonisation of the instrument concerned. This second question is therefore also closely linked to the contents of each individual instrument of secondary EU law.

[1131] See on this subject J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, para. 3.2; F. Amtenbrink & H.H.B. Vedder, *European Union Law*, The Hague: Eleven International Publishing 2021, pp. 64 and 339; A. Arena, "Exercise of EU competences and pre-emption of member states' powers in the internal and the external sphere: towards 'grand unification'," Yearbook of European Law 2016/35, p. 40 et seq.

[1132] See, for example, CJEU 15 December 2011, C-242/10 (*Inno*), para. 29; CJEU 9 November 2010, C-540/08 (*Mediaprint*), para. 27.

[1133] See also Y. Hofhuis, "*Minimumharmonisatie in het Europese recht*" (Minimum harmonisation in European Law), Deventer: Kluwer 2006, pp. 25 and 28.

[1134] See, for example, CJEU 21 March 2024, C-10/22 (*LEA/Jamendo*), paras. 53 up to and including 56.

[1135] J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, p. 59.

[1136] J.R. Torenbosch, *De slaafse nabootsingsleer getoetst aan het Europese recht*, Amsterdam: Delex 2025, p. 60.

[1137] See, inter alia, CJEU 27 January 2021, C-229/19 and C-289/19 (*Dexia*), para. 44 with (further) references. See also J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, p. 58 with further references in footnote 168.

[1138] J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, p. 58.

(a) In the case of maximum harmonisation*,* member states may not adopt divergent national law that falls *within the boundaries* of the scope of harmonisation. This means that maximum harmonisation merely precludes member states from adopting more far-reaching measures regarding the matters that the secondary legislation wishes to regulate exhaustively. Any area falling outside this scope falls within the area of shared competences, for which member states may, as a general rule, adopt their own law.[1139] This therefore always requires an assessment against a specific instrument and specific provisions of that instrument.

(b) In the case of *minimum harmonisation,* the starting-point is that member states are allowed to adopt more far-reaching measures in the area concerned. The established minimum sets the floor to be observed, while the primary EU law constitutes the ceiling. Between the two, member states may provide and design greater protection compared to the secondary EU law.[1140] The extent of the leeway member states have relative to the established minimum must be assessed from instrument to instrument and from provision to provision.

638 For this assessment, the contents of the relevant instrument of secondary EU law are of primary importance. Some instruments explicitly stipulate that a more extensive protection is or is actually not permitted for certain objectives.[1141] Additionally, some instruments contain a non-regression clause. Such a clause stipulates that the instrument in question is without prejudice to previously established, more stringent national protection regimes.[1142] Several examples of this were already discussed in the Section on EU policies in Section V.6.2 of this Explanatory Submission, such as Article 1(2) CSDDD.

639 In addition, the objective of the instrument is relevant. This helps determine to what extent member states have discretion to adopt different or more far-reaching measures.[1143] If the national rules pursue the same objectives as the relevant instrument of secondary EU law, a conflict will not easily arise. In *Deponiezweckverband*[1144] and *Windmills*[1145] , the CJEU specifically pointed out, with regard to this aspect, the scope

[1139] J.R. Torenbosch, "*Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen*", *NTBR* 2024/24, para. 4.1. See also M.W. Wallinga & A.C.W. Pijls, "*De wisselwerking tussen Europees financieeltoezichtrecht en nationaal privaatrecht"* (The interaction between European financial supervision law and national private law), *RMThemis* 2018/1, p. 13; C. Timmermans, "ECJ Doctrines on Competences" in: L. Azoulai (ed.), The Question of Competence in the European Union, Oxford: Oxford Union Press 2014, p. 162; A. Arena, "The doctrine of Union pre-emption in the EU single market: between Sein and Sollen," Jean Monet Working Paper 03/10, p. 47.

[1140] P. Craig & G. De Burca, *EU Law*, Oxford: Oxford University Press 2024, p. 657; J.R. Torenbosch, "*Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen*", *NTBR* 2024/24, para. 4.1.

[1141] See on this subject Y. Hofhuis, "*Minimumharmonisatie in het Europese recht"*, Deventer: Kluwer 2006, pp. 95 and 96.

[1142] Y. Hofhuis, "*Minimumharmonisatie in het Europese recht*", Deventer: Kluwer 2006, pp. 6 and 102.

[1143] K. Lenaerts & P. van Nuffel, "*Europees recht"*, Antwerp: Intersentia 2023, p. 226.

[1144] ECJ 14 April 2005, C-06/03 (*Deponiezweckverband*), paras. 41 and 58.

[1145] CJEU 21 July 2011, C-2/10 (*Windmills*), para. 50.

for more far-reaching environmental measures. This each time requires an interpretation of the specific EU instrument. This is all the more true because an EU instrument may often be formally based on internal market interests, but the specific provisions within that instrument may indeed have a different objective, such as an environmental objective. It has already been noted above that the CSDDD, for example, has such a character.[1146]

640 Finally, it is relevant whether secondary EU law was established to comply with obligations under international law and whether the member state is pursuing compliance with those same obligations with its national measures. In such a case, more far-reaching national measures are permitted.[1147] For example, Belgium was permitted to adopt measures against exposure to radiation hazards that went beyond what the Radiation Directive in force at the time prescribed, despite a prohibition to that effect by the European Commission, because Belgium was complying with recommendations of the ICPR with these measures.[1148] Logically, the foregoing also applies if the EU and the member state seek to comply with binding obligations under international law and human rights law with their measures, such as the obligations to offer protection against dangerous climate change.

641 The level of harmonisation of an instrument of secondary EU law can therefore only be assessed for every provision specifically. The need for a specific examination at the level of the provision clearly follows from a recent dispute regarding the extent to which member states are allowed to adopt more far-reaching measures in relation to the EU ETS. As already discussed in Section V.6.2 of this Explanatory Submission, the EU ETS for installations provides for a system of emission allowances with a cap that is gradually lowered.[1149] Part of this system consists of free emission allowances that are allocated to certain parties for installations, which (in summary) aim to kick-start the system and prevent carbon leakage. This specific component of the EU ETS concerns maximum harmonisation. This raised the question whether member states were allowed to adopt measures that interfere with this system of free emission allowances.

642 In this case, Advocate General Ćapeta reached a nuanced conclusion at the level of the specific and fully harmonised provisions of the Directive relating to free emission allowances and the objectives they serve. The only thing that member states are not allowed to do is adopt measures that undermine the objectives of those provisions.[1150] In line with this, the CJEU subsequently ruled that Article 1 and Article 10a of the Directive preclude a national scheme under which a party that has been allocated free emission allowances under the EU ETS is specifically subjected to a tax on CO_2

[1146] See, in this regard, Section V.6.2 of this Explanatory Submission.
[1147] Y. Hofhuis, "*Minimumharmonisatie in het Europese recht"*, Deventer: Kluwer 2006, p. 30.
[1148] ECJ 25 November 1992, C-376/90 (*Commission/Belgium*), paras. 21, 25 and 26.
[1149] See, in this regard, Section V.6.2 of this Explanatory Submission.
[1150] Opinion of Advocate General Ćapeta dated 9 October 2025, ECLI:EU:C:2025:773, paras. 67 and 68.

emission allowances, where such a scheme neutralises the compensatory effect of those free emission allowances and conflicts with the objectives of the EU ETS of ensuring competitiveness and preventing carbon leakage.[1151] However, irrespective of this component of the EU ETS, it *is* permitted for member states to adopt more far-reaching climate measures. According to the Advocate General, such measures could, for example, consist of a carbon tax that would increase the production costs for companies and thus also apply to installations entitled to free emission allowances within the scope of the EU ETS.[1152] This example underscores the fact that the harmonisation assessment must be conducted at the level of the instrument in question and (subsequently) at the level of a specific component of the instrument.

(iii) Circumvention of a specific instrument and a specific rule

643 If a national measure falls outside the scope of the relevant instrument of secondary EU law (step (i)) or falls within a member state's margin of appreciation because the instrument provides for minimum harmonisation (step (ii)), such a measure will of course be permitted in almost all cases. The conclusion in that case is, after all, that the member state is making use of the room left to it under Article 2(2) TFEU and Protocol No. 25 that the EU will not encroach upon. This applies in particular if the national measure is consistent with the objectives of the secondary EU law. Essentially, a conflict can never arise, because the national measure is actually serving those objectives.

644 According to some authors, the CJEU can still accept, in very exceptional cases, that national provisions may stand in the way of the full effect or full functioning of *specific* provisions of *specific* secondary EU law. A reason for this may be that the national measure hinders the full effectiveness of such specific provisions.[1153] This analysis is highly casuistic in nature, for the mere reason that it is a "concluding element". It requires a specific analysis of the objectives of a specific instrument of secondary EU law, of the purpose and structure of the specific provision that would be interfered with, and of the effect of the national measures that would result in such interference. After all, it is only at that level that it can be determined whether a specific provision is being interfered with.[1154]

645 The legal literature bases this "circumvention test" on a few examples from the case law of the CJEU.

[1151] CJEU 16 April 2026, C-519/24 (*Nitrogénművek/Nemzeti*), para. 38.

[1152] Opinion of Advocate General Ćapeta dated 9 October 2025, ECLI:EU:C:2025:773, paras. 67 and 68. In this regard, she refers to J.V. Nysten, "On the legality of national carbon pricing instruments alongside the new EU ETS 2," npj Climate Action, vol. 3, no. 91, 2024, pp. 1 up to and including10.

[1153] See, for example, J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht*", Amsterdam: Delex 2025, pp. 65 and 66, which refers in this regard to (among others) ECJ 30 November 1978, C-31/78 (*Bussone*), para. 43; ECJ 17 September 2002, C-253/00 (*Muñoz*), paras. 28 up to and including 30; CJEU 21 March 2024, C-714/22 (*S.R.G./Profi Credit Bulgaria*), para. 84.

[1154] See, for example, J.R. Torenbosch, "*De slaafse nabootsingsleer getoetst aan het Europese recht"*, Amsterdam: Delex 2025, pp. 65, 66 and 74.

(a) In the *Dexia* case, the central issue was whether national law may fill the contractual void that had arisen after the annulment of an unfair term. According to the CJEU, this conflicts with Article 7 of the Unfair Terms Directive, which aims to put an end to the inclusion of unfair terms in consumer contracts. Sellers would not be sufficiently deterred if they could fall back on national law.[1155] The analysis is therefore made here at the level of the specific directive and the specific provision.

(b) In the case *of D.V./M.A.,* the CJEU ruled, for the same reasons, that a lawyer, following the declaration of invalidity of an unfair term (in this case: merely stating the lawyer's hourly fee without also providing an estimate of the total costs) may not, in principle, fall back on supplementary national law, even if this results in the lawyer receiving no remuneration whatsoever for the services rendered by them.[1156] Here, too, the analysis is therefore made at the level of the directive and of the provision.

(c) The CJEU has further held in several judgments that national procedural law may conflict with EU law in special cases, because the application of that procedural law in those specific cases could make the exercise of the rights granted by EU law impossible or extremely difficult, which, in light of the principle of effectiveness, is contrary to Articles 6 and/or 7 of the Unfair Terms Directive.[1157] Here too, the assessment takes place at the level of the directive and of the specific provisions.

646 First and foremost, it should be noted that the circumvention test in these cases was each time made *within the scope* of the relevant EU instrument. After all, the Unfair Terms Directive applies (in summary) to all general terms and conditions between consumers and professional counterparties. The above case scenarios were invariably covered by this. As a result, these judgments do not provide a basis for the conclusion that the circumvention test can also take place in violation of Article 2(2) TFEU and Protocol No. 25 - outside the scope of an instrument of secondary EU law.

647 Whatever the case may be, it follows from these cases and their analysis in legal scholarship that the application of national law in a specific case can conflict with specific secondary EU law. This requires a case-based analysis at the level of the specific EU instrument and a specific provision of that instrument. Only in this way can it be accepted that the application or effect of national law in a certain way precludes

[1155] CJEU 27 January 2021, C-229/19 and C-289/19 (*Dexia*), para. 64.
[1156] CJEU 12 January 2023, C-395/21 (*D.V./M.A.*), para. 68.
[1157] See CJEU 9 April 2024, C-582/21 *(Prof Credit Polska),* para. 78; CJEU 29 February 2024, C-724/22 *(Investcapital),* para. 58; CJEU 25 January 2024, C-811/21 (*Caixabank*), paras. 54, 55 and 61; CJEU 18 January 2024, C-531/22 *(Noble Bank),* para. 61.

the achievement of the objectives of specific provisions of EU law or precludes the full effectiveness or the functioning to its full capacity of specific provisions of EU law.

648 From this it follows that this final assessment cannot, in any case, be conducted in respect of a vast patchwork of secondary EU law. After all, in the case of a patchwork, various forms of secondary EU law have been combined. These instruments have different scopes of application, different objectives and different levels of harmonisation, and, moreover, consist of all sorts of different provisions intended to achieve those objectives in a variety of ways. As a result, performing a circumvention test in respect of such a patchwork will lead to nothing, because it will not become clear against which precise objectives the test should be performed, to what extent and how room was left in the instruments for the member states (via the intended scope of application and level of harmonisation) and in what sense an objective envisaged by a specific provision or chosen system might be circumvented. This will be an important starting-point in the discussion of the objections raised by Shell in ground of appeal no. 1.1.

V.6.8 Defence against ground of appeal no. 1 of the conditional cross-appeal in cassation of Shell

649 In light of the foregoing, Milieudefensie et al. will discuss below the objections in ground of appeal no. 1 of the conditional cross-appeal in cassation. It is worth noting that the objections, particularly those in ground no. 1.1, have been presented by Shell in a rather unstructured manner and show significant overlap. Where possible, Milieudefensie et al. will each time indicate in a footnote where the relevant objection made by Shell can be found.

EU policies viewed in their entirety (ground of appeal no. 1.1)

650 Shell's objections in ground of appeal no. 1.1 (particularly in ground of appeal no. 1.1.1 under a. and b. and ground of appeal no. 1.1.3 under a., c. up to and including e., and g.), which argue that a legal duty of care regarding CO_2 reduction based on national law is inconsistent with the patchwork of EU policies sketched by Shell in ground of appeal no. 1.1.2 (and which is exhaustive, according to Shell) are unfounded in view of what was discussed above.[1158] The objections wrongly suggest that a single clear objective and a single clear, exhaustive balancing of interests as outlined by Shell can be distilled from that patchwork. By extension, the objections assume that Shell's duty of care can be assessed against that "EU distillate".

651 First of all, Sections V.6.2 and V.6.3 of this Explanatory Submission set out that EU policies are aimed, in a broad sense, at CO_2 reductions, accelerated and large-scale reductions in the use of fossil fuels and a rapid development of sustainable alternatives.

[1158] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 28 under (i) up to and including (v), 31 up to and including 35, 51 up to and including 53, 55 up to and including 62, and 66 up to and including 68.

With these policies, the EU aims not only to help the climate, but also to contribute to energy security, European competitiveness and its energy independence. Moreover, EU policies actually give member states considerable leeway for more far-reaching climate measures, which is also confirmed by the history of the CSDDD's development. The general picture of these instruments as outlined by Shell is therefore already wrong at a fundamental level. In that light, it is inconceivable that a due duty of care to reduce CO_2 emissions based on national law would fail the circumvention test, assuming that such a test could even be conducted at this very general level. After all, such a duty of care is fully in line with the direction and objectives of EU policies. For that reason alone, Shell's objections are unfounded.

652 Second, the circumvention assessment advocated by Shell is not legally possible. This was already addressed in Section V.6.7 of this Explanatory Submission. In that section, Milieudefensie et al. explained that this assessment must be conducted at the specific level of a specific provision of a specific instrument of secondary EU law. As a result, the patchwork woven by Shell cannot be properly assessed. After all, in reality, that patchwork breaks down into a wide range of instruments of secondary EU law with different scopes of application, different degrees of harmonisation, different specific objectives and a large number of individual provisions. This was discussed in Sections V.6.2 and V.6.3 of this Explanatory Submission.

653 This immediately makes it clear why the circumvention test advocated by Shell cannot lead to anything; the patchwork woven by Shell for this purpose does not provide a court with even a starting-point for a consistent assessment. What scope of application and what degree of minimum harmonisation of which instrument must the court start out from? Also, must the court start out from the objectives of the EU ETS, or, instead, from those of ReFuelEU, or perhaps from those of the CSDDD? And in that case: how do all these scopes of application and objectives relate to each other? Do some objectives carry more weight than others? And exactly which specific provisions must the court assess? Shell is offering no clarity whatsoever in this regard. A court cannot conduct such an unclear and unstructured assessment. And EU law does not require a court to do so either. This is another reason why the objections are unfounded.

The principle of energy solidarity (ground of appeal no. 1.1)

654 In ground of appeal no. 1.1 (specifically in ground of appeal no. 1.1.1 under e. and ground of appeal no. 1.1.3 under b.), Shell further argues that a duty of care to reduce CO_2 emissions under national law would conflict with the principle of energy solidarity. To this end, Shell sketches the picture that the principle of energy solidarity requires a court to assess whether a national measure carries the risk of jeopardising the energy interests and the continuity of the energy supply in (other) member states or the EU. In the event of conflicting interests, the court must balance those interests, according to

Shell's objections. This must not be done on the basis of assumptions, but on the basis of specific information. In Shell's view, the Court of Appeal should have carried out this assessment, with a supplementation of the legal grounds based on Article 25 of the Dutch Code of Civil Procedure.[1159]

655 The principle of energy solidarity is grounded in Article 194(1) TFEU. That article reads as follows:

> Article 194 TFEU
> 1. *In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
>
> *(a) ensure the functioning of the energy market;*
>
> *(b) ensure security of energy supply in the Union;*
>
> *(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
>
> *(d) promote the interconnection of energy networks.*

656 The principle of energy solidarity is read into the phrase *"in a spirit of solidarity between Member States*." According to the CJEU's *OPAL* judgment, this principle means that the EU institutions and the member states must ensure, in the context of the establishment and functioning of the internal market, and in particular the internal market of natural gas, the security of energy supply in the EU. To that end, they must not only deal with emergencies when they arise, but also adopt measures to prevent crisis situations.[1160] Precisely because of this focus on emergencies and crisis situations, a CO_2 emission reduction obligation based on national law does not fall within its scope. The objection is already unfounded for this reason.

657 In the *OPAL* judgment, the CJEU further clarified that the application of the principle of energy solidarity does not mean that the EU's energy policy must never have negative impacts for the particular energy interests of a member state.[1161] This means that the EU and the member states are allowed to take measures that could be detrimental to gas supplies within the EU or to the supply of other types of energy between the member states, if other interests - including, in particular, environmental interests – carry more weight.

[1159] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 28 under (vi), 40 up to and including 42, and 54.
[1160] CJEU, 15 July 2021, C-848/19 (*OPAL*), para. 69.
[1161] CJEU, 15 July 2021, C-848/19 (*OPAL*), para. 73.

658 The EU policies described in Sections V.6.2 and V.6.3 of this Explanatory Submission illustrate how this balancing of interests plays out. After all, from the perspective of protection against dangerous climate change, energy security, European competitiveness and the EU's energy independence, those policies aim for considerable CO_2 emission reductions, an accelerated phase-out of fossil fuels and a large-scale shift towards renewable energy sources. Furthermore, Article 22(1) CSDDD established a corporate CO_2 reduction obligation, without an exemption for energy suppliers or oil and gas companies. From this it follows that the EU legislator does not see any conflict with the principle of energy solidarity in a reduction in fossil-fuel use and in the CO_2 emission reduction obligations focussing on this. After all, the result of the EU policies will be that less use is made of fossil fuels (including gas) within the EU. That is precisely the intended outcome. Consequently, a duty of care under national law to reduce CO_2 emissions does not conflict with the principle of energy solidarity either.

659 Another reason why the objection cannot succeed is that Shell did not rely on the principle of energy solidarity before the lower courts. That is what has led Shell to rely on Article 25 of the Dutch Code of Civil Procedure. However, that reliance can be of no avail to Shell, because the principle of energy solidarity, as shown above, is intended solely to prevent emergencies and requires a balancing of interests between the energy interests of the EU and the member states and the interests served by the duty of care to prevent or limit dangerous climate change. Shell has not presented any arguments on this point (in the context of the principle of energy solidarity), nor has Shell explained why an emergency might arise or why the interests (and which interests) of the EU and the other member states should carry more weight than the climate interests served by the duty of care. This means that Shell has also not provided any concrete information – which Shell's objection itself presents as a requirement - indicating that the energy security of other member states or the EU could in any way come under threat with the duty of care. The objection does not refer to any such assertions either. For this reason, Milieudefensie et al. did not raise, and could not raise, a defence on this point. In short, there was no reason or obligation for the Court of Appeal to supplement the legal grounds with the principle of energy solidarity.

660 Finally, the principle of energy solidarity is directed only at the member states and the EU institutions. Only between them is the principle of energy solidarity binding at EU level. The principle is too general to have direct effect in the national legal systems, as it lacks the sufficiently clear and precise contents required for such direct effect. Shell's objection is unfounded.

The principle of sincere cooperation (ground of appeal no. 1.1)

661 Shell further argues in ground of appeal no. 1.1 (in particular in ground of appeal no. 1.1.1 under d. and ground of appeal no. 1.1.3 under a.) that a duty of care to reduce CO_2 emissions conflicts with the principle of sincere cooperation. According to Shell, this principle obliges member states to refrain from any measures which could jeopardise the attainment of the EU's objectives and undermine the effectiveness of EU-law provisions. According to the objection formulated by Shell, such measures should not affect the competence of other member states to make their own judgments. Furthermore, a certain level of seriousness is allegedly required for a violation of this negative obligation. Countries and sectors dependent on fossil fuels are said to be disproportionately affected by a duty of care.[1162]

662 Article 4(3) TEU, which formulates the principle of sincere cooperation, reads as follows:

> Article 4 TEU
> *3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*

663 The principle of sincere cooperation requires - as a positive obligation - that Member States assist each other in complying with EU obligations and contribute to facilitating the EU's tasks. At the same time, the principle requires - as a negative obligation - that member states refrain from taking measures which could jeopardise the attainment of the EU's objectives.[1163] This dual nature of the principle of sincere cooperation is inherently problematic. After all, the EU has various objectives that sometimes conflict with each other. A member state that fulfils its positive obligation based on the principle of sincere cooperation to serve an EU objective can, to that end, sometimes take measures that, at first glance, are not entirely in line with other objectives. This makes the application of the principle to concrete situations difficult.

664 The CJEU resolves this inherent "tension" within the principle of sincere cooperation by limiting the application of the negative obligation to exceptional cases. For this purpose,

[1162] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 28 under (iii), 37 up to and including 39, and 51 up to and including 53.
[1163] K. Lenaerts & P. van Nuffel, "*Europees recht*", Antwerp: Intersentia 2023, p. 104.

the CJEU has ruled that the wording of the negative obligation under Article 4(3) TEU reflects the EU legislature's express intention to limit its scope to *"situations of a particularly serious nature"*.[1164] Only in such exceptionally serious situations can it be said that a member state is actually jeopardising the EU's objectives and is therefore not pursuing any other objectives anymore. What Shell is suggesting by omitting this crucial addition by the CJEU (i.e. that only "*some degree of seriousness*" is required)[1165] is therefore also wrong. Shell's objections already fail for this reason.

665 Furthermore, Shell does not say with which EU objective a CO_2 reduction obligation would precisely conflict with. Without this information, no assessment against the principle of sincere cooperation can be made. The unspoken suggestion of Shell's objection seems to be that it is the EU's objective to serve energy security within the EU (partly for the benefit of countries and sectors that are *more* dependent on fossil fuels) by allowing an undiminished and even increasing supply of oil and gas. This suggestion is diametrically opposed to the actual objectives of the EU. Sections V.6.2 and V.6.3 of this Explanatory Submission discussed at length that the EU, in light of its climate objectives, energy security, competitive position and energy independence, is in fact aiming for a significant reduction in the use of oil and gas and a strong increase in renewable energy. A CO_2 emission reduction requirement is therefore fully in line with the EU's objectives. For this reason, too, Shell's objection cannot lead to an overturning of the Judgment of in cassation.

666 Finally, Shell's ground of appeal ignores that Shell did not substantiate in the lower courts that the principle of sincere cooperation has been breached, let alone adequately substantiate in these courts with which specific EU objective a CO_2 reduction obligation conflicts, and why a situation of a particularly serious nature as required by the principle has occurred. This means that the formulated objection is not referring to any specific submission. This is yet another reason why the ground of appeal is unsuccessful.

The principle of proportionality (ground of appeal no. 1.1)

667 Furthermore, Shell is arguing in ground of appeal no. 1.1 – in particular in ground of appeal no. 1.1.1 under c. and ground of appeal no. 1.1.3 under f. - that a duty of care to reduce CO_2 emissions conflicts with the general EU-law principle of "proportionality". To that end, Shell argues, citing two CJEU judgments[1166], that the principle of proportionality requires that a national measure must always be proportionate, and thus appropriate and necessary to achieve the desired objective. This requires a weighing against other EU objectives. That bar is allegedly very high if the national measure has the same objective as the relevant EU rules, because a balancing of interests is already

[1164] CJEU 7 September 2023, C-15/22 *(RF/Finanzamt G)*, para. 63.
[1165] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 38.
[1166] CJEU 13 July 2017, C-129/16 (*Túrkevei Tejtermelö*); CJEU 9 March 2010, C-379/08 (*Raffinerie Mediterranee*).

inherent in those rules. According to Shell's objection, EU law already aims for a high level of protection. In line with this, Shell argues that a CO_2 reduction obligation will have a major impact on the other objectives of the EU as well as on individual companies such as Shell, while such an obligation is ineffective. Even if it were effective, there would be a mismatch between that effect and the "huge impact" of the CO_2 reduction obligation on those other objectives of the EU and individual companies such as Shell, still according to Shell.[1167]

668 Article 5 TEU sets out the general principle of proportionality of EU law. The principle of subsidiarity is also included here. The relevant part of this provision reads as follows:

> Article 5 TEU
> 1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality* (…).
>
> *3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*
>
> *4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

669 The general EU principle of proportionality aims to limit the extent to which the EU interferes with national sovereignty to take the measures that are necessary for and proportionate to the intended objectives of the EU. This also applies to the principle of subsidiarity. The proportionality requirement thus imposes proportionality requirements on measures adopted *by the EU*. The principle thereby serves as the starting-point of Article 4(1) TEU and Article 2 TFEU that member states retain their sovereignty in areas not regulated by the EU.

670 In line with this, the CJEU has ruled that the mere fact that a national measure relates to an area in which the European Union *also* has powers is not sufficient to bring that measure within the scope of EU law.[1168] According to the CJEU, it further follows that the principle of proportionality does not apply to that area not regulated by EU law. This

[1167] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 28 under (vii), 36 and 63 up to and including 65.
[1168] CJEU 19 November 2019, C-609/17 (*Terveys- ja/Hyvinvointialan liitto ry*), paras. 46 and 53; CJEU 10 July 2014, C-198/13 (*Julian Hernández*), para. 36.

is the case, for example, when a member state makes use of the leeway afforded to it by minimum harmonisation in order to adopt more far-reaching environmental measures:

> *"64. (…) the Community-law principle of proportionality is not applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by a Community directive in the sphere of the environment, inasmuch as other provisions of the Treaty are not involved."*[1169]

671 This is easy to understand. If national measures lying under the harmonisation threshold of an EU legal instrument are taken and do not implement any EU law, they are purely national measures. The EU-law principle of proportionality, which is focused on the proportionality of EU law, does not apply to such measures. Of course, those national measures still need to be consistent with primary EU law.[1170]

672 A somewhat atypical situation arises when EU law designates bodies of a member state (often referred to as the "competent authority") in order to carry out (nationally implemented) EU legislation. In that case, the member state will be implementing EU law. Sometimes, EU law also leaves room for a further shaping of the EU rules at national level. In that case, the member state in question must also observe the EU-law principle of proportionality when shaping that national legislation. That is understandable, because the member state is, essentially, implementing EU law in that case.

673 This situation had arisen in the two cases cited by Shell. Both cases concern the Environmental Liability Directive, which seeks to prevent environmental damage caused by operators. To that end, Article 6(2)(c) Environmental Liability Directive confers the power on member states (the competent authority) to require the operator to take remedial measures. However, the Environmental Liability Directive does not specify exactly which concrete remedial measures the competent authority may require. In this regard, the CJEU found that member states may themselves identify concrete remedial measures within their legal systems. By extension, when those concrete remedial measures are identified, member states must comply with EU principles and thus also with the EU-law principle of proportionality:

> *"79. Directive 2004/35 does not specify the precise conditions under which the competent authority may require the operators concerned to take the remedial measures identified by the authority. In such circumstances, it is for each Member State to determine those*

[1169] ECJ 14 April 2005, C-06/03 (*Deponiezweckverband*), para. 64.
[1170] F. Amtenbrink & H.H.B. Vedder, "*Recht van de Europese Unie*", The Hague: Boom Juridische uitgevers 2022, p. 369.

> *conditions, which must, first, seek to attain the objective of the directive, as set out in Article 1 thereof, namely to prevent and remedy environmental damage and, second, comply with EU law, in particular its general principles."*[1171]

674 The second case cited by Shell centred, essentially, on a similar question. Under Hungarian law, a national remedial measure in the form of a fine was directed at not only the operator, but also the owner of a parcel of contaminated land, who were not the same parties. This raised the legal question of whether that member state, when adopting the national remedial measures envisaged by the Environmental Directive, was also allowed to opt for measures targeting a party other than the operator. The CJEU answered that question in the affirmative, but did point out, with reference to the recital cited above, that such national rules must comply with EU law, including the principle of proportionality.[1172] This case, again, concerns the proportionality of measures within the national legal system adopted under EU law.

675 Contrary to what Shell wants, the general EU-law principle of proportionality therefore does not require that every national measure is always proportionate to the objectives of the EU. That ignores the nature of the EU-law principle of proportionality. All that the principle of proportionality requires is - precisely the opposite - that the EU law and the national measures taken based on that EU law do not interfere with the national sovereignty any further than the objectives of such a measure inspired by EU law require. The answer to the reverse question of whether national measures are compatible with EU law must be determined based on the assessment described in Section V.6.7 of this Explanatory Submission.

676 A proportionality test operating in reverse would also be inconsistent with the scope of the general principle of proportionality under EU law. After all, that test examines whether a rule is necessary and proportionate in relation to *its own objectives* to restrict a certain right, freedom or power, such as (in the case of EU law) the sovereignty of member states.[1173] In Shell's approach, this test loses its original nature. After all, Shell does not want the Court to assess the proportionality of the national-law duty of care to limit CO_2 emissions against the environmental objectives it seeks to achieve, but against other (incorrect) EU objectives presented by Shell. This derails the assessment, as it is no longer clear in that case *in relation to what* the proportionality of the national measure must be assessed, how different objectives within EU law must be reconciled with each other within that assessment and which freedom or power is actually being restricted in

[1171] CJEU 9 March 2010, C-379/08 (*Raffinerie Mediterranee*), para. 79.
[1172] CJEU 13 July 2017, C-129/16 (*Túrkevei Tejtermelö*), para. 61.
[1173] The same system can be found in the restriction of the four freedoms guaranteed by EU law. Those freedoms may be restricted if there is a legitimate justification for doing so. The proportionality test is also part of this, since it concerns a restrictive measure. No decision has to be taken on that issue in this case and the grounds of appeal rightly do not cover it.

that case. The cause of this derailment lies in the fact that Shell is wrongly reversing the perspective of the general EU-law principle of proportionality. Shell's objection is unfounded.

Level playing field, competitiveness and investments in sustainable alternatives (grounds of appeal nos. 1.1.3 under d., e. and g.)

677 Finally, in grounds of appeal nos. 1.1.3 under d. and e., Shell cites several general concepts shaped in EU law that would be jeopardised by the imposition of a CO_2 reduction injunction based on a duty of care, according to Shell. To this end, Shell first points to the level playing field and Europe's competitive position. The underlying argument is that only Shell – or, in any event, only Dutch or EU companies - would be held to a CO_2 reduction obligation.[1174] Furthermore, Shell is arguing in ground of appeal no. 1.1.3 under g. that such a duty of care could have unintended adverse consequences for the energy transition. Investments in net-zero technology also generate CO_2 emissions. A duty of care to reduce CO_2 emissions would therefore neither encourage companies to invest in sustainable alternatives nor incentivise them to have their customers switch to more sustainable alternatives.[1175] These perspectives are not part of the objections formulated in ground of appeal no. 1.1 or contain any clear objections themselves either. Milieudefensie et al. therefore assume that they are not intended to be presented as independent objections to the Judgment. They further note the following in this regard.

678 This line of reasoning by Shell is difficult to follow in many respects from a doctrinal perspective alone. Its main flaw is, first of all, that Shell does not clarify which EU-law standard it has in mind, let alone explain how and why a CO_2 reduction obligation would conflict with such a standard. EU law does not recognise a right to a level playing field, a right to European competitiveness or a right to prevent (alleged) negative consequences of climate measures. It was along these lines that the Court of Appeal, in the *Urgenda* case, rightly rejected the grounds of appeal of the Dutch State (which amounted to the fact that a reduction obligation imposed on the State would harm the level playing field for, and the competitiveness of, Dutch companies and which was not challenged in cassation at the time[1176]). A level playing field is not an independent criterion against which an assessment can be made.[1177]

679 Furthermore, Shell is overlooking the fact that the existence of differences among member states that affect the level playing field for companies is not, in and of itself,

[1174] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 60 up to and including 62.
[1175] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 66 up to and including 68.
[1176] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 4.209.
[1177] Judgment of the Court of Appeal of The Hague of 9 October 9, 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), ground 56.

contrary to EU law. If a national measure does not fall within the scope of application of the internal (primary or secondary) market rules, EU law accepts the existence of differences among member states. This applies equally in cases of minimum harmonisation. More far-reaching measures are permitted in that case, even if they may, to some extent, affect the playing field on which different companies operate. There is no basis for concluding that a measure conflicts with EU law in that case.

680 Also, Shell is wrongly assuming that the duty of care to prevent or mitigate dangerous climate change applies solely to Shell. That is incorrect. The duty of care applies to all companies that are bound by it on the basis of the objective points of reference discussed in Chapter IV of this Explanatory Submission. Moreover, establishing CO_2 reduction obligations is by no means limited to the Netherlands. Worldwide, claimants are seeking reduction injunctions against companies that contribute significantly to dangerous climate change. In France[1178] and Belgium[1179], for example, TotalEnergies has been sued. In Switzerland, residents of the island of Pari are demanding a percentage-based CO_2 reduction obligation from concrete company Holcim.[1180] In the United States as well, a number of lawsuits against oil and gas companies are pending that can be decided at state level.[1181] Meanwhile, lawsuits aimed at CO_2 emission reductions are also pending in Japan,[1182] Italy,[1183] New Zealand[1184] and Poland.[1185] It is expected that many more dozens, and perhaps even hundreds, of cases will be brought both in the Netherlands and abroad.[1186] It is relevant to note here that the *Urgenda* ruling has been followed all around the world, has led to several landmark rulings in many jurisdictions[1187] and is, essentially, the precursor to the *KlimaSeniorinnen* ruling.

[1178] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 980 and footnote 780. See https://www.asso-sherpa.org/climate-case-totalenergies-hearing-on-merits. For the current state of affairs, see, for example, https://www.climatecasechart.com/document/notre-affaire-a-tous-and-others-v-total_85ea.

[1179] For the status quo, see, for example, https://www.climatecasechart.com/document/hugues-falys-fian-greenpeace-ligue-des-droits-humains-v-totalenergies-the-farmer-case_5077.

[1180] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 980 and footnote 780. For the current status, see, for example, https://zg.ch/de/gerichte/zivil-und-strafrechtspflege/kantonsgericht#MitteilungA120239; https://www.climatecasechart.com/document/asmania-et-al-vs-holcim_f2ce. See also E.H.P. Brans & X.W. de Vries, "*De lange arm van het milieuaansprakelijkheidsrecht*" (The long arm of climate liability law) in MvV 2026/2, pp. 39 and 40.

[1181] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 390. See also the Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 103.

[1182] For the status quo, see, for example, https://www.climatecasechart.com/document/youth-climate-case-japan-for-tomorrow_74f6.

[1183] For the status quo, see, for example, https://www.climatecasechart.com/document/greenpeace-italy-et-al-v-eni-s-p-a-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-s-p-a_d341.

[1184] For the status quo, see, for example, https://www.climatecasechart.com/document/smith-v-fonterra-co-operative-group-limited_33b2.

[1185] For the status quo, see, for example, https://www.climatecasechart.com/document/greenpeace-poland-v-pge-giek_9581; https://www.climatecasechart.com/document/clientearth-v-polska-grupa-energetyczna_cdf4.

[1186] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 390. See also the Notes of the Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 89 and 90.

[1187] Oral Arguments (2) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 124 up to and including 127.

681 Shell's story is, essentially, its own policy view on how the EU, in light of the level playing field and the competitiveness of European companies - and, of course, Shell's own position in particular - should regulate national-law duties of care relating to CO_2 reduction. However, Shell's view is not consistent with EU policies, as described in detail in Sections V.6.2 and V.6.3 of this Explanatory Submission. From the perspective of the climate, energy security and the EU's competitive position and energy independence, EU policies are directed at a significant and accelerated reduction in fossil fuels and the growth and promotion of alternative energy. The EU leaves ample room for more far-reaching national reduction measures here, including the CO_2 reduction obligation for Shell demanded by Milieudefensie et al. That obligation is therefore in line with the objectives of the EU.

682 There is also no evidence whatsoever that Shell's duty of care to prevent or limit dangerous climate change would affect European or national competitiveness. This firstly follows from EU policies running counter to this by committing to the phase-out of fossil fuels and transitioning to sustainable alternatives, also for the sake of the EU's competitiveness. It secondly follows from the response of national and EU legislators to the reduction injunction issued against Shell in the Decision. Attention was paid to the Decision by the Dutch government in a letter to Parliament dated 6 December 2021. In that letter, the Minister of Economic Affairs and Climate Policy of the Netherlands concluded that the Decision did not provide the Dutch government with any direct reason to adjust its climate policy. On the contrary, he regarded it as an opportunity for companies to gain a competitive edge.[1188] There has been no response whatsoever from the EU legislature. So, apparently, the EU legislature saw no threat to EU policies in the Decision either. On the contrary, after the Decision, the EU has continued and further intensified its policies aimed at moving away from fossil fuels.

683 Finally, the negative consequences of Shell's duty of care in relation to climate policy, as outlined by Shell, will never occur. The essence of Shell's arguments is that the development of net-zero technologies could increase an individual company's emissions in the short term. If companies are required to comply with a CO_2 reduction obligation, they will not easily make such investments anymore and help customers switch to sustainable alternatives anymore, according to Shell.

684 In this way, Shell is painting a distorted picture of reality. As already noted in Sections II.2 and IV.5 of this Explanatory Submission, the UN climate regime and the objective points of reference - including a large number of soft-law sources - each individually take as their starting-point that companies must proceed to reduce their Scopes 1, 2 and 3 CO_2 emissions. Article 22(1) CSDDD also pointed in that direction. So, as opposed to Shell' argument, the starting-point of that regulatory framework was – and

[1188] Exhibit MD-341 (Letter from the Minister to the Dutch House of Representatives regarding the "Analysis of the Shell judgment" dated 6 December 2021), p. 4.

is – that companies *will* actually take actions leading to CO_2 reductions across all scopes, based on individual CO_2 reduction obligations. This means that the authorities responsible for drafting these instruments did not fear the dangers suggested by Shell.

685 This is easy to understand. The energy transition must be achieved gradually over a longer period of time within the limits of the available carbon budget.[1189] If investments in low-carbon solutions actually do temporarily cause higher CO_2 emissions - in a specific year, for example - companies will also simultaneously implement reduction measures to bring the reported CO_2 emissions down again. In the longer term within which the CO_2 reduction obligations must be fulfilled, the investments in sustainable alternatives will subsequently also lead to lower CO_2 emissions. In this way, the entire system will ultimately result in CO_2 reductions. This is the way in which companies will comply with their CO_2 reduction obligations. This is also the premise of the entire regulatory framework.

686 In the lower courts, Shell also failed to substantiate its argument that sustainability investments would limit its ability to achieve the required CO_2 reductions. This is understandable. The lion's share of Shell's activities relates to the production and combustion of oil and gas products. If it starts to reduce the supply of these products or uses its influence to shift demand for such products towards sustainable alternatives, any limited increase in its CO_2 emissions will be easily compensated by the declining CO_2 emissions associated with its oil and gas products. For all these reasons, Shell's arguments are invalid.

Conflict with Article 34 or 35 TFEU (ground of appeal no. 1.2)

687 In ground of appeal no. 1.2, Shell argues that its duty of care to prevent or mitigate dangerous climate change conflicts with the free movement of goods, as it could restrict cross-border movement. For this purpose, reference is made to Articles 34 and 35 TFEU.[1190] In the lower courts, Shell limited itself to invoking Article 34 TFEU. According to Shell, the Judgment of the Court of Appeal is insufficiently reasoned in light of the arguments presented by Shell on this point. In the cassation proceedings, Shell further argues that the Court of Appeal should have assessed the relationship between its duty of care and Article 35 TFEU *ex officio* pursuant to Article 25 of the Dutch Code of Civil Procedure.[1191]

688 This objection fails for lack of interest. Although the Court of Appeal found that Shell has a duty of care to prevent or mitigate dangerous climate change, it did not impose any concrete reduction obligation on Shell, which is what the majority of the objections

[1189] See, in this regard, Sections II.1.4 and II.1.5 of this Explanatory Submission.
[1190] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 19 under (b) and paras. 70 up to and including 73.
[1191] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 73 and footnote 249.

of the main appeal in cassation of Milieudefensie et al. are directed at. In the absence of any concrete reduction obligation, the Court of Appeal was not required to examine whether such an obligation would conflict with the free movement of goods. Only in the situation where Shell had been ordered to reduce its CO_2 emissions by a certain percentage by 2030 would Shell's argument based on Article 34 TFEU be relevant. The Court of Appeal therefore did not get round to assessing the arguments and submissions relating to this point. For that reason, the Court of Appeal did also not need to examine *ex officio* whether Article 35 TFEU precludes a concrete reduction obligation for Shell.

689 There are also other reasons why this objection of Shell fails for lack of interest. After all, the duty of care to prevent or limit dangerous climate change cannot, in any event, be considered as a restricting measure. For that reason, too, there was no need for the Court of Appeal to separately assess whether Article 34 or 35 TFEU had been violated. In the absence of a violation of these Articles, there was also no need for the Court of Appeal to assess whether a CO_2 reduction obligation constitutes a justified restriction.[1192] Milieudefensie et al. will explain this in more detail below.

No restriction on imports within the meaning of Article 34 TFEU

690 Article 34 TFEU provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states. According to established case law, the following must be regarded as prohibited measures:

(a) measures adopted by a member state the object or effect of which is to treat products coming from other member states less favourably; and

(b) any other measure which hinders access of products originating in other member states to the market of a member state.[1193]

691 The prohibition of Article 34 TFEU means that, to achieve the internal European market, member states may not impose restrictions that favour their own national markets in any way, nor may they put other types of obstacles in place for goods that were lawfully placed on the market in other member states.[1194] Discriminatory or protectionist measures or measures that raise the barriers for the import of foreign products into a state's national territory are therefore prohibited (unless there is a justification ground). General rules that could *also* affect energy transport do not, as such, fall under Article 34 TFEU. In line with this, the ABRvS (Administrative Jurisdiction Division of the Council

[1192] The duty of care would, incidentally, easily pass that test. See the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 1012 up to and including 1042.
[1193] See, for example, CJEU, 10 February 2022, C-499/20 (*DIMCO*), para. 28. See also the Commission Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (2021/C 100/44).
[1194] P. Craig & G. De Burca, "EU Law", Oxford: Oxford University Press 2024, pp. 698, 700 and 707.

of State of the Netherlands) holds the view that rules restricting the construction of wind turbines do not conflict with Article 34 TFEU, because they are not rules that restrict the import of goods into the Netherlands.[1195]

692 Furthermore, a national rule will not fall within the scope of Article 34 TFEU if its potentially restrictive effects are too uncertain and indirect. This applies in particular to measures that make no distinction according to the origin of the goods transported and do not seek to regulate the trade in goods with other member states.[1196]

693 A duty of care to prevent or mitigate dangerous climate change imposed on Shell does not constitute a restriction on imports. First, the duty of care does not determine how Shell must reduce its CO_2 emissions. For that reason alone, it is by no means certain that the duty of care will affect any imports of fossil fuels into the Netherlands in any way. Moreover, due to the freedom Shell has as to how to comply with that duty, any potential effect of the duty of care is in any case too uncertain and indirect to fall within the scope of Article 34 TFEU.

694 Second, the duty of care imposes a general obligation on Shell to reduce its global Scope 1, 2 and 3 CO_2 emissions. This obligation is therefore not limited to the Netherlands or the EU, nor does the duty of care target goods from other member states in any sense. On the contrary, the obligation makes no distinction whatsoever according to the member state or the origin of goods that may be affected by the duty of care. The duty of care does not seek to regulate trade between the Netherlands and other member states either; it is a general obligation for Shell to reduce its global CO_2 emissions. Shell is free to determine how it will comply this obligation, in terms of both the way in which Shell will achieve the reductions and the countries, member states and regions in which Shell will achieve them. For this reason, too, there is no question of any import restriction or measure having equivalent effect within the meaning of Article 34 TFEU. Shell's objections are unfounded.

No restriction on exports within the meaning of Article 35 TFEU

695 Article 35 TFEU provides that quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States. This provision is narrower in scope than Article 34 TFEU. According to the CJEU, Article 35 TFEU concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a member state and its export trade. If a particular advantage is provided for the national production or domestic market of the state in

[1195] ABRvS 30 August 2017, ECLI:NL:RVS:2017:2318 (*NDSM/Noord-Holland*), paras. 11.3 and 11.4.
[1196] ECJ 18 June 1998, C-266/96 (*Corsica Ferries France*), para. 31; ECJ 5 October 1995, C-96/94 (*Centro Servizi Spediporto*), para. 41. See further on this subject the Opinion of Advocate General Wahl dated 6 February 2019, C-591/17 (*Austria/Germany*), para. 123.

question at the expense of the production or trade of other member states, Article 35 TFEU is applicable.[1197] In line with this, the ABRvS does not consider rules restricting the construction of wind turbines to be in conflict with Article 35 TFEU either, because the rules are applicable, regardless of the end use of the generated energy. There is therefore no difference in treatment between domestic trade and export trade.[1198]

696 It follows from the above that a duty of care on the part of Shell to prevent or limit dangerous climate change does not conflict with Article 35 TFEU either. Even if Shell chooses to also achieve the required CO_2 reductions within the Netherlands, its duty of care does not result in a difference in treatment between goods exported by Shell from the Netherlands (or another member state) and goods traded by Shell within the Netherlands. This means that the objection is unfounded.

697 Incidentally, it is not possible to first rely on Article 35 TFEU at the stage of the cassation proceedings. Milieudefensie et al. have also merely interpreted Shell's arguments as an invocation of Article 34 TFEU[1199] and so have not been able to raise a defence against an assessment of Shell's duty of care based on Article 35 TFEU. Shell's reliance on Article 25 of the Dutch Code of Civil Procedure does not alter this. For this reason, too, the objections cannot lead to the Judgment being overturned.

Follow-up objection (ground of appeal no. 1.3)

698 In ground of appeal no. 1.3, Shell merely presents a follow-up objection ("*vervolgklacht*").[1200] This ground of appeal shares the fate of grounds of appeal nos. 1.1 and 1.2 discussed above and therefore cannot lead to the overturning of the Judgment.

No reasons for preliminary questions or stay of the proceedings

699 In connection with its arguments in ground no. 1 of its conditional cross-appeal, Shell requests the Supreme Court to refer questions to the CJEU for a preliminary ruling.[1201] It should first of all be noted that this suggestion can only have been inspired by a desire to delay proceedings. A preliminary ruling procedure would delay this case by at least two years, which would bring the year 2030 - which the demands of Milieudefensie et al. relate to - within sight. This applies all the more strongly if the court of remittal, following the remittal by the Supreme Court, would also have to consider the question what the *concrete* reduction obligation of Shell is. This could result in ineffective legal

[1197] ECJ 29 November 2003, C-12/02, (*Marco Grilli*), para. 41; ECJ 8 November 1979, C-15/79 (*Groenveld/Produktschap voor Vee en Vlees*), para. 7. See also the Guide on Articles 34-36 TFEU (2021/C 100/03), pp. 64 and 65.
[1198] ABRvS 30 August 2017, ECLI:NL:RVS:2017:2318 (*NDSM/Noord-Holland*), paras. 11.3 and 11.4.
[1199] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 1006–1042.
[1200] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 74.
[1201] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 25.

protection. That is something that partly determines how the referral of preliminary questions for a preliminary ruling should be dealt with.

700 In any case, there is no need to refer questions for a preliminary ruling, as this requires the existence of reasonable doubt about the interpretation of EU law.[1202] It has already been made very clear above that Shell's grounds of appeal based on EU law cannot possibly succeed, and thus do not cast reasonable doubt on the substance of EU law. After all, Shell's objections are based on a patchwork of EU instruments, through which Shell is painting an inaccurate picture of the substance of EU policies. In reality, EU law is diametrically opposite in meaning. Furthermore, Shell is advocating that a circumvention test should be conducted that is wrong and that, by its very nature, does not work in the case of a patchwork of instruments. Consequently, it is difficult to see how questions to be referred for a preliminary ruling should be formulated in concrete terms and the interpretation of which instrument and provision they would then concern.

701 There is in any event no reason to stay the proceedings as a result of preliminary questions, as EU law covers only about 16.6% of Shell's CO_2 emissions.[1203] This means that Milieudefensie et al. will continue to have an interest in a decision on all the relief sought by them, regardless of the substance of EU law, because that relief sought in any event also concerns the remaining 83% of Shell's CO_2 emissions. The Dutch Supreme Court must therefore assess those objections of Milieudefensie et al. independently of what EU law says. Should the Dutch Supreme Court nevertheless consider referring questions for a preliminary ruling, then Milieudefensie et al. request the Supreme Court - also in light of the requirement of effective legal protection - to *also* immediately deal with their remaining objections in an exhaustive manner in its interlocutory judgment in which the questions proposed for a preliminary ruling are submitted to the parties.

V.6.9 Further explanation of grounds of appeal nos. 1.35 up to and including 1.45 of the principal appeal in cassation of Milieudefensie et al.

702 When the Court of Appeal judged whether Shell is subject to a duty of care to prevent or mitigate dangerous climate change, it interpreted and took EU law into account in two ways that are detrimental to Milieudefensie et al. This concerns the findings of the Court of Appeal regarding (i) the impact of the EU ETS, the EU ETS 2 and the CSDDD on that duty of care and (ii) the scope of the CSDDD and CSRD. The objections set forth in grounds of appeal nos. 1.35 up to and including 1.45 of the principal appeal in

[1202] See, for example, the judgment of the Dutch Supreme Court of 23 June 2023, ECLI:NL:HR:2023:965 (*MTB/Heineken*), para. 3.7.

[1203] Response to questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 10 and 11. Shell itself declined to answer this question, both in the first-instance proceedings and on appeal. See also, in this regard, Section V.6.1 of this Explanatory Submission.

cassation of Milieudefensie et al. are directed at these findings. Milieudefensie et al. will explain their objections in more detail below.

Relationship with the EU-ETS, EU-ETS 2 and CSDDD (grounds of appeal nos. 1.35 and 1.36)

703 In grounds 7.35, 7.53 and 7.54, the Court of Appeal found (in summary) that the EU ETS system cannot easily be reconciled with the percentage-based reduction demands of Milieudefensie et al., that the EU-ETS 2 system should also be taken into account in the concrete of determination of Shell's duty of care and that existing legislation affects Shell's obligations according to the duty-of-care standard. Ground of appeal no. 1.36 challenges these findings. In its Judgment, the Court of Appeal ignored that the EU-ETS, the EU-ETS 2 and the CSDDD, along with their respective frameworks, do not have a limiting effect on a CO_2 reduction obligation based on national law. This follows from the EU policies that were discussed in great detail above. Milieudefensie et al. will further explain this below.

704 Sections V.6.2 and V.6.7 of this Explanatory Submission set forth that the EU ETS and the EU ETS 2 are instruments that implement the EU's own climate policies. As reflected in their nature, i.e. they are minimum-harmonisation measures, they do not wish to interfere with national climate polices. Under the EU ETS, member states are therefore free (apart from very specific rules that would interfere with the system of free emission allowances as part of the EU ETS) to adopt more far-reaching climate measures. Such measures could, for example, consist of a national carbon tax, which would increase production costs. That tax is also allowed to apply to installations entitled to free emission allowances.[1204] Furthermore, it has already been noted that the EU ETS 2 even actively encourages national reduction measures that are more far-reaching compared to the EU ETS and EU ETS 2.[1205] This indicates that member states can accept a CO_2 reduction obligation without circumventing the EU ETS and EU ETS 2.

705 Section V.6.2 of this Explanatory Submission further discussed that Article 22(1) CSDDD required companies, where appropriate, to set and achieve their own absolute reduction targets for Scopes 1, 2 and 3. That Article therefore also assumed that companies can have an independent CO_2 reduction obligation, in addition to the EU-ETS and EU-ETS2. The EU-ETS systems do not alter this. This applies all the more strongly because the CSDDD as enacted subsequently also permits, and even encourages, more far-reaching national CO_2 reduction obligations because of its nature as a minimum-harmonisation instrument.

[1204] Opinion of Advocate General Ćapeta dated 9 October 2025, ECLI:EU:C:2025:773, paras. 67 and 68, in which she referred to J.V. Nysten, "On the legality of national carbon pricing instruments alongside the new EU ETS 2," npj Climate Action, vol. 3, no. 91, 2024, pp. 1 up to and including10.

[1205] EU ETS 2, Recital (para. 12).

706 In the lower courts, the parties held a debate, in view of the District Court's findings regarding the EU ETS and from the perspective of Dutch law, whether the EU ETS has an "immunising effect." According to the District Court, the EU ETS provides Shell with immunity, insofar as Shell was allowed to rely on the fact that the interests to be considered had been fully and properly weighed by the relevant authorities when they allocated the emission allowances. This concerns the reduction target aimed for by the EU ETS system. This then pertains to Shell's Scope 1 emissions (which are very minimal in relation to its total emissions).[1206]

707 The Court of Appeal, rightly, did not approach this question from this doctrine of "immunising effect". After all, the doctrine of immunising effect solely concerns the question whether a party can still be held liable for conduct engaged in by it based on a licence issued to that party by a government body. In answering that question, it is particularly relevant whether the interests concerned were exhaustively weighed when the licence was granted, in addition to the nature of the licence.[1207] This question is distinct from the question whether an (EU) legislative instrument also regulates certain conduct exhaustively, and thus excludes any further obligations based on private law. That question must be answered based on an interpretation of the relevant legislative instrument. As previously discussed, the EU ETS, the EU ETS 2 and the CSDDD - even after being amended by Omnibus - leave room for a CO_2 reduction obligation and also encourage such national measures. For that reason, the conclusion of the Court of Appeal that these systems have a restricting effect on Shell's duty of care is incorrect.

Contents of the CSDDD and CSRD (grounds of appeal nos. 1.37 up to and including 1.45)

708 In ground 76, the Court of Appeal found (in summary) that companies such as Shell must align their strategies with the objectives of the Paris Agreement pursuant to EU directives such as the CSDDD and the CSRD, but held that those Directives do not impose absolute reduction obligations on individual companies or particular industries. The Court of Appeal appears to have based this finding on three considerations from grounds 7.44 up to and including 7.46.

(a) Article 22(1) CSDDD provides that the climate transition plan must contain time-bound targets and states that the plan must include absolute reduction targets for Scopes 1, 2 and 3 greenhouse gas emissions for each significant category, "*where appropriate*". Pursuant to Article 22(2) CSDDD, companies that report a climate change mitigation transition plan in accordance with the CSRD are also

[1206] Decision of the District Court, grounds 4.4.46 and 4.4.47.
[1207] Judgments of the Dutch Supreme Court of 21 October 2005, ECLI:NL:HR:2005:AT8823 (*Ludlage/Van Paradijs*) and 10 March 1972, ECLI:NL:HR:1972:AC:1311 (*Vermeulen/Lekkerkerker*).

deemed to have fulfilled the CSDDD obligation to adopt a climate change mitigation transition plan (ground 7.44);

(b) Shell also falls within the scope of application of the CSDDD. With effect from 26 July 2027, it must prepare a climate transition plan meeting the requirements of the CSDDD. Shell has argued that there is no obligation under the CSDDD (either) to introduce an absolute reduction target. Companies can include such a target in their climate transition plan, *"where appropriate*," but that target is not binding or static, as changes in circumstances may lead the company to adjust the target. In this connection, Shell is noting that while a proposal was made during the drafting process to require companies to impose an absolute reduction target on themselves, this proposal was not adopted. Shell also highlights the connection with the CSRD: under the CSRD, companies may set intensity targets, which Shell has done for Scope 3; a transition plan with such a target is sufficient for the CSDDD, according to Shell (ground 7.45); and

(c) In short, based on the CSDDD, Shell is under an obligation to draw up a climate transition plan consistent with the Paris Agreement and the targets the European Union has set for itself. However, the plan does not necessarily need to include an absolute reduction obligation (of, for example, 45%) for Scopes 1, 2 and 3. The text of the preamble to the Directive suggests some flexibility for companies to periodically adjust their own targets to the market conditions (ground 7.46).

709 In ground 7.46, the Court of Appeal appears to fully adopt Shell's position as set forth in ground 7.45, and to attach the conclusion to this that the climate transition plan does not necessarily have to include an absolute reduction obligation. To this, the Court of Appeal subsequently also attaches the conclusion that Shell will not have such an obligation either. Grounds of appeal nos. 1.38 up to and including 1.45 challenge the above-mentioned findings of the Court of Appeal from multiple perspectives. To that end, it is argued that the judgment of the Court of Appeal cannot be upheld (partly) in light of Article 22(1) CSDDD as applicable at that time. That test must be performed *ex tunc*. These grounds of appeal, in addition to the objections themselves and the discussion of the CSDDD in Section V.6.2 of this Explanatory Submission, require only a limited further explanation.

710 The first thing that must be noted is that the CSDDD starts out from a minimum-harmonisation approach and permits more far-reaching measures. Member states also, and particularly, have these powers for the CO_2 reduction obligations covered by Article 22 CSDDD. Milieudefensie et al. have already explained this in detail in Section V.6.2 of this Explanatory Submission. If the Court of Appeal had ruled that the CSDDD precludes a duty of care to reduce CO_2 emissions based on national law, its judgment would have been incorrect anyway (ground of appeal no. 1.38).

711 Furthermore, the objections essentially point out that the Court of Appeal has overlooked the fact that the CSDDD *did* require companies, "*where appropriate"*, to adopt *and achieve* the absolute Scope 1, 2 and 3 reduction targets determined in a climate transition plan. This literally followed from Article 22(1) CSDDD. After all, this provision, insofar as relevant, read as follows:

> Article 22 CSDDD
> *1. Member States shall ensure that companies referred to in Article 2(1), points (a), (b) and (c), and Article 2(2), points (a), (b) and (c), adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities.*
>
> *The design of the transition plan for climate change mitigation referred to in the first subparagraph shall contain:*
>
> (a) *time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category.*

712 This provision thus literally required companies, where appropriate, to set and achieve absolute reduction targets for 2030 and 2050. This is consistent with the preamble to the CSDDD, which required exactly the same thing.[1208] In ground 7.43, the Court of Appeal itself also refers to that text and preamble, which makes the judgment of the Court of Appeal all the more difficult to follow (grounds of appeal nos. 1.39 and 1.40).

713 The history of the CSDDD's development also sheds light on the question when it was deemed *"*appropriate*"* by the CSDDD to include concrete reduction targets in a climate transition plan. This was the case, among other things, if the company contributed significantly to climate risks.[1209] Emission reductions would therefore be "appropriate" if a company has significant CO_2 emissions within the relevant scope.[1210] Consequently,

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[1208] CSDDD, recitals (para. 73). See, in this regard, Section V.6.2 of this Explanatory Submission.

[1209] Minutes of the oral hearings on appeal dated 2, 3, 4 and 12 April 2024, p. 33. See also the Proposal for a Directive of the European Parliament and of the Council of 23 February 2023 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, para. 50, available at https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[1210] See, for example, B.A. Kuiper-Slendebroek, "*Tussen papieren ambities en juridische realiteit*" (Between paper ambitions and legal reality) in *SEW* 2025/9, p. 424; E.H.P. Brans and M.W. Scheltema, "*Shell/Milieudefensie. Geen*

it must be assumed that companies such as Shell, which emit significant quantities of CO_2 and thereby contribute substantially to dangerous climate change, would fall - or at least could fall - under the notion of "where appropriate". It was partly in this light that Milieudefensie et al. pointed out that Shell's obligations under the CSDDD would go just as far as a duty of care to reduce CO_2 emissions based on national law.[1211] Therefore the Court of Appeal should, at the very least, have provided a reasoned response to their point, because it follows - or at least can follow – from this that Shell would be required to implement a climate transition plan with concrete reduction obligations under Article 22(1) CSDDD. This reinforces the notion that such a CO_2 reduction obligation can also be accepted without any problems at national level (ground of appeal no. 1.41).

714 The Court of Appeal has further found that there is some flexibility for companies to periodically adjust their own reduction targets to the market conditions. With this finding, the Court of Appeal suggests that a company was allowed to make the level of effort under Article 22(1) CSDDD dependent on the market conditions. This is based on an incorrect interpretation of Article 22(1) CSDDD. The notion of "market conditions" is far too vague and overly focused on the financial interests of the company in question to be able to play a role in this context. The interpretation of the term "market conditions" and the extent to which they would be relevant will, after all, strongly depend on a company's own commercial objectives and commercial strategies. As a result, "market conditions" would always become a license for inaction.

715 That vague concept was therefore not what the EU legislator had in mind and it was not codified or mentioned by the EU legislator anywhere. This clearly follows from the preamble of the CSDDD, which is very specific on this point.[1212] That preamble stipulated that specific circumstances related to (i) the progress made by companies and (ii) the evolving nature of climate transitioning could mean - due to the best-efforts nature of the CSDDD objectives – could mean that it might not be reasonable anymore to expect companies to reach the targets set. The adjustment of the targets to the market conditions referred to by the Court of Appeal in ground 7.46 is therefore not covered by this (ground of appeal no. 1.42).

716 Furthermore, these specific circumstances envisaged by the CSDDD cannot negate the existence of the obligation of means *as such*. The CSDDD merely clarified that, in determining to what extent a company can fulfil its obligation of means (*"being an*

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reductiebevel voor Shell. Wel een aantal voor klimaat- en milieuzaken belangrijke mijlpalen" (Shell/Milieudefensie. No reduction injunction for Shell, but a number of important milestones for climate and environmental cases) in *M en R* 2025/42, para. 3. See also the Consultation version of the Explanatory Memorandum to the (draft) bill for the Internationally Responsible Business Act, p. 150, available at https://www.internetconsultatie.nl/wivo/document/13309.

[1211] Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 14 and 16.

[1212] CSDDD, preamble (recital (73)).

obligation of means"),[1213] the progress made by companies and the evolving nature of climate transitioning could *also* be relevant. Those circumstances therefore influenced the level of effort that could and should ultimately be expected from companies in order to comply with the CSDDD-based obligation at that time. The obligation of means as such remains unaffected. This is consistent with the finding of the District Court that Shell has a stringent obligation of means. Logically, within such an obligation there is always some flexibility that does not detract from the existence of that obligation itself (ground of appeal no. 1.43).[1214]

717 Finally, in ground 7.44 and (in particular) ground 7.56, the Court of Appeal seems to link the obligations under the CSRD and the CSDDD to each other in the wrong manner. First, the Court of Appeal suggests that the CSRD does not provide for a reporting obligation for absolute reduction targets. This in itself is already incorrect, because the CSRD does actually provide for such an obligation (*"where appropriate*") in Article 19a(2)(b) and 29a(2)(b). The Court of Appeal itself rightly also noted this in ground 7.40. In ground 7.44, the Court of Appeal further found that companies that report a climate transition plan in accordance with the CSRD pursuant to Article 22(2) CSDDD are also deemed to have fulfilled their obligation to adopt one under the CSDDD. With this finding, the Court of Appeal has suggested that a company will fulfil its obligations as applicable at that time under the CSDDD if it complies with its CSRD obligations. That interpretation of the law is incorrect. As previously discussed, Article 22(1) CSDDD also required, *"*where appropriate*," the putting into effect" of* the climate transition plan, including the absolute reduction targets included in that plan. So this goes beyond the reporting prescribed by the CSRD (grounds of appeal nos. 1.44 and 1.45).

No reason for preliminary questions or stay of the proceedings

718 There is no reasonable doubt about the interpretation of these elements of EU law. The Court of Appeal has overlooked the nature of the EU ETS, the EU ETS 2 and the CSDDD as minimum-harmonisation instruments. Furthermore, with regard to the CSDDD, the Court of Appeal has disregarded its clear text and preamble and thereby lost sight of the fact that a company could *also* be required under the CSDDD to put into effect the climate transition plan and the included absolute reduction obligations. Furthermore, the Court of Appeal has failed to examine whether Shell complies with the applicable *"where appropriate"* criterion. This means that there is no reason for referring questions for a preliminary ruling.

719 Should the Supreme Court nevertheless see grounds to do so, Milieudefensie et al. (once again) point out that the submission of preliminary questions cannot lead to a

[1213] CSDDD, preamble (recital (73)).
[1214] See, for the degree of flexibility within the stringent obligation of means, Sections VI.7.2 and VI.7.3 of this Explanatory Submission.

stay of the proceedings and still requires the Supreme Court to examine their other objections, because EU law affects only 16.6% of Shell's total CO_2 emissions.[1215]

V.7 Further explanation of the principal appeal in cassation of Milieudefensie et al.

V.7.1 The doctrine of hazardous negligence as an independent assessment framework (grounds of appeal nos. 1.3 up to and including 1.10)

720 In grounds of appeal nos. 1.3 up to and including 1.10, Milieudefensie et al. are challenging the role attributed by the Court of Appeal to the doctrine of hazardous negligence and the *Kelderluik* factors forming part of this doctrine when it established and fleshed out Shell's duty of care.[1216] In ground 7.3, the Court of Appeal considered that dangerous climate change is not entirely equivalent to the hazardous situations to which the *Kelderluik* factors tend to be applied. To this, the Court of Appeal attached the conclusion that it would therefore not assess (specifically) using the so-called *Kelderluik* factors whether a duty of care exists that requires Shell to reduce its CO2 emissions by a certain percentage.

721 That conclusion is incorrect. As Milieudefensie et al. have explained in Section IV.5.1 of this Explanatory Submission, the doctrine of hazardous negligence can actually be applied effectively and even independently when the duty of care to prevent or limit dangerous climate change is established and concretely determined. After all, this is a prime example of a danger - indeed: the greatest conceivable danger of our time – that requires an assessment, partly in light of the probability of damage (or its magnitude), the nature of the conduct, the nature and severity of any potential damage and the onerousness of taking precautionary measures, to determine whether a legal duty to help prevent or limit the occurrence of that danger exists.

722 Dangerous climate change does not, moreover, involve a situation that is fundamentally different from the hazardous negligence situations to which the *Kelderluik* factors tend to be applied. After all, the question whether creating or perpetuating a dangerous situation is unlawful – because it constitutes a breach of the duty of care expected in society - always hinges on whether another person is exposed to a greater risk than is reasonably justifiable under the given circumstances.[1217] In light of that criterion, it is difficult to see why there would be a difference between global climate change and other, much more limited dangers. After all, essentially, this court case is also about the

[1215] Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 10 and 11. Shell itself declined to answer this question, both in the first-instance proceedings and on appeal. See also, in this regard, Sections V.6.1 and V.6.8 of this Explanatory Submission.

[1216] Notice of Appeal to the Supreme Court of Milieudefensie et al. dated 11 February 2025, under 1.3 up to and including 1.10.

[1217] See, in this regard, Section IV.5.1 of this Explanatory Submission, also with reference to K.J.O. Jansen, "*GS Onrechtmatige Daad*", Art. 6:162 DCC, note 6.3.5. See in detail the Opinion of Advocate General Hartkamp prior to the judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*) under 11 et seq. and the literature cited therein.

question whether Shell, through its conduct, is exposing citizens to a greater danger than is socially acceptable, so that Shell may be required to take action.

723 This does not change as a result of the circumstances that (i) dangerous climate change is caused by a large number of parties, each of which has a share of the responsibility, and (ii) the interests of a large number of parties are being harmed. After all, this does not detract from the fact that Shell, through its conduct, *is* actually exposing citizens to the danger of climate change and must, at the very least, avert the dangers to that extent. Moreover, the higher the number of people at risk, the higher the level of care that can be demanded.[1218] In case law, the doctrine of hazardous negligence is therefore also applied in situations involving a large number of injured parties or a large number of parties responsible for the damage.[1219] This also applies in the context of dangerous climate change, as evidenced by the *Urgenda* case[1220] and the recent ICJ Advisory Opinion.[1221] All of this was also further addressed in Section IV.5.1 of this Explanatory Submission.

724 A duty of care to prevent or limit dangerous climate change can therefore *also* be independently based on the doctrine of hazardous negligence. This is also recognised in the legal literature.[1222] The Court of Appeal failed to appreciate this by stating, in ground 7.3, that it would not use the doctrine of hazardous negligence and the *Kelderluik* factors forming part of it as an assessment framework, in spite of the fact that it did actually identify some *Kelderluik* factors as factors to be considered in ground 7.24. After all, the Court of Appeal has failed to examine whether Shell is required to reduce

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[1218] C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 207-2.

[1219] See, for example, the judgments of the Dutch Supreme Court of 19 July 2019, *NJ* 2020, 391 (*Aardbevingsschade Groningen*) and 19 July 2019, *NJ* 2019, 356 (*Mothers of Srebrenica*); the judgment of the Court of Appeal of The Hague of 24 August 2010, *NJ* 2011, 418 (*Vuurwerkramp Enschede*) and the Decision of the District Court of The Hague of 13 December 2006, *NJ* 2007, 197 (*Vuurwerkramp Enschede*).

[1220] Decision of the District Court of The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), para. 4.63. In the judgments of the Court of Appeal of The Hague of 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*) and of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), the *Kelderluik* factors do not reappear, because the Court of Appeal independently based the State's duty of care to prevent or limit dangerous climate change on a violation of Articles 2 and 8 ECHR.

[1221] ICJ 23 July 2025, no. 187 (Obligations of States in respect of climate change). See also ICJ 23 July 2025, no. 187 (Obligations of States in respect of climate change), paras. 275 up to and including 279.

[1222] See, for example, E. Bauw & E.H.P. Brans, "*Milieuprivaatrecht*" (Private Environmental Law), Deventer: Wolters Kluwer 2023, pp. 63, 82 and 83; A.J. Verheij, "*Onrechtmatige daad*" (Unlawful act), Deventer: Wolters Kluwer 2023, p. 61; A.G. Castermans, "*Het klimaatgevaar en het gouden Kelderluik*" (The climate threat and the golden cellar hatch) in *AA* 2016/1, pp. 34 up to and including 40; Chr.H. van Dijk, "*Opwarming van de aarde en de kelderluikcriteria*" (Global warming and the Kelderluik criteria) in *M en R* 2016/43, pp. 279–286; E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*" (Duty of care: on the setting of liability law standards for uncertain risks), dissertation, Utrecht University, The Hague: Boom juridisch 2016, para. 6.2.3; W. Braams, A. van Rijn & M.W. Scheltema, "*Klimaat en recht: is het recht klaar voor klimaatverandering*" (Climate and law: is the law ready for climate change), Deventer: Wolters Kluwer 2010, p. 5; Chr. H. Van Dijk, "*Privaatrechtelijke aansprakelijkheid voor opwarming van de aarde*" (Private-law liability for global warming) in *NJB* 2007, p. 2333; E. Bauw, "GS Onrechtmatige daad" (Green series on onlawful acts), note VIII.6.3.6; K.J.O. Jansen, "*GS Onrechtmatige daad",* Art. 6:162 DCC, notes 6.3.9.4 and 6.3.9.7. See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), paras. 2.20 up to and including 2.24.

its CO_2 emissions under the doctrine of hazardous negligence. The Court of Appeal also failed to (correctly) perform an assessment in this context against the precautionary principle, the principle of intergenerational justice and the CBDR principle,[1223] even though these principles play a role in fleshing out the *Kelderluik* factors and are thus relevant to the application of the doctrine of hazardous negligence. Grounds of appeal nos. 1.4 up to and including 1.7 contain legal objections challenging this.

725 In grounds of appeal nos. 1.8 up to and including 1.10, Milieudefensie et al. subsequently point out that they have relied (very) extensively on the doctrine of hazardous negligence, both in the first-instance proceedings and on appeal. In that context, they also explain why the *Kelderluik* factors forming part of it point not only to a duty of care to prevent or limit dangerous climate change, but also to a concrete reduction obligation on Shell's part. Given the extensive nature of their submissions, Milieudefensie et al. present the relevant arguments in a very condense form in their objections. In light of the debate between the parties, the Court of Appeal therefore had every reason for assessing the demands of Milieudefensie et al. based on the doctrine of hazardous negligence and the *Kelderluik* factors. By failing to do so and by also failing to respond (with a sufficient reasoning) to the submissions identified by Milieudefensie et al., the judgment of the Court of Appeal in any event lacks sufficient reasoning.

726 Milieudefensie et al. also have an interest in the success of their objections as explained above. As set forth in grounds of appeal nos. 1.6 and 1.7, the doctrine of hazardous negligence requires courts to carry out their own weighing of the relevant circumstances that could result in a reduction obligation expressed as a certain minimum percentage for Shell. In other words: an assessment against the doctrine of hazardous negligence and the *Kelderluik* factors forming part of it cannot only result in a duty of care to prevent or limit dangerous climate change, but *also*, directly, in a concrete reduction obligation. So in light of the duty of care to prevent or limit dangerous climate change on Shell's part already rightly established by the Court of Appeal[1224], too, an assessment against the doctrine of hazardous negligence can therefore lead to the award of the relief sought by Milieudefensie et al. The Court of Appeal *should* therefore have performed that assessment.

V.8 Defence against Shell's conditional cross-appeal in cassation

V.8.1 Shell's duty of care and unwritten law (ground of appeal no. 2)

727 In ground of appeal no. 2 of its conditional cross-appeal in cassation, Shell presents a range of objections to the Court of Appeal's Judgment from the perspective of Dutch

[1223] See, in this regard, in particular, grounds of appeal nos. 1.11 up to and including 1.24, which are discussed in Chapter VI of this Explanatory Submission.
[1224] See, in this regard, Sections V.1 up to and including V.5 of this Explanatory Submission.

law. What they boil down to is that liability law precludes a duty of care to prevent or mitigate dangerous climate change on Shell's part as established by the Court of Appeal.

728 Before discussing these objections on their merits, Milieudefensie et al. wish to note the following. The objections and the comments preceding them, which are presented as a defence, seem to be based on the assumption that the Court of Appeal has ruled that Shell only has a "general legal obligation" ("*algemene rechtsplicht*"). With this, Shell apparently wishes to suggest that the Court of Appeal has not accepted a duty of care for Shell to achieve percentage-based Scope 1, 2 and 3 CO_2 emissions.

729 First and foremost, this interpretation is inconsistent with the reasoning of the Court of Appeal. For example, in grounds 7.26, 7.27, 7.55 up to and including 7.57 and 7.67, the Court of Appeal has each time pointed out that Shell is required to reduce its CO_2 emissions and that *more* can be expected of Shell than of most other companies. This duty of care is based on (among other things) a large number of soft-law sources that call for percentage-based CO_2 reductions and on the ECtHR's *KlimaSeniorinnen* judgment, which also requires CO_2 reductions linked to the remaining carbon budget. These reductions can be expressed as percentages. All of this has already been discussed in detail in Chapters IV and V of this Explanatory Submission. In grounds 7.63 up to and including 7.66, the Court of Appeal has subsequently also acknowledged - in its assessment of Shell's Scope 1 and 2 emission reduction obligation - that Shell is indeed bound to achieve such percentage-based reductions, although the Court of Appeal believed (wrongly so, see Section VIII.1.1 of this Explanatory Submission) that Shell is already complying with that obligation. The Court of Appeal has therefore (rightly) proceeded on the basis that Shell has a duty of care to reduce its CO_2 emissions and that this duty can be expressed as a percentage. To the extent that Shell's objections are based on a different interpretation of the Judgment of the Court of Appeal, they are unfounded in view of the foregoing.

Conflict with the system of the law and the situations regulated by it (ground of appeal no. 2.1)

730 In ground of appeal no. 2.1, Shell challenges grounds 7.53 and 7.57.[1225] In those grounds of the Judgment, the Court of Appeal ruled that it did not concur with Shell's arguments that a duty of care is not in line with the system of the law and that obligations arising from existing Dutch and EU legislation do not, in and of themselves, preclude a duty of care. What this ground of appeal argues - in summary - is that the Court of Appeal has overlooked the fact that the accepted duty of care accepted is not in line with the European and Dutch energy transition and climate legislation systems and the

[1225] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 80 up to and including 87.

underlying policy choices. That framework allegedly concerns energy security, a well-functioning internal energy market, the promotion of energy efficiency, decarbonisation and research and innovation. In that connection, Shell cites various existing and proposed EU instruments, a number of Dutch instruments, quotes from Dutch parliamentary history and statements made by the Dutch government.

731 First and foremost, these objections cannot succeed because they are all based on the erroneous legal view that the system of the law and the cases that *are* specifically regulated by it are relevant (in a decisive manner) when an unwritten duty of care under Article 6:162 DCC is determined. Shell is therefore confusing two different doctrines. Milieudefensie et al. will explain this in more detail below.

The Quint/Te Poel judgment is not relevant to the duty of care under Article 6:162 DCC

732 In the *Quint/Te Poel* ruling cited by Shell, the Dutch Supreme Court answered the question whether Dutch civil law also recognises the concept of unjust enrichment ("*ongerechtvaardigde verrijking*") as a source of obligations. That question was relevant at the time because the (old) Civil Code did not explicitly regulate that concept.[1226] In this context, the Supreme Court ruled that the question whether a court, as part of its law-shaping role, can accept a legal concept that creates an obligation must be answered by examining whether it is in line with the system of the law and the cases it *does* regulate.[1227] In the current Dutch Civil Code, this has resulted in Article 6:1 DCC, which provides that obligations can only arise to the extent that they *follow* from the law.[1228] Krans formulates this very elegantly: within this system, civil law is not only what the law explicitly says, but also what it implies without saying it in words.[1229] Whether that is the case depends on the system of the law and the cases it *does* actually regulate.[1230] In short, within those limits, Dutch law recognises sources of obligations. This is called the semi-closed system of obligations ("*gematigd gesloten stelsel van verbintenissen*").[1231]

[1226] Unlike the current situation: see Article 6:212 DCC.

[1227] Judgment of the Dutch Supreme Court of 30 January 1959, *NJ* 1959, 548 (*Quint/Te Poel*). In support of its legal view, Shell cites, in its Statement of Defence in Cassation dated 7 November 2025, footnote 267, the judgment of the Supreme Court of 11 November 2011, *NJ* 2011, 598 (*De Rooyse Wissel*), ground 5.4. However, no support for this legal view can be found there at all. Shell further refers to the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), ground 5.22, in which no such legal view can be found either. On the contrary, Langemeijer and Wissink actually point out that a duty of care must be established on the basis of objective points of reference.

[1228] See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 62 up to and including 77.

[1229] H.B. Krans & M.H. Wissink, "*Verbintenissenrecht algemeen"* (General contract law), *SBR 4*, Deventer: Wolters Kluwer 2022, para. 25.

[1230] "*Parl. Gesch. Boek 6 BW*" (Dutch Parliamentary History of Book 6 DCC), p. 42 (Explanatory Memorandum II).

[1231] See also *Asser/Sieburgh 6-I* 2022/47 et seq.

733 In light of the foregoing, it is also relevant to note that the *Quint/Te* Poel judgment and Article 6:1 DCC focus on the *Dutch* legal system and the situations regulated by it. After all, the criterion aims to ensure that Dutch law also allows for the existence of sources of obligations which, even though they were not explicitly regulated by the legislature, seamlessly fit into it, in view of the system. As a result, no meaning attaches to EU law in this context, as EU law provides no insight into the sources of obligations that the Dutch legislature intended to regulate in Dutch civil law. EU law can, of course, serve as a source of obligations in its own right (based on the autonomous European legal order or as "law"). However, that is a matter of interpreting EU law.[1232]

734 What is also important to observe for the purpose of the assessment against the system of the law and the situations regulated by it, is that generally binding provisions that do *not* originate from the formal legislature are not relevant either. After all, only generally binding provisions that *do* originate from the formal legislature determine the system of civil law. In any case, policy choices and other policy considerations by administrative bodies have no effect on the system of law, because they do not constitute law.

735 Article 6:162 DCC is a source of obligations regulated by law. The unwritten duty of care forms part of it. So for obligations based on the unwritten duty of care, it is already established that they follow from the law, and the system of the law and the cases that *are* regulated by it are not relevant anymore. The question *whether* a duty of care exists in a concrete case must be answered within the context of Article 6:162 DCC based on all relevant objective points of reference.[1233]

736 Shell's duty of care is based on the unwritten duty of care that Dutch law accepts as a source of obligations. In order to establish this, the Court of Appeal rightly attached primary importance to the standard of "objective starting points" as the relevant framework in ground 7.2 of its Judgment. Shell, rightly, is not raising any objections to that standard. Subsequently, the Court of Appeal concluded on that basis, also rightly, that Shell has a duty of care to prevent or limit dangerous climate change. Milieudefensie et al. have discussed this in detail in Chapter IV and Sections V.1 up to and including V.5 of this Explanatory Submission. Since the objections are based on an incorrect premise as to how a duty of care should be determined and, moreover, do not challenge the standard rightly applied by the Court of Appeal in ground 7.2, they cannot succeed for that reason alone.

[1232] See, for example, R. de Graaff, "*Het Europese recht als bron van verbintenissen*" (European Law as a source of obligations), pp. 199 up to and including 208, in: F.Q. van der Pol et al., "*Vijftig weeffouten in het BW*" (Fifty flaws in the Dutch Civil Code), Nijmegen: Ars Aequi Libri 2017.

[1233] See, in this regard, Section IV.3 of this Explanatory Submission.

Relationship between national duty of care and EU law

737 The objections to the Judgment raised in ground of appeal no. 2.1 are also invalid for other reasons. According to these objections, a duty of care based on national law is incompatible with a number of EU instruments already presented in ground no. 1: the EU ETS, the EU ETS 2, the CSDDD, the CSRD, Omnibus and Regulation 2017/1938. These instruments allegedly aim to achieve or protect security of supply, energy affordability, free competition and the international competitive position of the Netherlands and Europe, in addition to climate interests. From this it follows, according to Shell, that EU legislation is not based on the premise that a (minimum) reduction percentage applies to each individual enterprise. The Court of Appeal wrongly limited its assessment against this system to the question whether that legislation is exhaustive, in Shell's view.[1234]

738 These objections overlook the fact that EU law is irrelevant when determining whether a source of obligations fits into the legal system, since that question must be answered based on the Dutch legal system. From an EU perspective, the only question that can arise is whether a duty of care under national law conflicts with EU law. This immediately makes it clear that the objections in this ground of appeal, which are based on EU law, amount to more of the same. After all, the objections argue again - via the *Quint/Te Poel* judgment - that a national duty of care is incompatible with the purpose and scope of the above-mentioned EU instruments. This is also what ground of appeal no. 1 boils down to. When Milieudefensie et al. discussed the objections raised in that ground of appeal in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission, it was already explained that a national duty of care is, in fact, very compatible with EU policies (and their purport and scope). By extension, the system of EU law and the situations regulated by it naturally do not preclude a duty of care on Shell's part either. The objections based on EU law in this ground of appeal fail for this reason as well.

Relationship between a national duty of care and policy intentions and concepts

739 Ground of appeal no. 2.1 further cites a number of Dutch policy measures, proposed measures and passages from the parliamentary records. According to Shell, these sources are relevant as part of the legal system and the situations regulated by it, and in Shell's view a duty of care on Shell's part is incompatible with those sources. Indeed, there is even cross-sectoral and sector-specific market-wide coverage that offers a careful balance, in Shell's view.[1235]

[1234] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 83, 85, 86 under a. up to and including c., and 87.
[1235] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 85 and 86.

740 In reality, the (policy) measures and passages from the Dutch parliamentary records presented by Shell offer no serious support whatsoever for its arguments. It should be noted that the Dutch climate rules and the policies developed for this purpose by ministers solely concern emissions from Dutch territory and thus, at most, concern a regulation of Dutch emissions by companies operating in the Netherlands. Shell's emissions exceed the Dutch emissions many times over. In Sections V.3.4 and V.3.5 of this Explanatory Submission, it was already noted that Shell is responsible for 1.7% of total global industrial GHG emissions and that Shell's emissions exceed those of all nation-states, except China, the United States, India and Russia. Shell's duty of care to prevent or mitigate dangerous climate change pertains to its responsibility to limit those total emissions, in part for the benefit of the residents of the Netherlands and the Wadden Sea region. The idea that Dutch climate policies wish to regulate Shell's total global emissions and that the duty of care would interfere with this sounds like a mouse saying to the elephant: "we sure make a lot of noise together".

741 In addition, there is a fairly clear and strong indication that the Dutch legislature does not reject a duty of care for Shell and (therefore) considers it to be compatible with the system of the law. After the District Court had issued a reduction injunction against Shell in the Decision in 2021, no steps were taken by either the Dutch House of Representatives or the Dutch government to "undo" this obligation via legislation. If the legislature truly believed that such an obligation would not be in line with government policies and the existing legal framework, it would have introduced legislation. That has not happened. On the contrary, attention was paid to the Decision in a letter to Parliament dated 6 December 2021. In that letter, the Dutch Minister of Economic Affairs and Climate Policy concluded that the Decision had not provided the Dutch government with any direct reason to adjust its climate policies.[1236] That position has not changed since. Shell is also unable to present any source pointing in this direction, but must rely on a large number of cobbled-together sources. The Dutch legislature has therefore explicitly accepted that a duty of care may exist and believes that it does not conflict with any government-developed legislation or conducted policies.

742 Incidentally, Shell is trying to give the sources presented by it more substance than they actually have. Shell first relies on the Dutch Climate Plan drawn up by the Ministry of Economic Affairs and Climate Policy in response to the Climate Law.[1237] This is a general policy plan that sets out, in very generic terms, which policy measures the Dutch government intends to take in order to meet the Dutch obligations under the Paris Agreement. By its very nature, the plan involves a broad range of general proposed policy measures, such as a strong commitment to solar and wind energy, the adoption

[1236] Exhibit MD-341 (Letter from the Minister to the Dutch House of Representatives regarding the "Analysis of the Shell Decision" dated 6 December 2021), p. 4.
[1237] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 84.

of incentivising schemes and a focus on energy-saving measures.[1238] Furthermore, the Climate Plan contains a few passages regarding a sectoral approach.[1239] The oil and gas industry is *not* a separate sector explicitly targeted by the Climate Plan. In fact, the sector does not appear anywhere in the entire plan. As for energy and supply security, the Climate Plan contains only two short paragraphs specifically for the electricity sector.[1240] Furthermore, under the heading "Cost and Revenue Effects ("*Lasten- en inkomenseffecten*"), the Climate Plan contains a general passage stating that the policy measures must lead to a balance between achieving targets in the industrial sector and maintaining an attractive business climate.[1241] Shell is pointing in particular to the latter passages on energy and supply security and on the business climate.[1242]

743 Contrary to what Shell is arguing, it cannot be inferred from this generic policy plan originating from the Dutch Ministry of Economic Affairs and Climate Policy that a duty of care on Shell's part is incompatible with the Dutch system of the law and the situations that *are* regulated by it, or that there is any cross-sectoral and sector-specific market-wide coverage that provides for a careful balance. First, the Dutch Climate Plan includes general policy intentions, so not obligations or measures laid down in the system of the law. Second, they are very generic policy intentions concerning sectors, companies and citizens. The passages dealing with energy and supply security and the business climate have not been fleshed out in concrete terms in any way, nor do they focus on the oil and gas industry, let alone on a company such as Shell. On the contrary, the Climate Plan does not mention any concrete measures for the oil and gas sector. Moreover, it is impossible to distil any carefully struck balance from these generic intentions, which do not result in any concrete measures anywhere. So based on this policy plan, it cannot be accepted that a duty of care for Shell conflicts with the Dutch system of the law and the situations regulated by it or with the wishes of the Dutch legislature.

744 Shell further argues that a duty of care is inconsistent with two parliamentary motions from 2021, a response from the Minister of Economic Affairs to several parliamentary questions, an opinion from the Council of the State of the Netherlands, a draft bill for the Dutch Responsible International Business Conduct Act ("*Wet internationaal Verantwoord ondernemen*") and a statement by the Minister of Climate and Green Growth.[1243] Milieudefensie et al. will briefly discuss these sources below. It is equally impossible to conclude from any of these sources that the system of the law or the wishes of the legislature precludes a duty of care on the part of Shell.

[1238] Climate Plan, pp. 22 and 23.
[1239] Climate Plan, p. 26 et seq.
[1240] Climate Plan, p. 28.
[1241] Climate Plan, p. 54.
[1242] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 84.
[1243] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under d.

(a) Parliamentary Motions.[1244] The parliamentary Motions cited by Shell (Motion no. 43[1245] and Motion no. 45[1246]) propose imposing an absolute reduction obligation in Scopes 1, 2 and 3 on all Dutch companies whose global CO_2 emissions exceed 50 megatonnes per year. The rejection of this Motion says nothing about the view of either the legislature or the House of Representatives on a duty of care for Shell. This already follows from the fact that the Motions concerned a much wider group of companies. Furthermore, these Motions must be viewed in the context in which they were submitted, namely during the debate on the adoption of the budget tables of the Dutch Ministry of Economic Affairs and Climate Policy for the year 2022.[1247] During this debate, 66 Motions were submitted that addressed a wide range of issues included in that table. Also, the Motions referred to by Shell are not stand-alone Motions, as the first Motion concerns public investments in green industrial policies (no. 43) and the second one concerns a generalised reduction obligation not placed within a broader framework, such as a bill or the CSDDD (no. 45). The rejection of these Motions therefore says nothing about the position of the legislature or the House of Representatives regarding a duty of care applicable to Shell.

(b) Response from the Minister of Economic Affairs and Climate Policy to parliamentary questions.[1248] Shell also points out that the Minister of Economic Affairs and Climate Policy, in response to parliamentary questions, has stated that the Paris Agreement does not impose direct obligations on companies.[1249] This does not lead to a different conclusion. That statement is, in and of itself, correct, since the Paris Agreement is a treaty that, by its very nature, applies to the signatory parties. It cannot in any way be inferred from this that the Minister of Economic Affairs and Climate Policy believes that companies could not have climate obligations based on private law. This applies even more strongly because the statement was made in the context of the discussion of the budget of the Dutch Ministry of Economic Affairs and Climate Policy. Furthermore, the

[1244] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under d., first bullet point.
[1245] Motion No. 43 was submitted by Members of the House of Representatives Van der Lee and Thijssen. According to this Motion, billions in public funds would be spent in the coming years on greening industry and it was only logical that something would be done in return for this by industry. Consequently, the government was asked to introduce a binding climate due diligence obligation for companies, requiring companies, for example, to draw up a plan for climate neutrality by 2050 and to assure that specific obligations would be required of companies that would benefit from public investments in green industrial policies.
[1246] Motion No. 45 was submitted by Members of the House of Representatives Teunissen and Van Raan. According to this Motion, the UNEP Emissions Gap Report indicates that the world is on track for dangerous warming of approximately 2.7°C, and that the Dutch Innovation Monitor 2021 shows that tens of thousands of companies do not expect to be climate-neutral this century. For this reason, the government was requested to impose an absolute Scope 1, 2 and 3 reduction obligation on all Dutch companies whose global emissions exceed 50 megatonnes per year, in line with the 1.5°C target from the Paris Agreement.
[1247] See https://www.tweedekamer.nl/debat_en_vergadering/plenaire_vergaderingen/details/activiteit?id=2021A06886.
[1248] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under d., second bullet point
[1249] Exhibit S-186 (Answers to parliamentary questions following the debate of the budget of the Dutch Ministry of Economic Affairs and Climate Policy), p. 36.

Minister of Economic Affairs and Climate Policy cannot be equated with the legislature.

(c) Opinion of the Council of State of the Netherlands.[1250] In addition, Shell is also relying on the "rejection" of a private-law duty of care by the Council of State of the Netherlands. To this end, Shell refers to an opinion related to a bill submitted by a member of parliament for the Dutch Responsible and Sustainable Business Conduct Act ("*Wet Verantwoord en duurzaam ondernemen*") of 11 March 2021.[1251] This bill did not yet include any climate obligations for companies. It was not until the submission of the second version of the bill dated 2 November 2022[1252] that climate obligations were introduced. These provide for an absolute reduction obligation for large companies,[1253] in which context - regardless of the context of the individual company - a fixed reduction percentage of 55% applies. The explanatory memorandum[1254] indicates that alignment was sought with the European Climate Law[1255] and the CSDDD.[1256] This means that the Council of State of the Netherlands was unable to give its view on any reduction obligation in the opinion cited by Shell[1257], as no such obligation was included in the 2021 bill yet. The absolute reduction obligation of 55% was subsequently abandoned, because the bill was amended again on 15 September 2023, via a first memorandum of amendment.[1258] Via this amendment, the absolute reduction obligation of 55% was replaced by an obligation to set reduction targets commensurate with the identified risks, so that the reduction obligation under the bill would be better aligned with the CSDDD and allow for the specific context of an individual company.[1259] The Council of State of the Netherlands was also asked to issue an opinion on this amendment.[1260] In its opinion, however, the Council of State did not comment on the reduction obligation, let alone reject it,[1261] as Shell is claiming.

(d) Draft Proposal for Dutch Responsible and Sustainable International Business Act.[1262] Shell is also pointing to a draft of a bill for the Dutch Responsible and

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[1250] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 8 under d., third bullet point.
[1251] Dutch Parliamentary Records II 2020/21, 35 761, No. 2.
[1252] Dutch Parliamentary Records II 2022/23, 35 761, No. 9.
[1253] According to the bill, this concerns large undertakings within the meaning of Article 3(4) of the European Accounting Directive. See *Parliamentary Records II* 2022/23, 35 761, no. 9, Article 1.1(g).
[1254] *Parliamentary Records II* 2022/23, 35 761, No. 10, pp. 26, 80 and 81 (Explanatory Memorandum).
[1255] Article 4(1) European Climate Law.
[1256] Article 15(2) CSDDD. This concerns the European Commission's proposal of 23 February 2022.
[1257] Opinion of the Advisory Division ("*Afdeling advisering"*) of the Council of State of the Netherlands dated 8 July 2021, W02.21.0072/II, available at https://www.raadvanstate.nl/adviezen/@124698/w02-21-0072-ii/. Shell refers to this opinion in its Speaking Notes on Appeal (Hearing Day 2 – Part 1 of 4) dated 3 April 2024, p. 20, footnote 82.
[1258] *Parliamentary records II* 2022/23, 35 761, No. 17 (Amendment Memorandum).
[1259] *Parliamentary records II* 2022/23, 35 761, No. 16 (Memorandum in response to the report), p. 2.
[1260] *Parliamentary records II* 2022/23, 35 761, No. 19.
[1261] See https://www.raadvanstate.nl/adviezen/@140030/w02-23-00316-ii/.
[1262] Statement of Defence in Cassation of Shell dated 7 November 2025, paragraph 86 under d., fourth bullet point.

Sustainable International Business Act, which opted, according to Shell, for implementing the CSDDD obligations in a "pure and low-burden" manner, considered the need for a level playing field and expressed support for a watered-down CSDDD. This concerns a *draft* of a *bill*. That draft cannot possibly say anything about the applicable system of the law and its relationship with Shell's duty of care. The draft does not mention the elimination of any private-law duties of care either. This applies equally to the statement by the Minister of Foreign Affairs cited by Shell in this context, who, contrary to Shell's assertion, is not "the legislature" either.

(e) Response from the Dutch Minister of Climate and Green Growth to parliamentary questions.[1263] Finally, Shell points to the response from the Dutch Minister of Climate and Green Growth to parliamentary questions, in which she states that the government's climate policy is aimed at encouraging companies to become as green as possible rather than scaling back their business activities, and that the existing regulations also implement the ICJ's Advisory Opinion. A response from a Minister of Climate and Green Growth cannot possibly say anything about the system of the law. In addition, that statement does not conflict with Shell's duty of care as established by the Court of Appeal. Of course, it is prudent to achieve CO_2 reductions as much as possible by becoming more sustainable. Shell can therefore (also) fulfil its duty of care by strongly committing to sustainability, in which case Shell would be doing exactly what the duty of care and the Minister of Climate and Green Growth have in mind.

745 Shell continues its objections by relying on an attempt by the Dutch government to conclude "bespoke agreements" with Dutch companies regarding the emissions originating from Dutch territory.[1264] It is difficult to see how such attempts to conclude bespoke agreements - which, moreover, solely concern Dutch emissions - say anything about the relationship between Shell's duty of care and the system of the law. This is all the more true, incidentally, given that Shell itself notes that the bespoke-approach discussions with Shell will not be continued.[1265] This means they have led to nothing.

746 Furthermore, Shell is pointing to the *proposed* implementation of Article 25 RED III in the Dutch Environmental Management Act ("*Wet Milieubeheer*").[1266] That provision includes sector-specific emission intensity targets and distinguishes between different transport sectors. From this it follows that the pace of sustainability may vary from sector to sector. Shell, however, is overlooking the fact that this is just a proposal, which (therefore) says nothing yet about the applicable system of the law. In addition, Shell

[1263] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under d., fifth bullet point
[1264] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under e.
[1265] Statement of Defence in Cassation of Shell dated 7 November 2025, footnote 292.
[1266] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under f.

is, essentially, raising the issue of the compatibility of the national duty of care with EU law again. The compatibly of Shell's duty of care with RED III has already been addressed in the discussion of ground of appeal no. 1 in Sections V.6.2 and V.6.3 of this Explanatory Submission. Milieudefensie et al. refers to these Sections for the sake of brevity.

747 Next, Shell relies on the Dutch North Sea Gas Extraction Acceleration Plan ("*Versnellingsplan gaswinning Noordzee"*). This plan announces various policy measures to promote the exploration and extraction of natural gas in the North Sea and to reduce dependence on foreign gas. For the implementation of that policy, Shell refers to several agreements and arrangements made subsequently.[1267] This (proposed) policy does not preclude a duty of care for Shell either.

(a) First of all, they are not existing legal measures, but (announced) policy measures, which have not (yet) been transformed into any legislation. For that reason alone, there is no conflict with the system of the law.

(b) Furthermore, the policy ambition of the Dutch State to extract gas in the North Sea does not mean that such scope actually exists within the framework of international climate obligations.[1268] On the contrary, it follows from the ECHR's ruling in the case between Greenpeace and Norway that the State, when granting licences for gas extraction in the North Sea, must always prepare an environmental impact assessment in good faith.[1269] In that assessment, the State must quantify the CO_2 emissions associated with the licence and assess whether, in that light, the licence is compatible with its national and international obligations under Articles 2 and 8 ECHR to take effective measures against dangerous climate change. If the anticipated emissions are not consistent with those obligations, the State cannot provide a licence.[1270] This therefore means that gas extraction in the North Sea can ultimately only take place within the limits set by Articles 2 and 8 ECHR. Shell's duty of care, which is partly based on these Articles, and the protection of human rights by the State are therefore in step with each other. For this reason alone, no conflict can arise.

(c) Furthermore, the fact that gas extraction in the North Sea is permitted - within the applicable national and international legislation – does not in any way mean that Shell does not have a duty of care. In a scenario where Shell's duty of care requires it to reduce its CO_2 emissions by 45% by 2030, Shell would, for example,

[1267] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under g.
[1268] See ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), para. 427.
[1269] ECHR 25 October 2025, No. 34068/21 (*Greenpeace/Norway*), paras. 318 and 319.
[1270] In the case between Greenpeace and Norway, the reliance on the ECHR ultimately failed because Norway was still able to prepare an environmental impact assessment after all and, building on this, to refuse to grant the licence. See ECHR 25 October 2025, No. 34068/21 (*Greenpeace/Norway*), paras. 330 up to and including 333.

have 55% of its CO_2 emissions left for gas extraction. If Shell wishes to increase its gas production in the North Sea within that margin - and thus reduce it by an equal or greater quantity in other parts of the world to reduce its total CO_2 emissions - then the State's intentions allow Shell room to do so. In that respect, too, no conflict arises.

748 Finally, Shell relies on a draft of a bill implementing Regulation 2017/1938.[1271] This, too, is a *draft* of a *bill* and therefore says nothing about the applicable system of the law. Moreover, this bill merely establishes a framework for how the government could step in and take action in the event of an (imminent) gas crisis.[1272] This is not related to any CO_2 reduction obligation. For the remainder, Shell again raises the question what the relationship is between Dutch law and the EU rules. Milieudefensie et al. have already explained in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission that there is no incompatibility in that regard. Ground no. 2.1 fails.

The role of societal interests such as security of supply (ground of appeal no. 2.2)

749 In ground of appeal no. 2.2, Shell argues that, in determining Shell's duty of care, the Court of Appeal wrongly failed to pay any (noticeable) attention to the broader interests involved in the energy transition. Within that context, Shell mentions the security of supply, the affordability of energy and, by extension, the interests of welfare and safety. Shell is pointing out that energy is needed in all sectors of society and argues that oil and gas play an important role here. Shell also mentions - as Milieudefensie et al. understand: in line with that security of supply and energy security - the interests of free market competition and the international competitiveness of the Netherlands and the EU here. Finally, Shell points out that it operates and makes investments in more than 70 countries around the world.[1273]

750 The ground of appeal is based on an incorrect legal view and must therefore fail. First of all, the ground of appeal is overlooking the fact that the Court of Appeal's assessment breaks down in two parts. In the grounds of the Court of Appeal's judgment challenged by Shell, the Court of Appeal examined *whether* Shell has a duty of care to prevent or limit dangerous climate change and concluded that Shell must reduce its CO_2 emissions. It is only from ground 7.67 onwards that the Court of Appeal addressed the question of *the concrete extent* to which a CO_2 reduction may be required of Shell. It was already previously noted that the onerousness of the precautionary measures to be taken only plays a role within that latter framework. After all, that perspective

[1271] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 86 under h.
[1272] Consultation version of the Explanatory Memorandum to the bill for the Energy supply crisis prevention act ("*wetsvoorstel bestrijden energieleveringscrisis*"), p. 128, available at https://www.internetconsultatie.nl/wbe/document/13723.
[1273] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 89 up to and including 93.

concerns *the extent to which* the concrete measures as demanded can be required of a party.[1274] The same applies to the broader societal interests cited by Shell in view of their nature. After all, Shell is, essentially, arguing that an *excessively high* reduction percentage could jeopardise the security of supply and energy security and the position of the Netherlands and Europe. The question of what would constitute an excessively high reduction percentage in light of those interests can therefore, by definition, only be answered after the duty of care has been determined in concrete terms. By extension, the societal interests mentioned by Shell could be taken into account, if necessary, when the reduction percentage applicable to Shell is determined. Whatever the case may be, these aspects play *no* role in the finding of the Court of Appeal – which is challenged by Shell in the cassation proceedings - that Shell has a duty of care. The ground of appeal already fails for this reason alone.

751 In addition, Shell is overlooking that – as opposed to what the ground of appeal wishes to achieve - the societal interests presented by Shell do not play a role in determining the duty of care in any other respect either; they could at most be relevant within that context for the question of whether there is any justification inspired by societal interests for the conduct for which Shell is being held accountable. The consideration of this question is fleshed out by the closing sentence of Article 6:162(2) DCC ("unless there is any justification") and Article 6:168(1) DCC. The burden of pleading and the burden of proof in this regard rest with Shell, since Shell is invoking the legal consequences of the justification and Article 6:168(1) DCC. Milieudefensie et al. will explain this in more detail below.

752 The question whether a duty of care exists always involves, essentially, a balancing of, on the one hand, the interest of the wrongdoing party to freely pursue their own interests and, on the other hand, the interest of the injured party in being protected from damage caused by others. A duty of care will come into existence if the interest of the injured party in being protected from dangers and the associated damage outweighs the interest of the wrongdoing party in freely pursuing their own interests.[1275] This balancing of interests therefore always focuses on the *own interests* of the wrongdoing party and the injured party. This matter was discussed in Section IV.3 of this Explanatory Submission.

753 There is no place for societal interests in the above-mentioned balancing of interests. A court will only consider those interests in its judgment when it establishes whether any justification can be found (as relied on by the wrongdoing party).[1276] Nieuwenhuis

[1274] See, in this regard, Section V.4.1 of this Explanatory Submission.
[1275] *Asser/Sieburgh 6-IV* 2023/75.
[1276] *Asser/Sieburgh 6-IV* 2023/96 and 97; K.J.O. Jansen, "*GS Onrechtmatige Daad*", Art. 6:162 DCC, notes 7.1.9.1, 7.1.9.2 and 7.3.7.1; M.E. Franke, "*Over de grens van de onrechtmatige daad: een onderzoek naar de plaats van de rechtvaardiging in het buitencontractuele aansprakelijkheidsrecht*" (*Beyond the boundaries of unlawful acts: an investigation into the place of the justification in non-contractual liability law*), The Hague: Boom Juridisch 2021, pp.

has described this framework in great detail in his commentary on the *Kalimijnen* judgment.[1277] The legislature also had this structure in mind for the Dutch Civil Code in its current version.[1278] In line with this, the Dutch Supreme Court has repeatedly ruled that a court must first establish a breach of the standard before it can get round to considering any societal interest as a justification.[1279]

754 Article 6:168(1) DCC also contains a separate arrangement for societal interests that constitute an "imperfect" justification.[1280] On that basis, a court can dismiss an injunction sought if the conduct in question must be tolerated in view of compelling societal interests. This justification is "imperfect" in that any right to compensation *will* continue to exist. This provision, too, is therefore based on the premise that an act is unlawful if the interests of the injured party outweigh the interests of the wrongdoing party. The compelling societal interests do not eliminate that unlawfulness as such, but rather require that the conduct concerned is tolerated.[1281]

755 This system is also logical. If there are societal interests that stand in the way of fulfilling a duty of care, it is up to the party relying on those interests - possibly with the help of the authorities that are fearing problems - to substantiate them. After all, the injured party does not have access to such information. Furthermore, the legislature may intervene by means of legislation, if it fears that a duty of care will conflict with societal interests. Such legislation will constitute a justification for the conduct in that case.

756 In short, contrary to what the ground of appeal is asserting, the societal interests mentioned by Shell do not play a role when the duty of care is established. At most, they could play a role in the context of a reliance on a justification or on Article 6:168(1) DCC. However, they are not relied on in the ground of appeal concerned. For this reason, too, the ground of appeal therefore fails.

757 Finally, in addition to the foregoing, Shell has not argued anywhere in the lower courts that the societal interests of energy security and security of supply, and the associated Dutch or European interests, must be considered when the duty of care is established, let alone substantiate in concrete terms why those interests would be jeopardised if the duty of care is fulfilled. On the contrary, Shell each time presents those interests of energy security and security of supply as an argument that the Dutch and EU legislators must regulate, and have regulated, the energy policies in an exhaustive manner, so

12 up to and including 133 and 143 up to and including 145.

[1277] Note by J.H. Nieuwenhuis on the judgment of the Dutch Supreme Court of 23 September 1988, *NJ* 1989, 743 (*Kalimijnen*).

[1278] Dutch Parliamentary Records II 1976/77, 4572, No. 10, pp. 3 and 4 (points 3 (g) and 8).

[1279] Judgments of the Dutch Supreme Court of 27 June 1986, ECLI:NL:HR:1986:AD7158 (*Holland Nautic/Decca*), 19 April 1986, *NJ* 1986, 263 and 24 December 1937, *NJ* 1938, 601 (*Somnifen/Solubarb*).

[1280] See Dutch Parliamentary Records II 1972, 4572, no. 5, p. 10, from which it follows that the legislature places this provision in the context of the justification.

[1281] See, for example, Note by J.H. Nieuwenhuis on the judgment of the Dutch Supreme Court of 23 September 1988, *NJ* 1989, 743 (*Kalimijnen*).

that no room whatsoever is left for a duty of care.[1282] The Court of Appeal has addressed these submissions in grounds 7.52, 7.53 and 7.57; in this context, the Court of Appeal rightly concluded that the Dutch legislature and the EU legislature did not intend to create an exhaustive legal system, partly with a view to the energy security and security of supply and the associated interests. With this conclusion, the Court of Appeal has considered and discussed these arguments by Shell in the right context and in light of the debate between the parties.

758 In the lower courts, Shell has also never demonstrated in any way - whether with figures or otherwise - to what extent Shell's oil and gas supplies are responsible for the Dutch or European energy supply. Nor has Shell asserted or substantiated that, and to what extent, the energy supply would come under threat in the case of a reduction obligation. The arguments have remained at the level of generalities. Even in the appeal in cassation, Shell does not refer to any concrete assertions in this regard, neither in the ground of appeal discussed here, nor elsewhere in its Statement of Defence in Cassation. As a result, its arguments are not placed within the context of the scope of its concrete reduction obligation, its duty of care or justification grounds, and are not substantiated in concrete terms either. In that light, it is understandable that the Court of Appeal has not paid any further attention to these arguments when establishing the duty of care. The ground of appeal fails.

Human rights and the duty of care (ground of appeal no. 2.3)

759 Ground of appeal no. 2.3 is dedicated to the relationship between human rights-based climate obligations and Shell's duty of care.[1283] The objections can be grouped into two themes. Grounds of appeal nos. 2.3.1, 2.3.2 and 2.3.4 address the question of whether human rights, and, more specifically, Articles 2 and 8 ECHR, play a role in establishing Shell's duty of care.[1284] Ground of appeal no. 2.3.3 focuses on the *Bosphorus* doctrine.[1285] Milieudefensie et al. will follow this thematic order in their discussion of the grounds of appeal below.

Significance of Articles 2 and 8 ECHR for Shell's duty of care

760 Grounds of appeal nos. 2.3.1 and 2.3.2 are closely intertwined. Ground of appeal no. 2.3.1 argues - in summary - that courts must exercise restraint when establishing duties of care based on human rights violations. To this end, Shell claims that governments have legal and policy instruments at their disposal that are not available to companies

[1282] The security of supply and affordability of energy are addressed in Shell's Statement of Appeal ("*Memorie van Grieven*") dated 22 March 2022, paras. 1.3.5, 2.2.5, 2.3.6, 2.5.3, 2.5.13 under c. and d., 2.5.14, 2.5.19, 2.8.1, 3.2.7, 3.3.7 under b., 5.3.1, 6.4.5, 9.2.13 under b., 10.2.9 and 10.8.6 as well as in footnote 298.
[1283] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 94 up to and including 105.
[1284] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 96 up to and including 101 and 105.
[1285] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 102 up to and including 104.

like Shell. Unlike companies, governments can achieve economy-wide emission reductions. Companies such as Shell have no influence over the composition of the energy mix or the choices made by end-users. Governments therefore have a primary and central role in combating climate change. In line with the foregoing, ground of appeal no. 2.3.2 cites the "margin of appreciation" recognised by the ECtHR in the *KlimaSeniorinnen* judgment that contracting states have in fulfilling their obligations under Articles 2 and 8 ECHR to combat dangerous climate change

761 These arguments fail. It should first be noted that they are based on an overly narrow reading of the findings of the Court of Appeal, insofar as they proceed on the assumption that the Court of Appeal has ruled that the human rights (which have horizontal effect) justify Shell's duty of care. Milieudefensie et al. have already discussed the judgment of the Court of Appeal in detail in Sections V.4 and V.5 of this Explanatory Submission. That Judgment is not based solely on human rights (which have horizontal effect). On the contrary, the Court of Appeal has found that there are a large number of relevant objective points of reference (such as the doctrine of hazardous negligence, human rights applicable within the EU and internationally and various soft-law sources), all of which indicate that companies - and, in particular, large oil and gas companies such as Shell – may be expected to contribute to the objective of the Paris Agreement due to their significant contribution to and influence on global CO_2 emissions. Moreover, such non-state action constitutes an important pillar of the entire UN climate regime.

762 Furthermore, the grounds of appeal fail to appreciate two things: first, human rights such as Articles 2 and 8 ECHR serve as a relevant objective point of reference when duties of care are established and fleshed out in concrete terms (such as the duty of care to prevent or mitigate dangerous climate change[1286]) and, second, there is no reason for restraint when applying them. No evidence whatsoever that this must be done can be found in the case law or legal scholarship either.[1287] On the contrary, it is virtually self-evident that there *is* actually, and primarily, room for this indirect horizontal effect of human rights precisely in relation to non-state actors whose conduct contributes to the violation of those same human rights in a direct and significant manner. After all, these obligations are deeply embedded in normative frameworks. This applies in particular in this lawsuit: dangerous climate change is the direct consequence of the CO_2 emissions and 48% of them can be attributed to the oil and gas industry, so that Shell's obligations under human rights law are actually more

[1286] See, in this regard, Sections IV.3, IV.4, and IV.5.2 of this Explanatory Submission.

[1287] In support of its objections, Shell refers in its Statement of Defence in Cassation dated 7 November 2025, footnote 325, to two sources of legal literature, which, however, provide no basis whatsoever for them. The article by Brans and Scheltema does not defend anywhere that the horizontal effect of fundamental rights cannot lead to positive obligations for companies, or only in exceptional circumstances. Sieburgh does also not argue, in the cited source (*Asser/Sieburgh 6-IV* 2023/48) or elsewhere, that restraint must be exercised when accepting (positive) duties of care in the context of horizontal effect. In fact, the cited passage does not address climate obligations at all.

extensive. All of this has already been discussed in detail in Sections IV.4, IV.5.2 and V.4.2 of this Explanatory Submission. The grounds of appeal also fail for this reason.

763 In addition, the grounds of appeal assume that the government would be better positioned to reduce CO_2 emissions than Shell. With this argument, Shell is disregarding its own position and characteristics, which Milieudefensie et al. have discussed in detail in Sections V.3.1 up to and including V.3.11 of this Explanatory Submission. In those Sections, it was described (in summary) that Shell's CO_2 emissions exceed those of virtually all nation states, with the exception of China, the United States, India and Russia. Furthermore, Shell actually *does* have influence on the demand for and supply of oil and gas and actually *is* able, based on its technical and financial capabilities, to contribute to preventing or mitigating dangerous climate change. The Court of Appeal also proceeded on this basis and found in ground 7.99 that Shell has influence over the demand side of the oil and gas market. Shell's influence on the supply side is evident, as Shell is one of the largest suppliers and traders of oil and gas and has direct control over the energy products offered by the Shell Group. Furthermore, Sections II.3 and II.4 of this Explanatory Submission already discussed at length that it is widely recognised that the oil and gas industry, including Shell, is actually using its significant factual and political influence everywhere in the world in order to stop international and national climate measures that would be detrimental to the oil and gas industry. The assertion that the influence of Shell, one of the largest and most powerful multinational companies in the world, on oil and gas consumption is smaller than that of governments is therefore not true in reality.

764 Ground of appeal no. 2.3.2 relies on a number of considerations from the ECtHR's *KlimaSeniorinnen* judgment and the *Urgenda* judgment of the Dutch Supreme Court. Shell first points out that, in the *KlimaSeniorinnen* judgment, the ECtHR granted the contracting states a "margin of appreciation" in fulfilling their climate obligations under Articles 2 and 8 ECHR.[1288] It then presents this margin of appreciation as a consequence of the broad policy discretion of the legislative and executive branches, which is subject to only a limited judicial review.[1289] Following from that, the ground of appeal refers to the *Urgenda* judgment, in which the Supreme Court commented, among other things, on the restraint to be observed by courts in reviewing the lawfulness of the reduction measures taken by the State.[1290] In short, the ground of appeal argues that this *margin of appreciation* and the exercise of restraint by the courts - which Shell apparently links to each other – preclude a duty of care to prevent or limit dangerous climate change for Shell, as that would undermine that margin of appreciation and restraint by courts.

[1288] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 538 under (d), 543 and 561.
[1289] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 99.
[1290] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.3.2, 6.6 and 8.3.2.

765 This ground of appeal fails to recognise that the margin of appreciation referred to by the ECtHR and the demarcation between the various branches of government do not play a role when private-law duties of care are established. After all, the doctrine of the margin of appreciation primarily determines the intensity of the ECtHR's assessment in relation to the contracting states. By extension, the margin of appreciation is related to the leeway allowed by the ECtHR to contracting states in their implementation of ECHR obligations. If the contracting states' consensus on the scope of certain ECHR obligations is broader and more detailed, the contracting states will generally have a more limited margin of appreciation in relation to the ECHR and the ECtHR when fulfilling their own obligations.[1291]

766 Thus by its very nature, the doctrine of the margin of appreciation plays a role in *vertical* relationships only. After all, in such a vertical relationship, the question may arise as to whether a citizen can directly invoke a specific right guaranteed by the ECHR in relation to a contracting state. It is possible that the citizen is asking for too much, because the measure required of the contracting state is not commensurate with the margin of appreciation available to that state in relation to the ECHR and the ECtHR. In a *horizontal* relationship, this doctrine is not relevant, seeing its nature, because this margin of appreciation does not apply in that relationship. In the horizontal relationship, courts must assess what may be reasonably expected between citizens and businesses based on the societal duty of care. This must be determined on the basis of all relevant objective points of reference, which also the include human rights, as already discussed at great length in Chapter IV of this Explanatory Submission. This means that the questions are fundamentally different.

767 The considerations in the *Urgenda* judgment do not support Shell's arguments either. In the *Urgenda* case, the Court was faced with the question to what extent it was able to assess whether reduction measures to prevent or limit dangerous climate change could be required of the Dutch State. In this context, a distinction must be made between judgments of a court that touch on considerations of pure policy - which a court cannot review vis-à-vis the State - and obligations that follow directly from the law, whose fulfilment can and must be enforced in relation to the State by the court. It was in this context that the Dutch Supreme Court ruled on the policy discretion of the Dutch State. In its grounds of appeal, Shell wrongly fails to mention the crucial ground 8.3.3:

> *"8.3.2 As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves*

[1291] For a detailed discussion of this, see J.H. Gerards, "*EVRM – Algemene beginselen*" (ECHR – General Principles), The Hague: Sdu 2011, p. 74 et seq.

> *of this discretion, the government and parliament have remained within the limits of the law by which they are bound.*
>
> *8.3.3 The limits referred to in 8.3.2 above include those for the State arising from the ECHR. As considered in 5.6.1 above, the Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the interpretation of the ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law."*[1292]

768 It therefore does not follow from these considerations that courts must always observe restraint – in view of the policy discretion – when judging the fulfilment of human rights and climate obligations. In relation to States, courts actually have the duty to fully assess what the ECHR (among other things) requires of States. Furthermore, these legal doctrines do not apply in horizontal relationships. In those relationships, the various relevant objective points of reference determine whether a duty of care exists. The fact that all relevant objective points of reference indicate that Shell has a duty of care was discussed in detail in Sections V.4 and V.5 of this Explanatory Submission. The Court of Appeal rightly acknowledged all of this in ground 7.11.

769 Ground of appeal no. 2.3.4 argues that the indirect effect of Articles 2 and 8 ECHR cannot provide a basis for obligations of companies "to all." As evidenced by the conclusion of the explanation given to it, the ground of appeal means an obligation toward all inhabitants of the Earth,[1293] as a duty of care, according to the ground of appeal, always operates relatively and thus between certain private individuals.

770 The ground of appeal is unsuccessful, because it fails to appreciate that duties of care always exist in relation to the persons intended to be protected by the standard. To the extent necessary for a mandatory injunction as the relief sought[1294], the doctrine of relativity determines *whom* the standard intends to protect (personal relativity).[1295] This may be a (limited) group of persons or just one person, if the standard is intended solely to protect such person. Special obligations of selling real estate agents to warn a buyer, for example, are directed at the buyer in question and thus have limited (personal)

[1292] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 8.3.2 and 8.3.3.

[1293] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 105.

[1294] In actions seeking a mandatory or prohibitory injunction, the question of whether the standard seeks to offer protection against the damage suffered, logically, plays no role. After all, the action in question does not concern damage (or the compensability of damage). See, in this regard, the judgment of the Supreme Court of 3 October 2025, ECLI:NL:HR:2025:1435 (*F-35*), ground 4.6.2.

[1295] See, for example, the standard judgments of the Supreme Court of 20 September 2019, ECLI:NL:HR:2019:1409 (*Schietincident Alphen a/d Rijn*) and 7 May 2004, ECLI:NL:HR:2004:AO6012 (*Duwbak Linda*). For a further discussion of the concept of personal relativity, see P.W. den Hollander, "*De relativiteit van wettelijke normen"* (The relativity of legal standards), The Hague: Boom Juridische uitgeverij 2016, p. 131.

relativity.[1296] Duties of care may also target a large group. This applies, for example, to obligations to warn for dangers in public spaces, such as a bus gate on a public road. These obligations are directed at anyone who may encounter the danger that is present there, namely all users of the public road.[1297]

771 The same applies to duties of care that aim to provide protection against dangerous climate change, partly in light of Articles 2 and 8 ECHR. They intend to protect everyone who may be and will be affected by it. In this case, that is virtually the entire world population. The fact that this duty of care is partly based (and not solely based, as the ground of appeal wrongly assumes) on Articles 2 and 8 ECHR does not alter this. On the contrary, Articles 2 and 8 ECHR actually provide a very wide protection to everyone falling within the scope of the ECHR. So they *in fact* point to wide protection. For that matter, this lawsuit only concerns the protection of the inhabitants of the Netherlands and the Wadden Sea region, and not all inhabitants of the earth. For this reason, the ground of appeal fails.

Significance of the Bosphorus doctrine for Shell's duty of care

772 Ground of appeal no. 2.3.3 brings the *Bosphorus* judgment of the ECHR up for discussion. According to Shell, that judgment is not just *relevant* in answering the question whether Shell can have a duty of care, but the *Bosphorus* doctrine even *precludes* that duty of care in this case.[1298] However, that is not true. Milieudefensie et al. will explain this below.

773 The *Bosphorus* judgment concerned a situation in which a State party to the ECHR had breached provisions of the ECHR by fulfilling obligations arising for that State from the membership of an international organisation, such as the EU.[1299] After all, a State may find itself in a bind if the international organisation in question mandates a certain course of action, which course of action is prohibited by the ECHR. The *Bosphorus* judgment determined to what extent a State that finds itself in such a position and fulfils its obligations arising from its membership of an international organisation can be held liable for violating the ECHR.

774 In principle, States are liable for their own acts and omissions, regardless of whether they are mandatory by virtue of their membership of an international organisation.[1300] However, such acts or omissions will not easily lead to a breach of the ECHR, as the *Bosphorus* judgment shows:

[1296] Judgments of the Dutch Supreme Court of 17 October 2014, ECLI:NL:HR:2014:2987 (*X/Hamar*) and 17 February 2012, ECLI:NL:HR:2012:BV6162 (*Savills/X*).
[1297] Judgment of the Dutch Supreme Court of 20 March 1992, *NJ* 1993, 547 (*Bussluis*).
[1298] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 102 up to and including104.
[1299] ECHR 30 June 2005, No. 45036/98 (*Bosphorus*).
[1300] ECHR 30 June 2005, No. 45036/98 (*Bosphorus*), paras. 152 up to and including154.

> *"155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see M. & Co., cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued* (…).
>
> *156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.* (…)*."*[1301]

775 This is the "*Bosphorus* presumption". If the human rights protection offered by the international organisation forcing the State concerned to act in a certain manner is comparable to that of the ECHR, the presumption will be that the State's actions are not in breach of the ECHR. With regard to the EU, to which the *Bosphorus* judgment specifically relates, the presumption is that the human rights protection is equivalent to that of the ECHR.[1302] That presumption may be rebutted if the protection of ECHR rights is "manifestly deficient" in a concrete situation.[1303] Consequently, a State's actions in accordance with binding EU obligations cannot, in principle, give rise to liability under the ECHR. By extension, the ECtHR, when assessing the liability of states, almost never gets round to a substantive assessment of a state's implementation of EU law against the ECHR.[1304]

776 The *Bosphorus* doctrine therefore only concerns the relationship between the ECHR and the EU.[1305] In that context, this doctrine is directed specifically at state parties to the ECHR. Furthermore, it only concerns state parties that are implementing obligations that follow mandatorily from the membership of an international organisation, such as the EU, which causes them to breach the ECHR. That situation does not arise here at any level. Shell is not a state party to the ECHR and is also not a member state of the

[1301] ECHR 30 June 2005, No. 45036/98 (*Bosphorus*), paras. 155 and 156.
[1302] ECHR 30 June 2005, No. 45036/98 (*Bosphorus*), paras. 159 up to and including165.
[1303] ECHR June 30, 2005, No. 45036/98 (*Bosphorus*), para. 156.
[1304] See M. van der Sluis, "*Twee spiegels en een veronderstelling: de driehoek van klimaatmitigatie en mensenrechten in Europa*" (Two mirrors and an assumption: the triangle of climate mitigation and human rights in Europe) in *M en R* 2024/16; T. Barkhuysen and M.L. Van Emmerik, Commentary on ECHR 23 May 2016, *AB* 2017/17 (*Avotins/Latvia)*, para. 2; J.H. Gerards and M. Claes, "*Bescherming van fundamentele rechten post-Lissabon. De interactie tussen het EU Handvest voor de grondrechten, het EVRM en de Grondwet*" (Protection of fundamental rights post-Lisbon. The interaction between the EU Charter of Fundamental Rights, the ECHR and the Constitution) in *SEW* 2012/60, p. 278.
[1305] See also J.H. Gerards and M. Claes, "*Bescherming van fundamentele rechten post-Lissabon. De interactie tussen het EU Handvest voor de grondrechten, het EVRM en de Grondwet*" in *SEW* 2012/60, p. 278.

EU or any other international organisation. Furthermore, Shell is not fulfilling any binding obligations flowing from such membership and the fulfilment of those obligations does not breach the ECHR. This means that the *Bosphorus* doctrine is not in any way related to the present situation and is entirely separate from it. The fact that Shell *is* required to comply with certain climate obligations under EU law does not alter this.

777 Incidentally, the climate obligations under EU law applicable to Shell, as set out in Sections V.6.2 and V.6.3 of this Explanatory Submission, constitute minimum requirements and leave member states a high degree of discretion when implementing them. That, too, is not contrary to the ECHR. In fact, the opposite is true. As discussed in Sections IV.5.2 and V.4.2 of this Explanatory Submission, Shell's duty of care to prevent or mitigate dangerous climate change is partly based on Articles 2 and 8 ECHR. This means that the ECHR actually supports Shell's duty of care. Therefore ground of appeal no. 2.3.3 cannot lead to the overturning of the Judgment.

Soft-law sources and duty of care (ground of appeal no. 2.4)

778 Ground of appeal no. 2.4 is devoted to the large number of soft-law sources considered as objective points of reference by the Court of Appeal in grounds 7.18 up to and including 7.23 to establish Shell's duty of care. The ground of appeal argues - in summary - that the Court of Appeal failed to examine each of these sources one by one in terms of, for instance, their formation, representativeness, target group, scope and purport. According to Shell, the Court of Appeal should also have exercised restraint in applying these soft-law sources and should have examined whether the soft-law sources used reflect a consensus prevailing in the Netherlands on the general legal duty to reduce CO_2 emissions. In its explanation of this ground of appeal, Shell also points out that these sources consistently state that they are not legally binding and that the scope and nature of the interaction between the various sources (partly public and partly private) differ. In this way, the ground of appeal tries to make the status of the various soft-law sources as low as possible.[1306]

779 This ground of appeal cannot lead to the overturning of the Judgment either. It should be noted at the outset that soft-law sources are, of course, not directly binding under national or international law. Had that been the case, they would not have had the status of soft law, but of hard law. The fact that the soft-law sources state that they are not legally binding therefore does not detract from their value. A contrary legal view would imply that sources other than formal legislation could never be relevant in establishing corporate (climate) obligations. That is not the case. After all, soft law constitutes an objective point of reference for establishing and concretely determining duties of care, as set out in Sections IV.3 and IV.5.4 of this Explanatory Submission.

[1306] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 106 up to and including 114.

780 On top of this, the soft-law sources deemed relevant by the Court of Appeal originate from or were drafted at the (co-)initiative of important international public-law bodies, such as the UN (the UNGP, the UN Expert Report and the SBTi Report) and the OECD (the OECD Guidelines), or by renowned institutions (the Race to Zero Initiative, the Net Zero Guidelines, the 1.5°C Business Playbook and the Oxford Report). Milieudefensie et al. have discussed the origin, contents and purpose of this soft law in detail in Section IV.5.4 of this Explanatory Submission. The conclusion drawn from this is that all soft-law sources indicate that companies, partly in light of their human rights obligations, must proceed, as much as possible, with percentage-based reductions of their Scope 1, 2 and 3 CO_2 emissions, and that the oil and gas industry – being the largest contributor to climate change - has a particularly important role to play here. To avoid unnecessary repetition, Milieudefensie et al. refer here to their earlier discussion.

781 In light of the foregoing, it is correct and entirely understandable that the Court of Appeal, in establishing Shell's duty of care, attached weight to the various soft-law sources. Milieudefensie et al. have discussed this at great length in Section V.4.4 of this Explanatory Submission and refer back to it here. The UN Global Compact, the OPGCC and the PCOE mentioned by Shell and the Court of Appeal were also addressed there. All these soft-law sources not only express a view that is widely held globally - and certainly in the West and also in the Netherlands - regarding what may be required from companies and, in particular, from the oil and gas industry (or the large actors within that industry), but also confirm the obligation also already indicated by the other relevant objective points of reference. Companies must make every effort to achieve percentage-based reductions in their Scopes 1, 2 and 3 CO_2 emissions; the starting-point here must always be the global average reduction rate of 45%. In that light, it is also not possible to see why the Court of Appeal should have exercised the restraint demanded by Shell or why the Court of Appeal failed to sufficiently examine the various soft-law sources in light of their different characteristics, as Shell alleges. The ground of appeal fails for this reason.

Responsibility and duty of care (ground of appeal no. 2.5)

782 Ground of appeal no. 2.5 is divided into six parts (under (i) up to and including (vi)).[1307] With this ground of appeal, Shell is challenging the findings of the Court of Appeal in ground 7.26 (to combat the danger posed by climate change, everyone has a responsibility) and in ground 7.27 (companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change).

[1307] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 116 and 117 under (i) up to and including (vi).

783 Under (i), Shell, essentially, argues that a responsibility cannot lead to a private-law legal duty, let alone to a CO_2 emission reduction obligation. This argument fails for lack of factual basis. The ground of appeal wrongly focuses entirely on the word "responsibility" used by the Court of Appeal in ground 7.26. However, the Court of Appeal did not merely rule that Shell has a responsibility, but found - based on all relevant objective points of reference - that Shell has a duty of care to prevent or limit dangerous climate change arising from Article 6:162 DCC, that Shell must reduce its CO_2 emissions with a view to this and that Shell will have to do *more* than most companies. This is evident, for example, from grounds 7.27, 7.55 up to and including 7.57, 7.61, 7.67 and 7.111. The ground of appeal therefore fails.

784 Under (ii), Shell is asserting that a "general legal duty" to limit emissions cannot exist without identifying what this legal duty means in concrete terms and to which persons it is owed. A legal duty requires identified conduct on the part of those who must comply with that legal duty. This argument also fails. To begin with, it should be noted that the ground of appeal fails to appreciate that the Court of Appeal did not establish an unidentified duty of care; after all, the Court of Appeal made it clear, including in grounds 7.27, 7.55 up to and including 7.57, 7.61, 7.67 and 7.111, that Shell must reduce its Scope 1, 2 and 3 emission to contribute to preventing or mitigating dangerous climate change, and also that *more* can be required of Shell than of most companies. That legal duty is clear. In the earlier discussion of ground of appeal no. 2.3.4, it was further discussed that this legal duty clearly exists to protect those threatened by dangerous climate change, including the inhabitants of the Netherlands and the Wadden Sea region. The ground of appeal is overlooking this. Having said that, the ground of appeal does touch upon a shortcoming that Milieudefensie et al. is also raising objections to in cassation: a legal duty must indeed result in a concrete obligation. The Court of Appeal should therefore have established a concrete reduction obligation. Chapter VI of this Explanatory Submission is devoted to this.

785 Under (iii) and (iv), Shell reiterates, with reference to ground of appeal no. 2.3.4, its objection that a duty of care must be towards certain persons or groups of persons, and that the horizontal effect of Articles 2 and 8 ECHR cannot justify their absence. This ground of appeal fails in view of what Milieudefensie et al. asserted in response to that ground of appeal no. 2.3.4: the scope of protection of the duty of care determines towards which persons the standard must be observed. In this case, these persons certainly also include the inhabitants of the Netherlands and the Wadden Sea region, who are threatened by dangerous climate change.

786 Under (v), Shell argues that the Paris Agreement provides no basis for legally enforceable obligations of enterprises. By extension, Shell argues that the Dutch and EU legislature deliberately chose not to achieve emission reductions by binding individual companies by law to the attainment of the Paris Agreement climate targets.

To this end, Shell again relies on its arguments discussed when ground of appeal no. 2.1 was addressed, i.e. that the Dutch legislature has rejected proposals to adopt such an obligation.

787 The ground of appeal is unfounded. First of all, in the view of the Court of Appeal, the Paris Agreement does not form the basis of Shell's duty of care; the basis for this duty of care was rightly found by the Court of Appeal in Article 6:162 DCC. In that context, the Paris Agreement constitutes only one of many relevant objective points of reference. After all, from that Agreement it follows that there is broad consensus on the necessity of non-state climate action to be able to limit global warming to 1.5°C. That finding of the Court of Appeal is also correct. In the discussion of ground of appeal no. 1 in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission, it was already noted that the EU legislature did not intend to "immunise" companies from private-law obligations. Also, in the discussion of ground of appeal no. 2.1, it was already observed that Shell's argument that the Dutch legislature deliberately refrained from imposing a private-law duty of care on Shell is based on a few quotes from the Dutch legislative history taken out of context that do not justify such a conclusion. Milieudefensie et al also already pointed out there that other sources - which Shell does not explicitly present in the ground of appeal discussed here - cannot support that conclusion either.

788 Finally, under (vi), Shell is complaining about the fact that the inhabitants of the Netherlands and the Wadden Sea region also contribute to CO_2 emissions - and (thereby) to dangerous climate change – through their own behaviour and energy consumption. According to Shell, that group is contributing to the very conduct for which Shell is being held accountable in this lawsuit. With this ground of appeal, Shell apparently has the "*in pari delicto"* doctrine in mind. According to that doctrine, a person cannot rely on a breach of standards if this person is also breaching these standards themselves. In this context, it is widely accepted in legal scholarship that the breaches of the standards *and* the degree to which both parties are guilty of that breach must be identical.[1308]

789 It will be clear that Shell's position, characteristics and significant contribution to the climate crisis - as described in Sections V.3.1 up to and including V.3.11 of this Explanatory Submission - are of a completely different order than those of individual citizens. This therefore also applies to the obligations of Shell and the obligations of the inhabitants of the Netherlands and the Wadden Sea region respectively. After all, the

[1308] D.A. van der Kooij, "*Relativiteit, causaliteit en toerekening van schade*" (Relativity, causality and damage attribution), Deventer: Wolters Kluwer 2019, no. 542; A.L.M. Keirse & B.M. Paijmans, "*In pari delicto: als de pot de ketel verwijt*" (In pari delicto; the pot calling the kettle black) in *MvV* 2017/7&8, p. 209; D.F.H. Stein, "*Relativiteit, eigen schuld en de collective actie"*) (Relativity, contributory negligence and class actions) in *MvV* 2016/10, para. 3.2; I. Haazen, "*Schade is een niet-rechtmatig belang*" (Damage is a non-lawful interest) in *WPNR* 2009/6816, p. 831 and footnote 43; T.F.E. Tjong Tjin Tai, "*Vuile handen en relativiteit*" (Dirty hands and relativity) in *Bb* 2007, pp. 71 up to and including 74.

situation in which an individual citizen finds themselves is not comparable to Shell's position when it comes to the climate crisis. In this context, it is therefore not possible to hold an individual citizen accountable for a human rights violation. Furthermore, this law-suit is a public-interest action, meaning that the court is not able, and not required, to assess the conduct of every individual citizen.[1309] In short, it is absurd to present the "*in pari delicto*" doctrine in this lawsuit and in relation to individual citizens. The ground of appeal is unsuccessful.

Role of the effectiveness of the duty of care (ground of appeal no. 2.6)

790 Ground of appeal no. 2.6, which is divided into (i) up to and including (iii),[1310] first complains, under (i), about the fact that when the Court of Appeal determined whether Shell has a duty of care, it failed to consider the effectiveness of the reduction injunction sought by Milieudefensie et al. In that regard, Shell refers to the defence raised by it that, if the duty of care were complied with, its market position would be taken over by third parties, so that, on balance, there would be no reduction in the CO_2 emissions to the atmosphere.

791 This ground of appeal fails. The question how the effectiveness issue should be dealt with under liability law will be discussed in detail in Chapter VII of this Explanatory Submission. In that connection, Milieudefensie et al. will discuss, in Sections VII.2 and (in particular) VII.3, that Dutch liability law, for good reasons, does not accept a rejection of liability on the grounds that third parties will also, and to the same extent, violate the interest that the standard seeks to offer protection for. For a detailed discussion of the incorrectness of Shell's argumentation, reference is made here to the above-mentioned Sections of this Explanatory Submission. What it boils down to, in short, is that the Dutch Supreme Court rejected Shell's arguments about ineffectiveness and substitution in (for example) its *The Pirate Bay* judgment for general Dutch liability law.[1311] The Supreme Court did this again in its *Urgenda* judgment for climate liabilities that break down into multiple shared obligations.[1312] The idea behind this is quite simple: if everyone can point their finger at someone else, nothing will ever happen. The ground of appeal fails on that account.

792 Shell continues under (ii) with the argument that the Court of Appeal should have assessed whether the duty of care constitutes a violation of Shell's fundamental right to property within the meaning of Article 1 of the First Protocol to the ECHR and Article 17 EU Charter and its freedom to conduct a business within the meaning of Article 16 EU

[1309] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 1146 up to and including 1151.
[1310] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 118 and 119 under (i) up to and including (iii).
[1311] Judgment of the Supreme Court of 13 November 2015, ECLI:NL:HR:2015:3307 (*Stichting Brein/Ziggo et al.*), ground 4.4.3.
[1312] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.7.7.

Charter. According to Shell, the Court of Appeal should have actively considered these various fundamental interests. In this context, Shell points out that it argued in the lower courts that other oil and gas companies will take over its market position and that Shell has been investing in the energy transition for many years, has more ambitious reduction targets than other market participants, is less emission-intensive than others and is a frontrunner when it comes to reducing methane emissions from oil and gas extraction.

793 This ground of appeal already fails because of the fact that Shell has never relied on Article 1 of the First Protocol to the ECHR or Articles 16 and 17 EU Charter in the lower courts. The reliance on these Articles cannot be found anywhere in the sources cited by Shell in its Statement of Defence in Cassation.[1313] This is a minimum requirement for a successful appeal to the Dutch Supreme Court. After all, the answer to the question whether the right to property as referred to in Article 1 of the First Protocol to the ECHR or Article 17 EU Charter has been infringed will first and foremost depend on the answers to the questions (i) exactly which right to property is being infringed, and (ii) whether there is a *"fair balance"* between the general interest in the infringement and the individual interests infringed (proportionality, no *"excessive burden"*, reasonable compensation and procedural safeguards).[1314] These questions are highly factual in nature and must therefore be answered before the fact-finding courts.

794 The same applies to the freedom to conduct a business of Article 16 EU Charter. In that context as well, it must be determined which specific freedom Shell is allegedly relying on, after which it must be examined whether there is any justified restriction within the meaning of Article 52(1) EU Charter. To that end, the general interest must also be weighed against the individual interests. Furthermore, a proportionality test must also be performed in that context, which, therefore, requires clear and detailed assertions geared to that test, which Shell has failed to make. The obligation of Dutch courts to supplement the legal grounds *ex officio* under Article 25 of the Dutch Code of Civil Procedure also relied on by Shell (which is apparently aware of this deficiency)[1315] does not alter this. After all, in this case, the factual assertions required for that purpose (and used in the right context) are lacking. For this reason, the ground of appeal already fails completely.

795 Moreover, Shell has still not clarified, even in the cassation proceedings, exactly which right to property within the meaning of Article 1 of Protocol 1 to the ECHR or Article 17 EU Charter it has in mind, let alone explained that and why there would be no "fair balance". The same applies to the freedom to conduct a business within the meaning

[1313] Statement of Defence in Cassation of Shell dated 7 November 2025, footnotes 365 up to and including 371.
[1314] See, for example, ECHR 14 November 2017, No. 46184/16 (*Plaisier/Nederland*); ECHR 13 December 2016, No. 53080/13 (*Béláné Nagy/Hungary*).
[1315] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 117 under (ii).

of Article 16 EU Charter. Shell provides no clarity with regard to the rights relied on by it or to the inadmissibility of their restriction of its freedom.

796 Finally, the ground of appeal overlooks the fact that, pursuant to Article 51(1) EU Charter, the EU Charter offers protection only in cases where EU law is being implemented.[1316] So beyond the implementation of EU law, the EU Charter offers no protection. This case concerns the application of Article 6:162 DCC, which is purely Dutch law and falls outside the scope of the EU Charter. This is yet another reason why the ground of appeal fails.

797 Under (iii), Shell further argues that the Court of Appeal should also have considered the regulatory and policy framework within which Shell is operating, consumer demand for energy and the interests involved in running a business when determining whether Shell could be required to make an appropriate contribution to combating dangerous climate change. The Court of Appeal should also have looked at the objectives and the actual emission reductions compared to other companies in the energy sector.

798 This complaint is insufficiently precise and cannot lead to the overturning of the Judgment for that reason alone. No clarification is provided of which "regulatory and policy framework" Shell is thinking of, let alone in what sense such a framework would preclude the aim for and achievement of emission reductions. The same applies to the reference to "consumer demand for energy" and the "interests involved in running a business." The ground of appeal fails for this reason alone.

799 In addition to this, the potential onerousness of a duty of care to prevent or limit dangerous climate change can only be assessed, as opposed to what Shell assumes, in the context of the determination of the concrete reductions that follow from that duty of care. After all, the level of the CO_2 reduction required from Shell follows from that concrete reduction obligation, so that the potential onerousness of any concrete CO_2 reductions can only be examined at that point.[1317] However, the Court of Appeal has not set a reduction percentage in Scope 3, which Shell seems to have in mind here, given the reference to consumers. Milieudefensie et al. cannot follow why the Court of Appeal should have paid *more* attention to the aspects presented by Shell in that light.

800 Finally, it is also unclear why it might be relevant how Shell is performing in relation to other companies in terms of its climate goals. After all, this court case is about Shell's obligations, not the obligations of other companies (which may be lagging behind Shell). The conduct of other companies in the oil and gas sector cannot therefore stand in the way of the duty of care to prevent or limit dangerous climate change that Shell has. The ground of appeal fails.

[1316] See CJEU 5 April 2013, C-617/10 (*Åkerberg Fransson*).
[1317] See also Section V.4.1 of this Explanatory Submission in this regard.

801 Shell concludes with an unnumbered ground of appeal in which Shell objects to the possible interpretation of the finding of the Court of Appeal that it is within the power of Shell to combat climate change independently from other parties.[1318] Of course, that is not what the Court of Appeal has found. Shell must accept its own share of the obligations and thus deliver the contribution required of it to prevent or mitigate dangerous climate change. The ground of appeal therefore fails for lack of factual basis.

The role of historical emissions and energy supply interests (ground of appeal no. 2.7)

802 Ground of appeal no. 2.7 (with separate objections under (i) and (ii)[1319]) argues under i. that no meaning can be attached to Shell's historical CO_2 emissions when its duty of care to prevent or mitigate dangerous climate change is established. The underlying idea - as Milieudefensie et al. understand it - is that in the past, no climate obligations or climate regulations existed yet and CO_2 emissions were in fact permitted through licences and concessions.

803 The ground of appeal is overlooking that the fact that a party that has contributed to a problem, through its historical role, that only manifests itself at a later stage *can* (partly) justify a duty of care. It was already discussed at length in earlier Sections of this Explanatory Submission that the UN climate regime, general legal principles and a large number of soft-law sources acknowledge that parties with a historical responsibility for the climate problem must also contribute to its solution.[1320] From the perspective of the doctrine of hazardous negligence, this also makes sense. Parties that have caused a hazard must also resolve that hazard to the greatest extent possible. The ground of appeal fails for this reason.

804 Under (ii), Shell argues that the fact that it is and has been a major player in the oil and gas market is irrelevant to the duty of care established by the Court of Appeal. With a view to this, Shell argues that the energy supplied by it has played an important role in society and will continue to do so, even after 2030, to ensure an affordable and reliable energy supply. According to Shell, the Court of appeal should also have taken that circumstance into account.

805 The ground of appeal fails. The fact that Shell is a major player in the oil and gas market of course *does* play a role in establishing its duty of care. After all, this fact encapsulates the key characteristics which the applicable objective points of reference identify as being relevant: it means Shell has high CO_2 emissions, is a major contributor to the climate problem, has influence on the use of oil and gas and has the capacity to limit

[1318] Statement of Defence in Cassation of Shell dated 7 November 2025, p. 81 (top).
[1319] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 120 and 121 under (i) and (ii).
[1320] See, in particular, Sections II.2.2, II.2.4, III.2.3, IV.5.3.2, IV.5.3.3 and IV.5.4 of this Explanatory Submission.

that use. No one will deny, incidentally, that oil and gas have played a significant role in the energy supply in the past. However, it is difficult to see why that should detract from the conclusion that Shell can also be required to help prevent or limit the consequences of the major climate risks caused by this. Liability law does not provide for the extinction of obligations to remedy problems caused by supplied products because of the services rendered by such a supply. This is all the more true because Shell has become one of the wealthiest companies in the world through these products and has the capabilities to contribute to solving the resulting problems.

806 The fact that oil and gas will remain relevant to the energy supply even *after* 2030 and that Shell will continue to play a role in that supply does not mean that Shell has no duty of care to reduce its CO_2 emissions by 2030 either. After all, global CO_2 emissions do not yet need to be net zero by 2030, but must have been reduced by 45%. The CO_2 reduction of the remaining 55% must be achieved in the period between 2030 and 2050. During that intermediate period until 2050, the CO_2 emissions will still be linked to oil and gas use, but that use *must* be phased out to net zero. Shell itself acknowledges this, as it has consistently endorsed the climate goals. In this lawsuit, it also keeps repeating that the parties' views merely differ on the point of how those goals should be achieved. In that light, it is unclear why the fact that oil and gas will still be needed *after* 2030 could diminish Shell's obligations.

807 Finally, with this ground of appeal, too, Shell is again overlooking the fact that the interests of affordability and energy security cannot play a role in determining the duty of care itself, because this involves a weighing of Shell's own interests against the interests of the inhabitants of the Netherlands and the Wadden Sea region. At most, those general-interest considerations can play a role when Shell's concrete reduction obligation is determined and can, within that context, have an effect on the extent of the reduction percentage applicable to Shell. Furthermore, with regard to the duty of care, those aspects can at most - if they are sufficiently substantiated by Shell, which Shell has now failed to do in three instances - provide a justification ground or enable Shell to rely on Article 6:168(1) DCC. This has been explained in the context of the discussion of ground of appeal no. 2.2.

The foreseeability of the duty of care (ground of appeal no. 2.8)

808 Ground of appeal no. 2.8 argues that the existence of a duty of care for Shell was not sufficiently foreseeable, because that duty does not meet the required "foreseeability" and "societal consensus" requirements. Furthermore, according to Shell, the duty conflicts with the principle of legal certainty. In this context, it is also relevant, according to the ground of appeal, that it is unclear whether, and to what extent, a comparable reduction obligation also applies to other companies. In the explanation of its ground of appeal, Shell further points out that the public-law framework governing the energy

transition may still change in the future. According to Shell, that is a carefully balanced framework that keeps reassessing how the reduction efforts must be distributed across various sectors, countries and energy sources. To this end, Shell points to several Dutch and European public-law attempts to regulate the European and Dutch CO_2 emissions via public law through the Climate Law and the "Fit for 55" legislative process. That is why it is also not possible, according to Shell, to set a minimum reduction percentage.[1321]

809 The ground of appeal fails to appreciate that unwritten duties of care, by their very nature, are never precisely clear in advance. After all, this category of unlawfulness addresses the impossibility of foreseeing or exhaustively regulating every possible situation involving an unlawful act. However, this does not mean that parties cannot anticipate such situations or that they are not foreseeable for the addressee of the standard. This was explained by Milieudefensie et al. in Sections IV.2 and IV.3 of this Explanatory Submission. The duty of care is determined on the basis of a large number of relevant objective points of reference. Only if they indicate that a duty of care exists can it be established. The objective character of this ensures that it is certain that the addressee of a standard can reasonably foresee that they have a duty of care.

810 Sections V.1 up to and including V.5 of this Explanatory Submission then discussed in detail that all the relevant objective points of reference indicate that Shell has a duty of care to prevent or limit dangerous climate change requiring Shell to proceed with CO_2 reductions. In line with this, the Court of Appeal rightly established a duty of care for Shell. This development has been, in short, that hard law and soft law have emerged (particularly since the 1990s) at an ever-increasing pace at international, European and national level, in which it is increasingly stressed that it is precisely companies such as Shell that must take action to help prevent or mitigate the consequences of dangerous climate change. The fact that this has also materialised in a duty of care after 35 years can therefore not have come as a surprise to Shell. On the contrary, Shell has been aware of the dangers of climate change caused by its own actions since as early as the 1980s and 1990s.[1322]

811 The argument that it is unclear to what extent Shell's duty of care *also* applies to other companies fails as well. Of course, the fact that it is not possible to determine in advance, based on the duty of care of the addressee of the standard, what other parties are or are not exactly required to do, does not detract from the established duty of care with respect to the addressee of the standard. Shell has no interest in this either. After all, this lawsuit is about Shell's own conduct. Moreover, the duty of care established by

[1321] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 122 up to and including 126.
[1322] Statement of Defence of Milieudefensie et al. dated 18 October 2022, paras. 225 up to and including 229; Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 77 up to and including 97; Summons of Milieudefensie et al. dated 5 April 2019, paras. 530 up to and including 574.

the Court of Appeal is not unclear on this point. Parties whose characteristics are comparable (*mutatis mutandis*) to Shell's - in short: that have high Scope 1, 2 and 3 emissions and the capabilities to reduce them – must also contribute to preventing or mitigating dangerous climate change. The Court of Appeal describes such companies in ground 7.27 and talks about *"companies such as Shell*" for a good reason.

812 Insofar as the ground of appeal (again) relies on the exhaustive nature of the Dutch and EU frameworks, it is defeated by the fact that (i) those frameworks are not exhaustive and therefore do not pretend to form a balanced regulatory system that would preclude a duty of care, and (ii) those frameworks apply only to the Dutch and European emissions and thus concern only a very limited portion of Shell's emissions. This has already been discussed at length above when ground of appeal no. 1 was addressed.

Performance of management duties and duty of care (ground of appeal no. 2.9)

813 According to ground of appeal no. 2.9, the Court of Appeal has failed to recognise that the board of a legal entity is always required to weigh the various interests involved and to determine the policies of the legal entity and the business run by it on that basis. In this connection, the ground of appeal submits that Shell's CO_2 reductions do not constitute an effective contribution to solving the climate problem and refers to Shell's arguments regarding energy security and security of supply. According to Shell, the duty of care to prevent or limit dangerous climate change as established by the Court of Appeal does not sit well with this.[1323]

814 This ground of appeal cannot lead to an overturning of the Judgment either. Liability law obviously does not accept that a duty of care to protect persons outside that company does not exist because, in the eyes of the board, it does not sit well with the company's envisaged policies. On the contrary, the board must act *within the boundaries of the law* and take its management decisions within those boundaries. After all, one of the board's tasks is to ensure that the company acts in a lawful manner. A director who intentionally causes their company to act unlawfully in relation to third parties risks being held liable as a director.[1324] For that reason, the ground of appeal fails.

815 Essentially, all this ground of appeal does is underline that Shell would prefer to make climate interests subordinate in its decision-making to other interests pursued by the company. What the pursuit of those interests results in - as also shown by the findings of the Court of Appeal in grounds 7.58 up to and including 7.61 – is the scale-up of the gas production and maintaining the oil production at its current level, with disastrous

[1323] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 127 and 128.
[1324] See, regarding the duty of care to be observed by boards in relation to third parties, inter alia, B.F. Assink, "*Compendium Ondernemingsrecht*" (Corporate law compendium), Deventer: Kluwer 2013, pp. 921 and 922.

effects for the climate. The ground of appeal thus makes it all the more clear that Shell must be compelled, through a duty of care, to act in the interest of the climate.

Possible future lawfulness of Shell's conduct (ground of appeal no. 2.10)

816 Ground of appeal no. 2.10 does not include any objection, but is a lack-of-interest defence. According to Shell, the appeal in cassation of Milieudefensie et al. must fail because the demanded reduction injunction is based on conduct that will not be unlawful under all circumstances in the future. After all, whether that conduct will be unlawful in the future will depend, according to Shell, on various factors, including (i) developments in legislation and policies, (ii) the security of supply and affordability of energy, (iii) global progress in the area of emission reductions, and (iv) the state of the infrastructure and technology. In addition, the ground of appeal submits that it is not established that Shell's conduct is also unlawful in other countries where its entities are based. Finally, it is argued that it is irrelevant that a change in circumstances could constitute a justification ground. That is a separate issue, in Shell's view.[1325]

817 This defence confuses various legal doctrines. It should first of all be noted that in this lawsuit, the focus is on the conduct of Shell's policy-making top holding company and not on the conduct of its many foreign subsidiaries. This will be explained in more detail below when ground of appeal no. 2.11 is discussed. The liability law in all those foreign countries is therefore irrelevant.

818 The assessment of the unlawfulness of the conduct for which Shell is held accountable must be based on the situation at the time of the Judgment.[1326] Therefore it is *that* moment that is decisive for whether or not an injunction will be issued to offer protection against unlawful conduct. Thus no injunction will be issued if the conduct ceases to be unlawful during the legal proceedings.[1327] After a judgment, a prohibitory or mandatory injunction may lapse at some point in special circumstances. One of the reason for this could be that the conduct in question ceases to be unlawful, for instance because a ground of justification arises.[1328] A mandatory injunction may also cease to be effective if essential conditions for its issue fall away.[1329] Therefore the fact that the conduct *might become unlawful* in the future due to new legislation or other (factual) developments does not, logically, mean that no mandatory injunction could be imposed. That is understandable. If this were different, there would almost never be a reason for

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[1325] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 129 up to and including131.
[1326] Judgment of the Dutch Supreme Court of 26 May 1972, *NJ* 1972, 450 (*Hero/Seven-Up*). See also, for example, C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 95.
[1327] Judgments of the Dutch Supreme Court of 8 July 1992, *NJ* 1993, 488 (*VVN/Staat*), 21 February 1975, *NJ* 1975, 456 and 457 (*Centrafarm/Sterling Drug and Winthorp*). See also, for example, C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel"*, Amsterdam: DeLex 2025, para. 95.
[1328] Judgment of the Dutch Supreme Court of 19 December 1952, *NJ* 1953, 642 (*Tilburg/Van Roessel*).
[1329] Judgment of the Supreme Court of 18 November 1983, *NJ* 1983, 272 (*Kluft/B en W*).

issuing a mandatory injunction, because there would always be a chance that the conduct ceases to be unlawful in the future or that the circumstances change.[1330]

819 For its defence, Shell looks for support in the *Kernwapens* judgment.[1331] That case concerned a declaratory decision sought by VJV (Lawyers for Peace) stating that the State was prohibited from rendering any cooperation in the deployment of nuclear weapons, including preparatory acts. There were no indications that the use of nuclear weapons was actually being considered. In the context of the standing of VJV, the following question needed to be answered: under what circumstances can a court grant such declaratory relief – concerning actions that have not taken place yet and are actually not being specifically contemplated either - to a claimant. The Dutch Supreme Court ruled in that specific case that such relief, which is directed solely at potentially unlawful conduct in the future, can be awarded only if it is established in advance that the potential conduct (the deployment of nuclear weapons) will be unlawful in every possible future scenario.[1332] This is understandable, as the declaratory relief sought solely concerned possible conduct in the future.

820 As a result, the situation in the *Kernwapens* judgment is exactly the mirror image of the present court case. After all, in this case, it is actually established that Shell's current conduct, in light of the established climate science data and the consequences of dangerous climate change for (among others) the inhabitants of the Netherlands and the Wadden Sea region, is extremely threatening, and that Shell must now proceed with CO_2 reductions pursuant to Article 6:162 DCC to make its contribution to preventing or limiting that danger. That subsequently justifies a reduction injunction that is commensurate with this. If, nevertheless, the circumstances were to change in the period up to 2030 to such an extent that a lower or even no CO_2 reduction could be required of Shell to achieve the climate targets, that could mean that the reduction injunction would lapse to that extent. That is not at issue now. The defence therefore fails.

Policy-maker and duty of care (ground of appeal no. 2.11)

821 Ground of appeal no. 2.11 first of all contains a lack-of-interest defence. In this regard, Shell argues that the reduction injunction sought by Milieudefensie et al. does not correspond with the legal duty on which they have based it. After all, that legal duty is directed at Shell as a policy-maker, whereas the relief sought implies a duty relating to

[1330] In Section VI.7 of this Explanatory Submission, Milieudefensie et al. discuss the aspects addressed here in even greater detail, as well as the interplay between injunctions, future exculpatory legislation and changes in the circumstances.
[1331] Statement of Defence in Cassation of Shell dated 7 November 2025, footnote 396, citing Supreme Court, December 21, 2001, *NJ* 2002, 217 (*Kernwapens*), para. 3.3.
[1332] Judgment of the Dutch Supreme Court of 21 December 2001, *NJ* 2002, 217 (*Kernwapens*), ground 3.3.

the actual GHG emissions of the Shell group as a whole. That would effectively lead to liability of foreign group companies.[1333]

822 This defence is difficult to follow. In this lawsuit, Milieudefensie et al. have each time pointed out that Shell, as the top holding company, is at the head of the Shell group. It is Shell, and only Shell, that determines the policies of the group – so also its climate policy - for the entire group; thus Shell has control over and influence on the CO_2 emissions of the entire group. It is this control and influence that Shell must use to reduce the CO_2 emissions of the entire group (including the Scope 3 emissions) and thereby eliminate its (imminent) unlawful act and the associated (imminent) human rights violations. For that reason, its duty of care within the meaning of Article 6:162 DCC applies solely to Shell as a policy-maker, whose conduct must be assessed here.[1334]

823 The Court of Appeal rightly took the foregoing as its starting-point in its assessment and this has remained unchallenged as such in cassation. In grounds 3.22 up to and including 3.24, the Court of Appeal ruled as follows in that regard. Shell is the ultimate shareholder of over 1,100 companies located throughout the world. As the top holding company, Shell determines the general policies of the Shell Group. The companies in the Shell Group are then responsible for their implementation and delivery.[1335] The general policies established by Shell as the top holding company include the climate policy. Shell's board has *"primary oversight*" over this. The board *"reviews* [the] *energy transition strategy periodically and oversees its implementation and delivery*."[1336] Shell subsequently also reports on the CO_2 emissions from the fossil fuels produced and sold by the entire Shell Group, based on the GHG Protocol.[1337]

824 Next, the Court of Appeal (in summary) found that Shell has an obligation to contribute to the climate goals, that it must reduce its CO_2 emissions to that end and that *more* may be required of Shell than of most companies.[1338] With these findings, the Court of Appeal naturally viewed Shell, as the top holding company, as the sole addressee of the standard. After all, Shell is the only policy-maker (for the climate). The subsidiaries operating under Shell merely implement those policies. This defeats the lack-of-interest defence. As evidenced by the foregoing, that defence is based on a misreading of the Judgment of the Court of Appeal. Moreover, that Judgment is correct.

[1333] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 132 up to and including 134.
[1334] Statement of Defence in Cassation of Milieudefensie et al. dated 18 October 2025, paras. 187 up to and including 267, 853 up to and including 883 and 1137 up to and including1145. See also the Notes of the Oral Arguments (3) of Milieudefensie et al. dated 3 December 2020 and Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 31 up to and including 82.
[1335] Judgment of the Court of Appeal, ground 3.22.
[1336] Judgment of the Court of Appeal, ground 3.23.
[1337] Judgment of the Court of Appeal, ground 3.24.
[1338] Judgment of the Court of Appeal, grounds 7.26, 7.27, 7.55 up to and including 7.57, 7.61, 7.67 and 7.111.

825 By way of objection to grounds 7.26, 7.27 and 7.53 up to and including 7.57, Shell's ground of appeal then argues that the Court of Appeal wrongly failed to address its reliance on Article 17 Rome II in these grounds. According to Shell, it follows from this Article that in assessing the conduct of the party claimed to be liable, regard must be had, as a matter of fact and in so far as is appropriate, for the rules of safety and conduct in force in the place and at the time of the event giving rise to the liability. According to Shell, this is the place where the actual CO_2 emissions occur.[1339]

826 The ground of appeal is unfounded. As previously discussed, the Court of Appeal rightly found – and this has not been challenged on appeal – that Shell is the sole policy-maker within the Shell group, also with regard to the climate policy, and, in that light, that the duty of care to prevent or mitigate dangerous climate change is the duty of Shell. That duty of care entails that Shell must start reducing the Scope 1, 2 and 3 CO_2 emissions of the Shell Group via its climate policy – and so in its role as sole policy-maker. That duty is therefore governed solely by Dutch law, because the *Handlungsort* that (co-)determines this law was in the Netherlands at the time of the Summons. After all, that is where the policy was being determined at that time. The fact that the CO_2 associated with its products is emitted virtually worldwide due to Shell's size and customer base does not alter this. The complaint fails for this reason.

827 Moreover, Article 17 Rome II does not apply to cases where the damage occurs in a different place:

> *"Art. 17 should not be extended to cover those rules of safety and conduct in force at the place where the damage occurred."*[1340]

Since it is the *Handlungsort* that determines the applicable law in this case and CO_2 emissions in other countries are merely the harmful consequence of it, Article 17 Rome II is not applicable.

828 Finally, Article 17 of Rome II merely requires courts to take account of the relevant rules of safety and conduct as a matter of fact and in so far as is appropriate. Courts have a large margin of appreciation in applying these rules in light of the circumstances of the case.[1341] In that regard, the minimum requirement is that it must be sufficiently established in the lower courts that requirements and rules are applicable in those other countries that are eligible to be applied. That is not the case. Shell has not relied on any specific foreign requirement (of safety) - neither in the first-instance proceedings nor on appeal - that it believed should be taken into account in this context, let alone argue and

[1339] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 135.
[1340] U. Magnus and P. Mankowski, Rome II Regulation, Cologne: Ottoschmidt 2019, Art. 7, note 21. See also *Asser/Kramer & Verhagen 10-III* 2022/1117.
[1341] U. Magnus and P. Mankowski, Rome II Regulation, Cologne: Ottoschmidt 2019, Art. 7, note 23.

substantiate that such requirements have full exculpatory effect.[1342] In cassation, Shell does also not cite any requirement against which the Court of Appeal should have performed an assessment under Article 17 Rome II. In that light, the Court of Appeal was not required to apply this provision any further. The ground of appeal fails.

No obligation of result on the part of Shell (ground of appeal no. 2.12)

829 Ground of appeal no. 2.12 challenges the Court of Appeal's judgment to the extent that it implies that the established duty of care regarding Shell's Scope 2 and 3 emissions constitutes an obligation of result. According to the ground of appeal, this would be inconsistent with the stringent obligation of means established by the District Court, which Milieudefensie et al. did not challenge on appeal.[1343] However, the Court of Appeal did not start out from an obligation of result regarding Shell's Scope 2 and 3 emissions. This ground of appeal therefore fails for lack of factual basis.

Follow-up objection (ground of appeal no. 2.13)

830 Ground of appeal no. 2.13 is merely a follow-up objection of Shell.[1344] This ground of appeal shares the fate of the above-mentioned grounds of appeal nos. 2.1 up to and including 2.12 and therefore cannot lead to the overturning of the Judgment.

V.8.2 Shell's duty of care and Scope 3 emissions (ground of appeal no. 3)

831 The Court of Appeal has ruled that Shell's duty of care also applies to its Scope 3 emissions. Shell challenges this with ground no. 3 of its conditional cross-appeal in cassation. This ground of appeal covers a wide range of issues, but can, essentially, be divided into four lines of argument: (i) the liability for Scope 3 emissions does not meet the fundamental requirements for liability (ground of appeal no. 3.1), (ii) the objective points of reference cannot result in a Scope 3 obligation (ground of appeal no. 3.2), (iii) Shell's own Scope 3 targets are merely non-binding ambitions that say nothing about its influence on end-users' emissions (ground of appeal no. 3.3), and (iv) Shell's Scope 3 obligation is not sufficiently foreseeable and conflicts with the principle of legal certainty (ground of appeal no. 3.4).[1345]

832 These complaints are largely a repetition of previous arguments. In the preceding chapters, Milieudefensie et al. have already discussed at length why Shell's duty of care also extends to its Scope 3 emissions in particular. This follows first and foremost from the UN climate regime and the soft-law sources partly based on it, which require – also in light of the limited capabilities of governments - that companies also contribute

[1342] See also the Statement of Defence in Cassation of Milieudefensie et al. dated 18 October 2025, para. 1133.
[1343] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 136.
[1344] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 137.
[1345] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 140 and 142.

to reducing (among other things) their Scope 3 emissions. Companies also have a greater and more direct influence on these emissions than governments. By extension, all relevant objective points of reference - and thus: the standards foreseeable for Shell - indicate that companies can and must *also* reduce their Scope 3 emissions. This applies all the more strongly to the oil and gas industry and, in particular, to its system actors that have very high Scope 3 emissions, such as Shell. This means that the ground of appeal fails. Milieudefensie et al. will explain this in more detail below.

Starting-point: companies and Shell do have influence on Scope 3 emissions

833 Sections IV.5 and V.1 up to and including V.5 of this Explanatory Submission have already discussed at length that all objective points of reference indicate that Shell has a duty of care to prevent or mitigate dangerous climate change, and also that this duty applies to its Scope 3 emissions as well. In light of that detailed discussion, no further attention has to be paid to this here. In the context of Shell's Scope 3 obligations, however, it *is* instructive to examine in more detail why the entire normative framework also explicitly focuses on Scope 3 emissions. This will also make it clear that Shell must also – and, indeed, primarily - focus on reducing its Scope 3 emissions and that it has more than sufficient influence on both the supply and demand sides of the oil and gas market to achieve this. For reason, the discussion by Milieudefensie et al. of the substance of Shell's ground of appeal will be preceded by a brief description of (i) the contents of the normative framework that is applicable in this context, (ii) Shell's Scope 3 emission targets, and (iii) the findings of the District Court and the Court of Appeal regarding Shell's influence on its Scope 3 emissions.

(i) UN climate regime, objective points of reference and scientific findings

834 In Sections II.2.2 up to and including II.2.5 of this Explanatory Submission, it was discussed that the UN climate regime and all soft-law sources partly based on it proceed from the premise that, in addition to governments, companies in particular must independently reduce their Scope 1, 2 and 3 emissions. The UN climate regime considers this role of companies to be crucial for several reasons.

835 First, the reduction efforts of companies will generate a flywheel effect that national states, with their slow legislative and policy instruments, can never achieve on their own. This was addressed in Section II.2.3 of this Explanatory Submission. If companies have reduction obligations in Scopes 1, 2 and 3, the result will be that they will help other companies and the countries in which they operate to further achieve each other's reduction targets in a natural manner. A simple example will illustrate this. The transportation sector, just like the oil and gas industry, must make independent efforts to become more sustainable. For this purpose - to reduce its Scope 1 emissions - the transportation sector will go in search of sustainable fuels or electric alternatives. The

sector's embracement of sustainable alternatives will automatically result in lower Scope 3 emissions for Shell. Furthermore, Shell can help its customers in the transportation sector to transition to sustainable alternatives by leveraging its market influence, power, knowledge and skills. Within the framework of their Scope 3 obligations, banks can then provide financing to the transportation sector to enable it to achieve its own Scope 1 reductions through sustainability measures. This, in turn, will also cause Shell's Scope 3 emissions to decrease.

836 If all companies capable of doing so actually make an effort to achieve CO_2 reductions, this will ultimately lead to the desired Scopes 1, 2 and 3 CO_2 reductions across society and globally. Companies are therefore not on their own, but can contribute, with their own reduction efforts, to the required reductions by other companies. However, if all key players continue to fearfully point a finger to the potential inaction of their competitors or point to the exclusive role of governments, or even believe that individual citizens bear the primary responsibility for this global problem through their consumption patterns and must achieve CO_2 reductions by changing them, then the climate transition will never come to fruition.

837 Second, the UN climate regime and the instruments based on it recognise that governments cannot solve the global climate problem on their own. This was already discussed in Section II.2.5 of this Explanatory Submission. Governments cannot effectively regulate companies that operate internationally, because their activities are spread across many countries and across an even large number of companies. As a result, the company concerned has to deal with many legal systems and governments. This fragmentation means that no single government has control over the entire company anymore. This governance gap therefore also prevents governments from being able to take effective action with regard to the CO_2 emissions of companies and their customers. The governance gap is particularly pronounced in the oil and gas industry, which operates highly internationally. This is all the more problematic because of all sectors, the oil and gas industry is also the sector that is making the largest contribution to the climate crisis. After all, 48% of total global CO_2 emissions are linked to oil and gas consumption.[1346]

838 The multinational companies themselves are not affected by the above-mentioned limitations associated with the governance gap. On the contrary, the top holding - in this case: Shell - has complete control over the entire enterprise. Through board resolutions, policy decisions and internal rules, it can control the conduct of the entire company: what direction the company will take, what types of suppliers and customers it will do business with and what sustainable alternatives it will invest in, and also where in the world that will be. The influence of companies on their CO_2 emissions and those of their

[1346] See, in this regard, Sections II.1.1 and V.2 of this Explanatory Submission.

end-users is therefore much more effective and direct than the influence of governments. This applies in particular to the oil and gas industry.

839 In line with the above, each of the relevant soft-law sources developed within the framework of the UN climate regime (the UNGP, the OECD Guidelines, the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook, the SBTi Report and the Oxford Report) requires companies to also implement CO_2 reductions in Scope 3. These instruments derive this obligation from, for instance, the human rights obligations relating to dangerous climate change to be fulfilled by companies. These instruments were already discussed in detail in Sections IV.5.4 and V.4.4 of this Explanatory Submission. In these Sections, it was made clear that each of these instruments requires companies to maximise their efforts to also achieve emission reductions in Scope 3, in line with the global average reduction rate of 45%. From this it already follows that the international community, the normative framework accepted by it and the instruments based on it proceed on the premise that companies have influence over their Scope 3 emissions and must also exercise that influence to the greatest extent possible. This, in turn, is in line with their human rights obligations requiring them to provide effective protection against dangerous climate change.

840 The fact that companies have influence over their Scope 3 emissions and must also exercise that influence also follows from various instruments of EU law. As discussed in, for instance, Sections IV.5.5, V.6.2 and V.6.9 of this Explanatory Submission, Article 22 CSDDD required companies, prior to Omnibus[1347], to adopt and put into effect absolute reduction obligations in Scopes 1, 2 and 3, "*where appropriate*". This of course presupposes that companies, as a matter of principle, also have influence over their Scope 3 emissions. This applies equally to the CSRD, which proceeds on the assumption that companies have their own responsibility for their Scope 3 emissions.

841 In Sections II.3.1 up to and including II.3.3 of this Explanatory Submission, it was further discussed - based on findings from the UN, the IEA, the IPCC and the UNEP - that oil and gas companies are actually using the governance gap to boost the use of oil and gas, resulting in the carbon lock-in effect. This effect describes how the extent to which the oil and gas industry and its key players expand or, conversely, limit their fossil-fuel supply strongly influences which energy sources individual citizens and businesses will use - and which society will thus become "locked into" in the long term. After all, citizens and businesses depend on the options that are offered to them by the energy market. If the largest and most influential players in that market, such as Shell, continue to offer their oil and gas products to the market at the same or even greater levels, the world will therefore also remain dependent on oil and gas in the long term. This, in turn, leads

[1347] Omnibus deleted Article 22 CSDDD. See, in this regard, Sections II.3.1 and V.6.2 of this Explanatory Submission.

to an even stronger carbon lock-in effect. Shell, too, is significantly increasing its production and sales of gas and will keep its oil production at the same level. Shell then justifies this decision by pointing to the steady demand resulting from the carbon lock-in that Shell has helped to create. For this reason, the Court of Appeal rightly pointed out in grounds 7.58 up to and including 7.62 that Shell's policy choices reinforce the carbon lock-in effect.

842 The foregoing means that the oil and gas market is not a purely demand-driven market in which only a change on the demand side will lead, or can lead, to a change in supply. Although the oil and gas industry likes to paint this picture in its media and lobbying campaigns - and also in this lawsuit - the opposite is true. The oil and gas industry, and particularly its system actors, determine – partly driven by the governance gap - which types of energy are brought to market and which energy sources citizens and businesses can use. If they steer towards more oil and gas, society will become *more* dependent on oil and gas. If they steer away from them, this will create space for alternative energy sources. Consequently, the oil and gas industry can also shift its focus more on alternative energy sources if it creates that space by adjusting its supply. The most relevant international institutions in this area, such as the UN, the IEA, the IPCC and UNEP, also believe that it is precisely the latter road that must be followed for an energy transition that is successful and that is as beneficial as possible from the perspective of energy security and geopolitics. Section III.3 of this Explanatory Submission was devoted to this. As set out in Section V.6.3 of this Explanatory Submission, the EU policies point in exactly the same direction.

843 All of this applies even more strongly to Shell. In Sections V.3.1 up to and including V.3.11 of this Explanatory Submission, Milieudefensie et al. discussed the position Shell occupies within the oil and gas industry. This showed not only that Shell's CO_2 emissions exceed those of any other country, except for China, the United States, India and Russia, but also that Shell is one of the richest, largest and most influential oil and gas companies in the world. Moreover, it is the world's largest purchaser of oil and gas and has the greatest purchasing power of all market players. Building on that, Milieudefensie et al. described that Shell has a particularly strong influence on the demand for, and supply of, oil and gas products. After all, it is Shell that determines the supply of the energy products of the Shell Group. It can, and must, therefore use that influence to reduce those high emissions in Scopes 1, 2 and 3.[1348]

[1348] See also, in this regard, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 853 up to and including 866, in which Milieudefensie et al. also explained in detail that and why Shell has control over its Scope 3 emissions.

(ii) Shell's own targets

844 Shell's influence on the supply and demand sides of the oil and gas market and on its Scope 3 emissions further follows from its own communications and objectives. In grounds 3.25 up to and including 3.41, the Court of Appeal established and described the history of Shell's climate goals in outline and these findings have not been challenged in cassation. These findings confirm that Shell acknowledges that it *does* have significant influence over its Scope 3 emissions, but that it has watered down its climate targets over the years for the benefit of commercially driven interests. Milieudefensie et al. will now highlight the most important findings.

845 In 1998, Shell still acknowledged without any reservation that Shell and the Shell companies should play their part in preventing dangerous climate change, and that in doing so, the focus should not only be on their own emissions, but also on those of their customers:

> *"They* [Shell and its companies] *must play their part in the necessary precautionary measures to limit greenhouse gas emissions.*
>
> *Shell companies expect to do the following* (…)*:*
>
> *Reduce emissions of greenhouse gases in their own operations as well as helping their customers to do the same."*[1349]

846 In 1999, Shell also highlighted its crucial role in moving away from oil and gas and towards sustainable alternatives in this connection:

> *"Shell is playing a major part in the move from oil and gas, and now we're planting the seeds of renewable energy with Shell International Renewables, a new business committed to making renewable energy viable."*[1350]

847 Starting in the late 2000s, the sentiment at Shell changed, which led, in 2009, to the winding down of Shell International Renewables[1351] and to an increasingly dominant commercial focus on boosting the demand for and supply of oil and gas.[1352] In a large number of policy documents, Shell continued to acknowledge that it has an influence on the contribution to dangerous climate change made by its products.[1353] In its 2021 Powering Progress strategy[1354], Shell still set concrete targets for its Scope 3 emissions, although these are clearly not ambitious enough and not consistent with its duty of

[1349] Exhibit MD-187 (Shell 1998 Climate Change), pp. 8 and 9. See also the judgment of the Court of Appeal, ground 3.25.
[1350] Exhibit MD-189 (Stockman 2009), pp. 20. See also the judgment of the Court of Appeal, ground 3.26.
[1351] Judgment of the Court of Appeal, ground 3.26.
[1352] Judgment of the Court of Appeal, ground 3.27.
[1353] Judgment of the Court of Appeal, grounds 3.28 and 3.33.
[1354] Exhibit S-3 (Shell Powering Progress 2021).

care.[1355] At that time, Shell also expressed its intention to allocate 50% of its total spending to low-emission or zero-emission products and services.[1356] After 2023, however, the sentiment within Shell shifted entirely towards commercially driven interests. This is reflected in the Shell Energy Transition Strategy 2024 Report,[1357] in which Shell opts for an increase in its gas production, a significant lowering of its Scope 3 targets and a sharp curtailment of its planned investments in sustainable alternatives.[1358]

848 In short, Shell acknowledges that it plays a significant role in the move from oil and gas use and that it has a significant influence on its Scope 3 emissions, through its influence on the supply and demand sides of the oil and gas market and its investments in sustainable alternatives. However, its commercial ambitions now lead it to deny or downplay that influence and to present its targets in this regard as highly conditional ambitions lacking any serious substance.

(iii) Findings of the District Court and Court of Appeal regarding Shell's influence on Scope 3 emissions

849 In light of the normative framework outlined above and Shell's targets and communications (and their history), it will come as no surprise that both the District Court and the Court of Appeal have ruled that Shell's influence over its Scope 3 emissions is such that its duty of care to prevent or mitigate dangerous climate change extends to these emissions as well. On this subject, the District Court ruled as follows:

> *"4.4.25* (…) *Most of the debate between the parties concerns RDS's control over and influence on the Shell Group's Scope 3 emissions, which are released at end-user level. RDS does not in itself dispute that it can exercise control over and influence on these emissions via (the composition of) the energy package that the Shell Group produces and sells. This is not altered by the circumstance emphasised by RDS that the Shell Group has to deal with contractual obligations and obligations arising from long-term concessions, which may limit its freedom of choice regarding the Shell Group's energy package. This limitation means that RDS is not entirely free in determining the Shell Group's*

[1355] Judgment of the Court of Appeal, ground 3.34. Shell expresses its targets in terms of the average carbon intensity of its products (judgment of the Court of Appeal, ground 3.32). This is a camouflaging method, because carbon intensity only indicates the average quantity of CO_2 particles per product. A reduction in that average does not necessarily lead to CO_2 reductions in absolute terms. This is easy to explain. If 1 unit of oil contains 100 particles and 1 unit of gas contains 50 particles, then Shell can simply reduce its average carbon intensity by selling more gas and less oil. However, it can then sell two units of gas. If it completely eliminates oil sales, the average carbon intensity will be halved, but the absolute emissions will remain the same. It is only when the average carbon intensity is net zero that the absolute emissions will also be zero. See, among other sources, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 638 up to and including 641.

[1356] Judgment of the Court of Appeal, ground 3.36.

[1357] Exhibit S-288 (Shell Energy Transition Strategy 2024).

[1358] Judgment of the Court of Appeal, grounds 3.38 up to and including 3.40.

> *energy package; it must take existing obligations into account when determining the Shell Group's energy package. That limitation does not alter the fact that it is ultimately RDS that determines the Shell Group's energy package - and thus its supply of energy products. With due observance of existing obligations, RDS is free to decide not to make new investments in exploration and fossil fuels and to modify the energy package offered by the Shell Group as required by the reduction pathways discussed below* (…)*. So via the energy package offered by the Shell Group, RDS has control over and influence on the Scope 3 emissions of the end-users of the products produced and sold by the Shell Group. What RDS further argues regarding its control over and influence on Scope 3 emissions, concerns the effectiveness of its reduction obligation to be discussed below* (…)*."*[1359]

850 The Court of Appeal established Shell's duty of care, for the most part, in grounds 7.27, 7.55 up to and including 7.57 and 7.67. In the context of the effectiveness debate, the Court of Appeal subsequently also concluded that Shell has influence on its Scope 3 emissions via both the demand side and the supply side. In grounds 7.98 and 7.99, the Court of Appeal addressed the demand side. After setting out Shell's argument that it has *no* influence on them and that Scope 3 emission obligations would lead to liability for someone else's Scope 1 emissions in ground 7.98, the Court of Appeal ruled as follows:

> *"7.99 This argument does not hold water. Several of the instruments discussed above presuppose corporate responsibility for scope 3 emissions as well. Examples are the EU ETS2, the CSRD, the CSDDD and the OECD guidelines. Moreover, the reporting of scope 3 emissions takes place on the basis of the GHG Protocol, which is considered the standard worldwide (see above under 3.5). It is therefore too easy to say that Shell has no influence on scope 3 emissions, even though Shell's power in this regard may be somewhat limited. In this context, it is important to note that tools have been developed that can help Shell influence its customers' choices. Examples include ISO's Net Zero Guidelines and the 1.5º C Business Playbook (see above under 7.23 under c). That Shell has some influence regarding the scope 3 emissions also follows from the fact that it has formulated scope 3 targets itself (see above under 3.33, 3.34 and 3.41). This is incompatible with its argument that it has no influence on them. Finally, contrary to Shell's argument, any reduction obligation regarding scope 3 emissions will not constitute a standard that creates liability of Shell for (lawful)*

[1359] Decision of the District Court, ground 4.4.25.

acts of third parties. Shell's responsibility with regard to scope 3 emissions applies to its own actions."[1360]

851 In grounds 7.100 et seq., the Court of Appeal discussed the supply side and rightly took as its starting-point here that a restriction in supply will, in any event, lead to a reduction in Shell's Scope 3 emissions. This is in line with the instruments and targets discussed above. Subsequently, the Court of Appeal honoured Shell's defence based on Article 3:303 DCC that it would be possible for Shell to comply with the reduction injunction in a manner that would be ineffective by simply limiting its resale of oil and gas from third parties via Shell Trading. Chapter VII of this Explanatory Submission will discuss in detail that there are many reasons why this assessment of the effectiveness of an injunction is incorrect and insufficiently reasoned.[1361] However, what is relevant for the assessment of ground no. 3 of Shell's conditional cross-appeal in cassation is that the Court of Appeal rightly proceeded from the assumption that the compliance with the reduction injunction via the supply side will lead to a reduction in Shell's Scope 3 emissions. The effectiveness debate in view of potential "substitution behaviour" of third parties is unrelated to this.

852 The District Court and the Court of Appeal also took into account that Shell cannot guarantee in absolute terms that it will fully achieve the required Scope 3 CO_2 emission reductions. For that reason, the District Court had found that Shell has a stringent obligation of means as far as its Scope 3 emissions are concerned. It must take the necessary steps to eliminate or prevent the serious risks resulting from the CO_2 emissions generated by it and use its influence to limit any ongoing consequences as much as possible.[1362] Milieudefensie et al. pointed out on appeal that they can, in principle, live with this stringent obligation of means and have not challenged it for that reason, provided Shell actually does justice to that obligation and does everything reasonably possible to limit its total Scope 3 emissions.[1363] Building on this, the Court of Appeal also started out from the premise that the duty of care established by it with regard to Shell's Scope 3 emissions constitutes a stringent obligation of means.[1364]

853 Finally, it is also almost self-evident that Shell's duty of care, in light of the protection that duty intends to offer against dangerous climate change, also applies to its Scope 3 emissions. After all, 95% of Shell's CO_2 emissions are Scope 3 emissions.[1365] In that

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[1360] Judgment of the Court of Appeal, ground 7.99.
[1361] For example, the operative part of the Judgment and the considerations on which it is based preclude this mode of compliance with the reduction injunction. Furthermore, the complete substitution assumed by the Court of Appeal is inconceivable, and there are also countless conceivable modes of compliance with the reduction injunction in which the Scope 3 emission reduction will not be substituted in any event.
[1362] Decision of the District Court, grounds 4.4.20 and 4.4.24.
[1363] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 868.
[1364] See also Section VI.7.2 of this Explanatory Submission in this regard.
[1365] Judgment of the Court of Appeal, grounds 3.24 and 3.45. See also Sections II.4.1 and V.3.9 of this Explanatory Submission in this regard.

light, it is inconceivable that Shell could make the contribution to preventing or mitigating dangerous climate change as required of Shell by the Court of Appeal by merely reducing the remaining 5% of its CO_2 emissions by 45%. Shell's duty of care, on the contrary, requires Shell to use its influence in order to *also* limit its Scope 3 emissions.

854 Against the backdrop of the foregoing, it will be clear that the objections set forth in ground of appeal no. 3 of Shell's conditional cross-appeal in cassation cannot succeed. Milieudefensie et al. will explain this on the basis of the various elements of the grounds for appeal.

The conditions for liability for Scope 3 emissions (ground of appeal no. 3.1.1)

855 Ground of appeal no. 3.1.1 argues that the Court of Appeal has overlooked the fact that the issue of a Scope 3 reduction injunction legally requires that it is within the power of the company in question to achieve the required CO_2 reductions. According to the ground of appeal, this is not something that is within Shell's power, so compliance with that obligation will have no realistically foreseeable, positive effect. Shell further adds that such power cannot be inferred from Shell's influence on the demand side of the oil and gas market either, as the Court of Appeal found in ground 7.99. Furthermore, the ground of appeal points out that a duty of care requiring Shell to reduce its absolute Scope 3 emissions by a certain (minimum) percentage essentially amounts to strict liability for the Scope 1 emissions of its customers. According to Shell, the Court of Appeal's ruling also lies outside the scope of the legal dispute, as the demands of Milieudefensie et al. have always been based on Shell's compliance with its Scope 3 obligations in the form of a reduction in its oil and gas sales and thus in its supply.

856 In its explanation of these grounds of appeal[1366], Shell points out that only governments can achieve the required CO_2 reductions via legislation and policies. As long as the demand for fossil fuels is not redirected by governments towards sustainable alternatives and Shell can capitalise on that, CO_2 emissions will remain high.[1367] Shell has no control over the supply from other suppliers; a portion of that supply is resold by Shell. It is the actions and choices of fossil-fuel customers and end-users that lead to atmospheric CO_2 emissions, according to Shell. Building on this, Shell argues that a reduction limitation for its Scope 3 emissions is also ineffective, and therefore disproportionate, because its customers and suppliers will purchase their fossil fuels from other suppliers.[1368]

[1366] In para. 142 of the Statement of Defence in Cassation of Shell dated 7 November 2025, the grounds of appeal are set out, which are then explained in paras. 143 up to and including154, under headings a. up to and including d. However, these letters do not correspond with the various objections to the Judgment, so that it is not always exactly clear what these passages are actually explaining.

[1367] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 143 up to and including146.

[1368] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 147 up to and including 151.

857 The first reason why these arguments fail is that they lack factual basis. Contrary to Shell's assumption, neither the Court of Appeal nor the District Court has proceeded on the premise that Shell has full and absolute power to reduce the emissions of its customers by a fixed percentage. They have *actually* assumed that such power is not absolute, at least as far as the demand side is concerned. However, it follows from the UN climate regime described above, the soft-law sources forming part of it, Shell's own Scope 3 targets and its position within the oil and gas industry, that Shell's influence on the supply and demand sides (in part because Shell determines the supply of energy products of the Shell Group) is actually *so* significant that Shell can also exercise this influence in order to limit its Scope 3 emissions. Shell must therefore make every effort to effectively fulfil its duty of care with respect to its Scope 3 emissions. This finding is reasonable and correct. It therefore does not amount to strict liability for the Scope 1 emissions of its customers, as Shell assumes,[1369] but rather to a duty of care for Shell itself, regarding its own conduct. As a result, Shell is not being held liable for any unlawful or lawful conduct of its customers either.[1370]

858 Also, Shell's reference to the presumed exclusive regulatory role of governments completely disregards the background of all the above-mentioned legislation and instruments, which are deeply rooted in normative principles, as also discussed above. Governments are insufficiently capable, partly due to the governance gap, of solving the global climate problem or bringing about large-scale global market shifts through legislative and policy instruments (which are slow anyway), let alone in light of the undermining lobbying activities of the oil and gas industry in general and Shell in particular.[1371] It is partly for this reason that this legislation and those instruments require independent climate action from companies. This will lead to the flywheel effect described above and break the cycle where companies keep watching each other or keep fearing that their competitors will not take action, all of which will result in a climate disaster. Shell's arguments, which keep referring to the role of governments, other companies and citizens – also here, before the Supreme Court - underscore the validity of the above-mentioned normative assumption and thus actually necessitate the acceptance of a duty of care for Scope 3.

859 Shell's arguments, incidentally, also rest on the assumption that its customers must start reducing their CO_2 emissions themselves. Of course, it is true that companies capable of doing so will have to reduce their Scope 1, 2 and 3 emissions. This is fully consistent with the flywheel effect that the legislation and instruments discussed above aim to achieve and also helps Shell comply with its own Scope 3 reduction obligation. After all, a reduction in the Scope 1 emissions of Shell's customers will lead to an

[1369] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 154.
[1370] See, in this regard, the more detailed discussion of ground of appeal no. 3.1.2 of Shell's conditional cross-appeal in cassation.
[1371] See, in this regard, Sections II.3.2 and II.4.2 of this Explanatory Submission.

identical reduction in Shell's Scope 3 emissions. The obligations of companies purchasing from Shell will thus support the existence of Shell's Scope 3 obligations.

860 However, Shell is shifting the responsibility for dangerous climate change just as much onto individual citizens, who make up a substantial portion of its customer base. In doing so, Shell fails to recognise that individual citizens - no matter how well-intentioned they are - cannot possibly exert any relevant influence on the supply of fossil fuels. Their influence on demand is limited to their individual emissions. That influence is, of course, negligible and immeasurably small compared to global CO_2 emissions. Moreover, individual citizens are, in fact, dependent on the products brought to market by energy giants like Shell. Sadly, they are ultimately the victims of the dangerous climate change resulting from this. It is precisely this situation that explains why companies like Shell, which *do* have influence on the energy supply and demand, must take action to protect those citizens. The fact that Shell is shifting this responsibility onto individual citizens is hardly commendable.

861 Furthermore, in its arguments, Shell is conflating the question of whether it must and can reduce its Scope 3 emissions with its unrelated defence that a reduction injunction to that effect would be ineffective. However, these are two distinct questions that must be assessed separately. In this context, the first question occupies central stage. In answering the second question, other normative perspectives are relevant, such as the role played by the potential action of third parties in our liability law and in cases of shared responsibility, such as in this court case. Chapter VII of this Explanatory Submission will address that question of effectiveness in detail.

862 Finally, the attention paid by the Court of Appeal to Shell's duty of care and its influence on the demand side of the oil and gas market relevant to this is well within the boundaries of the parties' legal dispute. That influence of Shell, as discussed above and as opposed to what Shell is assuming, is actually extensive, in the view of the Court of Appeal. Contrary to what the ground of appeal starts out from for the remainder,[1372] Milieudefensie et al. actually never limited their arguments to the assertion that Shell can only fulfil its Scope 3 obligations via the supply side. Milieudefensie et al. have consistently taken the position that Shell is free to choose how it will fulfil its duty of care,[1373] as long as that mode of fulfilment ensures that atmospheric CO_2 emissions are reduced.[1374] Milieudefensie et al. have also pointed out that Shell can fulfil its

[1372] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 152 and 153.
[1373] See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 104 up to and including 112 and the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 124, 349, 410 and 462.
[1374] See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 107 up to and including 109. In ground no. 7 of their principal appeal in cassation, Milieudefensie et al. challenge the manner in which the Court of Appeal used this discretion to allow Shell to comply with the reduction injunction in a seemingly ineffective manner. This does not do justice to the reduction injunction issued by the District Court. Section VII.7 of this Explanatory Submission will discuss this in further detail.

reduction obligations because it has influence on both the supply side[1375] and the demand side of the oil and gas market.[1376] This means that the Court of Appeal has not exceeded the boundaries of the legal dispute. This part of Shell's ground of appeal fails.

Scope 3 reduction obligation and scope 1 emissions of customers (ground of appeal no. 3.1.2)

863 Ground of appeal no. 3.1.2 argues that a Scope 3 reduction obligation for Shell is incompatible with the lawfulness of the Scope 1 emissions of its customers and end-users as well as with their own responsibility for their CO_2 emissions. For this purpose, Shell submits that if its customers are not acting unlawfully by purchasing and using fossil fuels, then the total of Shell's supplies to them is not unlawful either. Moreover, according to the ground of appeal, liability for the actions of third parties can only exist if the third party itself is also acting unlawfully. A Scope 3 obligation for Shell leads to liability for the Scope 1 emissions of others.[1377] According to the ground of appeal, this is not workable and leads to legal uncertainty.[1378]

864 Furthermore, Shell argues that its customers and end-users have their own responsibility. According to Shell, the responsibility for CO_2 reductions must therefore also be placed on them. To this end, Shell refers in the explanation of its grounds of appeal to the PCOE, which, in its view, also indicate that CO_2 emissions may only be attributed to the end-users in each case.[1379] Finally, Shell submits that a Scope 3 obligation is inconsistent with the scope of protection afforded by the legal duty invoked. To this end, Shell again points out that all parties bear their own responsibility for their Scope 1 emissions and that Shell is not responsible for the emissions of others.[1380]

865 These grounds of appeal constitute a virtually complete replay of earlier arguments and fail in full due to the nature and basis of Shell's duty of care regarding its Scope 3 emissions, as discussed in great detail above. That duty of care follows from various relevant objective points of reference, including, and building on, the UN climate regime and the soft-law sources based on it. All of these instruments point to obligations for Scope 3 emissions. Shell's duty of care regarding its Scope 3 emissions is also consistent with Shell's own targets. In light of this, no legal uncertainty can therefore arise.

[1375] See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 126 up to and including 128 and the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 242 up to and including 254 and 934 up to and including 936.
[1376] See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 126 up to and including 128, and the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 931 up to and including 933, 937 and 938.
[1377] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 155 and 156.
[1378] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 157.
[1379] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 158.
[1380] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 159.

866 Shell's duty of care to prevent or mitigate dangerous climate change further constitutes a stringent obligation of means of Shell itself. It does not pertain to any (unlawful or lawful) conduct of third parties.[1381] The fact that other companies also have their own Scope 1 reduction obligations for the same emissions merely helps Shell to meet its own Scope 3 obligations more easily. Moreover, these collective obligations lead to the flywheel effect envisioned by the UN climate regime and the soft-law sources based on it. It is also unclear why this would be "unworkable," as Shell is arguing. That submission is based solely on the idea that Shell would become liable for other parties' Scope 1 emissions. That is not the case.

867 For the remainder, Shell's arguments are again based on the idea that individual citizens (among others) bear their own responsibility for their CO_2 emissions, so that Shell only needs to focus on its own Scope 1 emissions. During the discussion of ground of appeal no. 3.1.1, Milieudefensie et al. already noted that Shell - despite its own position within the system - expects individual citizens to do *more* to solve the global climate problem than they will ever be able to do in practice. For this reason, Shell's argument that its duty of care is inconsistent with the protective purpose of the invoked legal duty since everyone is only responsible for their own Scope 1 emissions also fails. That argument is also invalid.

868 The PCOE do not alter the foregoing either. It should be noted that Shell is not raising a ground of appeal to object to the fact that the Court of Appeal applied the PCOE in an incomprehensible manner. The PCOE merely serves as an illustration of its argument that parties can only be held responsible for their own conduct, and that this also applies to Shell in this case. For this reason alone, the reliance on the PCOE fails. Furthermore, it is true that the PCOE proceed on the basis that emissions, by definition, can only be attributed to a single party in a value chain,[1382] but this is not in line with the global reporting standard of the GHG Protocol;[1383] that standard is actually based on the necessity for every actor to report on their emissions across their entire value chain. This is based on the idea that every actor in the value chain can exert influence on emission reductions and that this will therefore contribute to global CO_2 emission reductions. The idea behind the PCOE appears to be that if every individual actor in the world reduces their own Scope 1 emissions, the climate problem will be solved. This shifts the responsibility back to individual citizens again. The inaccuracy, unfeasibility and unreasonableness of this approach have already been discussed above.

[1381] See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 1137 up to and including 1152.

[1382] Production S-96 (PCOE), p. 61: "(…) *emissions from oil exploration, extraction and refining are attributed to the responsible oil company, whereas emissions from combustion in an airplane are attributed to the airline*." Under the Scope 3 Standard to be discussed in relation to ground of appeal no. 3.1.3 of Shell's conditional cross-appeal in cassation, these emissions must be considered as scope 1 emissions of the airline and scope 3 emissions of the fuel producer.

[1383] See, in this regard, the more detailed discussion of ground of appeal no. 3.1.3 of Shell's conditional cross-appeal in cassation.

869 Incidentally, the PCOE do not appear to reject responsibility for Scope 3 emissions in an absolute sense, as they actually do see a need for fossil-fuel companies to stop investing in new oil and gas reserves (and to therefore also stop selling those new reserves):

> *"Although not explicitly mentioned in these Principles we do believe the exploration of new oil and gas fields is an issue. There should be no room for such exploration. Burning the existing reserves would exceed the carbon budget several times over."*[1384]

In that respect, the PCOE actually confirm the position of Milieudefensie et al,[1385] which is why the ground of appeal cannot result in the overturning of the Judgment.

GHG Protocol and Scope 3 emissions (ground of appeal no. 3.1.3)

870 Ground of appeal no. 3.1.3 is devoted to the manner in which Scope 3 emissions are measured via the GHG Protocol. According to this ground of appeal, a reduction obligation for Scope 3 cannot be imposed, because the GHG Protocol is insufficiently suitable for measuring those reductions. In connection with this, Shell is raising three objections: (i) the measured Scope 3 reductions do not always correspond with the actual global atmospheric emissions, for example because Shell may begin supplying gas to replace more carbon-intensive coal of another company, which would increase its Scope 3 emissions, (ii) under the GHG Protocol, double counting may occur between Shell's Scope 3 emissions and the Scope 1 and 2 emissions of its end-users, and possibly also in relation to the Scope 3 emissions of other parties in the supply chain, so that the total Scope 3 emissions of all companies combined would be much greater than the actual CO_2 emissions, and (iii) the GHG Protocol does not provide an unambiguous CO_2 emission reporting method, which can lead to significant differences between companies.[1386]

871 These objections cannot succeed because they do no justice to the nature and contents of the GHG Protocol and the way in which that Protocol has accurately measured CO_2 reductions at company level over the years. The objections raised by Shell are irrelevant to the measurements of CO_2 reductions under the GHG Protocol and the possibility of using them, do not exist in reality or actually work to Shell's advantage when it comes to the compliance with its Scope 3 obligations. Milieudefensie et al. will first briefly discuss the history and contents of the GHG Protocol, after which Shell's grounds of appeal will be addressed.

[1384] Exhibit MD-467 (PCOE General Commentary), p. 66.
[1385] See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 862 up to and including 868.
[1386] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 160 up to and including165.

872 The GHG Protocol was initiated in 1998 with the mission of developing internationally accepted GHG accounting and reporting standards and promoting their widespread acceptance. The most recent version dates from 2004.[1387] The GHG Protocol is the most widely used standard globally for reporting companies' Scope 1, 2 and 3 emissions. With a view to this, the size of the company is always the first factor to consider, because it must be clear to which economic activities the emissions are being attributed. This determination takes place on the basis of either the equity share or the operational or financial control, depending on which aspects best reflect economic reality. The reported and measured emissions are thus always aligned as closely as possible with the economic reality.[1388]

873 Since 2011, the Scope 3 Standard has been an annex to the GHG Protocol.[1389] The Scope 3 Standard fleshes out in more detail how a company's Scope 3 emissions must be reported. This is an internationally accepted method, and even the most widely used method, to account for companies' emissions in the value chain. Shell was a member of the 25-person steering group that contributed to the first version of this Scope 3 Standard. A broad group of stakeholders from industry, government, academia and the non-profit sector was involved in the extensive drafting phase.[1390]

874 The GHG Protocol and, in particular, the Scope 3 Standard, aim - in line with the UN climate regime discussed above and the soft-law sources partly based on it - to help companies play their own necessary role, alongside governments, in preventing or mitigating dangerous climate change:

> *"*(…) *the need to accelerate efforts to reduce anthropogenic GHG emissions is increasingly urgent. Existing government policies will not sufficiently solve the problem. Leadership and innovation from business is vital to making progress."*[1391]

875 Five core principles underpin the reporting of Scope 1, 2 and 3 emissions: (i) relevance, (ii) completeness, (iii) consistency, (iv) transparency, and (v) accuracy. These principles are, in turn, derived in part from generally accepted principles for financial accounting and reporting.[1392] This means, among other things, that companies must report in a consistent manner based on the methodologies prescribed by the GHG Protocol. As a result, a company cannot simply make changes to a chosen methodology. The GHG Protocol thereby enables stakeholders to measure and report progress in a consistent manner, ensuring that the reduction progress of the company in question can be

[1387] Exhibit RK-15 (GHG Protocol).
[1388] Exhibit RK-15 (GHG Protocol), pp. 16 up to and including 24. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 828.
[1389] Exhibit RK-19 (Scope 3 Standard).
[1390] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 829 with further references.
[1391] Exhibit RK-19 (Scope 3 Standard), p. 3.
[1392] Exhibit RK-15 (GHG Protocol), pp. 6 and 7.

followed in a reliable manner over the years.[1393] So through long-term and consistent measurement and reporting, the GHG Protocol and the Scope 3 Standard provide accurate insight into a company's Scope 1, 2 and 3 emissions and, by extension, also accurately reflect the reductions actually achieved by the company at the aggregate level.

876 Shell has been measuring and reporting its Scope 1, 2 and 3 emissions based on the GHG Protocol and the Scope 3 Standard since as early as their initial publication. Because Shell follows the methodology prescribed by them, this results in an accurate representation of the CO_2 reductions achieved across the various scopes over a period spanning many years. In line with this, it is therefore also possible to verify whether Shell is meeting the reductions that may be required of it in order to contribute to preventing or mitigating dangerous climate change. In this light, the GHG Protocol and the Scope 3 Standard provide ample assurance regarding the extent to which Shell is actually achieving its percentage-based Scope 1, 2 and 3 reduction obligations relative to the 2019 level (or any other base year).[1394]

877 In light of the foregoing, the objections to the GHG Protocol raised in Shell's ground of appeal do not undermine the reliability and accuracy of the reporting and measurement of its Scope 3 emissions made on that basis. Therefore those objections cannot preclude any duty of care on Shell's part regarding its Scope 3 emissions. Milieudefensie et al. will explain this below.

878 Shell's first objection - that the gas supplied by it could also replace more carbon-intensive coal used by another company - cannot succeed in light of the foregoing. It overlooks the nature and contents of the GHG Protocol, the Scope 3 Standard and the concept of "Scope 3 emissions". The GHG Protocol and the Scope 3 Standard measure whether there is any reduction in the Scope 3 emissions associated with a company's *own* products or services. What these instruments aim for is that a company subsequently identifies opportunities for emission reductions within their value chain and acts accordingly, for example by developing lower-emission products.[1395] A reduction in that company's own Scope 3 emissions will consequently lead, in principle, to a reduction in atmospheric CO_2 emissions. For this reason, the soft-law sources discussed in Section IV.5.4 of this Explanatory Submission require companies to bring down their Scope 1, 2 and 3 emissions. They proceed on the reasonable assumption that global CO_2 emissions will decrease as a result of independent climate action taken by companies. In that light, the authors of those soft-law sources therefore endorse the

[1393] Exhibit RK-19 (Scope 3 Standard), pp. 23 up to and including 25. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 833 and 834 with further references.
[1394] See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 835 up to and including 837.
[1395] Exhibit RK-19 (Scope 3 Standard), p. 111.

reliability of the methodology chosen by the GHG Protocol and the Scope 3 Standard to also require Scope 3 emission reductions by companies.

879 The GHG Protocol and the Scope 3 Standard do not aim to measure whether a company's products or services *could also serve* as substitutes for products used by other companies that are, potentially, more carbon-intensive. That would be a pointless exercise. After all, it is impossible to determine whether a supplied product will serve as a substitute for another product and, if so, to what extent that other product is more carbon-intensive. If Shell sells gas, it is the company that purchases it that determines how it will use that gas. That use will vary from company to company. Some companies will use the gas to increase their own production or to replace gas that used to be supplied by another supplier, in which case global CO_2 emissions would rise or remain the same respectively. Other companies might use the gas to replace coal, which could potentially lead to a slight net decrease in global CO_2 emissions. These purely hypothetical scenarios do not detract from the fact that the reduction in a company's own Scope 3 emissions will, in principle, also lead to lower atmospheric CO_2 emissions.

880 In any case, there is no reason to discard this internationally accepted method (which is even the most widely used method) to account for emissions in the value chain - in violation of the GHG Protocol, the Scope 3 Standard and various soft-law sources – because of the theoretical possibility that gas might in some cases serve as a substitute for coal. After all, this would result in Shell increasing its gas supply (in breach of the modelled reduction scenarios)[1396], with the (misleading) message that the gas may be used to replace coal, so that Shell is actually helping the climate by doing so.

881 Shell's second objection casts no doubt on the reliability of the measurement of Scope 3 emissions in accordance with the GHG Protocol and the Scope 3 Standard either. After all, multiple companies generally operate within the same value chain. As a result, the Scope 3 emissions of one company may also constitute the Scope 1, 2 or 3 emissions of another company. The Scope 3 Standard actually presupposes that this is the case and also highlights the beneficial consequences of this for companies itself. If one of those companies successfully reduces its emissions, this will also lead to a reduction in the Scope 3 emissions of the other companies:

> *"Double counting within scope 3 occurs when two entities in the same value chain account for the scope 3 emissions from a single emissions source* (…)*. This type of double counting is an inherent part of scope 3 accounting. Each entity in the value chain has some degree of influence over emissions and reductions. Scope 3 accounting facilitates the*

[1396] See, in this regard, Section VI.3.7 of this Explanatory Submission.

simultaneous action of multiple entities to reduce emissions throughout society."[1397]

882 This means that the double counting mentioned by Shell is not problematic. On the contrary, it works solely to Shell's advantage and underscores the flywheel effect that was always envisaged by the UN climate regime and the soft-law sources based on it. This double counting cannot possibly preclude a duty of care for Shell regarding its Scope 3 emissions.[1398]

883 Finally, Shell's third objection to the Judgment holds no water either. This is the argument that the GHG Protocol does not establish an unambiguous reporting requirement and could therefore lead to differences in the measurements among different companies. After all, the GHG Protocol and the Scope 3 Standard are specifically designed to measure, in a precise and consistent manner, whether a company has achieved reductions in its own Scope 1, 2 and 3 emissions relative to a base year. It is irrelevant for this purpose whether that measurement corresponds *at company level* with the measurement methods used by other companies and their CO_2 reductions. Shell also fails to explain why that would be relevant to the question of whether the GHG Protocol and the Scope 3 Standard are suitable for measuring whether Shell has fulfilled its own Scope 3 reduction obligation.

884 The prescribed methods, for that matter, hardly differ from each other in an economic sense. After all, they require companies to choose the method that best reflects economic reality. The chance that significant differences would actually arise between the measurements is therefore negligible. Shell has not presented any concrete arguments to substantiate this point either. The preceding discussion completely refutes ground of appeal no. 3.1.3.

Scope 3 emissions, legislation and human rights (ground of appeal no. 3.2)

885 Ground of appeal no. 3.2 is sub-divided into 3.2.1 and 3.2.2 and raises various objections to ground 7.99.[1399] The objections all fail for lack of factual basis. Milieudefensie et al. will elaborate on this below.

886 According to ground no. 3.2.1, the Court of Appeal has failed to recognise in ground 7.99 that the instruments mentioned there (the CSDDD, the CSRD and the EU-ETS 2) and *"various laws and regulations discussed previously*" do not provide support for the acceptance of a reduction obligation for Scope 3 emissions.[1400] In the explanation of this ground of appeal, Shell again argues that a Scope 3 reduction obligation would be

[1397] Exhibit RK-19 (Scope 3 Standard), p. 108.
[1398] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 838 up to and including 845.
[1399] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 168.
[1400] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 169 and 170.

incompatible with the EU ETS 2 system[1401]; in that explanation, Shell also refers to RED III, which is not mentioned in the ground of appeal itself and plays no role. RED III requires Member States to set a reduction target (share in the energy use or greenhouse gas intensity) for the share of renewable energy in the transport sector; according to Shell, this Directive aims to regulate the entire chain, with which a Scope 3 obligation would not be compatible.[1402] Furthermore, Shell argues that no reduction obligations follow from the CSRD and that Article 22 CSDDD merely imposed a reduction obligation formulated as an obligation of means, *"where appropriate*", to be enforced under administrative law.[1403] Finally, Shell argues, insofar as the Court of Appeal inferred from this legislation in ground 7.99 that companies have control over their Scope 3 emissions, that the Court of Appeal has overlooked the fact that this legislation offers no support for such a conclusion.[1404]

887 These objections - which fully overlap, content-wise, with parts of ground of appeal no. 1 of Shell's conditional cross-appeal in cassation, which Milieudefensie et al. have discussed in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission - all fail due to lack of factual basis. After all, in ground 7.99, the Court of Appeal did not rule on the question whether Shell has a duty of care with respect to Scope 3 emissions. That question was already answered by the Court of Appeal in the affirmative in grounds 7.27 up to and including 7.57, based on all relevant objective points of reference. In ground 7.99, the only question the Court of Appeal answered - in response to Shell's defence based on Article 3:303 DCC – was whether imposing a reduction obligation for Scope 3 emissions would be effective. This is also evident from ground 7.97 and the subheading above it (*"4. Is a Scope 3 reduction obligation 3 effective?"*). In that connection, the Court of Appeal found that it follows from, among other things, the instruments mentioned in ground 7.99 that Shell has influence on the demand side of the market. That factual finding is easy to follow, as already explained in the first part of this Section.

888 All that Shell's final objection does (which submits that it follows from that legislation that companies have *no* control over their Scope 3 emissions) is to give rise to questions. In the absence of any explanation, the objection offers no further clarity on this point. It will be clear from the foregoing that this legislation *does* actually offer support for the Court of Appeal's finding, in addition to the various other instruments already discussed. After all, all that legislation each time presupposes that companies have influence on their Scope 3 emissions. Otherwise, they would not establish any rules on this subject.

[1401] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 171.
[1402] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 172.
[1403] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 173 up to and including175
[1404] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 176.

889 Ground of appeal no. 3.2.2 is divided thematically into three parts. The first part alleges that the Court of Appeal has erred in law, insofar as it ruled that the indirect horizontal effect of human rights supports and justifies the existence of a Scope 3 reduction obligation in grounds 7.18 up to and including 7.27 and 7.55 up to and including 7.57.[1405] This part of the ground of appeal is a complete repetition of the objections formulated in grounds of appeal nos. 2.3 and 2.5 of Shell's conditional cross-appeal in cassation that are based on the same idea and which the ground of appeal itself also refers back to. Milieudefensie et al. have already explained in detail in Sections IV.5 and V.1 up to and including V.5 of this Explanatory Submission that all relevant objective points of reference - including human rights - point to a duty of care that also extends to a Scope 3 reduction obligation. Furthermore, in Section V.8.1 of this Explanatory Submission, they have already set out why grounds of appeal nos. 2.3 and 2.5 of Shell's conditional cross-appeal fail. For this reason, the ground of appeal fails.

890 Shell's second objection is directed, again, at ground 7.99 of the judgment, arguing that the Court of Appeal has erred in law, insofar as it ruled there that other instruments (including the OECD Guidelines) support the existence of a Scope 3 reduction.[1406] This complaint again overlooks the fact that the Court of Appeal does not say anything in ground 7.99 about the existence of a reduction obligation, but gives its view on its effectiveness for Scope 3, so that the ground of appeal fails for lack of factual basis.

891 Finally, Shell's third objection submits that insofar as the Court of Appeal found in ground 7.99 that it is within the power of Shell to reduce its customers' emissions by a fixed date in the future, in light of instruments such as the GHG Protocol, the Net Zero Guidelines and the 1.5° Business Playbook, this finding of the Court of Appeal is incomprehensible. To this end, the ground of appeal refers to Shell's arguments on this point in ground of appeal no. 2.4 of its conditional cross-appeal.[1407] This complaint is completely defeated by the fact that the Court of Appeal did not rule in ground 7.99 that Shell has absolute power to ensure that its customers will have reduced their emissions by a fixed point in time. The Court of Appeal merely held that Shell has influence not only on the supply side, but also on the demand side of the oil and gas market, so that compliance with its duty of care for Scope 3 is not ineffective via that connection. Compliance with that duty does not require that Shell has absolute power over its customers' reductions. Milieudefensie et al. have already addressed this above, for instance in the context of the discussion of ground of appeal no. 3.1.1 of Shell's conditional cross-appeal. The complaint fails.

[1405] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 177.
[1406] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 178 up to and including180.
[1407] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 181.

Shell's targets and influence on Scope 3 emissions (ground of appeal no. 3.3)

892 Ground of appeal no. 3.3 challenges the Court of Appeal's factual finding in ground 7.99 that Shell's influence over the demand side can also be derived from Shell's own reduction targets; this cannot be reconciled with the fact that Shell has no influence on its Scope 3 emissions.[1408]

893 Shell challenges this factual finding with a somewhat absurd argument. It argues that it naturally does not set targets or ambitions without "having a reasonable basis to genuinely believe that it can meet them", but this does not mean that it has any control over its Scope 3 emissions. Rather, targets are forward-looking statements of an organisation's plans and objectives for such an organisation to pursue.[1409] Whether they will be achieved, depends on external factors, such as investments, innovations, infrastructural facilities and changes in demand.[1410] There is no direct relationship between the emissions that Shell reports and the emissions released into the atmosphere by its end-users. Therefore, the targets that were set are irrelevant to establishing the existence of control for Shell over its emissions.[1411] Moreover, the external environment affecting the achievement of the targets is uncertain and dynamic. If it could be inferred from the setting of targets for emissions that a company also has control over those emissions, then companies would be dissuaded from adopting any targets. It would therefore only be counterproductive, still according to Shell.[1412]

894 This ground of appeal fails. Firstly, the Court of Appeal based its finding that Shell has influence on the emissions of end-users via the demand side, in an independent and comprehensible manner, on the elements of the UN climate regime cited by the Court of Appeal and the soft-law sources partly based on it as well as on the above-mentioned EU instruments (the CSDDD, the CSRD and the EU-ETS 2). The Court of Appeal subsequently also pointed to Shell's targets (*"also follows from the fact*").[1413] The ground of appeal therefore already fails for lack of interest, as the success of the ground of appeal cannot change the Court of Appeal's factual conclusion.

895 For the remainder, Shell's line of reasoning is unclear. Naturally, a court can infer, on understandable grounds, from the fact that a company sets certain reduction targets for which - in Shell's words – it has "*a reasonable basis to genuinely believe that it can meet them*"[1414] that this company also has influence on those emissions. What would be really counterproductive is if such targets were set without the possibility of having any influence whatsoever on them. That is not the case. As already discussed in the

[1408] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 183 and 184.
[1409] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 185.
[1410] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 186.
[1411] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 187.
[1412] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 188.
[1413] Judgment of the Court of Appeal, ground 7.99.
[1414] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 185.

first part of this Section, Shell also took the position from 1998 to 2023 that it has influence on the emissions of its end-users. At the time, Shell still intended to allocate half of its investments to the innovations and sustainable alternatives also deemed necessary by Shell, according to the ground of appeal, to reduce the emissions of its end-users and to shift demand. Those ambitions were abandoned in the course of that period and, after 2023, at an even accelerated pace. So Shell's targets do actually demonstrate that it has influence on the demand side. It is solely the lack of will that has prevented Shell, for nearly 30 years, from using that influence to limit its Scope 3 emissions.

Foreseeability of the duty of care for Scope 3 (ground of appeal no. 3.4)

896 Finally, ground of appeal no. 3.4 (once again) submits that the duty of care established by the Court of Appeal regarding Shell's Scope 3 emissions was not sufficiently foreseeable or self-evident. There is no precedent for it and there are no sufficiently clear, objective points of reference.[1415] The ground of appeal again points to the various arguments presented in grounds of appeal nos. 3.1 and 3.2: the existing laws and regulations do not point to or include points of reference for a Scope 3 obligation; such an obligation would be at odds with the fundamental principles of liability law and the other relevant instruments do not contain such points of reference either. This means that the standard was not sufficiently foreseeable.[1416]

897 This ground of appeal again overlooks the relevant objective points of reference applied by the Court of Appeal, all of which indicate that Shell also has a duty of care to reduce its Scope 3 emissions. Milieudefensie et al. have discussed all the relevant objective points of reference in Section IV.5 of this Explanatory Submission and demonstrated in Sections V.1 up to and including V.5 that they specifically designated Shell as the company that has this duty of care. Moreover, in the discussion of ground of appeal no. 2.8 of Shell's conditional cross-appeal in cassation in Section V.8.1 of this Explanatory Submission, Milieudefensie et al. already observed that, because of the objective nature of the points of reference leading to this conclusion, it is also established that the standard was sufficiently foreseeable for Shell. The ground of appeal therefore fails.

VI SHELL'S DUTY OF CARE REQUIRES THE COURT TO IMPOSE A CONCRETE REDUCTION OBLIGATION

VI.1 Introduction

898 Chapter V of this Explanatory Submission explained that Shell has a duty of care to prevent or limit dangerous climate change, seeing all the relevant objective points of reference. It was also set out there that the objections formulated in Shell's conditional

[1415] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 190.
[1416] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 191 up to and including193.

cross-appeal in cassation that challenge that finding are without merit. This Chapter will discuss that and why the Court of Appeal, building on, and for the purpose of the compliance with, the accepted duty of care, should also have established, and imposed on Shell, a concrete reduction obligation. To this end, Milieudefensie et al. will explain on the basis of which objective points of reference and modelled reduction scenarios the Supreme Court can arrive at a reduction obligation that is well-founded from both a normative and a scientific perspective.

899 In this context, it will become apparent that all the objective points of reference relevant to the determination of Shell's duty of care to prevent or limit dangerous climate change - the doctrine of hazardous negligence, human rights, general legal principles, soft law, and legislation that is not directly applicable – each time point in the same direction, also in the context of Shell's concrete reduction obligation. Science supports and complements these normative findings with the reduction scenarios modelled by it. This combination provides ample normative and scientific justification for establishing a specific reduction percentage for Shell. Milieudefensie et al. will explain that, on that basis, it can be determined within the boundaries of the law that Shell must reduce its Scope 3 emissions - in addition to its Scope 1 and 2 emissions - in line with the global average reduction percentage of 45%, or by a reduction percentage within the range of (rounded) 30% to 45% or any other reduction percentage. The Court of Appeal could in any event have imposed a minimum percentage on Shell. In the view of Milieudefensie et al., that minimum percentage is (rounded) 30%.

900 Accordingly, this Chapter will first outline the applicable assessment framework within which the fact-finding court can determine a concrete reduction obligation with a concrete reduction percentage. This will provide the court of remittal with sufficient guidance to arrive at a concrete reduction percentage for Shell.

901 In this case, the Court of Appeal divided its assessment of the reduction percentage applicable to Shell into three parts ("the three-step approach"). In ground 7.67, the Court of Appeal set forth the standard applied by it, namely that there must be scientific consensus regarding a reduction percentage applicable to a company such as Shell. Subsequently, the Court of Appeal assessed in grounds 7.73 up to and including 7.81, based on that standard, whether Shell can be held to the global average reduction percentage of 45%. In grounds 7.82 up to and including 7.97, the Court of Appeal then assessed, based on that same requirement of scientific consensus, whether the sectoral reduction scenarios provide sufficient points of reference for a reduction percentage applicable to Shell. The Court of Appeal answered both questions in the negative.

902 This Chapter is structured as follows. In Section VI.2 of this Explanatory Submission, Milieudefensie et al. will first discuss, by way of explanation of grounds of appeal nos. 3.3 up to and including 3.7 and 4.2, why the strict consensus requirement applied by

the Court of Appeal is incorrect. The determination of the concrete reduction obligation must in reality be based on all relevant objective points of reference. This also applies to a significant extent when the “Common Ground method” of the ECtHR is applied; the Court of Appeal apparently (but erroneously) linked up with this method with its “scientific consensus standard”. That alone already constitutes sufficient grounds for cassation. Subsequently, Section VI.3 of this Explanatory Submission will discuss in detail how - based on the right standard and on normatively and scientifically sound grounds - a reduction percentage for Shell must be determined as well as why the Court of Appeal’s judgment cannot be allowed to stand by the Supreme Court in that light. With that, Milieudefensie et al. will have explained virtually all the other objections to the Judgment raised in grounds of appeal nos. 1, 3 and 4.

903 For cassation-technical reasons, the Notice of Appeal in Cassation followed the three-step approach used by the Court of Appeal, both in the presentation of how Shell’s concrete reduction obligation must be established and in the formulation of the related objections regarding the accompanying reasoning of the Court of Appeal. However, this three-step assessment approach is contrived from a normative perspective, because the concrete reduction obligation and the associated reduction percentage follow from all relevant objective points of reference taken together, also in light of the modelled reduction scenarios. Therefore, the way in which Shell’s concrete reduction obligation and the reduction percentage applicable to Shell must be determined, as well as the related objections to the Judgment will be discussed below from the perspective of those relevant objective points of reference and reduction scenarios as much as possible. This will immediately make clear what is wrong with the Judgment of the Court of Appeal. From this it follows that the Court of Appeal, due to the overly narrow standard and that three-step assessment, has failed to follow complete parts of the assessment framework in the context of both the discussion of the global average reduction percentage and the discussion of the sectoral reduction percentages.

904 To further explain the objections to the Judgment raised in grounds of appeal nos. 1, 3 and 4, Milieudefensie et al. will also discuss, in Section VI.4 of this Explanatory Submission, a number of fundamental misconceptions on the part of the Court of Appeal when determining the reduction percentage applicable to Shell. The most important one is the idea that Shell is allowed to increase its CO_2 emissions because the gas supplied by it could partially replace more carbon-intensive coal use, resulting in a net reduction in global CO_2 emissions. This idea conflicts with all relevant objective points of reference and modelled reduction scenarios, each of which points to a decrease in gas production and gas consumption. The second misconception is the assumption that the fact that Shell also serves harder-to-abate sectors diminishes its obligation to aim for the global average reduction percentage. That, too, is wrong for several reasons. Third, it is important to realise that the demanded concrete reduction obligation can be

achieved based on the current quantities of available oil and gas, while at the same time meeting the total demand for oil and gas. That is also something the Court of Appeal failed to recognise. All of this will culminate, in Section VI.5 of this Explanatory Submission, in a conclusion regarding the way in which the Court of Appeal should have arrived at a reduction percentage applicable to Shell.

905 The purpose of this Chapter is therefore not to explain all the objections to the Judgment raised in grounds of appeal nos. 1, 3 and 4 again. After reading this Chapter (and the relevant Sections of the preceding Chapters to which it refers), the objections raised in these grounds of appeal will be largely self-explanatory. For this reason, the reader can simply just read the objections themselves for the most part. In Section VI.6 of this Explanatory Submission, Milieudefensie et al. will briefly touch upon a number of objections and briefly explain some of them in more detail.

906 Finally, in Section VI.7 of this Explanatory Submission, Milieudefensie et al. will set out that a fixed reduction percentage is also consistent with the system of liability law and the various modelled reduction scenarios. In that context, they will also argue that a fixed reduction percentage is far preferable to Shell's argument that the differences between the reduction percentages included in the modelled reduction scenarios should mean that no reduction obligation can be imposed on Shell at all. Section VI.8 of this Explanatory Submission will conclude this Chapter.

VI.2 The reduction obligation fleshes out the duty of care in concrete terms

VI.2.1 Concrete obligations under Article 6:162 DCC and the role of consensus

907 The duty of care to be established under Article 6:162 DCC and the resulting concrete obligation – i.e. what the wrongdoing party must do or must not do in concrete terms - are, from a doctrinal perspective, two sides of the same coin. After all, the search for the unwritten duty-of-care standard and the obligation that results from it essentially always revolve around the question *what* a party is required to do, based on what is appropriate in society. The Dutch Supreme Court has succinctly formulated this as follows:

> *"Whether such an act has taken place depends - in abstract terms - on whether the wrongdoer did not act as they should have done in order to avoid harming someone else's specific interest that the wrongdoer should have respected* (…)[1417]

[1417] Judgment of the Dutch Supreme Court of 30 October 1994, *NJ* 1996, 196 (*State/Shell*). See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.18; K.J.O. Jansen, "*GS Onrechtmatige daad*", Art. 6:162 DCC, note 6.1.4.2.

908 As a result, the unwritten duty-of-care standard and the resulting concrete obligation converge in full from both a normative and a dogmatic perspective. In other words: the duty-of-care standard and the related concrete legal duty are part of the same duty of care. In "normal-typical" cases, this convergence is self-evident: a concrete danger necessitates the placement of a warning sign,[1418] a potash mine operator must cease salt discharges into the river in view of the interests of downstream users [1419] and asbestos-processing companies must take concrete precautionary measures to prevent their employees' exposure to asbestos in view of the associated dangers.[1420] The standard of care and the concrete obligation thus merge from a normative point of view. They therefore also follow from the same normative framework. The five-level approach suggested by Shell[1421], which fragments the duty-of-care standard and the concrete legal obligation to a significant degree, is therefore complicating as well as incorrect.

909 Chapter IV of this written explanatory explained that the question of what the duty of care to prevent or limit dangerous climate change based on Article 6:162 DCC entails in a concrete case must be answered on the basis of all relevant circumstances of the case and, more specifically, on the basis of all relevant objective points of reference. These include (i) the doctrine of hazardous negligence, (ii) the human rights, including in particular Articles 2 and 8 ECHR, (iii) general legal principles, including the precautionary principle, the principle of intergenerational justice and the CBDR principle, (iv) soft law, and (v) legislation that is not directly applicable.

910 As set out in Chapter V of this Explanatory Submission, the Court of Appeal rightly took as its starting-point that these objective points of reference are relevant for determining the duty of care incumbent upon Shell. Because the unwritten duty-of-care standard and the concrete obligation attaching to it converge from a normative perspective, it goes without saying that those same objective points of reference *also* form the basis for determining the concrete obligations and, thereby, the legal duty to reduce emissions (in any event the minimum duty) [1422] to be imposed by the court in the form of a court injunction. As a result, the objective points of reference discussed in Chapter IV of this Explanatory Submission *also* form the basis for determining Shell's concrete reduction obligation and the associated reduction percentage.

911 The foregoing therefore immediately establishes – as pointed out in different ways in grounds of appeal nos. 3.3 up to and including 3.5 and 4.2 - that the Court of Appeal, in ground 7.67, wrongly proceeded on the assumption that scientific consensus on a reduction percentage applicable to a company such as Shell is required. This criterion is not only overly strict, but also a criterion that science will never be able to provide.

[1418] Judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*).
[1419] Judgment of the Dutch Supreme Court of 23 September 1988, ECLI:NL:HR:1988:AD5713 *(Kalimijnen).*
[1420] Judgment of the Dutch Supreme Court of 17 December 2004, ECLI:NL:HR:2004:AR3290 *(Hertel/Van der Lugt et al.).*
[1421] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 9.
[1422] The obligation to set a minimum percentage will be addressed in Section VI.6.3 of this Explanatory Submission.

This criterion sets aside all the relevant objective points of reference without any good reason.

912 In the legal literature published in response to the Judgment, the requirement of scientific consensus as applied by the Court of Appeal has therefore rightly been found to be far too strict.[1423] Faber has pointed out that up to and including ground 7.66, the Court of Appeal applied a qualitative contextual test, but then, wrongly, switched to a quantitative assessment based on climate-science consensus.[1424] Van Dam speaks of looking for a needle in a haystack where there is no needle, because the scientific models do not provide unambiguous percentages, but rather ranges.[1425] He succinctly summarises the manner in which the reduction percentage must be determined and courts' own legal responsibility in line with the foregoing as follows:

> *"The difficulty in this type of cases is that the court must navigate the tension between scientific reality and the court's duty to provide sufficiently effective protection for the violated rights of individuals. This applies even more strongly when, as in the present case, it concerns the protection of the fundamental rights enshrined in the ECHR. Scientific consensus is therefore not a necessary condition for the administration of justice. The court has its own responsibility to distribute rights and obligations in a socially just manner, also in the absence of scientific consensus or even contrary to scientific consensus. If this were different, unlawfulness will become an empty shell as in the Court of Appeal's judgment, a standard to which no obligation is attached, with the result that citizens in the Netherlands and the Wadden Sea region are insufficiently protected against the violation of their rights guaranteed under Articles 2 and 8 ECHR."*[1426]

[1423] M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JOR* 2025/81, paras. 9 and 10; R.E. Kautz, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JA* 2025/27, p. 269; W.Th. Douma, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JM* 2025/5, pp. 87 and 88; E.M. Appel, "*De uitspraak van het gerechtshof Den Haag in Milieudefensie c.s./Shell: zes lessen voor toekomstige klimaatzaken*" (The judgment of the Court of Appeal of The Hague in the Milieudefensie et al. v. Shell case: six lessons for future climate cases) in *MvV* 2025/4, para. 3.6; B.A. Kuiper-Slendebroek, "*Tussen papieren ambities en juridische realiteit: de klimaattransitie van ondernemingen en indirecte horizontale mensenrechtenwerking*" (Between paper ambitions and legal reality: the climate transition of companies and indirect horizontal human rights effects) in *SEW* 2025/9, para. 4.4; S.M. Bartman, "*Het Shell CO_2-arrest, mede bezien door een concernrechtelijke bril*" (The Shell CO_2 judgment, partly viewed from a corporate group law perspective) in *AA* 2025/1, p. 51; M.J. Faber, "*Milieudefensie/Shell: tussen verplichting en veroordeling*" (Milieudefensie v. Shell: between obligation and injunction) in *MvO* 2024/10&11, para. 3.4.

[1424] M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JOR* 2025/81, paras. 8 and 9.

[1425] C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schending zonder remedie*" (Shell/Milieudefensie: a standard without an obligation and a violation without a remedy) in *AV&S* 2025/13, para. 3.2.2.

[1426] C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schending zonder remedie*" in *AV&S* 2025/13, para. 3.2.3.

913 This is consistent with the views of Jansen and De Jong. They, too, emphasise that it is up to courts to carry out the translation from the scientific domain into the legal domain.[1427] It is not the courts' role to resolve scientific debates, nor can courts base their judgments on science. On the contrary, their judgments are based on *legal* grounds.[1428] Dietz et al. also confirm this view.[1429]

914 The unwritten duty-of-care standard of Article 6:162 DCC and the objective points of reference relevant to it therefore *also* determine what concrete reduction obligation may be required of Shell. Section VI.3 of this Explanatory Submission will discuss how the Court of Appeal could have arrived at a reduction percentage for Shell based on the applicable normative framework and the science-based reduction scenarios. This will be preceded by a brief discussion of the relevance of the concept of consensus in horizontal, private-law relationships and the substance of the ECHR's Common Ground method, which the Court of Appeal has apparently used as the source for the consensus requirement applied by it.

VI.2.2 Contents and relevance of the Common Ground method and the role of consensus

915 The requirement of scientific consensus imposed by the Court of Appeal in ground 7.67 appears to have been derived from the ECHR's "Common Ground" method. In its considerations, the Court of Appeal appears to have focused in particular on the *Urgenda* judgment, in which the Dutch Supreme Court, based on the consensus interpretation prescribed by that method, determined a (minimum) reduction percentage for the Dutch State under Articles 2 and 8 ECHR.[1430] This means that the Court of Appeal has started out, in several respects, from an incorrect legal view of the role of consensus and the Common Ground method.

916 Grounds of appeal nos. 3.3 up to and including 3.7 and 4.2 take issue with this. In Section VI.2.1 of this Explanatory Submission, it was already noted that the Court of Appeal has overlooked the fact that the scientific consensus requirement applied by it is far too narrow. All objective points of reference are *also* decisive for determining the concrete measures required by a duty of care and (therefore) for determining the reduction percentage applicable to Shell. Furthermore, the Court of Appeal has failed to recognise (i) that the notion of consensus does not apply to horizontal duties of care based on private law and (ii) that even the Common Ground method, in which consensus does indeed play a role, is much broader than a search for scientific

[1427] K.J.O. Jansen & E.R. de Jong, "*Rechterlijke toetsing van wetenschappelijke kennis in het aansprakelijkheidsrecht*" (Judicial review of scientific knowledge in liability law) in *NTBR* 2022/2, para. 6.3.
[1428] K.J.O. Jansen & E.R. de Jong, "*Rechterlijke toetsing van wetenschappelijke kennis in het aansprakelijkheidsrecht*"," *NTBR* 2022/2, para. 6.3.
[1429] S. Dietz et al., Translating climate science into legal standards: Lessons from the Milieudefensie v. Shell case, Science 2026/1, p. 28.
[1430] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 6.3 and 7.5.1.

consensus on a specific reduction percentage for a specific company. Milieudefensie et al. will explain both points below.

(i) Consensus and horizontal duties of care based on private law

917 The most important point to note is that no consensus requirement applies in legal relationships that are purely based on private law. This can be easily illustrated by the *Urgenda* judgment, in which the Dutch Supreme Court interpreted Articles 2 and 8 ECHR in light of the applicable international normative framework, the generally accepted standards *(*soft law*)* and the existing scientific insights. This led the Supreme Court, and the Court of Appeal, to conclude that a reduction contribution of at least 25% could be required of the Dutch State. To that extent, the State therefore has no margin of appreciation in fulfilling its ECHR obligations to protect Dutch citizens against dangerous climate change either. So to that extent there is also no question of a primacy of politics which courts cannot encroach upon.[1431]

918 In this connection, the Dutch Supreme Court found the following:

> *"6.3* (…) *Although determining the share to be contributed by the Netherlands in the reduction of greenhouse gas emissions is, in that context too, in principle, a matter for the government and parliament, the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change.* (…) *Under certain circumstances, there may also be such clear views, agreements and/or consensus in an international context about the distribution of measures among countries that the courts can establish what – in accordance with the widely supported view of states and international organisations, which view is also based on the insights of climate science – can in any case be regarded as the State's minimum fair share. On the basis of the standards referred to above in 5.4.2 and 5.4.3 (including the common ground method), which the Dutch courts are obliged to apply when interpreting the ECHR (see above in 5.6.1), the courts are then obliged to proceed to establishing such and to attach consequences to it in their judgment on the extent of the State's positive obligations."*[1432]

919 In the opinion of the Supreme Court, it is possible that the primacy of politics diminishes in importance if the views, agreements and/or consensus in an international context regarding the distribution of measures among countries is such that the courts can establish what can in any case be regarded - in accordance with the widely supported

[1431] Judgment of the Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 6.2, 6.3, and 6.6. See also ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz v. Switzerland*), para. 543.
[1432] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 6.3.

view of states and international organisations, which view is also based on climate science - as the State's minimum "fair share" In this way, the Supreme Court directly linked the concept of consensus to the tension between the separation of powers and judicial restraint, which is the starting point in that context. None of these aspects play a part in horizontal relationships based on private law. This alone already means that the concept of consensus has no (decisive) significance in such relationships. The Court of Appeal has failed to recognise this.

(ii) Consensus and the Common Ground method

920 Furthermore, the Common Ground method is wider than scientific consensus on a specific reduction percentage for a specific company. The Common Ground method, also referred to as "consensus interpretation" (the terms are used interchangeably[1433]), is a method of interpretation employed by the ECHR for the ECHR treaty provisions. Gerards has summarised this method as follows:

> *"Generally speaking, this method means that the Court seeks support for a new interpretation of the ECHR in the legal developments within the various contracting states or in international law. There is room for such a new interpretation when there is sufficient consensus on the reasonableness or appropriateness of that interpretation within the contracting states."*[1434]

921 With this interpretation criterion, the ECtHR aims to ensure that the contents of the ECHR can evolve in tandem with the social developments and changing social views in the contracting states.[1435] To this end, the ECtHR links up with prevailing legal views in those contracting states.[1436] Unanimity among all the contracting states is not required in this connection.[1437] A clear trend in a particular direction may be sufficient for a broad interpretation of the Convention.[1438] Consensus may therefore already exist if a trend is identified by the ECtHR.[1439] The ECtHR points to several relevant sources for this purpose: (i) international law other than the ECHR and its interpretation by competent bodies, (ii) the general practice – the legislation, case law and policies - of contracting states, insofar as they reflect their common values, and (iii) widely accepted scientific

[1433] J.H. Gerards, *ECHR – "Algemene beginselen"* (General Principles), The Hague: Sdu 2011, pp. 74 and 75.
[1434] J.H. Gerards, *ECHR – "Algemene beginselen"*, The Hague: Sdu 2011, pp. 74 and 75.
[1435] J.H. Gerards, *ECHR – "Algemene beginselen"*, The Hague: Sdu 2011, p. 34.
[1436] J.H. Gerards, *ECHR – "Algemene beginselen"*, The Hague: Sdu 2011, p. 75.
[1437] J.H. Gerards, *ECHR – "Algemene beginselen"*, The Hague: Sdu 2011, p. 77.
[1438] J.H. Gerards, *ECHR – "Algemene beginselen"*, The Hague: Sdu 2011, pp. 90 up to and including 91.
[1439] ECHR 11 July 2002, No. 28957/95 (*Christine Goodwin/United Kingdom*), para. 85.

insights.[1440] Milieudefensie et al. will discuss these points of reference in more detail below.

922 (i) International instruments. International sources or instruments for establishing consensus[1441] include international treaties,[1442] soft law[1443] and judgments of other international courts.[1444] In the Common Ground method, soft law encompasses a large collection of non-binding international instruments, such as guidelines, action plans, conference declarations and non-binding resolutions of international organisations.[1445] The more deeply an international legal source is accepted within the contracting states, the more weight it carries. Conversely, the fact that not all contracting states are bound by the instrument of international law does not mean that it carries no meaning.[1446]

923 The foregoing implies that, when the ECHR is interpreted, all relevant international climate treaties that were already discussed in detail above and to which the ECHR contracting states are also parties are relevant, such as the Paris Agreement and the UN Climate Convention in particular as well as other human rights treaties, such as the ACHR. For the purpose of this interpretation, regard must also be had for the general legal principles codified in them, such as the precautionary principle, the principle of intergenerational justice and the CBDR principle. These instruments can also provide guidance for the human rights obligations under the ECHR. In the *Urgenda* judgment, for example, the Dutch Supreme Court considered the precautionary principle relevant in that light for determining the State's obligations under Articles 2 and 8 ECHR.[1447]

924 (ii) National sources. To determine consensus, the ECHR also looks at the national case law and legislation within a country,[1448] because the ECHR finds *"the practice of*

[1440] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 456; judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.4.2 and 5.4.3 with reference to ECHR 12 September 2012, no. 10593/08 (*Nada/Switzerland*); ECHR 20 May 2010, no. 61260/08 (*Oluic/Croatia*), paras. 29 up to and including 31, 49, 60 and 62; ECHR 12 November 2008, No. 34503/97 (*Demir and Baykara/Turkey*); ECHR 30 November 2004, No. 48939/99 (*Öneryildiz/Turkey*), paras. 59, 71, 90 and 93; ECHR 17 October 1986, No. 9532/81 (*Rees/United Kingdom*), para. 47.

[1441] See, for example, J.H. Gerards, "*EVRM – Algemene beginselen*" (ECHR – General Principles), The Hague: Sdu 2011, p. 75; V. Martenet, Shaping Rights Through European Consensus or Trend in German Law Journal 2024/25, p. 1443.

[1442] ECHR 12 September 2012, No. 10593/08 (*Nada/Switzerland*); ECHR 12 November 2008, No. 34503/97 (*Demir and Baykara/Turkey*).

[1443] The Dutch Supreme Court refers to "generally accepted standards". See the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.4.3, with reference to ECHR 20 May 2010, no. 61260/08 (*Oluic/Croatia*), paras. 29 up to and including 31, 49, 60 and 62; ECHR 30 November 2004, No. 48939/99 (*Öneryildiz/Turkey*), paras. 59, 71, 90 and 93; ECHR 17 October 1986, No. 9532/81 (*Rees/United Kingdom*), para. 47.

[1444] ECHR 12 September 2012, No. 10593/08 (*Nada/Switzerland*); ECHR 12 November 2008, No. 34503/97 (*Demir and Baykara/Turkey*). See also J.H. Gerards, "*EVRM – Algemene beginselen*", The Hague: Sdu 2011, p. 81.

[1445] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.31.

[1446] J.H. Gerards, "*EVRM – Algemene beginselen*", The Hague: Sdu 2011, p. 83.

[1447] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.3.2, 5.3.3 and 7.2.10. See also Section IV 5.3.1 of this Explanatory Submission in this regard.

[1448] J.H. Gerards, "*EVRM – Algemene beginselen*", The Hague: Sdu 2011, p. 80.

European States reflecting their common values" herein.[1449] From this it follows that broadly accepted obligations and doctrines based on national law may play a role in the interpretation of ECHR obligations. This therefore means that general principles that play a role within the doctrine of hazardous negligence may *also* be relevant in the interpretation of human rights obligations based on the Common Ground method.

925 (iii) Widely accepted scientific insights. When the ECHR is interpreted, widely accepted scientific insights must also be taken into account.[1450] In its *KlimaSeniorinnen* judgment, the ECHR used such insights as a relevant perspective for determining the climate obligations of the contracting states. It is not difficult to actually find that view in the *KlimaSeniorinnen* judgment:

> *"546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC* (…)*, the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention."*[1451]

926 The ECtHR makes it clear here that regard must be had for *"*cogent scientific evidence*"* in combination with the international commitments of the member states, such as the obligations under the UN climate regime. From this, the obligation to take the necessary measures under Article 8 ECHR to prevent dangerous climate change - in order to protect human rights – follows.

927 When this Common Ground method is applied, incidentally, the result is not always that a particular right is or is not assured by the ECHR in absolute terms. The method results in a sliding scale.[1452] For instance, there may be absolute ECHR obligations that member states must fulfil without any margin of appreciation as well as ECHR obligations for which the member states do have a certain margin of appreciation. Depending on the degree of presence or absence of common denominators, the ECtHR determines what is required by the ECHR and subsequently what margin of appreciation

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[1449] ECHR 12 November 2008, No. 34503/97 (*Demir and Baykara/Turkey*), para. 86.
[1450] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.4.3, with reference to ECHR 20 May 2010, no. 61260/08 (*Oluic/Croatia*), paras. 29 up to and including 31, 49, 60 and 62; ECHR 30 November 2004, No. 48939/99 (*Öneryildiz/Turkey*), paras. 59, 71, 90 and 93; ECHR 17 October 1986, No. 9532/81 (*Rees/United Kingdom*), para. 47.
[1451] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 546.
[1452] J.H. Gerards, "*EVRM – Algemene beginselen*", The Hague: Sdu 2011, p. 183. See in detail N. Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation, and the Legitimacy of the Strasbourg Court," *European Public Law* 2019/3, pp. 445 up to and including 480.

the member states have with regard to a given subject.[1453] National courts, however, always remain obligated to assess human rights violations without any restraint. They must assess such violations with particular rigor and care.[1454]

928 Thus in the Common Ground method, consensus is not always decisive. This means that the Common Ground method does not require scientific consensus on a specific reduction percentage for a specific company either. On the contrary, within the Common Ground method, meaning is actually attached to a large number of relevant facts and circumstances, such as (i) international obligations and treaties, including human rights and general principles of law, (ii) widely accepted doctrines and obligations based on national law, such as the doctrine of hazardous negligence, (iii) soft law, and (iv) widely accepted scientific insights. This means that the Common Ground method shows significant overlap with the method of objective points of reference. This underscores that the scientific consensus requirement applied by the Court of Appeal does not preclude a reduction obligation on Shell's part. The Judgment of the Court of Appeal is therefore wrong.

Conclusion

929 It follows from the foregoing that the Judgment of the Court of Appeal cannot be upheld. In the context of determining Shell's concrete reduction obligation, there is no requirement to the effect that it must be possible to establish scientific consensus on a specific reduction percentage for Shell. The reasons for this are that (i) all objective points of reference are *also* decisive for determining the concrete measures required by a duty of care and (therefore) for determining the reduction percentage applicable to Shell, (ii) the concept of consensus is not decisive when horizontal duties of care based on private law are established, and (iii) the Common Ground method, which the Court of Appeal apparently based its "scientific consensus requirement" on, also requires a much broader assessment. When the Court of Appeal determined Shell's concrete reduction obligation, it therefore wrongly used the scientific consensus requirement in grounds 7.67 et seq.

VI.3 Determination of Shell's concrete reduction obligation

VI.3.1 Introduction

930 In the following, Milieudefensie et al. will discuss that, and how, the relevant objective points of reference, certainly when viewed in relation to each other, have more than sufficient guiding force to arrive at a concrete reduction percentage for Shell in a

[1453] J.H. Gerards, "*EVRM – Algemene beginselen"*, The Hague: Sdu 2011, pp. 193 and 194.
[1454] See the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.39 and the sources cited. See also ECHR 7 February 2013, No. 16574/08 (*Fabris/France*), para. 72.

responsible manner and with due regard for all the relevant interests. That percentage constitutes the contribution that may be required of Shell to prevent or limit dangerous climate change. This therefore constitutes the concrete determination of Shell's duty of care – the existence of which was rightly established by the Court of Appeal - to prevent or limit dangerous climate change.[1455] This also does justice to the requirement (which also has horizontal effect) of Articles 2 and 8 ECHR to provide effective - not illusory - protection against dangerous climate change.

931 The Supreme Court could arrive at a concrete reduction obligation for Shell itself, by way of an interpretation of the law ("*rechtsoordeel*"), on the basis of the relevant objective points of reference. After all, all these points of reference point to a reduction obligation of (at least) 45%. That percentage is part of the duty of care to prevent or limit dangerous climate change and thus constitutes an interpretation of the law. However, what will follow below is not only intended to persuade the Supreme Court to do so. In case the Supreme Court should view that determination, in part, as a question of fact, Milieudefensie et al. will illustrate that a court can determine a concrete reduction percentage based on the applicable framework of Article 6:162 DCC without any difficulties. Due to its focus on scientific consensus, the Court of Appeal did not get round to this. The Supreme Court must therefore, in any event, instruct the fact-finding court to arrive at a concrete reduction percentage for Shell within the limits of the right framework to be described below. Grounds of appeal nos. 1, 3 and 4 all provide tools for such an interpretation of the law.

VI.3.2 The oil and gas industry as the primary cause of climate change

932 To properly understand how a concrete reduction percentage follows from the objective points of reference that are relevant in this context, we must first look, again, at a number of factual starting-points within which the CO_2 reduction required of Shell must be assessed. Milieudefensie et al. have also concisely outlined these starting-points in Section V.2, with reference to Chapters II and III above. Very briefly summarised, these starting-points are as follows: (i) 81% of global CO_2 emissions originate from fossil fuels, (ii) 48% of global CO_2 emissions originate from oil and gas use, (iii) 33% of global CO_2 emissions are linked to coal use, (iv) 80% of that coal use occurs in developing countries, and (v) 50% of total oil and gas use can be attributed to developed countries (1.3 billion people) and the other 50% to developing countries (6.4 billion people).[1456]

933 Since nearly half of global CO_2 emissions are associated with oil and gas consumption, there is simply no conceivable reduction scenario in which the oil and gas industry - and so Shell as well - will not have to drastically reduce its emissions to achieve the climate goals of the Paris Agreement and, more specifically, a global CO_2 emission reduction

[1455] See, in this regard, Chapter V of this Explanatory Submission.
[1456] See, in this regard, Sections II.1.1, III.2.3, and V.2 of this Explanatory Submission.

of 45% by 2030 - or at least to keep it within sight. This is a simple mathematical and physical premise. Milieudefensie et al. have also addressed this in Section II.1.1 of this Explanatory Submission.

934 The above can be further illustrated with a simple numerical example. Suppose[1457] that total global emissions amount to 1,000 $GtCO_2$ annually, meaning that an annual reduction of 450 $GtCO_2$ (45%) must be achieved by 2030. If, for example, emissions from coal (33%) and all other sectors (19%) were to decrease by 60% in 2030 (and thus already far exceed the global reduction average), then these sectors would have reduced their emissions by (1000 $GtCO_2$ x 0.6 x 0.52 =) 312 $GtCO_2$. This means that the oil and gas industry will still have to shoulder the remaining portion of (450 $GtCO_2$ – 312$GtCO_2$ =) 138 $GtCO_2$. This requires a total CO_2 reduction in the oil and gas sector of (138 $GtCO_2$ / (1000 $GtCO_2$ x 0.48) x 100) = 28.75%. This percentage does not yet take into account all the practical and normative objections that make it impossible to generically impose a required 60% CO_2 reduction on *all other* sectors globally for the mere purpose of letting the oil and gas industry off the hook, when the global average reduction rate is 45%. It follows from this alone that the reduction effort to be made by the oil and gas industry is very substantial.

935 In reality, there are many reasons and normative grounds indicating that the oil and gas industry in general, and Shell in particular, will have to achieve much higher CO_2 emissions than 28.75%. The objective points of reference that are relevant in this context, also in light of the various modelled reduction scenarios, provide more than sufficient guidance to responsibly determine what percentage-based emission reduction can be required from the oil and gas industry in general and from Shell in particular. Milieudefensie et al. will now discuss this in more detail.

VI.3.3 Duty of care as the starting-point for a concrete reduction obligation

936 The starting-point for determining Shell's concrete reduction obligation and the concrete reduction percentage that can be required of Shell in this context is the duty of care established by the Court of Appeal, which requires Shell to prevent or limit dangerous climate change. After all, as explained in Section VI.2.1 of this Explanatory Submission, this duty of care and the concrete reduction obligation (that follows from it) are two sides of the same coin. The findings of the Court of Appeal in the context of Shell's duty of care with regard to the objective points of reference relevant to it, such as the doctrine of hazardous negligence, human rights and soft law, are therefore *also* relevant when Shell's concrete reduction obligation is established and fleshed out. Those findings were discussed in detail in Chapter V of this Explanatory Submission.

[1457] This figure was chosen for the sake of simplicity. For the purposes of this example, the specific figure does not matter. After all, the question here is what the percentage-based contribution to the reduction in total emissions should be. We know the percentage that each sector contributes to total emissions. Therefore, the calculation remains the same regardless of the specific figure used for total emissions.

937 Nevertheless, Milieudefensie et al. recall the following conclusions of the Court of Appeal:

(a) Companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change (ground 7.27). Shell therefore also has an obligation to reduce its Scope 3 emissions (ground 7.111);

(b) Companies have a duty of care to reduce their emissions (ground 7.57), and *more* can be required of Shell than of most other companies, given that Shell has been a major player in the fossil-fuel market for over a century and is also still holding a prominent position in that market (ground 7.55); and

(c) In order to comply with their duty of care to prevent or mitigate dangerous climate change, companies such as Shell must make an appropriate contribution to the climate goals of the Paris Agreement (ground 7.67), and to keep the climate objectives of the Paris Agreement within reach, emissions will have to be drastically reduced by 2030 (ground 7.61).

938 These obligations of Shell, which are based on some of the objective points of reference relevant in this context, already provide a first, clear direction for Shell's concrete reduction obligation. It must reduce its CO_2 emissions by more than the average (*"more than* (…) *most other companies*"), and those reductions must constitute an appropriate contribution to the climate goals of the Paris Agreement. This already indicates that a substantial, above-average contribution may be required of the oil and gas industry and of Shell.

VI.3.4 Doctrine of hazardous negligence and legislation that is not directly applicable

939 Section VI.3.3 of this Explanatory Submission discussed the fact that the duty of care to prevent or limit dangerous climate change as established by the Court of Appeal and its considerations in this regard provide a first, general direction for Shell's concrete reduction obligation. As Milieudefensie et al. explained in Sections V.4.1 and V.4.5 of this Explanatory Submission, this also applies to the doctrine of hazardous negligence and legislation that is not directly applicable as objective points of reference, which the Court of Appeal recognised in part. For example, in the context of the *Kelderluik* factors, the Court of Appeal acknowledged that Shell is contributing significantly to the climate problem and that it is within the power of Shell to contribute to combating it (grounds 7.26 and 7.27); with regard to the non-directly applicable CSDDD, the Court of Appeal found that not only Shell, but also Shell's customers will contribute to the EU's emission reduction targets by reducing CO_2 emissions (grounds 7.45, 7.46 and 7.56). It therefore follows from these objective points of reference that are relevant in this context, too,

that Shell must not only contribute to preventing or mitigating dangerous climate change, but must also do so to an above-average extent.

VI.3.5 Human rights, effective protection and effective remedy

940 The objective point of reference formed by human rights, more specifically the ECHR, subsequently provides a more concrete direction. In the *KlimaSeniorinnen* judgment, the ECtHR ruled that Articles 2 and 8 ECHR require the protection against dangerous climate change to be *effective* – not illusory. This requires states to achieve CO_2 reductions in line with the 1.5°C target from the Paris Agreement and the remaining carbon budget, resulting in a 45% reduction by 2030 and net-zero emissions by 2050. To this end, they must set adequate intermediate reduction targets. States have a very limited margin of appreciation in this regard. For this purpose, the ECtHR has pointed to the nature and severity of the consequences of dangerous climate change and the general consensus on the importance of ensuring that net-zero CO_2 emissions are achieved to provide effective protection against it. This means that Articles 2 and 8 ECHR always require CO_2 reductions that are in line with the Paris Agreement objectives.[1458] This constitutes the absolute outer boundary within which all action taken by the actors that are bound by the obligations of Articles 2 and 8 ECHR, either directly (states) or via their horizontal effect (the largest CO_2 emitters, such as oil and gas companies like Shell), must take place.

941 Although states have a larger margin of appreciation when it comes to the specific measures to be taken, this discretion is also circumscribed by the ECtHR in light of the requirement for effective protection. In this context, the ECtHR requires practical measures that provide effective protection. Moreover, these measures must not be merely theoretical. Measures must therefore be taken that are capable of mitigating the existing and potentially irreversible, future effects of climate change.[1459] According to the ECtHR, this requirement of effective protection against dangerous climate change necessitates, at a minimum, the following:

(a) measures must be taken for the substantial and progressive reduction of CO_2 emission levels, with a view to reaching net neutrality within, in principle, the next three decades (i.e. by 2050);[1460]

(b) in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate

[1458] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 543.
[1459] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), paras. 538 and 545.
[1460] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 548.

intermediate reduction goals must be set for the period leading to net neutrality;[1461]

(c) the measures must specify a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions in line with the climate goals of the Paris Agreement;[1462]

(d) the measures must set out intermediate reduction targets and pathways that are deemed capable of meeting the required reduction goals within the relevant time frames.[1463]

942 With the above, the ECtHR firstly confirms that only emission reductions within the maximum available carbon budget for limiting global warming to 1.5°C can effectively contribute to combating dangerous climate change. This view is generally accepted. The only conceivable alternative would be adaptation measures (human adaptation to the consequences of climate change), but such measures could not prevent excessive global warming. Moreover, such adaptation measures are often ineffective due to adaptation limits, especially if global warming were to exceed 1.5°C. In that respect, climate problems differ from other environmental problems for which different measures *are* often conceivable.[1464]

943 This was also recognised in the *Urgenda* case, in which the Dutch Supreme Court found the following:

> *"7.5.2* (…) *In para. 59, however, the Court of Appeal established fully comprehensibly that although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures. This finding also implies that even if account is taken of the fact that the State is taking adaptation measures, mitigation measures that reduce emissions by at least 25% by 2020 are urgently needed, also for the Netherlands."*[1465]

[1461] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 549.
[1462] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 550 under (a).
[1463] ECHR 9 April 2024, No. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 550 under (b).
[1464] See in detail the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 338 up to and including 342, 347 and 348.
[1465] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 7.5.2. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 339.

944 This is consistent with the ruling of the Court of Appeal of Brussels that a court order mandating emission reduction is the best, if not the only, remedy against a violation of Articles 2 and 8 ECHR.[1466] The IPCC has also underscored this scientific premise:

> *"Available evidence on projected climate risks indicates that opportunities for adaptation to many climate risks will likely become constrained and have reduced effectiveness should 1.5C global warming be exceeded and that, for many locations on Earth, capacity for adaptation is already significantly limited. The maintenance and recovery of natural and human systems will require the achievement of mitigation targets."*[1467]

945 In addition to this scientific acknowledgment, there is a politically recognised need for *"rapid, deep and sustained reductions in global greenhouse gas emissions"* and climate action *"across all actors of society, sectors and regions"* in this decade.[1468] Furthermore, there is scientific and political consensus that global emissions must be reduced by 45% by 2030 and that net-zero emissions must be achieved globally by 2050 in order to prevent dangerous climate change (in the form of a temperature rise of more than 1.5°C).[1469] After all, that is the starting-point of the Paris Agreement. Shell also acknowledges the necessity of this 45% CO_2 reduction by 2030.[1470] Furthermore, it is widely recognised that the global temperature target can only be achieved if companies independently and proactively implement emission reductions in line with the temperature target of the Paris Agreement.[1471] All of this was discussed in detail in Sections II.1, II.2 and III.1 of this Explanatory Submission.

946 In light of the important role played by the oil and gas industry in global CO_2 emissions, no effective scenario is conceivable in which no CO_2 emissions at all are required of the oil and gas sector. This was already addressed in Sections II.1.1 and VI.3.2. It is therefore obvious that the requirement of effective protection under Articles 2 and 8

[1466] Judgment of the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, paras. 240 and 244. See also the judgment of the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, paras. 198 up to and including 202 and 284. The judgment has been submitted as Exhibit MD-570B. See also, in this regard, the Statement of Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 70 (citation) and 71 up to and including 73.

[1467] Exhibit MD-347 (IPCC AR6 WG II Technical Summary), p. 43. See also, in this regard, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 339.

[1468] Motion in Reply to Motion commenting on the Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 11 and 112; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 474.

[1469] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 5 up to and including 11, 37, and 61; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 473, 474 and 513; Summons of Milieudefensie et al. dated 5 April 2019, paras. 416 (with further elaboration in paras. 404 up to and including 415, 417 and 418), 728 up to and including 756, and 827.

[1470] Statement of Defence of Milieudefensie et al. dated 18 October 2022, paras. 3 and 474.

[1471] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 28 and 30; Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 99; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 18 and 73 up to and including 76; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 25 and 35 under (41) up to and including (45); Notes of the Oral Arguments no. in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 27 and 130 up to and including 147.

ECHR, as fleshed out by the ECtHR in its *KlimaSeniorinnen* judgment and discussed above, is *also* relevant for the determination of Shell's concrete reduction obligation. From a normative perspective, after all, it makes no difference whether an effective remedy is required of a state or of Shell. After all, the duty of care to prevent or mitigate dangerous climate change is also based in part on Articles 2 and 8 ECHR, which have horizontal effect. They also require effective protection in their horizontal effect. Logically, that effective protection also consists in that case of concrete, quantifiable reduction targets in line with the climate goals of the Paris Agreement and with attainable intermediate reduction targets. This translates into an obligation to adopt and achieve reduction targets for 2030 and 2050. These targets can be expressed as percentages.

947 The applicability of Articles 2 and 8 ECHR to Shell's concrete reduction obligation also follows from the second mode of operation of ECHR rights discussed in Section IV.4 of this Explanatory Submission. Based on Article 1 ECHR, the ECHR requires national courts - as part of the contracting state to which the standards are addressed - to effectively enforce the rights guaranteed by Articles 2 and 8 ECHR and to provide remedies to ensure the protection thus afforded. This means that national courts are also required to apply Articles 2 and 8 ECHR horizontally if the effective protection required by those articles so demands. That translates into an obligation for the Court to require Shell to set concrete reduction targets in line with the Paris Agreement obligations.[1472]

948 The requirement to apply the climate obligations under Articles 2 and 8 ECHR horizontally – either as a relevant objective point of reference or to comply with the obligations incumbent upon the State - applies even more strongly because Article 13 ECHR guarantees the existence of a right to an effective remedy in the event of a violation of the ECHR rights and freedoms. This provision reads as follows:

> *Article 13 ECHR*
> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

949 It follows from the ECtHR case law that this provision guarantees the existence of rights and freedoms under the ECHR at the national level and requires the existence of an effective remedy at the national level with which these rights can actually be enforced. After all, only then will the ECHR provide meaningful rather than empty rights. Article 13 ECHR is therefore partly directed at national courts, which are not merely required

[1472] See, in a similar vein, C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schending zonder remedie*" *AV&S* 2025/13, paras. 2.4.1, 3.2.2 and 3.2.3.

to conduct an investigation. In cases where such rights and freedoms (may) have been violated, national law must offer a practical and legally effective remedy (*"must* [grant] *appropriate relief")* to protest to such violation.[1473] In this regard, there is a preference for preventive rather than compensatory remedies.[1474] It follows from this that it is deeply embedded in the normative framework that the protection guaranteed by the ECHR must translate into effective remedies at the national level.

950 In the words of the Supreme Court:

> *"5.5.2 A remedy is considered effective as meant in Article 13 ECHR if it will prevent or end the violation or if the remedy offers adequate redress for a violation that has already occurred. In the case of more serious violations, the available remedies must provide for both: the prevention or end of the violation as well as redress. National states are thus required to provide remedies that can effectively prevent more serious violations."*[1475]

951 In addition to the foregoing, the Dutch Supreme Court accepted in its *Edamse bijstandsvrouw* judgment that Article 8 ECHR has direct horizontal effect. After all, in that judgment the Supreme Court held that Article 8 ECHR must be understood to have effect between citizens mutually.[1476] As a consequence of that direct horizontal effect, Article 13 ECHR, logically, guarantees even more strongly that an effective legal remedy exists at the national level to ensure compliance with it.

952 The translation of the foregoing is, logically, that Shell's duty of care to prevent or mitigate dangerous climate change (which is partly based on Articles 2 and 8 ECHR and the UN climate regime) also requires an actual CO_2 reduction in line with the goals of the Paris Agreement. Any other interpretation would fail to do justice to the effective protection required by Articles 2 and 8 ECHR as well as to the effective national remedy required by Article 13 ECHR in that regard. This, too, indicates that Shell not only has a duty of care to prevent or mitigate dangerous climate change, but also a concrete reduction obligation. Based on that concrete reduction obligation, Shell is required to achieve a percentage-based CO_2 emission reduction that does justice to the need to reduce global CO_2 emissions by 45% by 2030.

VI.3.6 Soft law

[1473] See, for example, ECHR 31 October 2019, no. 21623/16 (*Ulemek/Croatia*), para. 71; ECHR 27 January 2015, no. 36925/10 (*Neshkov/Bulgaria*), paras. 180, 181 and 188; ECHR 15 January 2015, no. 62198/11 (*Kuppinger/Germany*), para. 137; ECHR 26 October 2000, no. 30210/96 (*Kudia/Poland*), para. 152 and 157. See also the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.5.1.

[1474] ECHR 11 July 2000, no. 40035/98 *(Jaban/Turkey*), para. 50; ECHR 8 June 2006, no. 75529/01 (*Sürmeli/Germany*), para. 100; ECHR 5 February 2002, No. 5156499 (*Conka/Belgium*), para. 79.

[1475] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 5.5.2.

[1476] Judgment of the Dutch Supreme Court of 9 January 1987, *NJ* 1987, 928 (*Edamse Bijstandsvrouw*).

953 Shell's reduction obligation can be further fleshed out by reference to soft law as an objective point of reference. In Section IV.5.4, Milieudefensie et al. discussed a large number of soft-law sources originating from renowned international organisations, all of which point to an obligation for companies to reduce their CO_2 emissions. The Court of Appeal also recognised this and partly – and rightly - based Shell's duty of care as accepted by it on these soft-law sources,[1477] as set out in Section V.4.4 of this Explanatory Submission. Those same soft-law sources collectively indicate that Shell must reduce its Scope 1, 2 and 3 CO_2 emissions in line with the global average reduction rate of 45% in order to contribute to preventing or mitigating dangerous climate change. In any case, each of these soft-law sources individually calls for the imposition of a (minimum) reduction percentage in line with the existing sectoral reduction pathways. Milieudefensie et al. will elaborate on this below.

954 Although Milieudefensie et al. will primarily build on its discussion of the soft-law sources relevant in this context in Section IV.5.4 to avoid unnecessary repetition, they consider it helpful to briefly summarise the essence of these sources here.

(a) UNGP and OECD Guidelines.[1478] From the UNGP and the OECD Guidelines, clear obligations follow for companies to reduce their Scopes 1, 2 and 3 CO_2 emissions in light of their human rights obligations. They must do so in line with the global temperature targets. This standard applies to all companies, but a company's size, sector, operational context and structure may play a part when determining what concrete action can reasonably be required of a company.

(b) The Race to Zero Initiative.[1479] The Race to Zero Initiative requires all companies to reduce their Scope 1, 2 and 3 emissions as quickly as possible to net zero by 2050. They must also make every effort to contribute their fair share to the globally required 50% CO_2 emission reduction by 2030. For many companies, this will mean they must achieve reductions that are even greater than 50%.

(c) The UN Expert Report.[1480] The UN Expert Report requires companies to prevent or mitigate dangerous climate change and to adopt Scope 1, 2 and 3 reduction targets in line with global climate goals. In this context, global CO_2 emissions must have decreased by 50% by 2030 as a minimum starting-point.

(d) The Net Zero Guidelines.[1481] The Net Zero Guidelines also require organisations to make every effort to reduce their CO_2 emissions in line with global climate goals. For 2030, the Net Zero Guidelines prescribe a Scope 1, 2 and 3 reduction

[1477] Judgment of the Court of Appeal, grounds 7.20, 7.23, 7.26, 7.27 and 7.55.
[1478] See, in this regard, Sections IV.5.4(i) and (ii) and V.4.4 of this Explanatory Submission.
[1479] See, in this regard, Sections IV.5.4(iii) and V.4.4 of this Explanatory Submission.
[1480] See, in this regard, Sections IV.5.4 under (iv) and V.4.4 of this Explanatory Submission.
[1481] See, in this regard, Sections IV.5.4 under (v) and V.4.4 of this Explanatory Submission.

of 50% by 2030 as the starting-point. Organisations that are capable of moving faster must do so. Another factor that plays a role here is whether a company has any historical responsibility for emissions or has very high emissions. This may necessitate steeper and faster reductions.

(e) The 1.5°CBusiness Playbook.[1482] According to the 1.5°C Business Playbook, companies must reduce their Scope 1, 2 and 3 emissions based on science-based reduction pathways to comply with global climate goals. These emissions must decrease by at least 50% every decade.

(f) The SBTi Report.[1483] The SBTi Report requires companies to achieve absolute emission reductions in line with the global reductions needed to limit global temperature rise to 1.5°C. It is best practice to reduce Scope 1, 2 and 3 emissions by 45%. Use must be made here of science-based reduction targets and of the most ambitious targets.

(g) The Oxford Report.[1484] The Oxford Report comprises a comprehensive study of the contents of relevant soft-law sources. This study concludes that all relevant soft law indicates that every company has an independent reduction obligation in Scope 1, 2 and 3, that companies must immediately start to reduce their CO_2 emissions, that all companies must set concrete, robust intermediate reduction targets and that large Western companies emitting large quantities of greenhouse gases and bearing historical responsibility for the climate problems must also set the most ambitious reduction targets.

955 These soft-law sources obviously do not merely determine that companies should aim for CO_2 reductions in line with the global average reduction percentage if their customer base and product offering are a pure reflection of that global average. In fact, the soft-law sources take into account the differences between companies and their "non-averageness" by requiring all companies to make every effort and aim for a CO_2 reduction of 45% (or even 50%). Those who can do more must also do more. Only in this way can all companies collectively achieve the global reduction target and will each company contribute its fair share.

956 Moreover, such an "averageness requirement" would negate the usefulness of these soft-law sources. There are no companies whose customer base and product range reflect any global average. Even large department stores targeting the general public, such as HEMA, Bijenkorf and also the British Harrods - which has long claimed "we sell everything"[1485] - are not average companies. After all, there are still lots of products that

[1482] See, in this regard, Sections IV.5.4 under (vi) and V.4.4 of this Explanatory Submission.
[1483] See, in this regard, Sections IV.5.4 under (vii) and V.4.4 of this Explanatory Submission.
[1484] See, in this regard, Sections IV.5.4 under (viii) and V.4.4 of this Explanatory Submission.
[1485] Harrods' motto is *"Omnia omnibus ubique*," which translates to *"Everything, everywhere, for everyone*." See, for

they do not sell. There can – and will be - differences, among these companies in terms of their product offering and customer base. However, that does not mean that they do not have to aim for the global average reduction rate. That is not what these soft-law sources presuppose either. On the contrary, they actually state that *all* companies must make every effort to achieve a CO_2 reduction of 45% (or more) and must deliver their fair share in this regard. The question, therefore, is whether this can also be required of a specific company in its specific circumstances. It is obvious here that large, carbon-intensive multinational companies with significant global power and substantial technical and financial resources, like the oil and gas industry, must aim for that average much sooner than low-carbon national companies and institutions with limited power and technical resources. So it is precisely the "non-average" character of the big players within the oil and gas industry that requires them to achieve high CO_2 reductions.

957 All relevant soft-law sources relevant in this context point to the same, rather obvious conclusion for Shell: the oil and gas industry – and, in the first place, the big players within that industry, such as Shell – must proceed with a substantial reduction of their Scope 1, 2 and 3 emissions, also in light of the human rights that are under threat from dangerous climate change. After all, oil and gas consumption is the primary cause of dangerous climate change and, with 48% of all CO_2 emissions, its contribution to the problem is higher than that of any other human activity. Shell is therefore a company that these soft-law sources also – and, in fact, primarily - target.[1486]

958 The fact that these soft-law sources actually require *more* from Shell follows in particular from the characteristics of Shell discussed in great detail in Section V.3 of this Explanatory Submission. These characteristics not only give rise to Shell's duty of care to prevent or mitigate dangerous climate change, but also require Shell, in that context, to go above and beyond the average when it comes to reducing its CO_2 emissions. After all, each of these characteristics is identified by the soft-law sources as a reason for following the global average reduction rate of 45% or an even higher reduction percentage. Milieudefensie et al. will briefly recall these characteristics below.

(a) First of all, Shell has a large past and present-day responsibility for climate change, particularly due to its high historical, present-day and future CO_2 footprint.[1487]

(b) In addition, Shell has control over and influence on its very substantial amount of emissions. That influence extends not only to Scope 1 and 2, but also to Scope 3. After all, Shell has influence on both the supply of oil and gas and the demand for oil and gas and, consequently, the energy products offered to consumers

example, https://www.bbc.com/news/10103783.

[1486] See also, in this regard, L.E. Burgers, "*De doorwerking van internationaal recht in klimaatzaken tegen bedrijven*" (The effect of international law in climate cases against companies) in *MvV* 2025/11, para. 4.

[1487] See, in this regard, Sections V.3.4, V.3.5, and V.3.10 of this Explanatory Submission.

worldwide. In ground 7.99, the Court of Appeal also based Shell's influence on its Scope 3 emissions via the demand side in a factual and non-incomprehensible manner on both EU legislation, such as the EU ETS and the CSDDD, and soft-law sources, which also presuppose that companies have such influence.[1488]

(c) Furthermore, Shell is one of the largest and wealthiest companies in the world and generates the vast majority of its revenue in wealthier and developed countries.[1489]

(d) Moreover, Shell has a strong global position of power and is the world's largest purchaser of oil and gas, which provides Shell with a substantial purchasing power.[1490]

(e) Finally, Shell is capable of bearing the heaviest burdens, it can handle reductions in line with the climate goals of the Paris Agreement and is even able to achieve reductions in excess of the global CO_2 reduction targets.[1491]

959 In conclusion: soft law as an objective point of reference *also* indicates, in light of Shell's characteristics, that Shell has a concrete reduction obligation. Seeing the above-mentioned characteristics, Shell is precisely the kind of company – in fact, it is even a textbook example of a company - which is required by a large number of soft-law sources enjoying wide international support to make every effort to reduce its CO_2 emissions in line with (and in excess of) the global average reduction rate of 45%. In case this 45% reduction rate could not be required of Shell, then these sources in any event collectively indicate that some (minimum) reduction percentage may be required of Shell.

VI.3.7 General legal principles in relation to the modelled reduction scenarios

960 Shell's reduction obligation can be made more concrete using the science-based reduction scenarios and the general legal principles discussed in Section IV.5.3 of this Explanatory Submission: (i) the precautionary principle, (ii) the principle of intergenerational justice and (iii) the CBDR principle. After all, the science-based reduction scenarios provide very concrete reduction percentages for the oil and gas industry and, consequently, also for its major players, such as Shell. The general legal principles serve as tools to normatively adjust the outcomes of these scenarios for the widely recognised scientific limitations of the IAM models on which the reduction scenarios are based. Their application confirms that Shell must reduce its CO_2 emissions in line with the global average reduction percentage of 45%, or with a

[1488] See, in this regard, Sections V.3.8 and V.3.9 of this Explanatory Submission.
[1489] See, in this regard, Sections V.3.1 up to and including V.3.3 of this Explanatory Submission.
[1490] See, in this regard, Sections V.3.6 and V.3.7 of this Explanatory Submission.
[1491] See, in this regard, Section V.3.11 of this Explanatory Submission.

reduction percentage within the range of (rounded) 30% to 45% or any other reduction percentage. In any case, a minimum percentage can be established for Shell. In the view of Milieudefensie et al., that minimum percentage is (rounded) 30%. Milieudefensie et al. will further explain this below.

The relevant modelled reduction scenarios and their limitations

961 In Section III.2.1 of this Explanatory Submission, it was discussed that IAM models and the reduction scenarios based on them are helpful in answering the question of which sectors must reduce their CO_2 emissions, to what extent they must do so and where in the world that reduction must take place. In that context, the parties have discussed six reduction scenarios: (i) the Tyndall Report, (ii) the Low Demand scenario of the IPCC, (iii) the Hawkes Report, (iv) Prof. Rogelj's recalculation of that Report, (v) the scenario from the IISD Report, and (vi) the IEA's NZE Scenario. These reduction scenarios all indicate that very substantial reductions must be realised in the oil and gas industry to achieve the Paris Agreement climate goals. Milieudefensie et al. have compiled an overview of these various reduction scenarios[1492], which the Court of Appeal also reproduced in ground 7.90 (and which was not challenged as such in cassation):

Reduction percentages in 2030 relative to the base year of 2019					
Source	**Fuel**	**Annual change in percentage**		**Reduction in 2030 relative to 2019**	
Tyndall Report	1 Oil and gas	2	-6.4%	3	-51.7%
IMP Low Demand scenario	4 Oil	5	-6.2%	6	-50.5%
	7 Gas	8	-6.2%	9	-50.5%
Recalculated C1 scenarios of Prof. Hawkes	10 Oil	11	-3%	12	-28.5%
	13 Gas	14	-3.6%	15	-33.2%
C1 scenarios of Prof. Hawkes **Developed countries**	16 Oil	17	-3.6%	18	-33.2%
	19 Gas	20	-5.3%	21	-45.1%
C1 scenarios, IISD	22 Oil	23	-3.5%	24	-32.4%

[1492] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 53. Hawkes' figures have been recalculated by Milieudefensie et al. In 2022, based on a set of IAM models, Hawkes had calculated reductions of 32% for oil and 18% for gas by 2030. Based on a new set of IAM models, Hawkes calculated a reduction rate of 5% for oil and 15% for gas in 2024. However, the methodology he used was incorrect, which necessitated a recalculation. This is shown in the table. See, in this regard, the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 22 et seq. The objections of Milieudefensie et al. in grounds of appeal nos. 4.36 and 4.37 relate to this. It is obvious that the Hawkes Report and its calculations should be discarded as a point of reference in view of their fundamental flaws. The other scenarios already provide sufficient points of reference for calculating a concrete reduction percentage. It is noteworthy, incidentally, that the recalculation of the Hawkes figures again comes close to the percentages from the other scenarios, which supports the validity of that recalculation.

	25	Gas	26	-3.5%	27	-32.4%
IEA NZE 2023	28	Oil	29	-4%	30	-36.2%
	31	Gas	32	-3.2%	33	-30.1%

962 Section III.2.1 of this Explanatory Submission explained that reduction scenarios are based on IAM models. As explained in Section III.2.2, these IAM models are based on the principle of cost-effectiveness. This has four essential implications within the models, which, in turn, lead to concrete limitations of reduction scenarios based on IAM models. Milieudefensie et al. have already discussed these limitations in detail in Sections III.2.3 up to and including III.2.6 of this Explanatory Submission. In summary, they boil down to the following:

(a) IAM models place the burden of reduction to a very significant extent on coal and, consequently, on developing countries that are heavily dependent on coal, even though these countries will never be able to achieve the prescribed reductions in reality from a technical, practical, financial and societal point of view.[1493]

(b) IAM models rely heavily on the hypothesis that CDR technologies deployable on a large scale will become available in the future and therefore accept overshoot scenarios that are often far-reaching; however, it is widely recognised within the scientific community that it is highly uncertain whether those technologies will ever be deployable in a feasible and scalable manner.[1494]

(c) The IAM models use a high discount rate, which makes it even more attractive from a cost-effectiveness perspective to rely on highly uncertain CDR technologies in the models, so that the reduction efforts are pushed back.[1495]

(d) The IAM models do not account for avoided climate damage, even though this is precisely what compels us to proceed with actual CO_2 reductions as quickly as possible.[1496]

963 The reduction scenarios that are developed using IAM models therefore invariably rely, to a greater or lesser extent, on a modelling paradise in which the most cost-effective solutions are actually feasible in the real world - on a global scale - from technical, practical, financial and societal perspectives. Based on these assumptions, such

[1493] See, in this regard, Section III.2.3 of this Explanatory Submission.
[1494] See, in this regard, Section III.2.4 of this Explanatory Submission.
[1495] See, in this regard, Section III.2.5 of this Explanatory Submission.
[1496] See, in this regard, Section III.2.6 of this Explanatory Submission.

reduction scenarios typically place a very significant part of the burden of the reduction target on coal and the coal-dependent developing countries (a more than 75% reduction in coal use) rather than on oil and gas, even though oil and gas are used to a greater extent in developed countries. In addition, such scenarios push back the reduction burden (without considering the widely recognised limitations of CDR technologies) to the period (well) beyond 2030 and, as a result, calculate a lower reduction percentage for oil and gas until 2030.

964 The above-mentioned modelled reduction scenarios compensate for these limitations to varying degrees. The scenarios with the lowest reduction percentages do not, or only hardly, compensate for the limitations, while those with higher reduction percentages do so to an increasing extent. This will be further discussed below. It is important to recognise that the lower range of the above-mentioned reduction percentages of (rounded) 30% represents the reduction contribution that may be required of the oil and gas industry in a scenario that is very beneficial to it and in which (i) the reduction target is distributed across the world and across oil, gas and coal in the most cost-effective manner and to the significant advantage of oil and gas, (ii) it is hoped that CDR technologies, despite all the uncertainties and scalability issues surrounding them, can still make a significant contribution to the reduction target and (iii) climate damage resulting from inaction is accepted.

965 This leads to the following picture. Even if all these choices to the advantage of the oil and gas industry could be made *and* were actually made, the oil and gas industry would still need to reduce its CO_2 emissions by (rounded) 30% by 2030 to keep the climate goals of the Paris Agreement within reach and provide the protection required by Articles 2 and 8 ECHR. This absolute minimum should not come as a surprise, incidentally, in light of the illustrative calculation provided by Milieudefensie in Section VI.3.2. In that context, it was already noted that the oil and gas industry accounts for 48% of global CO_2 emissions. Even in the completely unachievable and unfair scenario in which the rest of the world shoulders 60% of the reduction target (for the benefit of the oil and gas industry), the oil and gas industry should still reduce its CO_2 emissions by 28.75%. This, in turn, is in line with the lowest reduction percentages from the reduction scenarios shown above.

966 However, the real world and the paradise on which the IAM models are based are worlds apart. Of course, developing countries cannot be required - neither technically, nor practically or from a financial or social perspective – to reduce their coal use by approximately 60% to 70% by 2030 so as to allow developed countries to continue to consume very high levels of oil and gas well beyond 2030. The reduction efforts for 2030 can also not be limited by relying on the hypothetical large-scale deployment of CDR technologies. This would not only jeopardise the attainment - or even the mere theoretical possibility - of the climate goals to a very large degree, but it would also

make the inhabitability of the world for younger and future generations dependent on these risks and uncertainties.

967 In reality, all the reduction percentages for oil and gas calculated based on IAM models – which are already quite considerable - in the scenarios shown above are therefore *lower* than the reductions required in reality in order to have a serious chance of achieving the Paris Agreement climate targets or even of keeping them within reach. The less these scenarios compensate for the described limitations of IAM models, the stronger this applies. This therefore also means that those reduction scenarios and reduction percentages are inconsistent (and the lesser they compensate as described above, the stronger this applies) with the requirement of Articles 2 and 8 ECHR to provide *genuine* and effective protection against dangerous climate change.

General legal principles as a selection and correction mechanism

968 As a result, reduction scenarios based on IAM models can only be used in the real world if a normative correction is made for their underlying limitations. The precautionary principle, the principle of intergenerational justice and the CBDR principle provide a solid basis for doing so. These general legal principles were discussed in detail in Sections IV.5.3.1 up to and including IV.5.3.3 of this Explanatory Submission. In these Sections, Milieudefensie et al. already discussed how fundamentally these principles are embedded in the UN climate regime, that and why they have horizontal effect and that and how they have an effect on the determination of the duty of care to prevent or mitigate dangerous climate change and, by extension, the determination of the concrete reduction obligation. As far as the latter determination is concerned, the following was discussed (among other things).

(a) The precautionary principle.[1497] The more slowly the CO_2 emission reductions are achieved, the greater the risks of dangerous climate change. The precautionary principle aims to avoid the chance of those risks materialising. This affects the assessment of the modelled reduction scenarios. After all, the assumptions on which they are based (regarding the distribution of the global reduction efforts across oil, gas and coal, and across different countries) cannot be achieved in the real world, rely heavily on highly uncertain CDR technologies and are not in line with the UN climate regime. This means that if the reduction percentages calculated by the modelled reduction scenarios are simply followed, there will almost certainly not be a decline in global CO_2 emissions in line with the Paris Agreement targets. On the contrary, those emissions will in that case remain well above them. This not only means that the CO_2 reductions needed to prevent or limit dangerous climate change will not be achieved, but also that the

[1497] See, in this regard, Section IV.5.3.1 of this Explanatory Submission.

risk of passing irreversible tipping points will increase significantly. In short, simply following the modelled reduction scenarios will, in all likelihood, result in climate risks becoming a reality. For this reason, relying solely on reduction percentages from modelled reduction scenarios would conflict with the precautionary principle, which requires measures for which there is sufficient certainty that they will be effective.

(b) The principle of intergenerational justice.[1498] Due to the limitations attaching to IAM models, adhering to the percentages from the modelled reduction scenarios would mean that the reduction targets of the Paris Agreement will not be met and will even be significantly exceeded. As a result, the burden of reducing emissions to prevent or limit dangerous climate change would be shifted, to a significant extent, to the younger and future generations after all. This conflicts with the principle of intergenerational justice. This applies all the more strongly because the emission reduction burden also becomes dependent on the large-scale deployment of highly uncertain CDR technologies by those younger and future generations. The habitability of their world thus becomes dependent on the deployment of highly uncertain technologies. That, too, conflicts with the principle of intergenerational justice.

(c) The CBDR principle.[1499] For reasons of cost-effectiveness, reduction scenarios based on IAM models place a very large share of the reduction burden on coal and, by extension, on the developing countries from whom such reductions cannot possibly be demanded for technical, practical, financial and societal reasons. Shell, on the other hand, has all the characteristics that are relevant in light of the CBDR principle for requiring a greater contribution to the reduction effort from Shell.[1500] Shell bears a large historical responsibility for climate change; its historical and future CO_2 emissions are or will be very high. Furthermore, it has control over and influence on its very high emission levels as well as influence on oil and gas supply and demand and, thereby, on the energy products offered to consumers across the globe. Moreover, Shell generates the vast majority of its revenue in wealthier and developed countries, is one of the largest and wealthiest companies in the world and holds a significant global position of power. On top of this, Shell is the world's largest purchaser of oil and gas and possesses significant purchasing power. Finally, it is capable of bearing the heaviest burdens and is certainly capable of achieving the globally necessary CO_2 reductions. The CBDR principle requires that these circumstances be taken into account when a reduction percentage is determined.

[1498] See, in this regard, Section IV.5.3.2 of this Explanatory Submission.
[1499] See, in this regard, Section IV.5.3.3 of this Explanatory Submission.
[1500] See, in this regard, Sections V.3.1 up to and including V.3.11 of this Explanatory Submission.

969 A court can apply these principles in several ways. The first method involves that the court determines what reduction percentage is prescribed by modelled reduction scenarios that do not compensate, or only compensate to a very limited degree, for the limitations of IAM models. Based on the general legal principles discussed above and taking into account the modelled reduction scenarios that *do* (partly) compensate for those limitations, the court can then realise that compensation after all. This will lead to an upward adjustment of the reduction percentage concerned. The result of applying these general legal principles then is that higher reduction percentages are started out from than those prescribed by the modelled reduction scenarios. The second method involves that the court – the other way round - uses the principles as a selection criterion when assessing the various modelled reduction scenarios. The more a reduction scenario allows for the limitations of IAM models and makes a correction for these limitations in light of the general legal principles discussed above, the more weight the court can attach to this when determining the reduction percentage. The general legal principles therefore offer the possibility of selecting reduction scenarios and differentiating among them. In this way, the court will do justice to these principles and to their implications within the models.

970 Thus the fact that the various modelled reduction scenarios mention different reduction percentages does not in any way preclude the determination of a reduction percentage applicable to Shell. After all, the divergence of those reduction percentages is not caused by any normative uncertainty regarding which reduction percentage applies to Shell. That divergency is caused by the extent to which the various reduction scenarios consider the limitations of IAM models and, by extension, the extent to which they compensate for these limitations in light of the precautionary principle, the principle of intergenerational justice and the CBDR principle.

971 The modelled reduction scenarios with the lowest reduction percentages rely most heavily on IAM models driven by cost-effectiveness and therefore have little or no regard for the associated limitations. Consequently, due to their focus on cost-effectiveness, they make (virtually) no distributional choices for either oil, gas or coal, or for different sectors and countries to the detriment of the oil and gas industry. They therefore do not yet take general legal principles into account. These reduction scenarios are therefore “normatively weak”. By contrast, the modelled reduction scenarios with the highest reduction percentages actually take the limitations of IAM models most into account and are, in that sense, “normatively stronger”. Following these latter reduction scenarios means that (some) justice *is* done to the interests and risks that these general legal principles seek to offer protection against. By extension, it is also clear that the modelled reduction scenarios with the lowest percentages are not reconcilable with the requirements of genuine and effective protection within the

meaning of Articles 2 and 8 ECHR, because they do not correspond with what is feasible in the real world to achieve CO_2 reductions in line with the climate targets.

The Hawkes Report as the absolute minimum; upwards adjustment and differentiation

972 The lowest reduction percentages from the modelled reduction scenarios presented in this lawsuit are the recalculated reduction percentages from the Hawkes Report. From what was discussed above, it follows that a court can start out from these lowest reduction percentages for oil (Hawkes (recalculated): 28.5%) and gas (Hawkes (recalculated): 33.2%). These are the least normative reduction percentages – and so the minimum - of what may be required of the oil and gas industry and of Shell. In that regard, the following is important to note.

973 Hawkes based his calculation in the Hawkes Report on a methodology and (thereby) on IAM models and reduction scenarios based on them that push back the reduction effects to an important degree and rely heavily on coal reduction. These scenarios therefore work in favour of the oil and gas industry.[1501] However, Hawkes applied his methodology in the wrong way, which led him to arrive at very low reduction percentages (5% for oil, 15% for gas and 75% for coal).[1502] This alone is surprising, since the reduction percentages were 32% for oil and 18% for gas in his earlier expert report.[1503]

974 Based on the methodology advocated by Hawkes, Prof. Rogelj has recalculated what the CO_2 reductions would be with the modelled reduction scenarios used within that methodology.[1504] This recalculation was subsequently verified[1505] by scientists Kikstra and Brutschin.[1506] The figures of 28.5% for oil and 33.2% for gas relative to 2019 are the outcome of this recalculation.[1507] These figures are therefore the result of the right application of the methodology used by Shell's expert. Moreover, that methodology works to the benefit of the oil and gas industry. These figures thus constitute the normative minimum for the CO_2 reductions that may be required of the oil and gas industry.

[1501] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 27 up to and including 44.
[1502] Exhibit S-123 (Expert Report by A. Hawkes dated 15 December 2023), pp. 19 and 31 up to and including 36. See, in this regard, the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 23 and footnote 21.
[1503] Exhibit S-22 (Expert Report by A. Hawkes dated 17 March 2022), p. 30. See also Exhibit S-123 (Expert Report by A. Hawkes dated 15 December 2023), p. 30. See, in this regard, the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 22 and 23.
[1504] Exhibit MD-566 (Expert Report by J. Rogelj dated 3 March 2024), pp. 15 up to and including 21. Starting on p. 15, Prof. Rogelj describes in detail that he followed the methodology chosen by Hawkes and how this was done.
[1505] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 27 and footnote 23. Both scientists were contributing authors to the IPCC AR6 WG3 report.
[1506] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 36.
[1507] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 27. There, Milieudefensie et al. mention percentages of 26% for oil and 31% for gas relative to the 2020 level. Relative to the 2019 level, this represents reductions of 28.5% for oil and 33.2% for gas.

975 Incidentally, the Court of Appeal left the debate about the validity of the (non-recalculated) Hawkes Report undiscussed and did not deal with the detailed criticism of the report by Milieudefensie et al. at all. The Court of Appeal seems to have started out from the validity of that criticism in its assessment. Building on this, the Court of Appeal also seems to have proceeded on the assumption that this correct recalculation results in the recalculated reduction figures.[1508] In the cassation proceedings, the starting-point therefore is, in any event hypothetically, that the recalculated Hawkes figures based on the right application of the Hawkes methodology that works to the advantage of the oil and gas industry results in the above-mentioned reduction percentages.

976 As already discussed above, the Court can subsequently adjust these lowest percentages upwards based on the general legal principles discussed above. The Court can also do so, or partly do so, by further differentiating between the various modelled reduction scenarios based on their degree of normativity. In that case, more *weight* is given to the scenarios that *better* account for the limitations of IAM models and the general legal principles than to the scenarios that do not account for them to the same extent or do not account for them at all. This is consistent not only with those principles themselves, but also with the obligation under Articles 2 and 8 to provide genuine and effective protection.

The IISD Report, the Low Demand scenario and the Tyndall Report: increasingly normative

977 Unlike the Hawkes Report commissioned by Shell, the IISD Report, the Low Demand scenario and the Tyndall Report were produced independently of the parties to this lawsuit. These reports and scenarios are therefore more objective in nature and increasingly account for the limitations of IAM models as discussed above. These scenarios thus also increasingly do justice to the general legal principles discussed above. This translates into the reduction percentages prescribed by those modelled reduction scenarios.

(a) The IISD Report.[1509] The IISD Report examined which reductions in oil and gas follow from the "C1 scenarios" if these scenarios are filtered based on threshold values reported by the IPCC for the deployment of CDR technologies. That threshold value corresponds with medium feasibility concerns.[1510] After this

[1508] This is also understandable because, as discussed above, Hawkes's latest calculation resulted in reduction percentages of 5% for oil and 15% for gas: see Exhibit S-123 (Expert Report by A. Hawkes dated 15 December 2023), pp. 18, 19 and pp. 31 up to and including 36. This is already inconsistent with his 2022 calculation, in which he arrived at 32% for oil and 18% for gas: see Exhibit S-22 (Expert Report by A. Hawkes dated 17 March 2022), p. 30. That calculation was already based on (unattainable) global coal reductions of 69%. See, in this regard, the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 22 and 23.

[1509] Exhibit MD-529 (IISD Report).

[1510] Exhibit MD-529 (IISD Report), p. 3. These are threshold values based on the *medium feasibility concerns* mentioned

filtering, 26 C1 scenarios remain. They show a median of 30% for oil and gas. Calculated back to 2019, this amounts to reductions of 32.4%. This means that in this model only the most extreme impossibilities of the CDR technologies have been filtered out of the model. The model thus still relies heavily on the extensive use of CDR technologies, even though their feasibility remains highly uncertain. All the other limitations of IAM models were not included in the model. Nevertheless, this already results in a reduction percentage for oil and gas of 32.4%.

(b) The Low Demand scenario.[1511] The IPCC's Low Demand scenario fully compensates for the reliance on CDR technologies and assumes that energy consumption will be significantly reduced through the use of (among other things) renewable energy sources.[1512] On that basis, that scenario arrives at a 47% reduction for both oil and gas by 2030. Calculated back to 2019, this is a reduction percentage of 50.5% for oil and gas by 2030. These are therefore reductions that far exceed the global average reduction rate of 45% merely because the CDR technologies have been filtered out and they are based on trends in future energy consumption. So in the Low Demand scenario, all the other limitations of IAM models have not yet been taken into account. This already indicates that Shell can be held to the global average reduction rate of 45% at a minimum and that reduction percentages between (rounded) 30% and 45% are by no means asking too much of Shell.

(c) The Tyndall Report.[1513] From the perspective of general legal principles, the Tyndall Report constitutes the most comprehensive and balanced reduction scenario. Of all the scenarios, the 76-page report best addresses the limitations of IAM models and, by extension, the general legal principles. After all, what the scenario looks for is fair reduction pathways based on the CBDR principle and the precautionary principle, while taking into account the limitations associated with the deployment of CDR technologies, which are widely accepted within the scientific community.[1514] Taking this into account, the Tyndall Report arrives at reduction percentages of 45% for both oil and gas by 2030. Calculated back to 2019, the percentage is 51.7% for oil and gas.[1515] This underscores that a reduction scenario that does justice to the limitations of IAM models and to the relevant general legal principles results in reductions that are well above the

in Exhibit S-140 (IPCC AR6 WGIII), p. 1877. Based on recent research, the threshold value for BECCS is even on the high side. See, in this regard, Exhibit MD-579B (Science article dated 2 February 2024), pp. 484 and 485.

[1511] Exhibit MD-495A (IPCC SR 2023), p. 22; Exhibit MD-236, pp. 515 and 520 up to and including 522 (Nature Energy article from June 2018); Exhibit S-140 (IPCC AR6 WGIII), p. 27.

[1512] Exhibit MD-236 (Article in Nature Energy from June 2018), p. 515 and 520 up to and including 522. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 47.

[1513] Exhibit MD-351 (Tyndall Report).

[1514] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 10 up to and including 21.

[1515] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 53.

global average reduction percentage. In that light, it is also perfectly understandable that a CO_2 reduction of 45% by 2030 can certainly be required of Shell and that Shell must, in any case, achieve reduction percentages of (rounded) 30% to 45%.

The NZE Scenario: political consensus, limited normative correction

978 Finally, the IEA's NZE Scenario - which was adopted in 2021[1516] and updated in 2023[1517] - also provides ample scientific, normative and political support for setting a concrete reduction target. To this end, Milieudefensie et al. will first discuss the background, status and contents of the NZE Scenario. Next, the reasons for the slight difference between the reduction percentages prescribed in the 2021 NZE Scenario and those in the updated 2023 version of the NZE Scenario will be explained. These reasons do not preclude the use of the NZE Scenario, but actually underline the need to establish a concrete reduction obligation for Shell.

(i) Background, status and contents of the NZE Scenario

979 The NZE Scenario calculates to what extent the use of oil and gas must be reduced and, consequently, what reduction may be required of the oil and gas industry. This scenario holds a special status, also in a political sense.[1518] The IEA consisted (until February 2024)[1519] of 31 member states,[1520] 5 candidate member states[1521] and 13 associate countries.[1522] Most of them are members of the OECD and represent by far the largest share of the global energy consumption and global CO_2 emissions: 80%.[1523] The IEA's main objective is to ensure energy security by securing the supply of oil and gas to the West as much as possible.[1524] This means that the IEA's findings must always be viewed in that light.

980 Hawkes, the Shell expert, also acknowledges this special status of the IEA. According to him, it is a:

[1516] Exhibit MD-362 (IEA Net Zero Roadmap 2021).
[1517] Exhibit MD-525 (IEA Net Zero Roadmap 2023).
[1518] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 85.
[1519] Latvia was a candidate member until February 2024 and joined the IEA in 2024. See https://www.iea.org/news/iea-ministers-invite-latvia-to-become-agencys-32nd-member for more information.
[1520] Australia, Belgium, Canada, Denmark, Germany, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Japan, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Austria, Poland, Portugal, Slovakia, Spain, the Czech Republic, Turkey, the United Kingdom, the United States, South Korea, Sweden and Switzerland.
[1521] Chile, Colombia, Costa Rica, Israel and Latvia.
[1522] Argentina, Brazil, China, Egypt, India, Indonesia, Kenya, Morocco, Ukraine, Senegal, Singapore, Thailand and South Africa.
[1523] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 87.
[1524] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 86.

> *"*(…) *widely respected source of information on energy and decarbonisation options."*[1525]

981 In 2015, the IEA's mandate was widened. Since then, the IEA has therefore also been addressing the energy transition and dangerous climate change. This led to the release of the NZE Scenario in 2021.[1526] Subsequently, in 2023, the IEA published an updated version of the NZE Scenario. That NZE Scenario was presented to the global community during COP28, the climate conference in Dubai, on the instructions of the member states.[1527] It was based on two key principles:

(a) tripling global renewable energy capacity by 2030; and

(b) doubling the annual speed of energy efficiency improvement by 2030.[1528]

982 At that time, the global community rallied behind these starting-points. It was also decided at that point to move away from fossil fuels.[1529] This means there is significant global political consensus on the principles of the NZE Scenario.[1530] This gives the NZE Scenario an important global status that is recognised by all countries in the world.[1531]

983 Even in February 2024 – so after Russia's invasion of Ukraine and with full knowledge of its consequences for gas supplies from Russia to the West - the IEA member states expressed, during their Ministerial Meeting and in the Ministerial Communiqué issued on its occasion, that the NZE Scenario constitutes important guidance for an orderly move-away from fossil fuels.[1532] The IEA even concludes in it that no new oil and gas fields are needed to achieve that scenario.[1533] In short, the reductions prescribed by the NZE Scenario are, in the view of the IEA - and thus: in the view of the representatives of 80% of the global energy consumption and global CO_2 emissions - achievable and necessary, *also* after the invasion of Ukraine.

984 In 2021, the NZE Scenario started out from a reduction percentage of 35% for oil and a reduction percentage of 18% for gas by 2030 relative to the 2019 levels.[1534] The updated version of the NZE Scenario from 2023 then models a reduction percentage of 28% for oil and 23% for gas relative to the 2022 levels. Calculated back to 2019, this

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[1525] Exhibit S-123 (Expert Report by A. Hawkes dated 15 December 2023), p. 7. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 51.
[1526] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 88.
[1527] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 89 and 90.
[1528] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 90.
[1529] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 91 and 92.
[1530] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 92.
[1531] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 92.
[1532] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 95 up to and including 97.
[1533] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 96.
[1534] This is not in dispute between the parties. See the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 559, 560 and 564, and Shell's Notice of Appeal dated 22 March 2022, para. 10.2.7. under b.

translates into reduction percentages of 36.2% for oil and 30.1% for gas by 2030.[1535] For coal, the NZE Scenario starts out from a lower reduction percentage than other modelled reduction scenarios. This is done in the NZE Scenario to reflect the CBDR principle.[1536] This means that a normative adjustment has already been made to reflect that general legal principle.

985 The normative adjustment based on the CBDR principle is carried out with great precision. In the NZE Scenario, the IEA brings together all its knowledge of the energy markets and the global energy infrastructure and, in that context, takes into account (among other things) policy developments, technology deployment, investments, supply chains, infrastructure, innovation and costs as well as the varying circumstances of individual countries and regions.[1537] Based on all this, the IEA calculates a slower decrease in emissions from coal and a faster decrease in emissions from oil and gas.[1538] So in the NZE Scenario, there is a less abrupt transition in countries that are not members of the OECD, which account for more than 80% of global coal consumption.[1539] Countries that *are* members of the OECD must therefore reduce their emissions by 2030 at roughly twice the speed of non-OECD countries.[1540] In its modelling, the IEA thus takes into account what is possible *("feasible")* in the real world for the sectors that use oil and gas.[1541] This leads to improved global access to and affordability of energy.[1542] In this respect, too, the NZE Scenario represents a balanced and scientifically sound approach.

986 However, the NZE Scenario does not yet make normative adjustments based on the precautionary principle and the principle of intergenerational justice. To that extent, it is therefore a scenario with limited normative force.[1543] Furthermore, the NZE Scenario also performs calculations based on IAM models. As a result, the NZE Scenario partly also makes the models based on cost-efficiency; it therefore also relies too heavily on, for example, the highly questionable use of CDR technologies, including CCS, with all the associated uncertainties when it comes to achieving the climate goals of the Paris Agreement or to keeping them within reach. The IEA itself also calls the reliance on

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[1535] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 51 and 53. See also Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 198, which shows the intended annual emission reductions in absolute numbers.
[1536] Exhibit MD-525 (IEA Net Zero Roadmap 2023), pp. 59 and 60. See also the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 25.
[1537] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, para. 26.
[1538] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 25 (including footnote 14).
[1539] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 25; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 56 up to and including 59.
[1540] Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 23 up to and including 25.
[1541] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 77.
[1542] Response of Milieudefensie et al. to the questions of the Court of Appeal dated 12 April 2024, p. 18 (including citation).
[1543] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 60 (footnote 67).

CDR technologies a *"key uncertainty*."[1544] The NZE Scenario therefore *also* suffers from the shortcomings already described in detail above, which necessitate an upward correction of the prescribed reduction percentages in light of the general legal principles.[1545]

987 Thus for all these aspects a (further) normative correction must still be made. Since the updated version of the 2023 NZE Scenario without a normative correction based on the precautionary principle and the principle of intergenerational justice already leads to reduction percentages of - calculated back to 2019 - 36.2% for oil and 30.1% for gas by 2030, the NZE Scenario equally supports the conclusion that Shell - after a correction based on the general legal principles discussed above - must be held to the global average reduction percentage of 45% or, at any rate, to a reduction percentage within the range of (rounded) 30% and 45% or any other reduction percentage.

(ii) Reasons for differences between the reduction percentages in the 2021 and 2023 NZE Scenarios

988 The NZE Scenario therefore carries great weight for several reasons. The fact that the NZE's 2023 update resulted in slight changes in the prescribed reduction percentages relative to the 2021 level does not detract from this. On the contrary, the causes of these changes make it all the more imperative for the oil and gas industry in general, and Shell in particular, to actually reduce their CO_2 emissions in the short term. Milieudefensie et al. will explain this in more detail below.

989 As already discussed above, the NZE Scenario takes the CBDR principle into account and, for that reason, calculates a lower reduction percentage for coal than other modelled reduction scenarios. This applies even more strongly to the updated version of the 2023 NZE Scenario, calculated back to 2019. Partly as a result of that lower reduction percentage for coal, the reduction percentages for oil and gas in the updated version of the 2023 NZE Scenario are higher than in the 2021 NZE Scenario.

990 In addition, the NZE Scenario not only takes the CBDR principle into account, but *also*, to a significant extent, the (financial) interests of the oil and gas industry. The NZE Scenario tries to spare the investments already made by the oil and gas industry in oil and gas fields and the associated infrastructure. This is also referred to as preventing "stranded assets". Once investments in oil and gas fields have been made, this therefore comes at the expense of the reduction target for 2030 deemed feasible by the IEA.[1546]

[1544] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 569 up to and including 572 and 681 up to and including 684.
[1545] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 56.
[1546] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 64 and 65; Statement of Defence

991 This makes itself felt in three ways in the NZE Scenario:

(a) The NZE Scenario focuses strongly on the use of CDR technologies until 2030 and beyond. This is the above-mentioned *"key uncertainty*" identified by the IEA.[1547]

(b) The NZE Scenario starts out from steeper reductions after the depreciation of the infrastructure in which the oil and gas industry has invested (the assets) and so from greater reductions *after* 2030 up to and including 2050.[1548]

(c) The updated version of the NZE Scenario from 2023 has become an overshoot scenario, whereas the original NZE Scenario from 2021 was not an overshoot scenario yet.[1549]

992 As a result, the NZE Scenario embraces a manifestation of the carbon lock-in effect as a relevant factor in determining the reduction percentage to be achieved by the oil and gas industry. This can be easily illustrated. If the oil and gas industry and Shell continue to invest in oil and gas fields unabated until 2030 and beyond, the NZE Scenario calculates in 2029 that no actual reductions are necessary in the oil and gas industry. The model would then pin all its hopes on very steep reductions at a later point in time (for example, after 2040 or 2045) with, in the meantime, a larger overshoot as the consequence.[1550] After all, only in this way can the continuing investments by the oil and gas industry be protected (in the model) and can stranded assets be prevented. The more the oil and gas industry continues to make new investments in oil and gas fields, the smaller the reductions will have to be under the NZE Scenario.

993 It should also be noted that reduction scenarios will continue to change as long as the oil and gas industry takes no action or even increases its emissions. This means, after all, that global CO_2 emissions will not have been sufficiently reduced by 2030, so that scenarios developed at a later stage will indicate that global warming cannot be limited to 1.5^{o} C anymore. Those scenarios will then explore what theoretical possibilities are still conceivable for the period *after* 2030 and will therefore, in the meantime, start out from an even larger overshoot. Even the mere passage of time until 2030 without the necessary climate action will thus lead to differences in reduction percentages.

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on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 565 up to and including 568. See also Exhibit MD-362 (IEA Net Zero Roadmap 2021), p. 57.

[1547] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 569 up to and including 572 and 681 up to and including 684.

[1548] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 64 and 65; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 565 up to and including 568. See also Exhibit MD-362 (NZE Scenario 2021), p. 57.

[1549] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 67.

[1550] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 65 up to and including 68.

994 These starting-points explain why the original NZE Scenario from 2021 presents slightly different reduction percentages than the updated version of the NZE Scenario from 2023. In 2021, the NZE Scenario started out from a reduction (which was already significant) of 35% for oil and 18% for gas in 2030 relative to the 2019 level.[1551] That relatively low percentage for gas could be explained by the fact that the gas industry had recently made investments in the gas infrastructure in connection with the promotion of gas as a transition fuel. The NZE Scenario models the saving of those investments by aiming less for gas reductions in the period up to 2030. For that matter, global gas consumption (and, by extension, global gas production) also had to decrease by 2030 in the original 2021 NZE Scenario, but only by 18%. The remainder of the reduction efforts were therefore postponed to the period between 2030 and 2050 in that scenario.[1552]

995 The updated version of the NZE Scenario from 2023 subsequently models - calculated back to 2019 - a reduction percentage of 36.2% for oil and 30.1% for gas by 2030.[1553] The reduction percentages are thus higher than in the original version of the NZE Scenario from 2021. This is partly due to the lower reduction percentage for coal and the fact that the decrease in oil and gas consumption must accelerate with effect from 2023, because the reductions in the period between 2021 and 2023 have been insufficient. This must be made up for in the period between 2023 and 2030. The IEA therefore considers this to be feasible. This also applies to the international community and the IEA member states, which, as discussed above, endorsed the starting-points of this Scenario during COP28, the climate conference in Dubai, and later in the Ministerial Communiqué.[1554]

996 When the NZE Scenario is applied, there is therefore every reason to abstract as much as possible from its embracement of the carbon lock-in effect by preventing stranded assets as well as from the effect of the latter on the reduction percentages mentioned in the NZE Scenario. It is precisely *because* the oil and gas industry and Shell are not complying with the reduction obligations that these reduction percentages keep changing. This is also what is happening in reality. The oil and gas industry and Shell are only increasing their investments in oil and gas. In grounds 7.59 up to and including 7.61, the Court of Appeal rightly held in that light that the carbon lock-in effect is undesirable and that an oil and gas company such as Shell may be required to take into account, also when investing in the production of fossil fuels, the negative consequences that a further expansion of the supply of fossil fuels will have for the

[1551] This is not in dispute between the parties. See the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 559, 560 and 564, and the Notice of Appeal of Shell dated 22 March 2022, para. 10.2.7.b.
[1552] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 565 up to and including 568.
[1553] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 51 and 53. See also Exhibit MD-525 (IEA Net Zero Roadmap 2023), p. 198, which presents the intended annual emission reductions in absolute numbers.
[1554] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 61.

energy transition. The Court of Appeal rightly pointed out that Shell's investments in new oil and gas fields may therefore be at odds with this.

997 If the variability of reduction percentages should become relevant for the acceptance of a concrete reduction obligation, this would essentially mean that investments in new oil and gas fields and (thus) the non-compliance with climate obligations would be rewarded with the conclusion that no concrete reduction obligation can be established. The undesirability of this is self-evident.[1555] All of this underscores the necessity for the oil and gas industry in general, and for Shell in particular, to actually reduce their CO_2 emissions in the short term.

Conclusion regarding the NZE Scenario

998 In light of the foregoing, the NZE Scenario provides sound normative and scientific points of reference for establishing a reduction percentage applicable to Shell. After all, that Scenario links up with scientific findings regarding its feasibility. Moreover, there is a significant degree of political consensus on the NZE Scenario, while it also takes into account, to a certain extent, the distribution of the reduction burden across the world and the various sectors. Having said that, the NZE Scenario tries to spare investments in oil and gas extraction, which has led to small changes in the reduction percentages. This variability is also due to the fact that the 2030 reduction targets are increasingly slipping out of sight due to the inaction of the oil and gas industry. The modelled reduction scenarios adapt to this to the detriment of the climate goals. This is an argument for holding the oil and gas industry to the reduction percentages calculated by the NZE Scenario at a minimum.

999 The NZE Scenario thus also supports the conclusion that, for Shell's concrete reduction obligation, the global average reduction percentage can be linked up with. After all, the NZE Scenario already indicates - calculated back to 2019 - reduction percentages of 36.2% for oil and 30.1% for gas. If these percentages are normatively adjusted because they still rely heavily on IAM models and their limitations, and because they have been adjusted only for the CBDR principle, and not for the precautionary principle and the principle of intergenerational justice, a percentage of 45% is already quite understandable. In any case, in light of the foregoing, the NZE Scenario also provides more than sufficient normative and scientific starting-points for setting a reduction percentage for Shell within the range of (rounded) 30% and 45% or any other reduction percentage.

[1555] See also, in a similar vein, T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *M en R* 2025/12, under "*Reductieverplichting*" (Reduction obligation), which also specifically points out that the NZE Scenario can serve as a minimum, and also that the variability of the reduction percentage is caused by the fact that the achieved reductions are insufficient. See also M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JOR* 2025/81, paras. 8, 9 and 12, who likewise believes that the Court of Appeal could at least have linked up with the NZE Scenario.

The modelled reduction scenarios lead to a (minimum) reduction of 45%

1000 It follows from the foregoing that the modelled reduction scenarios and the general legal principles together complete the determination of the reduction percentage applicable to Shell. The reduction scenarios with the lowest reduction percentages do not compensate, or hardly compensate, for the limitations of IAM models. Consequently, the general legal principles are also not factored into, or are hardly factored into, these scenarios. This means that these reduction scenarios are based on choices that work, to a very significant extent, in favour of the oil and gas industry. This already leads to a minimum reduction percentage based on the Hawkes Report (recalculated) of (rounded) 30% for oil and gas. All other reduction scenarios confirm this minimum. The reduction scenarios that do (to an increasing extent) allow for the limitations of IAM models and the general legal principles arrive at much higher reduction percentages. The Tyndall Report indicates the highest percentage: 51.7% for oil and gas. Based on the general legal principles and the modelled reduction scenarios allowing for them, the Court can adjust the lowest reduction percentage applicable to Shell upwards and/or select reduction scenarios and differentiate between them. This results in a reduction percentage of (at least) 45%, which, in turn, is consistent with the requirements of Articles 2 and 8 ECHR and the soft-law sources. This completes the normative circle: all relevant objective factors and the modelled reduction scenarios together lead to a reduction percentage for Shell of (at least) 45%.

VI.3.8 Conclusion

1001 Milieudefensie et al. have explained above how the Court can determine a reduction percentage applicable to Shell based on the relevant objective points of reference and the modelled reduction scenarios discussed between the parties. Such a determination will thus be well within the limits set by Article 6:162 DCC and is therefore a task of the Court. The objective points of reference lead to the conclusion that Shell is bound by the global average reduction percentage of 45%, or by a reduction percentage within the range of (rounded) 30% to 45% or any other reduction percentage. In any case, a minimum percentage for Shell can be based on those objective points of reference. In the view of Milieudefensie et al., that minimum percentage is (rounded) 30%. That is therefore what the Supreme Court must impose on Shell as a concrete reduction obligation in line with Shell's duty of care to prevent or limit dangerous climate change.

VI.4 There are no circumstances that detract from Shell's concrete reduction obligation

1002 It will be clear that the Court of Appeal did not (fully and correctly) work through the assessment framework outlined in Section VI.3 of this Explanatory Submission to determine Shell's concrete reduction obligation. This is partly caused by the fact that

there were several fundamental misunderstandings in this connection on the side of the Court of Appeal. Milieudefensie et al. will discuss them below, from which it will follow that these circumstances that the Court of Appeal took as its starting-point are based on inaccuracies and cannot detract from the determination of a concrete reduction obligation for Shell.

VI.4.1 The substitution of coal does not justify an increase in gas production

1003 In assessing whether Shell can be held to the global average reduction percentage of 45%, the Court of Appeal first started out from the misunderstanding that Shell would be permitted to increase its gas production because gas can serve as a substitute for more carbon-intensive coal use in grounds 7.74 and 7.75 of the Judgment. That would ultimately lead to a greater CO_2 reduction globally. This line of reasoning presented by Shell is as simplistic as it is incorrect. Milieudefensie et al. will explain below why the notion that gas production should be allowed to increase in order to replace coal is based on a scientific and normative misunderstanding. After all, this line of reasoning is not in any way consistent with the modelled reduction scenarios based on scientific findings or with the direction indicated by the objective points of reference.

(a) Scientific misunderstanding. The fact that the substitution argument is based on a *scientific* misunderstanding is already evident from the modelled reduction scenarios discussed above. There is not a single reduction scenario that proceeds on the assumption that gas consumption and the associated CO_2 emissions are allowed to increase until 2030. After all, all the reduction scenarios presented by the parties assume that the gas consumption must *also* decrease during that period. Moreover, every one of these reduction percentages is high: at least (rounded) 30% by 2030. Even Shell has not proposed a reduction scenario that models an *increase* in the gas consumption as being feasible and in line with limiting global warming to 1.5°C. Hawkes also models (prior to the recalculation) a 15% reduction for gas.[1556] From this it follows that there is very broad scientific consensus that the emissions associated with gas use will need to be reduced just as much as those associated with oil or coal. This, incidentally, is easy to follow mathematically and physically: if 48% of CO_2 emissions are related to oil and gas and only 33% to coal, it goes without saying that an increase in the gas emissions to replace (part of) the 33% of emissions associated with coal can never lead to the reductions required in total by 2030 of 45% of total global CO_2 emissions. This also follows from the calculation example given by Milieudefensie et al. in Section VI.3.2 of this Explanatory Submission.

(b) Normative misunderstanding. The substitution argument is also based on a *normative* misunderstanding. After all, all relevant objective points of reference

[1556] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 23.

indicate the need to reduce emissions from all fossil fuels. This therefore also applies to the consumption of gas. Article 8 ECHR, for instance, requires the setting of concrete reduction targets, and all soft-law sources require all companies to aim for CO_2 reductions in Scopes 1, 2 and 3. That is what the modelled reduction scenarios pointing to a decline in oil and gas, in their turn, link up with. This applies all the more strongly if these scenarios are adjusted in accordance with the general legal principles. The Court of Appeal has therefore rightly held that companies have an obligation to limit (ground 7.27) and reduce (grounds 7.56 and 7.111) their CO_2 emissions and also that more may be required of Shell than of most companies (ground 7.55). Building on this, the Court of Appeal rightly concluded that the supply of fossil fuels must also be limited in order to keep climate targets within reach (ground 7.61). In that connection, the Court of Appeal also rightly considered that Shell's planned investments in, among other things, new gas fields and the associated increases in its gas production may be at odds with that duty of care (grounds 7.59 up to and including 7.61). It defies logic to then assume, in spite of the foregoing, that Shell's gas emissions *are* allowed to increase *before* 2030. There is no normative basis whatsoever for that conclusion. On the contrary, all objective points of reference indicate - in line with the modelled reduction scenarios – exactly the opposite.

VI.4.2 Shell's customer base does not justify a lower reduction percentage

1004 Shell has also taken the position that its customer base does not allow it to reduce its CO_2 emissions by 45%. In that regard, it has specifically pointed out - to the extent still relevant in cassation - that its customer base consists, to a greater-than-average extent, of companies active in harder-to-abate sectors. These are sectors in which alternatives to fossil fuels are more difficult to implement, such as, in particular, the aviation sector and parts of the freight transport sector.[1557] The Court of Appeal also attached meaning to this in ground 7.79, where it found that Shell cannot be held to the CO_2 reduction prescribed by soft law in accordance with the global average reduction percentage of 45%. Milieudefensie et al. will explain below that the composition of Shell's customer base does not justify a deviation from the global average reduction percentage and, in any case, cannot result in Shell not having to achieve any reductions at all.

1005 Milieudefensie et al. first point out that it would have a highly counterproductive effect if weight were to be given (or too much weight were to be given), when a company's reduction obligation is determined, to the extent to which that company serves harder-to-abate sectors. If that circumstance were to carry significant weight, it would become tempting for companies to fill a significant portion of their customer base with those

[1557] Notice of Appeal of Shell dated 22 March 2022, paras. 2.3.8 et seq.

sectors. After all, in that case they would not have to take any climate measures at all, or would only have to take far fewer measures, for that reason. This applies all the more to companies that actually already serve many of those sectors. In this context, the IEA has flagged up that oil and gas companies are also making this a corporate strategy so that they can remain as large as possible in oil and gas.[1558] For Shell, it would therefore become tempting to invest (or continue to invest) heavily in oil and gas and keep its customers as dependent on these products as possible, resulting in an even more far-reaching carbon lock-in effect.[1559] That is also exactly Shell's current strategy, in line with what the IEA has found. The Court of Appeal itself also established this in grounds 7.59 and 7.60: Shell intends to maintain its oil production at the current level (and so does not intend reduce it) in the period until 2030 and plans to increase its LNG sales by 20% to 30%. This will be accompanied by investments in its oil and gas activities (so including the exploration and development of new oil and gas fields) totalling USD 100 billion between 2023 and 2030.

1006 For this reason alone, it makes much more sense, from a normative perspective, to consider the fact that Shell partly operates in harder-to-abate sectors in assessing whether Shell has fulfilled its stringent obligation of means to reduce its Scope 3 emissions. That obligation requires Shell to do everything reasonably possible to limit its total Scope 3 emissions. This must be done by Shell via its influence on the demand and supply sides of the oil and gas market. If Shell can demonstrate that it has made serious efforts to achieve the reduction targets imposed on it via these roads, but that it has not fully succeeded in doing so solely because of the harder-to-abate sectors, then that may be a reason for assuming that it has fulfilled its stringent obligation of means nevertheless. This approach provides Shell with a significant incentive to also seriously explore what alternatives it can offer to the harder-to-abate sectors and to work, actively and with great effort, via its influence on the demand and supply sides of the oil and gas market, on achieving CO_2 reductions within these sectors. Shell must therefore also investigate how it can compensate for any impossibilities within the harder-to-abate sectors by achieving further CO_2 reductions in sectors that can be made more sustainable more easily. At the same time, this approach prevents Shell from actually increasing those sectors' dependence on oil and gas, which would strengthen the carbon lock-in effect. Building on this, this approach would also reinforce the sustainability initiatives of the harder-to-abate sectors themselves, rather than stifling them. Many of such initiatives are also being taken, as will be further discussed below.

1007 For a further assessment of this harder-to-abate aspect, some quantitative insight into Shell's customer base is required. According to Shell itself, 44% of its customer base belongs to the harder-to-abate sectors, based on the "transport sector" as defined by

[1558] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 124.
[1559] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 599 and 600.

the IEA.[1560] Milieudefensie et al. have pointed out that Shell is misrepresenting the situation in this way. According to the IEA, that "transport" sector also includes passenger cars, motorcycles, scooters, light commercial vehicles, minibuses, buses and trains. These do not belong to the harder-to-abate sectors, i.e. sectors that are difficult to green. The harder-to-abate portion of the transport sector is therefore (much) smaller than 44% of Shell's customer base. It only covers shipping, aviation and heavy road transport.[1561]

1008 What is also important is that *even* with a 45% reduction in its Scope 1, 2 and 3 CO_2 emissions, Shell is still allowed to keep 55% of its emissions. A very substantial portion of Shell's portfolio will therefore continue to consist of oil and gas. This gives it ample capacity to continue serving the harder-to-abate portion of its customer base.[1562]

1009 In addition, Shell's customers in the harder-to-abate sectors will, of course, also have to reduce their own emissions on the road to 2030. These reductions will lead to lower Scope 3 emissions for Shell and thus help Shell. After all, all sectors - such as the industrial sector, the transportation sector, the real estate sector, the electricity sector and the agricultural sector - will have to become more sustainable and switch to sustainable alternatives, partly driven by national, European and international obligations. This, in turn, will affect the demand for oil and gas. Shell itself also highlighted this trend in its annual report:

> *"Rising concerns about climate change and effects of the energy transition could continue to lead to a fall in demand and potentially lower prices for fossil fuels* (...)*. This increasing focus on climate change and drive for an energy transition have created a risk environment that is changing rapidly* (...)*. We also expect that actions by customers to reduce their emissions will continue to lower demand* (...)*. In summary, rising climate change concerns and effects of the energy transition have led and could lead to a decrease in demand and potentially affect prices for fossil fuels."*[1563]

1010 Furthermore, Shell itself also notes that the harder-to-abate sectors of aviation and road freight are increasingly working on sustainable alternatives:

> *"Business customers in the harder-to-abate sectors of road freight and aviation are increasingly keen to cut their carbon emissions. Shell and Deloitte's Decarbonising Aviation: Cleared for Takeoff report, published*

[1560] Notice of Appeal of Shell dated 22 March 2022, para. 2.3.8. under b.
[1561] Exhibit MD-365 (IEA Global CO_2 Emissions). See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 586 and footnote 347.
[1562] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 585.
[1563] Exhibit MD-377 (Shell Annual Account 2021), p. 23. See also the Statement of Defence on Appeal of Milieudefensie et al.'s dated 18 October 2022, paras. 588 and 589.

> *in September, found that 90% of aviation executives and experts interviewed said cutting emissions was one of their top priorities. The equivalent figure in the January 2021 report Decarbonising Road Freight: Getting into Gear was more than 70%."*[1564]

1011 The maritime shipping sector is also working on emission reductions. Moreover, sustainable alternatives are also available in that sector. This is evident from the findings of the maritime shipping sector itself, as indicated by, for instance, Maersk. Maersk is the world's largest container shipping company and, as such, a major consumer of oil. Maersk has made it clear that in the maritime shipping sector (and, for that matter, also in other fossil-intensive sectors) there are alternatives to oil, and that gas cannot be seen as a transition fuel. Maersk has also pointed out that the shift to sustainable alternatives will be immediate:

> *"We are in a climate emergency, and any emergency requires an emergency response. Fighting climate change has become an imperative for all of us as individuals and as companies. We must all do the most we can - and we must start now. Global logistics emits more than 3.5 Gigatons of CO2 every year, and that is clearly not sustainable* (...). *It is evident that very good solutions are available today that can have an immediate impact. There is no need to wait for 'perfect' solutions, future studies, or emerging technologies to mature before we act. There is no excuse not to act now. Across global supply chains low-carbon or carbon-neutral solutions are available. Trucks can be electrified or operate on green hydrogen, warehouses can operate on renewable energy, terminals can operate on renewable energy or biofuels, and container vessels can be powered by carbon neutral fuels.*
>
> *There has been much talk about so-called transition fossil fuels, such as Liquified Natural Gas (LNG) in shipping. We do not consider that a solution at all. The burning of fossil fuels is the problem that needs to be solved, so introducing yet another fossil fuel into the mix can never be a permanent solution. We simply do not see any credible fossil fuel with acceptable lifecycle emission reductions, and the cost associated with infrastructure etc. to work with such fuels could slow the transition to sustainable solutions. We want to leapfrog to the fuels of tomorrow, today. And we can. Methanol technology is available for marine propulsion, and methanol has the potential to be made in a carbon neutral manner either as biomethanol from sustainable biomass, or as electro-fuel from green hydrogen and biogenic CO2* (...). *This means we are ready to scale, and therefore we have now placed an order for eight 16,000 TEU ocean going container vessels, the first of which will*

[1564] Exhibit MD-377 (Shell Annual Account 2021), p. 23. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 590.

> *be delivered in early 2024* (...). *Today vessels, tomorrow trucks, warehouses, terminals, and airplanes. Our ambition is to ensure that not only our ocean leg, but our supply chain end to end is sustainable. This is the decade where we must take bold action, and it is on us to do it."*[1565]

1012 Finally, in this context, it should be noted that a stringent obligation of means for Shell to reduce its Scope 3 CO_2 emissions can actually contribute to this sustainability shift in the harder-to-abate sectors. After all, to comply with that obligation, Shell will want to focus in particular on the sectors in which significant reductions are feasible and scalable. It is therefore likely that Shell, in order to comply with its stringent obligation of means, will also specifically look at the harder-to-abate sectors. This applies even more strongly because, as shown above, those sectors are also already actively looking for reduction opportunities themselves. This is, in fact, precisely the flywheel effect described in Section II.2.3 of this Explanatory Submission on which the UN climate regime and the soft-law sources are based.

1013 It follows from the foregoing that the fact that Shell's customer base consists in part of harder-to-abate sectors does not preclude a reduction obligation for Shell of 45% or in any event a (minimum) reduction obligation of (rounded) 30% or any other percentage with respect to its Scope 3 emissions. Not only is the share of those harder-to-abate sectors within Shell's customer base limited, but those sectors themselves are also already undertaking many initiatives to reduce their CO_2 emissions. If the Court would indeed attach (significant) weight to the fact that Shell's customer base partly consists of harder-to-abate sectors when determining the reduction percentage applicable to Shell, this would only encourage Shell to expand its customer base within those sectors and also to keep – and make - those sectors dependent on oil and gas. This would increase the carbon lock-in effect. It would be far more logical to consider the fact that Shell serves harder-to-abate sectors at the stage where Shell's fulfilment of its stringent obligation of means is assessed, if it has not achieved the required CO_2 reductions via its influence on the demand and supply sides of the oil and gas market. This is in line with the necessity for Shell to reduce its CO_2 emissions as quickly as possible.

VI.4.3 The climate targets can be achieved with the operation of existing oil and gas fields

1014 A third misconception in the reasoning of the Court of Appeal has to do with the fact that the required CO_2 reduction can already be achieved - in line with the Paris Agreement climate goals - by the oil and gas industry without exploring and operating new oil and gas fields. Within that reduction pathway, the energy demand can continue to be met.

[1565] Exhibit MD-366 (Maersk Statement), p. 23. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 590.

This also follows from the IEA's findings. Milieudefensie et al. will briefly explain this below.

1015 In the original version of the NZE Scenario from 2021, the IEA concluded that it was possible to sufficiently scale up alternative energy sources, so that no further investments in oil and gas fields are necessary to meet the climate goals and to continue to be able to meet both the existing and projected energy needs. So to meet the energy supply needs, the oil and gas industry can make do with the existing oil and gas fields, according to the IEA. In the IEA's own words:

> *"Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required.* (…) *the focus for oil and gas producers shifts entirely to output - and emission reductions - from the operation of existing assets."*[1566]

1016 From this it follows that all sectors using oil and gas - and therefore also the harder-to-abate sectors can make do, according to the IEA, with the production from oil and gas from fields already committed. Consequently, Shell can fully meet its Scope 3 obligations as far as its own production is concerned without looking for and starting to operate new oil and gas fields.[1567] This is in line with what the Court of Appeal required of Shell in grounds 7.59 and 7.60.

1017 In the updated version of the NZE Scenario from 2023, the IEA still saw no room or necessity for investing in new oil and gas fields. On the contrary, the NZE Scenario is based on the assumption that no such investments are necessary.[1568] This was also addressed in the discussion of the NZE Scenario in Section VI.3.7 of this Explanatory Submission. The IEA (by contrast) fears that, in reality, there will be overinvestment in oil and gas and thus an excess supply.[1569] The NZE Scenario, too, therefore proceeds on the assumption that the climate targets can simply be met by depleting the committed oil and gas fields.[1570] It allows for the fact that the oil and gas industry also serves the harder-to-abate sectors.

1018 These findings underline, once again, that all sectors using oil and gas - and thus also the harder-to-abate sectors - do not prevent the oil and gas industry from being able and required to significantly reduce its Scope 3 emissions without investing in new oil and gas fields. This therefore also applies if the customer base of an oil and gas

[1566] Exhibit MD-362 (IEA Net Zero Roadmap 2021), p. 21. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 582 and 593.
[1567] Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 24 and 32; Statement of Defence of Milieudefensie et al. dated 18 October 2022, para. 595.
[1568] Exhibit MD-528 (IEA The Oil and Gas Industry in Net Zero Transitions 2023), p. 58. See also the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 112, 113 and 119.
[1569] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, para. 107.
[1570] Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 112 and 113.

company consists, partly or to a limited extent, of harder-to-abate sectors, as in the case of Shell.

VI.5 Shell has a concrete reduction obligation

1019 A number of clear conclusions follow from what was discussed in Sections VI.2 up to and including VI.4 of this Explanatory Submission. First, the reduction percentage applicable to Shell must be determined on the basis of all relevant objective points of reference. The scientific consensus standard applied by the Court of Appeal is far too narrow. The relevant objective points of reference and modelled reduction scenarios also provide more than sufficient normative and scientific basis for determining a reduction percentage applicable to Shell.

1020 The starting-point for determining the reduction percentage that can be required of Shell is formed by the (correct) findings of the Court of Appeal that Shell must start reducing its CO_2 emissions and that *more* can be expected of Shell than of other companies, in light of the doctrine of hazardous negligence, human rights, soft law and various general legal principles. After all, the UN climate regime requires CO_2 reductions that keep the Paris Agreement targets within reach and, in that regard, it also – and specifically - requires action from companies. Moreover, Articles 2 and 8 ECHR, which have horizontal effect, oblige Shell to provide effective protection and to set a concrete reduction target. A large number of soft-law sources subsequently indicate that Shell must make every effort in this regard and they provide concrete percentages in line with the global average reduction percentage of 45%. The modelled reduction scenarios themselves, in their turn, contain very concrete reduction percentages for the oil and gas industry and so also - and specifically - for Shell, one of its largest players. Finally, the precautionary principle, the principle of intergenerational justice and the CBDR principle provide concrete normative points of reference for differentiating among the various modelled reduction scenarios and for making corrections for any unrealistic assumptions that are incompatible with the obligation to provide effective protection against dangerous climate change.

1021 It follows from this framework that Shell must be held to the global average reduction percentage of 45%. After all, all relevant objective points of reference - and so the complete normative framework - point in that direction. This framework in any event means that the minimum reduction that can be required of Shell is equal to the lower end of the various modelled reduction scenarios, which is (rounded) 30%. After all, that lower end concerns the CO_2 reductions that may be required of the oil and gas industry if every distribution choice for the reduction efforts were to be made strongly in favour of the oil and gas industry. Also, these scenarios take little or no account of the technical, practical, financial and societal unfeasibility of such distribution choices or of climate damage. Moreover, all the assumptions in the models regarding the deployment of

CDR technologies would have to be correct in that case, despite the significant uncertainties associated with them. After all, the modelled reduction scenarios at the lower end of the range proceed on the basis of a substantial deployment of CDR technologies. This is therefore the absolute minimum that can be required of the oil and gas industry, and thus of Shell. Finally, based on the general legal principles and the modelled reduction scenarios, the Court may also arrive at a percentage within the range of (rounded) 30% to 45% or any other percentage.

1022 It also became clear that all relevant objective points of reference and modelled reduction scenarios preclude the notion that Shell's gas production is allowed to increase in order to reduce global coal use. All emissions must decrease, including those resulting from gas use. Furthermore, it was discussed that the fact that Shell's customer base partly consists of harder-to-abate sectors does not preclude, as a matter of fact or of principle, a reduction obligation in conformity with the global average reduction percentage or, at the very least, in line with the sectoral reduction scenarios. Finally, it has become clear that the climate targets can actually be achieved with the current oil and gas reserves. Continuing to focus on oil and gas production would be at odds with this and would increasingly exacerbate the disastrous carbon lock-in effect. Nothing, therefore, stands in the way of determining that Shell must have reduced its Scope 3 CO_2 emissions by 45% by 2030, or by a reduction percentage within the range of (rounded) 30% to 45% or any other percentage.

VI.6 Further explanation of the principal appeal in cassation of Milieudefensie et al.

1023 In Sections VI.2 up to and including VI.5 of this Explanatory Submission, Milieudefensie et al. have outlined the framework for determining Shell's concrete reduction obligation. That framework also forms the basis for reading and judging the objections set forth in grounds of appeal nos. 1, 3 and 4 of the principal appeal in cassation of Milieudefensie et al. The grounds of appeal essentially explain, on cassation-technical grounds, why the Court of Appeal's Judgment cannot be upheld.

1024 After reading the preceding paragraphs, it will be virtually self-evident why the Court of Appeal wrongly ruled that it was unable to determine a reduction percentage applicable to Shell. In the following Sections, Milieudefensie et al. will therefore only provide a limited further explanation of those objections and will, firstly, refer back to what was discussed above. A number of objections to the Judgment, however, do require an additional explanation.

VI.6.1 The global reduction standard and Shell's concrete obligation (grounds of appeal nos. 1 and 3)

1025 In grounds 7.67 and 7.73 up to and including 7.81, the Court of Appeal first ruled that Shell cannot be held to the global average reduction percentage of 45%. The judgment of the Court of Appeal essentially boils down to the following:

(a) In the absence of a statutory framework, the determination of a reduction percentage applicable to Shell requires scientific consensus on a reduction standard applicable to a company such as Shell (ground 7.67);

(b) There is broad scientific consensus that global CO_2 emissions must have been reduced by 45% by 2030. This is an average for companies in all countries and all sectors, and some countries and sectors will have to reduce emissions to a greater extent and others to a lesser extent. Furthermore, this average applies to all greenhouse gases (grounds 7.73 and 7.74);

(c) CO_2 emissions are caused by the combustion of oil, gas and coal. Shell does not sell coal. The greatest reduction gains in the short term can be achieved by ceasing the combustion of more carbon-intensive oil. This will lead to the combustion of more gas, but on balance, this is less harmful to the climate. This, admittedly, will lead to an increase in Shell's Scope 3 emissions, but it also results in lower global emissions. For that reason alone, the general standard of 45% (or 35% or 25%) is not sufficiently case-specific for Shell (see grounds 7.74 and 7.75);

(d) The reduction pathways may vary by sector and also by country. Shell serves multiple sectors, including harder-to-abate sectors. Applying a general standard would, in that light, overlook the fact that different reduction pathways exist for the individual sectors (grounds 7.75 up to and including 7.78);

(e) For the general standard of 45% to apply to Shell, it would have to be plausible that its product range and customer base reflect the global product range and customer base (ground 7.79);

(f) While the Race to Zero Initiative does mention an interim target of 50%, that must be a fair share, and therefore it cannot automatically result in a 50% reduction obligation for every company. The same applies to the UN Expert Report. The fact that this Report, and other sources, state that parties must make every effort to reduce emissions as quickly as possible is not sufficient to impose the global average reduction percentage on Shell (ground 7.80);

(g) The fact that Shell is a major player in the oil and gas market *was* actually included in the Court of Appeal's finding *that* Shell has an obligation to reduce its emissions. However, this does not yet mean that Shell can be held to the global average reduction percentage (ground 7.81); and

(h) Holding Shell to the global average reduction percentage does not follow from the equity principle (the CBDR principle) either, because that standard is too general for inferring that Shell has a 45% reduction obligation (ground 7.81).

1026 The objections in grounds of appeal nos. 1 and 3 challenge these considerations. At their core, these objections amount to the fact that the Court of Appeal has failed to conduct a structured and/or sufficiently reasoned examination, based on the relevant objective points of reference and modelled reduction scenarios (also in light of the meticulously elaborated arguments presented by Milieudefensie et al.), as to whether Shell can be held to a reduction percentage of 45%. Essentially, all that the reader will find in the considerations of the Court of Appeal are a few arguments mentioned by Shell that the Court of Appeal appears to have adopted uncritically.

The Court of Appeal has applied the wrong standard (grounds of appeal nos. 1.25 up to and including 1.34 and 3.2 up to and including 3.7)

1027 First of all, the Court of Appeal has applied an assessment framework that is far too narrow because it has completely disregarded not only the relevant objective points of reference, but also the broad Common Ground method (grounds of appeal nos. 3.2 up to and including 3.7). Milieudefensie et al. have addressed this in detail in Sections VI.2.1 and VI.2.2 of this Explanatory Submission. This requires no further explanation.

1028 In addition, the relevant ECHR perspective is not discussed anywhere in the findings of the Court of Appeal. That perspective has fallen by the wayside because the Court of Appeal has wrongly focused entirely, in its search for scientific consensus, on a reduction standard applicable to a company such as Shell. However, the ECHR perspective is a crucial objective point of reference for concretely determining the obligation to prevent or mitigate dangerous climate change and, thereby, for determining the reduction percentage applicable to a company such as Shell. Articles 2 and 8 ECHR and Article 13 ECHR compel courts to determine a reduction percentage applicable to Shell that provides genuine and effective protection against dangerous climate change. This requires the establishment of a reduction obligation that can be expressed as a percentage. Grounds nos. 1.25 up to and including 1.34 address the above-mentioned omission in the Court of Appeal's judgment from different perspectives. In light of what was set forth in Section VI.3.5 of this Explanatory Submission, this requires no further explanation.

The Court of Appeal has failed to pay attention to the doctrine of hazardous negligence (grounds of appeal nos. 1.3 up to and including 1.10 and 3.9)

1029 Furthermore, the Court of Appeal has not done any justice to the role of the doctrine of hazardous negligence. Despite all the arguments on this point put forward by Milieudefensie et al., the Court of Appeal has not considered this doctrine at all in its

Judgment. If the Court of Appeal had considered it, this could already have provided important guidance for the determination of a reduction percentage applicable to Shell or could even have led to a concrete reduction percentage. This is all the more true because the Court of Appeal has already concluded based (in part) on those criteria that Shell must reduce its CO_2 emissions *more* than most companies. That is what the objections set out in grounds of appeal nos. 1.3 up to and including 1.10 and 3.9 relate to. Milieudefensie et al. have already explained them in Section V.7.1 of this Explanatory Submission, so no further explanation of the objections is required here.

The Court of Appeal has not considered general legal principles, not even in its assessment of the modelled reduction scenarios (grounds of appeal nos. 1.11 up to and including 1.24 and 3.10 up to and including 3.20)

1030 In addition, the Court of Appeal has not paid any serious attention to the precautionary principle, the principle of intergenerational justice and the CBDR principle, not even in light of the modelled reduction scenarios and the arguments put forward by Milieudefensie et al. in this regard. Section VI.3.7 of this Explanatory Submission has already elaborated in detail that it is precisely this step of the assessment that is of crucial importance in order to arrive at a concrete reduction percentage for Shell. In that context, it was also explained that this assessment – especially in conjunction with the other relevant objective points of reference – may well have resulted in a reduction percentage of 45% for Shell. This was therefore one of the central pillars of the arguments of Milieudefensie et al. before the fact-finding courts.

1031 The precautionary principle and the principle of intergenerational justice even play no role whatsoever in the deliberations of the Court of Appeal regarding the question of whether Shell can be held to the global average reduction percentage of 45%. These general legal principles are simply not included anywhere in that entire assessment and are not mentioned anywhere. In ground 7.81, the Court of Appeal does mention the CBDR principle (equity), but its considerations on this point, essentially, only show that it has made no serious effort to perform an assessment against that principle in light of the modelled reduction scenarios and the relevant submissions of Milieudefensie et al. After all, the Court of Appeal merely finds that this standard is too general to infer a 45% reduction percentage from. The Court of Appeal has thus failed to grasp the essence of the way in which the general legal principles - including the CBDR principle – work (as outlined in Sections IV.5.3 and VI.3.7 of this Explanatory Submission) when the reduction percentage applicable to a company such as Shell must be determined.[1571] In light of what those Sections discussed, this requires no further explanation.

[1571] See also, in this regard, L.E. Burgers, "*De doorwerking van internationaal recht in klimaatzakent tegen bedrijven*" (The effect of international law in climate cases against companies) in *MvV* 2025/11, para. 4, which points out that the CBDR principle was misapplied.

1032 The objections to the judgment formulated in grounds of appeal nos. 1.11 up to and including 1.24 and 3.10 up to and including 3.20 are devoted to this significant omission in the Judgment of the Court of Appeal. Based on the arguments raised by Milieudefensie et al. on this point, these grounds of appeal elaborate in detail on (i) the shortcomings in the IAM models and, consequently, in the modelled reduction scenarios based on them, (ii) the consequences of these shortcomings for determining a reduction percentage applicable to the oil and gas industry and to Shell that actually contributes to achieving the Paris Agreement climate goals, (iii) how the precautionary principle, the principle of intergenerational justice and the CBDR principle exactly require, in that light, an upward correction of the reduction percentages calculated by the modelled reduction scenarios and/or how a differentiation among those reduction scenarios can exactly be made, and (iv) that and how such an upward correction and/or differentiation method results in a reduction obligation of (at least) 45% for Shell. The parts of the grounds of appeal point out, from different angles, that the Court of Appeal should have paid thorough attention to this crucial aspect of the arguments put forward by Milieudefensie et al. In these grounds of appeal, it is also explained why the considerations of the Court of Appeal do not constitute an adequate response to them. In light of what was discussed in Section VI.3.7 of this Explanatory Submission, these objections do not require any further elaboration either.

The Court of Appeal has failed to conduct a thorough assessment against the soft-law sources (grounds 3.21 up to and including 3.46)

1033 Furthermore, the Court of Appeal has failed to thoroughly examine whether the large number of soft-law sources cited by Milieudefensie et al. result in the conclusion that Shell must reduce its CO_2 emissions by 45% in light of all its characteristics as set out in detail by Milieudefensie et al. The contents of these soft-law sources were already addressed in Sections IV.5.4 and VI.3.6 of this Explanatory Submission. In Section VI.3.6 of this Explanatory Submission, Milieudefensie et al. further concisely discussed their arguments in support of their contention that Shell, because of its characteristics, is precisely the type of company that is targeted by those soft-law sources and must maximise its efforts to reduce its CO_2 emissions by at least 45%. In reaching its decision, the Court of Appeal has failed to give serious consideration to these soft-law sources and the detailed arguments put forward by Milieudefensie et al. relating to them.

1034 The first thing to be noted is that in its key considerations, the Court of Appeal has demonstrated insufficient understanding of the contents and purport of the relevant soft-law sources. This begins with the finding of the Court of Appeal in ground 7.74 that the global average reduction percentage applies to all greenhouse gases. That is factually incorrect. The global average applies to CO_2 emissions only. A further and more profound misunderstanding is evidenced by the crucial finding of the Court of Appeal in ground 7.79 that the global average reduction percentage can only be applied

to Shell if it is plausible that its customer base and product range reflect the global product range and global customer base. As discussed in Section VI.3.6 of this Explanatory Submission, companies whose customer base and product range reflect any global average do not exist. That would be an unworkable requirement for the application of soft law. What the soft-law sources actually require, first and foremost, is high reductions from Western companies that have, in short, very high CO_2 emissions and significant capabilities and resources to achieve those reductions. The companies in the oil and gas industry are prime examples of this. It is precisely the "non-averageness" of a company like Shell that may lead to an obligation on its part to aim for the global average reduction percentage with maximum effort.[1572] This, again, constitutes a crucial error in the Judgment of the Court of Appeal.

1035 Of all the soft-law sources cited by Milieudefensie et al., the Court of Appeal has only mentioned the Race to Zero Initiative and the UN Expert Report by name in its Judgment. Subsequently, the Court of Appeal does no justice at all to their contents. Admittedly, the Court of Appeal has acknowledged in ground 7.80 that the Race to Zero Initiative points to a 50% CO_2 reduction as the starting-point, but it fails to mention that many other soft-law sources also explicitly indicate that a CO_2 reduction of at least 45%, or even 50%, is required or that the reduction must be in line with the 1.5°C target of the Paris Agreement (and therefore: 45%). For example, the Net Zero Guidelines, the 1.5°C Business Playbook and the SBTi Report all point to a CO_2 reduction of 45% or 50%. The OECD guidelines and the UNGP require reductions in line with the 1.5°C target of the Paris Agreement. The Court of Appeal does not refer to any of these sources and does not even mention that all of them point to a CO_2 reduction of 45% or more. Collectively, these sources thus constitute strong evidence that a reduction of (at least) 45% *is* indeed the starting-point that every company must aim for and concentrate its efforts on. So that is something that the Court of Appeal should have explicitly taken into account in its decision.

1036 In grounds 7.80 and 7.81, the Court of Appeal goes on to examine whether Shell belongs to the category of companies from which the soft-law sources require maximum efforts to reduce CO_2 emissions by (at least) 45%, or what Shell's fair share actually amounts to. For this examination, the reasoning provided by the Court of Appeal is even more concise. Essentially, the Court of Appeal completely ignores the arguments put forward by Milieudefensie et al. on this point. What its reasoning actually boils down to is that the obligation to maximise the efforts is not sufficient to turn a global average reduction standard into a binding standard for Shell. The Court of Appeal subsequently mentions one of the many characteristics mentioned by Milieudefensie et al.: Shell is a major player in the oil and gas market. But *even* to that aspect no weight is attached by

[1572] See also W.Th. Douma, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JM* 2025/5, under "Fair share."

the Court of Appeal. With a view to this, the Court of Appeal considered that the latter circumstance was already included in its decision *that* Shell has a legal obligation to reduce its emissions. To justify this finding, the Court of Appeal then points to the existence of different reduction scenarios for different sectors in different countries. The judgment of the Court of Appeal may have to be interpreted as meaning that its decision is partly based on the fact that Shell is not an "average global" company, but serves different sectors (including harder-to-abate sectors) in different countries and that the increase in its gas production could cause the use of more carbon-intensive coal to decrease.

1037 To start with, these considerations do not constitute a genuine response to the detailed arguments of Milieudefensie et al. in which the very aspects that the Court of Appeal also mentioned were discussed and rebutted. The Court of Appeal has not devoted a single word to such a rebuttal. Milieudefensie et al. have argued in detail that Shell falls within the group of companies that are required, based on soft-law sources, to at least limit their CO_2 emissions in line with the global average reduction percentage.[1573] To that end, they pointed out that many companies are required to reduce their emissions at a faster rate than the global average reduction rate. According to the soft-law sources, this applies in particular to influential Western companies with high emissions and a large historical responsibility for the climate problem. In that regard, Milieudefensie et al. have argued that Shell, too, generates the largest part of its revenue in wealthy and predominantly Western countries. These are the countries that must take the lead in addressing climate change and therefore phase out fossil fuels fastest to bring their emissions down. Building on this, Milieudefensie et al. have argued that Shell, based on the maximum efforts and fair share required by the soft-law sources, should *even* do more than limit its CO_2 emissions by the global average 45% reduction. The reasons for this include Shell's large responsibility for the climate crisis, its high emissions, the fact that it generates the largest part of its revenue in the wealthiest countries and its undeniable capacity to change at the required high pace.

[1573] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 15 and 16, referring to their submissions in the first instance and on appeal, in which they explained in detail that a 45% reduction by 2030 in Scope 1, 2 and 3 is the minimum of what Shell must do in light of the doctrine of hazardous negligence, human rights and the general (legal) principles, which is supported by the UN climate regime and soft-law sources. What Milieudefensie et al. tried to achieve with this is (in brief) to also base their invocation of soft law on the arguments raised in that context. The Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 18 up to and including 74, were then devoted entirely to the Race to Zero Initiative, the UN Expert Report, the Net Zero Guidelines, the 1.5°C Business Playbook and the SBTi Report. In the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 75 up to and including 102, the OECD Guidelines and the UNGP were also discussed in this context. In the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 102, Milieudefensie et al. conclude, based on everything that preceded that paragraph, that the same can be expected of Shell as under Dutch liability law (i.e. a CO_2 reduction of 45%). Milieudefensie et al. have also explained that, due to its position, Shell is covered by the soft law (as existing at that time), including the Race to Zero Initiative. See the Statement of Defence of Milieudefensie et al.'s dated 18 October 2022, paras. 488, 489 and 503 up to and including 507.

1038 In addition, Milieudefensie et al. have pointed out a large number of other relevant characteristics of Shell.[1574] Since the Court of Appeal either acknowledged these characteristics each time or left them undiscussed in the Judgment, they must serve as the starting-point in cassation, in any event hypothetically. These characteristics are as follows. Shell has a large historical responsibility for climate change, had high CO_2 emission in the past and will have high CO_2 emissions in the future CO_2 and exercises control over and influence on its very high level of emissions. In addition, Shell has an influence on the energy products offered to consumers globally and (thereby) on the demand for oil and gas, generates the largest part of its revenue in wealthier and developed countries and is one of the largest and wealthiest companies in the world. Furthermore, Shell holds a significant global position of power; it is the world's largest purchaser of oil and gas and possesses substantial purchasing power. Finally, Shell has the capacity to bear the heaviest burdens and is capable of achieving reductions exceeding the globally required 45%. What also follows from all of this is that a 45% CO_2 reduction by 2030 is, in fact, the minimum reduction target for Shell. Shell can simply achieve this 45% reduction by 2030 almost entirely in its production division by refraining from investing in new oil and gas fields.

1039 Milieudefensie et al. have also discussed the characteristics of Shell's customer base, in which connection the following was pointed out. The fact that Shell has a customer base that partly consists of companies operating in sectors that are more difficult to green does not mean that Shell could not be held to the global average reduction percentage of 45% for its Scope 3 emissions. Even after a 45% reduction in its CO_2 emissions, Shell can still sell 55% of the volume of fossil fuels sold by it in 2019. Furthermore, the sectors that are more difficult to green must also have reduced their emissions by 2030. With sufficient investment in sustainable alternatives, no new investments in oil and gas fields are needed, not even for the harder-to-abate sectors. According to the IEA, all sectors – so including the harder-to-abate sectors - can make do with the supply capacity from committed oil and gas fields. If investment in oil and gas fields continues, this will only prevent Shell's customers - including the harder-to-abate sectors - from making their own transition due to the carbon lock-in effect. Milieudefensie et al. have already presented this argument in detail in Sections VI.4.2 and VI.4.3 of this Explanatory Submission.

1040 In light of these arguments of Milieudefensie et al., the Court of Appeal should not have restricted itself to general observations regarding the global average reduction percentage and Shell's "non-average" status in connection with its supply to various sectors which have their own reduction pathways. After all, what follows from the above-mentioned arguments is that it is precisely *because of* Shell's "non-averageness" in numerous areas that it must make every effort to reduce its Scope 3 emissions by

[1574] See, in this regard, Sections V.3.1 up to and including V.3.11 of this Explanatory Submission.

45%.[1575] In that light, the Court of Appeal should have examined much more precisely, based on the characteristics of Shell mentioned by Milieudefensie et al., whether the soft-law sources identify Shell as a company that can be expected to aim for a reduction percentage of at least 45% and to make every effort to achieve it. The mere reference to the fact that Shell is a major player in the oil and gas market is clearly insufficient for this purpose, while the other reasons cited by the Court of Appeal do not support that conclusion in light of the above-mentioned arguments either. Furthermore, the Court of Appeal does not say a word about the detailed submissions of Milieudefensie et al. that, and why, the fact that Shell also serves harder-to-abate sectors does not detract from its obligation to aim for a 45% CO_2 reduction in Scope 3. No attention whatsoever is paid to those carefully developed arguments. It seems as if the Court of Appeal has uncritically followed the position taken by Shell, without providing any reasoning.

1041 In this light, the objections in grounds of appeal nos. 3.21 up to and including 3.25 essentially argue that the judgment of the Court of Appeal is insufficiently reasoned. The objections in grounds of appeal nos. 3.26 up to and including 3.46 then discuss, for every individual ground of the Judgment and on the basis of the above, why the reasoning provided in these grounds is insufficient, particularly in light of the soft-law sources and the arguments raised by Milieudefensie et al. on that point. This requires no further explanation in light of the foregoing.

No increase in gas production to substitute coal (grounds of appeal nos. 3.29 and 3.47 up to and including 3.50)

1042 Finally, the objections formulated in grounds of appeal nos. 3.29 and 3.47 up to and including 3.50 concern a final crucial error in the Court of Appeal's reasoning. The Court of Appeal has assumed that global CO_2 emissions stand to benefit most in the short term from the substitution of carbon-intensive coal by less carbon-intensive gas. Consequently, the Court of Appeal apparently believes that Shell's gas sales are allowed to increase. For this reason, too, Shell cannot be held to the global average reduction percentage, according to the Court of Appeal. This example *"*alone*"* demonstrates, according to the Court of Appeal, that applying the general global reduction standard (or the percentages of 35% or 25%) to Shell would not be sufficiently "case-specific".

1043 In Section VI.4.1 of this Explanatory Submission, Milieudefensie et al. have already set out why this assumption is fundamentally incorrect, from both a factual and a normative perspective. After all, all relevant objective points of reference, all modelled reduction scenarios and also the Court of Appeal itself take as their starting-point that the global CO_2 emissions associated with gas and Shell's Scope 1, 2 and 3 emissions must

[1575] See, in a similar vein, M.J. Faber, "*Milieudefensie/Shell: tussen verplichting en veroordeling*" in *MvO* 2024/10&11, para. 3.2.

decrease. That cannot in any way be reconciled with the notion that Shell's gas production and, consequently, its Scope 3 CO_2 emissions are allowed to increase nevertheless. This part of the Court of Appeal's judgment is therefore equally untenable.

VI.6.2 The sectoral reduction standard and the concrete reduction obligation for Shell (grounds of appeal nos. 1 and 4)

1044 In grounds 7.67 and 7.82 up to and including 7.97, the Court of Appeal went on to find that Shell cannot be held to any sectoral reduction percentage derived from the modelled reduction scenarios developed for the oil and gas sector. The judgment of the Court of Appeal on this point can be summarised as follows:

(a) In the absence of a statutory framework, scientific consensus on a reduction standard applicable to a company such as Shell is required in order to establish a reduction percentage applicable to Shell (ground 7.67);

(b) No sufficiently clear conclusion can be drawn from the various modelled reduction scenarios discussed between the parties regarding a reduction percentage applicable to Shell (grounds 7.82 up to and including 7.91);

(c) The cited sources relate partly to oil and gas production and partly to emissions from combustion, meaning they are not readily comparable. More importantly, the various reduction figures are quite divergent: Hawkes mentions the lowest figures, the Tyndall Report mentions the highest figures, and the parties have criticised each other's reports. Even the figures recalculated by Milieudefensie et al. for 2019 range from 28.5% to 51.7% for oil and from 30.1% to 50.5% for gas (ground 7.91);

(d) Moreover, the figures in those sources are not stable, since the original NZE Scenario from 2021 shows a different reduction path than the updated NZE Scenario from 2023. Apparently, there are large differences of opinion among experts regarding the percentages and methodology (ground 7.91);

(e) The NZE Scenario - which does not originate from the parties - cannot serve as a starting-point, because that would disregard the doubts that Milieudefensie et al. themselves have raised about that scenario. More importantly, the Court of Appeal would thereby elevate that scenario to a legal standard, even though it that was never its intended purpose. Moreover, the scenario is subject to change, which would be incompatible with an injunction requiring Shell to achieve a fixed reduction percentage (ground 7.92);

(f) The parties have also questioned the value of the IAM models. According to Milieudefensie et al., they are even “of limited use”. That, too, calls for far-reaching restraint in elevating them to a legal standard (ground 7.93);

(g) The fact that reduction percentages are based on IAM models that do not sufficiently take into account the CBDR principle does not result in a more far-reaching standard. On that basis, reduction pathways that prioritise the phase-out of coal may be called into question, but even if allowance is made for this, a reduction standard applicable to Shell does not yet follow from it (ground 7.93);

(h) The fact that, in the case of a 45% reduction, Shell can still sell 55% of the fuels sold in 2019 and thereby also meet the needs of the harder-to-abate sectors is also not a fact that can contribute to establishing a legal standard for Shell (ground 7.94);

(i) The precautionary principle does not justify a different conclusion, as that principle requires that action is taken even when there is uncertainty regarding the occurrence of certain consequences. This case, however, does not concern uncertainty about the consequences of CO_2 emissions, but about the standard to be applied. The precautionary principle does not justify ignoring that uncertainty at the expense of a private party and establishing a legal standard for it (ground 7.95); and

(j) The available figures do not provide the Court of Appeal with sufficient support to oblige Shell to reduce its CO_2 emissions by a certain percentage by 2030, so the relief sought regarding Scope 3 must be dismissed (ground 7.96).

1045 The objections in grounds of appeal nos. 1 and 4 challenge these considerations. To this end, Milieudefensie et al. essentially argue that the Court of Appeal has not systematically examined (based on all relevant objective points of reference, the sectoral reduction scenarios discussed between the parties and the relevant arguments raised by Milieudefensie et al) which reduction percentage is applicable to Shell. The Court of Appeal has merely emphasised differences between the sectoral reduction scenarios, without considering the reasons for those differences and the ways in which the relevant objective points of reference and - in particular - the general principles of law provide a solid basis for explaining those differences and applying them in a normative way to determine a concrete reduction percentage. If this had been done by the Court of Appeal, those differences would not have posed any obstacle to determining a reduction percentage for Shell.

1046 Since Milieudefensie et al. have already discussed in detail in Section VI.3 of this Explanatory Submission how the Court of Appeal *could* and should have arrived at a reduction percentage applicable to Shell, the objections related to this point are largely

self-explanatory. Therefore, Milieudefensie et al. will largely limit themselves to a brief explanation of this point. Some parts of the grounds of appeal deal with separate erroneous assumptions of the Court of Appeal; Milieudefensie et al. will explain those parts in more detail below.

The Court of Appeal has used the wrong standard (grounds of appeal nos. 1.25 up to and including 1.34 and 4.2)

1047 Just like the objections set out in grounds of appeal nos. 3.3 up to and including 3.7, ground of appeal no. 4.2 points out that the Court of Appeal wrongly examined, in the above-mentioned grounds of the Judgment, whether there is scientific consensus on a reduction percentage for a company such as Shell. That is the wrong standard, in which the right standard – i.e. the relevant objective points of reference and/or the broad Common Ground method – cannot be found. This has already been explained in Sections VI.2.1 and VI.2.2 of this Explanatory Submission, so no further explanation is required on this point.

1048 In this context, too, Milieudefensie et al. point out the consequence this has, i.e. that the crucial ECHR perspective is not considered in the decision of the Court of Appeal. After all, Articles 2 and 8 ECHR and Article 13 ECHR compel courts to determine a reduction percentage applicable to Shell that provides genuine and effective protection against dangerous climate change. This is the subject of the objections formulated in grounds of appeal nos. 1.25 up to and including 1.34, for which Milieudefensie et al. refer to Section VI.3.5 of this Explanatory Submission.

The Court of Appeal has failed to pay attention to the doctrine of hazardous negligence (grounds of appeal nos. 1.3 up to and including 1.10 and 4.7)

1049 The objections set out in grounds of appeal nos. 1.3 up to and including 1.10 and 4.7 draw attention to the fact - in the same sense as ground of appeal no. 3.9 - that the Court of Appeal has also failed to consider the doctrine of hazardous negligence in the context of its review of the sectoral reduction scenarios discussed between the parties, despite all the arguments of Milieudefensie et al. on this point. As explained in Section V.7.1 of this Explanatory Submission, such a review could already have provided significant guidance for the reduction percentage to be determined for Shell or could even have led to a concrete reduction percentage. In light of this, no further explanation is required.

The Court of Appeal has considered the general legal principles in an incorrect, and insufficiently reasoned, manner, even in its assessment of the modelled reduction scenarios (grounds of appeal nos. 1.11 up to and including 1.24, 4.8 up to and including 4.22, 4.44, 4.45, 4.47 and 4.48)

1050 From various angles, the objections of Milieudefensie et al. formulated in grounds of appeal nos. 1.11 up to and including 1.24, 4.8 up to and including 4.22, 4.44, 4.45, 4.47 and 4.48 point out that in this context, too, the Court of Appeal has failed to conduct a structured assessment, despite all the detailed arguments of Milieudefensie et al., of the modelled reduction scenarios, partly in light of the precautionary principle, the principle of intergenerational justice and the CBDR principle, and to determine what reduction percentage may be required of Shell on that basis. The Court of Appeal has also failed to consider the other objective points of reference that are relevant. Milieudefensie et al. have carefully elaborated how, using the method outlined in Section VI.3 of this Explanatory Submission, a correct normative interpretation can be arrived at for the various modelled reduction scenarios.

1051 However, the Court of Appeal has moved away from any normative methodology and made no distinction whatsoever between the various modelled reduction scenarios. In grounds 7.82 up to and including 7.92, it has focused solely on the fact that the reduction percentages mentioned in the various modelled reduction scenarios differ and that there are slight differences between the original NZE Scenario from 2021 and the updated NZE Scenario from 2023. Subsequently, in grounds 7.93 and 7.95, the Court of Appeal only pays the wrong attention to the precautionary principle (*"not relevant to determining the reduction percentage*") and the CBDR principle (*"no percentage follows from this*"), while no attention at all is paid to the principle of intergenerational justice.

1052 In reaching this conclusion, the Court of Appeal has overlooked the fact that the differences between the modelled reduction scenarios are easy to explain and are not a reason, if the right normative framework is applied, to refrain from determining a reduction percentage applicable to Shell. After all, the general legal principles provide ample support for taking those differences into account when a reduction percentage is determined for Shell. They also compel the Court of Appeal to do so. These percentage-based differences are, in fact, driven to a crucial extent by the fact that the modelled reduction scenarios (more specifically: the underlying IAM models) take into account, to varying degrees, the scientific uncertainties regarding the feasibility of CDR technologies, the associated climate risks (such as an overshoot and the crossing of tipping points) and the extent to which the distribution of the reduction efforts driven by cost-effectiveness across oil, gas and coal (and across the different countries of the world) is feasible in the real world.

1053 The reduction percentages provided by the scenarios are therefore always (in part) the result of the degree to which the risks and interests protected by the general legal principles have been factored in. All of this has already been discussed in detail in Sections III.2.2 up to and including III.2.7 of VI.3.7 of this Explanatory Submission. The modelled reduction scenarios with the highest reduction percentages take all these aspects (and thus: the general legal principles) into account to the greatest extent in the model, while the modelled reduction scenarios with the lowest percentages do not take them into account at all, or only to a very limited extent. The foregoing means that the Court of Appeal could and should have differentiated, on the basis of the precautionary principle, the principle of intergenerational justice and the CBDR principle, among the various modelled reduction scenarios and could and should have normatively adjusted the resulting reduction percentages upwards in accordance with those general legal principles.

1054 The foregoing is supported in the legal literature. For example, Bleeker notes in his commentary on the judgment that the Court of Appeal has failed to critically examine the scientific substantiation of the modelled reduction scenarios and the assumptions they use in respect of, for example, the feasibility of CO_2 removal and the distribution of burdens between poor and rich countries. According to Bleeker, this could have provided a further concretisation of the duty of care.[1576] Van Asselt shares this view.[1577]

1055 Grounds of appeal nos. 1.11 up to and including 1.24, 4.8 up to and including 4.10 and 4.12 up to and including 4.18 elaborate on the foregoing. In essence, Milieudefensie et al. argue in these grounds, from various angles, that when the Court of Appeal conducted an assessment against the precautionary principle, the principle of intergenerational justice and the CBDR principle - it could and should have made a distinction - in light of the arguments raised by Milieudefensie et al. on this point - between the various modelled reduction scenarios and, building on this, could and should have attached normative weight to those scenarios in a much clearer way.

1056 In any event, the Court of Appeal should have normatively adjusted the reduction percentages resulting from the modelled reduction scenarios upwards on the basis of those general legal principles, as the above grounds of appeal also submit. The Hawkes reduction scenario (recalculated) with the lowest reduction percentage (of (rounded) 30%) represents, in that regard, the absolute minimum reduction threshold for oil and gas. Every choice made in that scenario is, effectively, to the advantage of the oil and gas industry and increases the risks associated with it for achieving the climate goals or even for keeping them within reach.

[1576] T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *M en R* 2025/12, under "*Reductieverplichting*"."

[1577] H. van Asselt, "Corporate climate (un)accountability? Landmark Shell ruling overturned on appeal," available at https://climatehughes.org/blog-corporate-climate-unaccountability-landmark-shell-ruling/, under "What are Shell's concrete mitigation obligations?"

1057 If the Court of Appeal *had* made a larger or smaller correction in order to offer protection against such risks and the related interests - as actually required by the general legal principles - it could and should have given more weight to the NZE Scenario, the IISD Report, the Low Demand scenario and/or the Tyndall Report. After all, these modelled reduction scenarios consider, to an increasing degree, the various limitations of IAM models and (thereby) the general legal principles. That would have resulted in a reduction percentage between 32% and 45% (or even more) for oil and between 30% and 45% (or even more) for gas. If a correction had been made in accordance with the general legal principles as comprehensively as possible, the Court of Appeal would have chosen the Tyndall Report and so a reduction percentage applicable to Shell of (more than) 45% for oil and gas. However, the Court of Appeal has made no attempt whatsoever to differentiate between the various modelled reduction scenarios or to apply an upward normative correction to their contents based on the general legal principles. The Court of Appeal stopped at the conclusion that the reduction percentages in those reduction scenarios vary.

1058 Incidentally, in ground 7.92 (“*The court of appeal could choose to take as a starting point a percentage that does not originate from the experts hired by the parties, namely the percentage of the IEA*”), the Court of Appeal still gives the impression that it believes that only the NZE Scenario does not originate from the parties, but the other scenarios do. This may be the reason why the Court of Appeal attached less significance to those other scenarios. However, that assumption is factually incorrect. The Low Demand scenario, the IISD Report and the Tyndall Report do not originate from the parties either and are therefore equally independent in nature. This is pointed out in ground of appeal no. 4.22.

1059 In ground 7.93 (and possibly also in ground 7.82), the Court of Appeal used another essential aspect of the arguments of Milieudefensie et al. to argue that, in fact, *no* reduction percentage can be established for Shell. In that connection, the Court of Appeal noted that Milieudefensie et al. have also questioned the value of the IAM models on which the reduction percentages from the modelled reduction scenarios are (partly) based and that Milieudefensie et al. have argued that these are “of limited use”. This leads the Court of Appeal to conclude that this, too, calls for far-reaching restraint in elevating those modelled reduction scenarios to a standard.

1060 According to grounds of appeal nos. 4.11 and 4.19[1578], this constitutes a misinterpretation and distortion of the arguments of Milieudefensie et al. In light of the foregoing, this requires no further detailed explanation. Milieudefensie et al. have, in fact, pointed out that the limitations of IAM models result in reduction percentages that are (far) too low. Due to these limitations, those reduction percentages must be adjusted

[1578] Grounds 4.40 up to and including 4.42 also concern this subject. They will be discussed separately below.

upwards in accordance with the general legal principles. So that criticism cannot possibly lead to the conclusion that the reduction percentages are too disadvantageous to hold Shell to them or to the conclusion that they must be assessed with restraint. What this consideration primarily stresses is that the Court of Appeal has not seriously considered the arguments of Milieudefensie et al.

1061 In ground 7.94, the Court of Appeal has acknowledged that Shell's customer base does not preclude a 45% CO_2 emission reduction. After all, in that ground, the Court of Appeal proceeds on the assumption that Shell, if 55% of its sales still consist of oil and gas, can still meet the energy needs of the harder-to-abate sectors. Ground of appeal no. 4.20 points out that this circumstance is, of course, also relevant in a normative sense. The fact that Shell can reduce its CO_2 emissions by 45% without adverse effects for the sectors that are the hardest too green can actually contribute to the conclusion that such a contribution may also be required of Shell.

1062 Finally, the general legal principles have played no role whatsoever in the Court of Appeal's assessment of the reduction percentage applicable to Shell.

(a) The precautionary principle. In ground 7.95, the Court of Appeal has concluded that the precautionary principle has no bearing on the determination of the reduction percentage applicable to Shell, because that principle is only relevant in the event of uncertainty regarding the occurrence of certain consequences. With this finding, the Court of Appeal has wrongly downplayed the effect of the precautionary principle. In reality, the precautionary principle also - and in particular - has an effect on the determination of what may be expected from a company for the fulfilment of a duty of care to prevent or mitigate dangerous climate change. The principle therefore also plays a significant role in determining the reduction percentage applicable to Shell. In Sections IV.5.3.1 and VI.3.7 of this Explanatory Submission, Milieudefensie et al. have already fully explained that and why this is the case. Grounds of appeal nos. 4.21, 4.47 and 4.48 point out this legal error in response to ground 7.95.

(b) The principle of intergenerational justice. The principle of intergenerational justice is not mentioned in the judgment of the Court of Appeal. This is wrong and, at the very least, constitutes a shortcoming in the reasoning of the Judgment. Ground of appeal no. 4.14 highlights this.

(c) The CBDR principle. In ground 7.93, the Court of Appeal (again, in the same way as in ground 7.81) requires the CBDR principle to establish a standard that is applicable to Shell and thus fails to appreciate the manner in which that principle has a normative effect on the determination of a reduction percentage for Shell. Milieudefensie et al. have already explained this in detail in Sections IV.5.3.3 and

VI.3.7 of this Explanatory Submission. The CBDR principle does not need to independently establish any standard applicable to Shell, but is one of the relevant objective points of reference that, together with the other objective points of reference and the modelled reduction scenarios, results in a reduction percentage applicable to Shell. That principle is therefore not only relevant in determining Shell's duty of care to prevent or mitigate dangerous climate change, but also plays a role in determining the reduction percentage applicable to Shell. Grounds of appeal nos. 4.21, 4.44 and 4.45 explain this in response to ground 7.93.

The finding of the Court of Appeal regarding the NZE Scenario is incorrect and insufficiently reasoned (grounds of appeal nos. 4.23 up to and including 4.35)

1063 In ground 7.92, the Court of Appeal separately mentions the NZE Scenario - which does not originate from the parties (and so is more objective, apparently, in the Court of Appeal's view) - as a possible starting-point for determining a reduction percentage applicable to Shell. The Court of Appeal subsequently chooses not to use it on the basis of a few brief considerations. These considerations are incomprehensible or disregard, without any justification, the detailed arguments presented by Milieudefensie et al., which actually specifically address the objections mentioned by the Court of Appeal. Grounds of appeal nos. 4.23 up to and including 4.35 elaborate on this in detail for each of the Court of Appeal's considerations.

1064 The first argument of the Court of Appeal is that by following the NZE Scenario, that estimate would be elevated to a binding legal standard for a specific company, whereas that was never its intended purpose. Ground of appeal no. 4.24 points out that the Court of Appeal has missed the essence of the assessment criterion with that argument. No reduction scenario is intended to serve as a legal standard for a specific company. The point is whether the relevant objective points of reference, together with the modelled reduction scenarios, lead to a reduction percentage that is sufficiently grounded in both normative and scientific terms. Section VI.3 of this Explanatory Submission set out in detail how that assessment works. This finding is therefore incorrect. Ground of appeal no. 4.25 further objects to the fact that the Court of Appeal, with its above-mentioned finding, has abandoned its own (overly narrow) assessment criterion again. After all, in the Court of Appeal's view, Shell *can* in fact be bound by a percentage that enjoys scientific consensus. Yet even that (wrong) assessment is not applied anymore by the Court of Appeal here.

1065 The second argument used by the Court of Appeal is (again) that by following the NZE Scenario, the doubts cast by Milieudefensie et al. themselves on its creation would be disregarded. Grounds of appeal nos. 4.26 up to and including 4.28 are directed against this finding, with which the Court of Appeal demonstrates it has not sufficiently grasped

the criticism of Milieudefensie et al. The Court of Appeal has also failed to mention this criticism in its judgment. That criticism, which was discussed in detail in Section VI.3.7 of this Explanatory Submission, boils down to the fact that the reduction percentages calculated in the NZE Scenario *are too low* each time due to certain underlying assumptions. This means that the NZE Scenario each time only provides reduction percentages for oil and gas that may be expected of Shell *at a minimum*.

1066 Conversely, the criticism from Milieudefensie et al. was of course never intended to argue that the NZE Scenario leads to reduction percentages that are too high. After all, what their arguments essentially amount to was that the NZE Scenario consistently attempts to spare new investments in oil and gas fields and, by extension, pushes back CO_2 reductions as much as possible. This is one of the reasons why the updated version of the NZE Scenario from 2023 has become an overshoot scenario, whereas the original version of the NZE Scenario from 2021 was not. Furthermore, the NZE Scenario also relies too heavily on the deployment of CDR technologies, including CCS, while the IEA itself views this as a *"*key uncertainty*."* The fact that the NZE Scenario leads to reduction percentages that are *too low* cannot possibly contribute to the conclusion that no CO_2 emission reductions may be required of Shell. The findings of the Court of Appeal directly contradict these submissions of Milieudefensie et al., so the Court of Appeal was not allowed to disregard them without any further reasoning, which has not been given.

1067 The third argument of the Court of Appeal for not taking the NZE Scenario as a starting-point is that the reduction percentages mentioned in the NZE Scenario are not stable and are subject to change. A fixed reduction percentage for Shell would not be compatible with this. For this purpose, the Court of Appeal has pointed out that the original 2021 version of the NZE Scenario provides different percentages than the updated 2023 version of the NZE Scenario. This finding is also blind to the arguments of Milieudefensie et al. in which the causes of these differences are explained. These causes, in fact, mean that Shell *must* be tied to a fixed percentage and that this must not be delayed. Grounds of appeal nos. 4.29 up to and including 4.32 elaborate on this.

1068 These causes were already elaborately explained in the discussion of the NZE Scenario in Section VI.3.7 of this Explanatory Submission. What it comes down to, in summary, is that the variability of the reduction percentages in the NZE Scenarios is caused by the adjustments made by the IEA to spare the investments of the oil and gas industry. That pattern causes the carbon lock-in effect, which the Court of Appeal has also rightly characterised as being highly undesirable in grounds 7.59 up to and including 7.61. Another reason why the above-mentioned reduction percentages vary is that the reductions in the run-up to 2030 are insufficient, meaning that higher reductions must be achieved in a shorter period of time. Where this is no longer possible, the NZE Scenario relies on uncertain CDR technologies or on greater reductions after 2030. So

the reduction percentages do not change because there are new insights meaning that lower CO_2 reductions are required of the oil and gas industry. The opposite is true. The reduction percentages are changing because nothing is happening, and they are postponing the reduction efforts to a more distant future in order to spare investments. However, the IEA has made it clear, time and again, that the oil and gas industry *must* actually reduce emissions and that achieving the 2030 climate targets is still possible within the limits of energy security and technical capabilities. Even in the updated 2023 version of the NZE Scenario, the achievable reduction rates - calculated back to 2019 - for 2030 are 36.2% for oil and 30.1% for gas.

1069 Grounds of appeal nos. 4.33 and 4.34 refer to the submissions of Milieudefensie et al. regarding the special status of the IEA and the NZE Scenario as well as the broad political consensus that the NZE Scenario is feasible and should be followed. Milieudefensie et al. have also already discussed this in detail in Section VI.3.7 of this Explanatory Submission. In that Section, it was explained that countries representing 80% of the global energy consumption and the global CO_2 emissions have rallied behind the NZE Scenario and the measures proposed by it. During COP28, the climate conference in Dubai, and subsequently in the Ministerial Communiqué, the global community reaffirmed this. This is also something the Court of Appeal has been blind to, even though it does find that the NZE Scenario contains reduction targets that enjoy broad consensus and that are achievable for the oil and gas industry. Consequently, that Scenario carries particular weight, not only in the context of determining the reduction percentage based on the relevant objective points of reference, but equally within the overly narrow scientific consensus criterion used by the Court of Appeal. When the Court of Appeal reviewed the NZE Scenario as the basis for a reduction percentage applicable to Shell, it could therefore not disregard the aspects elaborated on by Milieudefensie et al. Yet this is what the Court of Appeal has done.

1070 Finally, ground of appeal no. 4.35 complains about the fact that Milieudefensie et al. have argued that the NZE Scenario is a scenario that is normative in a limited sense, because it takes the CBDR principle into account. Milieudefensie et al. have also discussed this in Section VI.3.7 of this Explanatory Submission. In light of this, too, the Court of Appeal could have been expected to devote more words to the NZE Scenario than it has actually done. Since the NZE Scenario partly considers the CBDR, a relevant objective point of reference has been factored into the prescribed reduction percentages. This gives the NZE Scenario greater weight. This is something that the Court of Appeal could and should have allowed for by, for example, adjusting the lowest reduction percentage mentioned in it upwards in that light or by assigning greater weight to the NZE Scenario. Instead, the Court of Appeal has not discussed this aspect at all.

The criticism of the Hawkes Report was not discussed or assessed (grounds of appeal nos. 4.36 and 4.37)

1071 Grounds of appeal nos. 4.36 and 4.37 concern the discussion about the accuracy of the reduction figures calculated by Hawkes. In Section VI.3.7 of this Explanatory Submission, it was already observed that - in the context of its assessment of the various modelled reduction scenarios - the Court of Appeal appears to have proceeded on the assumption that the figures recalculated by Prof. Rogelj are methodologically sound and lead to the recalculated reduction percentages of 28.5% for oil and 33.2% for gas. In line with this, it was also already noted above that those figures, due to the underlying IAM models that favour the oil and gas industry, constitute the normative minimum of Shell's reduction obligation. Therefore the Court of Appeal could and should have taken that minimum as the starting-point for an upward normative adjustment of the reduction percentage applicable to Shell or for differentiating between the various modelled reduction scenarios.

1072 In case the Court of Appeal *did* have doubts about those recalculated figures and attached less significance to them for that reason as well, grounds of appeal nos. 4.36 and 4.37 indicate that the Court of Appeal should in any case have resolved the discussion about the accuracy and significance of those figures in that case based on all the submissions made by the parties on this point. After all, that discussion is particularly relevant to determining the reduction percentage applicable to Shell, because the recalculated Hawkes figures can form the normative minimum for that percentage. The objections of Milieudefensie et al. explain which arguments they raised in this regard and why their result is that a recalculation of the Hawkes Report also results in reduction percentages of 28.5% for oil and 33.2% for gas. The Court of Appeal has not responded to those arguments at all, which means that it is impossible to understand why the Court of Appeal has doubted the accuracy of the recalculation. In ground 7.90, prior to presenting the reduction percentages from the various modelled reduction scenarios, the Court of Appeal even restricts itself to mentioning that it has not yet taken into account "*Shell's challenge"* of these figures. The Court of Appeal does also not mention there that it was actually Milieudefensie et al., too, that had criticised the figures presented by Hawkes. This confirms that the Court of Appeal has had no regard for this criticism at all.

The distinction between production reduction figures and emission reduction figures is actually to the benefit of Shell (grounds of appeal nos. 4.38 and 4.39)

1073 In ground 7.91, the Court of Appeal has held that the sources cited in grounds 7.82 up to and including 7.90 partly refer to oil and gas production and partly to their combustion. This in itself already means, according to the Court of Appeal, that the sources are not easily comparable. Grounds of appeal nos. 4.38 and 4.39 indicate that this distinction

works solely to Shell's advantage and so can certainly not be taken into account to Shell's advantage in the finding that the various sources provide insufficient basis for establishing a reduction percentage for Shell. This requires some further clarification based on the debate between the parties held before the fact-finding courts.

1074 Citing the Tyndall Report, Milieudefensie et al. have explained that the global production of fossil fuels (is almost) equal to the global consumption of fossil fuels,[1579] to which they attached the conclusion that a percentage-based decrease in global production can be equated with a percentage-based decrease in global CO_2 emissions. After all, a decrease in production will go hand in hand with a decrease in consumption.

1075 To counter this, Shell subsequently argued that the percentage-based reduction in oil and gas production cannot be equated one-to-one with the necessary reduction in oil and gas emissions, based on the assumption that the use of fossil fuels for non-energy applications (such as plastics) will remain constant or increase in the coming years. The share of fossil fuels for non-energy applications within the total fossil-fuel production will in that case increase proportionally.[1580]

1076 In response to this argument, Milieudefensie et al. have nuanced their position on the relationship between production reduction figures and emission reduction figures, pointing out that the consumption of fossil fuels can indeed involve both energy use (combustion) and non-energy use (such as plastics). Energy use causes significantly higher CO_2 emissions. So when fossil-fuel production is reduced to achieve a CO_2 reduction, this will primarily be at the expense of the portion of fossil-fuel production intended for energy use. After all, this is the way in which the greatest emission reduction can be achieved with the smallest production reduction. That is therefore in the sector's interest. If fossil-fuel production for energy use is reduced to achieve an emission reduction, while fossil-fuel production for non-energy use remains the same or increases in absolute terms, the CO_2 emission reduction resulting from this production (and consumption) reduction will not, in percentage terms, correspond exactly with the production reduction.[1581]

1077 However, this difference between the production reduction and the CO_2 emission reduction does not work to Shell's disadvantage. In this scenario, the percentage-based CO_2 emission reduction will actually exceed the percentage-based production reduction. After all, the CO_2 emission reduction is achieved from the portion of the production with higher CO_2 emissions (which is more efficient), while the share of fossil fuels for non-energy use (with lower CO_2 emissions) remains unchanged. The decrease in the total fossil-fuel production is therefore lower in percentage terms than the

[1579] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 556.
[1580] Motion commenting on Exhibits of Shell dated 19 September 2023, p. 8.
[1581] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 53.

percentage-based reduction in CO_2 emissions. Using a production reduction as the starting-point for a CO_2 emission reduction thus produces an outcome that is conservative (and to Shell's advantage). After all, the CO_2 emission reduction associated with the production reduction could be (significantly) higher.[1582]

1078 Therefore if the Court of Appeal had based the reduction percentage applicable to Shell on percentage-based production reduction figures only, then the CO_2 emission reduction required of Shell could only end up being lower than the CO_2 emission reduction actually needed to prevent or limit dangerous climate change. Such an approach would thus be to Shell's advantage. If, on the other hand, the Court of Appeal had based the reduction percentage applicable to Shell on emission reduction figures only, that would correspond with the CO_2 reductions actually needed. The reduction percentage would then, logically, be higher.

1079 Based on the foregoing, Milieudefensie et al. point out that it is to Shell's advantage to in any event *also* include the production reduction figures when Shell's reduction percentage is determined. Thus the fact that the sources mentioned by the Court of Appeal partly refer to production reductions and partly to emission reductions cannot possibly justify *not* setting a reduction percentage applicable to Shell. Milieudefensie et al. have also substantiated this with arguments based on what was discussed above before the fact-finding courts, so that the Court of Appeal could not disregard all of this without providing any reasoning.

The IAM models only lead to reduction percentages that are too low (grounds of appeal nos. 4.40 up to and including 4.43)

1080 Grounds of appeal nos. 4.40 up to and including 4.42 are related to the Court of Appeal's findings in grounds 7.82 and 7.93, where the Court of Appeal uses the criticism of the IAM models as voiced by Milieudefensie et al. as one of the reasons for refraining from setting a reduction percentage applicable to Shell. The incomprehensibility of this decision has already been discussed earlier.[1583] The criticism of Milieudefensie et al. merely held that IAM models lead to reduction percentages that are too low, so it is not clear why Shell could not be held to any reduction percentage. Sections III.2.2 up to and including III.2.6 and VI.3.7 of this Explanatory Submission are devoted to this. Those objections to the Judgment therefore require no further explanation.

1081 Ground of appeal no. 4.43 further points out that the Court of Appeal did actually refer to the criticism of the IAM models voiced by Shell in ground 7.93 of its Judgment, but failed to indicate what that criticism amounts to. Consequently, it is also not possible to check whether the Court of Appeal properly understood that criticism, properly

[1582] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 53.
[1583] See also, in this regard, grounds of appeal nos. 4.11 and 4.19 (and their explanation).

considered it in its assessment and sufficiently weighed it against any counterarguments raised by Milieudefensie et al. This applies even more strongly because Milieudefensie et al. have explained in detail why those IAM models lead to reduction percentages that are too low. Because the decision of the Court of Appeal cannot be checked on this point, it is insufficiently reasoned.

Determining a reduction percentage is not the same as elevating it to a legal standard (ground of appeal no. 4.46)

1082 In grounds 7.92 and 7.93, the Court of Appeal has, essentially, held that the expert opinions and submitted reports (i.e. the various modelled reduction scenarios) provide insufficient basis to elevate the reduction percentages they mention to legal standards.

1083 Ground of appeal no. 4.46 challenges this. With the above considerations, the Court of Appeal has failed to recognise the manner in which the reduction percentage applicable to Shell must be determined. Section VI.2 of this Explanatory Submission has discussed the legal framework applicable in this connection in detail. Against the backdrop of the various modelled reduction scenarios, the relevant objective points of reference lead to a concrete reduction percentage applicable to Shell. Section VI.3 of this Explanatory Submission subsequently described the path that the fact-finding court can and should follow for this purpose within those frameworks. This results in the reduction percentage applicable to Shell. This is the concrete reduction obligation for Shell, which follows from its duty of care to prevent or limit dangerous climate change. Thus the central question to be answered here is *not* whether any reduction percentage from any modelled reduction scenario can be elevated to a legal standard.

The Court of Appeal has not followed the global average reduction percentage because sectoral reduction pathways exist (grounds of appeal nos. 4.49 up to and including 4.51)

1084 One of the reasons why the Court of Appeal has not imposed the global average reduction percentage of 45% on Shell is that sectoral reduction pathways also exist. In grounds 7.75, 7.78 and 7.81, the Court of Appeal cites this fact as a relevant factor. Grounds of appeal nos. 4.49 up to and including 4.51 indicate that this reasoning by the Court of Appeal actually underscores that it *is* actually possible to determine a sectoral reduction percentage for Shell. The subsequent failure to do so by the Court of Appeal is inconsistent with this. Milieudefensie et al. will briefly explain this.

1085 In ground 7.75, the Court of Appeal mentions the existence of sectoral reduction pathways as a reason for assuming that the global average reduction percentage of 45% is not sufficiently case-specific. To substantiate this argument, the Court of Appeal

explicitly refers in ground 7.76[1584] to the NZE Scenario, in which the IEA (indeed) points out that emission reductions vary across sectors:

> *"On a sector basis, electricity sees CO_2 emissions fall the most, with emissions almost halving between 2022 and 2030 as renewables and other low-emissions sources of electricity generation are deployed rapidly and unabated fossil fuel-based generation declines. Other sectors, where low-emissions options are still being developed or ramped up, are slower to decrease emissions. Nevertheless, emissions from all sectors peak in the near term. Sectoral emission decreases between 2022 and 2030 are 20% in industry, around 25% in transport and around 40% in buildings."*[1585]

1086 In ground 7.78, the Court of Appeal notes that Shell's Scope 3 emissions are spread across several sectors and that these harder-to-abate sectors account for a significant portion of these emissions. In light of this, the Court of Appeal believes that applying a general percentage for Shell's Scope 3 emission reduction would disregard the different reduction pathways for the individual sectors that make up Shell's customer base. In ground 7.81, the Court of Appeal finds that the fact that Shell is a major player in the oil and gas market and can therefore be expected to make a special effort does not mean that Shell can be held to the global average reduction percentage of 45%. There, too, the Court of Appeal points out that different reduction pathways exist for different sectors in different countries.

1087 All these considerations imply that it is important, according to the Court of Appeal, that sectoral pathways exist and that specific reduction percentages apply to those sectors. This means that the Court of Appeal *could* and should have found the "case-specificness" (as required by it in ground 7.75) for every sector within the sectoral reduction pathways. After all, in the view of the Court of Appeal, these sectoral reduction pathways point the way for the sectoral reduction targets, so that they can be used as a starting-point for determining a (minimum) reduction percentage for Shell.

1088 This applies most strongly to the NZE Scenario highlighted by the Court of Appeal in ground 7.76. Both in Section VI.3.7 of this Explanatory Submission and in this Section (by way of explanation of grounds of appeal nos. 4.23 up to and including 4.35), the NZE Scenario has been discussed at length. In these Sections, it was observed that the NZE Scenario contains achievable reduction percentages for the oil and gas industry and *also* takes into account the sectors served by the oil and gas industry. This therefore also applies to the sectors mentioned in the citation of the Court of Appeal in

[1584] Ground of appeal no. 4.50 erroneously refers to ground 7.75 of the judgment of the Court of Appeal. It should be clear to Shell and the Supreme Court that the reference is intended to be to ground 7.76 of the judgment of the Court of Appeal.
[1585] Exhibit MD-525 (IEA Net Zero Roadmap 2023), pp. 62 and 63.

ground 7.76 included above, which sectors themselves, incidentally, are already demonstrating substantial CO_2 reductions ranging from 20% to (nearly) 50%. The fact that the IEA's findings and the reduction pathway outlined in the NZE Scenario led the Court of Appeal to not hold Shell to the global average reduction percentage should therefore have been all the more reason for the Court of Appeal to hold Shell to a *sectoral reduction pathway* instead. This applies in particular to the NZE Scenario, which at least accommodates the objections mentioned by the Court of Appeal and, in that light - calculated backward to 2019 – arrives at reduction rates of 36.2% for oil and 30.1% for gas.

VI.6.3 The minimum reduction standard and the concrete reduction obligation for Shell (grounds of appeal nos. 4.52 up to and including 4.55)

1089 In any case, there were more than sufficient points of reference that allowed the Court of Appeal to establish a minimum reduction percentage for Shell. Section VI.3 of this Explanatory Submission already set out that all relevant objective points of reference indicate that Shell must proceed with percentage-based emission reductions this decade. It was also repeatedly observed there that these points of reference in any event point to a minimum reduction percentage. Milieudefensie et al. will briefly explain below that the Court of Appeal should also have examined in *that* light whether a reduction percentage applies to Shell, and if so, what percentage.

1090 As discussed several times above - in particular in Section VI.3.3 of this Explanatory Submission - the Court of Appeal explicitly found, in several places in its Judgment, that Shell must limit its CO_2 emissions:

(d) Companies such as Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change (ground 7.27). Shell therefore also has an obligation to reduce its Scope 3 emissions (ground 7.111);

(e) Companies have a duty of care to reduce their emissions (ground 7.57) and *more* can be required of Shell than of most other companies, given that Shell has been a major player in the fossil-fuel market for over a century and now also holds a prominent position in that market (ground 7.55); and

(f) In order to comply with their duty of care to prevent or mitigate dangerous climate change, companies such as Shell must make an appropriate contribution to the climate goals of the Paris Agreement (ground 7.67) and to keep the climate goals of the Paris Agreement within reach, emissions must have been drastically reduced by 2030 (ground 7.61).

1091 It already follows from these considerations that Shell will have to make a greater-than-average contribution to achieving the goals of the Paris Agreement. This already points to a clear minimum. Section VI.3 of this Explanatory Submission also discussed in detail that all relevant objective points of reference provide courts with ample opportunity to subsequently determine a concrete minimum reduction percentage for Shell that is grounded in normative and scientific principles. The doctrine of hazardous negligence already clearly points to a concrete reduction obligation. Articles 2 and 8 ECHR require genuine and effective protection (which must be partly guaranteed by courts) against dangerous climate change, which necessitate a determination of a reduction obligation linked to the carbon budget. To this end, Article 13 ECHR requires an effective legal remedy at the national level. In addition, various soft-law sources require large companies to maximise their efforts to reduce CO_2 emissions in line with the climate targets, aiming for a reduction of 45% (or even 50%). The various modelled reduction scenarios point, to an increasing degree of normativity, to a reduction range of 28.5% to 51.7% for the oil and gas industry. The general legal principles make it necessary to adjust the reduction percentages from modelled reduction scenarios for the oil and gas industry upwards, as the percentages calculated by them are often too low to actually achieve the climate goals and, thus, to provide effective protection.

1092 In this light, a minimum for Shell can easily be derived from the relevant objective points of reference in combination with the modelled reduction scenarios. That minimum is formed by the modelled reduction scenarios (which *do* use methodologically correct calculations) that are based on assumptions and reduction choices that are to the advantage of the oil and gas industry (in particular: Hawkes (recalculated)) and that do not compensate, or hardly compensate, for the limitations of the underlying IAM models. These percentages essentially embody the minimum efforts that may be required of the oil and gas industry (or major players within it) to provide at least some effective protection as required by Articles 2 and 8 ECHR and to make some of the effort required by soft law. These reduction percentages thus constitute the absolute minimum.

1093 Setting a minimum reduction percentage in this manner is consistent with the approach of the Dutch Supreme Court in its *Urgenda* judgment. In that case, too, there was no certainty about the precise reduction percentage applicable to the Dutch State. However, according to the Supreme Court, this did not mean that a court could not and should not set a reduction percentage for the State. The Supreme Court held that a court *must* assess whether the number of measures taken by the State is clearly below its minimum share in the measures to be taken globally to combat dangerous climate change.[1586] In this way, a court can determine what can in any event be regarded as the State's minimum fair share by way of normative consensus.[1587] The Supreme Court

[1586] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 6.3.
[1587] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 6.3.

based that obligation on Articles 2 and 8 ECHR. In this context, the Supreme Court held that the Dutch State has a *minimum* reduction obligation of 25%:

> *"7.5.1* (…) *As stated above, there is a large degree of consensus in the international community and climate science that at least this reduction by the Annex I countries, including the Netherlands, is urgently needed (see 7.2.11 and 7.3.6 above). Proper legal protection means that this consensus can be invoked when implementing the positive obligations incumbent on the State pursuant to Articles 2 and 8 ECHR. The target of achieving a reduction of at least 25% by 2020 is also in line with what the State itself considers necessary for other years (2030, 2050 and 2100 (see 7.4.1-7.4.5 above). In the context of the positive obligation on the State under Articles 2 and 8 ECHR to take appropriate measures to prevent dangerous climate change, this target can therefore be regarded as an absolute minimum.* (…)*."*[1588]

1094 Legal authors have also pointed out that, in the present case, the Court of Appeal could and should have assessed - based on the relevant objective points of reference and the modelled reduction scenarios - whether a minimum reduction percentage could be established for Shell. With a view to this, Van Dam has emphasised that scientific models, by their very nature, never lead to unambiguous percentages, but rather to ranges. In this case, the modelled reduction scenarios provide a range at the lower end that a court can in any event link up with. According to him, this applies all the more strongly because the reduction efforts must be made based on a fair distribution between rich and poor countries, so in accordance with the CBDR principle. In his view, this method is also consistent with the *Urgenda* judgment discussed above as well as with the obligations (also directed at the courts) under Articles 2 and 8 ECHR to provide effective protection against dangerous climate change.[1589]

1095 Bleeker also believes that the relevant objective points of reference and the modelled reduction scenarios in any event indicate a minimum. He cites the NZE Scenario as an example. In this scenario, the unwritten duty of care is fleshed out in a conservative manner.[1590] Bartman also considers it necessary to link up with the minimum reduction percentage required for the oil and gas industry as a whole to achieve the climate goals.[1591] Kautz has endorsed the possibility of establishing a minimum and refers, approvingly, to Bleeker and Bartman in this regard.[1592] Appel has concluded that, in

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[1588] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 7.5.1.
[1589] C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schending zonder remedie*" in *AV&S* 2025/13, para. 3.2.2.
[1590] T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024 in *M en R* 2025/12, under "*Reductieverplichting*."
[1591] S.M. Bartman, "*Het Shell CO_2-arrest, mede bezien door een concernrechtelijke bril*" in *AA* 2025/1, p. 51.
[1592] R.E. Kautz, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JA* 2025/27, p. 269.

light of the above-mentioned considerations from the *Urgenda* judgment, the Court of Appeal should have examined whether a normative minimum could be identified.[1593] Faber has noted that the Court of Appeal, in its search for an invariable percentage enjoying scientific consensus, in any case lost sight of the fact that it was able to proceed with a determination of Shell's minimum reduction obligation. In her view, the standards and modelled reduction scenarios provide sufficient support for this.[1594] Burgers has also pointed out that, in line with the international obligations forming the basis for Shell's duty of care to prevent or limit dangerous climate change, the Court of Appeal should have set a minimum percentage for Shell.[1595] Finally, Dietz et al. have exactly described the "range method" proposed by Milieudefensie et al.[1596]

1096 The obligation to set at least a minimum percentage is also far preferable to the method used by the Court of Appeal. After all, all relevant objective points of reference indicate that Shell must proceed with CO_2 reductions. Although the reduction percentages in the various modelled reduction scenarios vary due to the differing degree in which they make corrections for the limitations of IAM models, they *can* indicate a minimum. In order to do at least some justice to the protection intended to be provided by Shell's duty of care to prevent or limit dangerous climate change and by the relevant objective points of reference, a court must therefore examine what minimum level of reduction may be required of Shell. Because the focus is on a minimum, this will never result in an overly stringent reduction obligation for Shell. The consequence of the method used by the Court of Appeal, however, is that Shell is required to do far less than the applicable standards and also what the Court of Appeal itself demands of Shell. After all, the Court of Appeal rightly held that Shell must make a greater-than-average contribution to the climate goals, but then fails to establish a reduction obligation.

1097 In this context, it is also relevant that the application of the Common Ground method - including the relevant objective points of reference and modelled reduction scenarios relevant to it - would also lead to the establishment of a minimum percentage for Shell. Using that method, the Dutch Supreme Court arrived at a minimum reduction percentage of 25% for the Dutch state in its *Urgenda* judgment. That is, essentially, the percentage that may, in any case, be required of the State as a minimum for compliance with its obligations under Articles 2 and 8 ECHR. That same method allows a court to search for the reduction percentage that, on average, must be achieved globally by all states collectively – to comply with their climate obligations - as an absolute minimum

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[1593] E.M. Appel, "*De uitspraak van het gerechtshof Den Haag in Milieudefensie c.s./Shell: zes lessen voor toekomstige klimaatzaken*" in *MvV* 2025/4, pp. 167 and 168.
[1594] M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JOR* 2025/81, paras. 8, 9 and 12; M.J. Faber, "*Milieudefensie/Shell: tussen verplichting en veroordeling*" in *MvO* 2024/10&11, paras. 3.4 and 4.
[1595] L.E. Burgers, "*De doorwerking van internationaal recht in klimaatzaken tegen bedrijven*" in *MvV* 2025/11, para. 4.
[1596] S. Dietz et al., "Translating climate science into legal standards: Lessons from the Milieudefensie v. Shell case" in *science* 2026/1, p. 28.

for oil and gas reductions. That reduction percentage is equal to the reduction effort for the oil and gas industry if all normative choices are made to its advantage. Shell is one of the largest players in the global oil and gas market, so it can at least be held to that reduction percentage. A court will then impose that reduction obligation as a private-law obligation under Article 6:162 DCC and, by doing so, the court will also fulfil the obligations it has under Articles 2 and 8 ECHR.

1098 Finally, the establishment of a minimum percentage is *even* possible within the (overly narrow) scientific consensus standard as used by the Court of Appeal. After all, there may well be consensus within the scientific community regarding what, based on the modelled reduction scenarios, should apply to a company such as Shell at a minimum. It is also quite conceivable, in this connection, that the scientific consensus will lie around the reduction percentages indicated in the NZE Scenario. However, the Court of Appeal has failed to examine this, but limited itself to finding that the reduction percentages mentioned in that Scenario vary too widely and that the NZE Scenario is subject to change. Nevertheless, this does not prevent them from providing a basis – especially if the reasons for that variability are considered - for determining the scientific consensus on the minimum percentage. The Court of Appeal should at least have examined this.

1099 In light of the foregoing, grounds of appeal nos. 4.52 up to and including 4.55 challenge the Judgment of the Court of Appeal. Against this background, the complaints largely speak for themselves.

(a) Grounds of appeal nos. 4.52 and 4.53 essentially point out that the Court of Appeal has failed to make any examination, based on the relevant objective points of reference and the modelled reduction scenarios, the Common Ground method or even its own (overly narrow) scientific consensus standard, whether a minimum percentage could be established for Shell. There was every reason to do so, as those methods of legal interpretation and the modelled reduction scenarios provide sufficient basis for this.

(b) Ground of appeal no. 4.54 adds to this that the Court of Appeal should in any event have conducted such an examination in light of Articles 2, 8 and 13 ECHR. After all, Articles 2 and 8 ECHR require effective and genuine protection against dangerous climate change. Moreover, national courts must provide that effective protection themselves via the application of their national laws. Building on this, Article 13 ECHR requires an effective legal remedy to enforce the protection afforded by Articles 2 and 8 ECHR. This, too, required the Court of Appeal to at least examine what the minimum percentage applicable to Shell was.

(c) Ground of appeal no. 4.55, finally, points out that even the Hawkes Report (recalculated) contains reduction percentages of 28.5% for oil and 33.2% for gas. These reduction percentages can serve as a minimum. Although Shell has criticised those figures, there is nothing to show that the Court of Appeal was unable to use them because of that criticism. As shown by ground 7.90, the Court of Appeal has remained silent about that criticism. For that reason, the Court of Appeal should at least have assessed that criticism in light of the counterarguments raised by Milieudefensie et al, which the Court of Appeal has also failed to do.

VI.6.4 The only remedy and concrete reduction obligation for Shell (ground of appeal no. 5)

1100 Finally, the Court of Appeal should in any event have set a reduction percentage for Shell pursuant to Article 3:296 DCC. The reason for this is that the Court of Appeal (in summary) has held that (i) Shell has a duty of care to reduce its CO_2 emissions *more* than most companies, (ii) Shell must make an appropriate contribution to the climate objectives of the Paris Agreement, and (iii) for this purpose, the CO_2 emissions must have been drastically reduced by 2030.[1597] This concerns Shell's duty of care to prevent or mitigate dangerous climate change.[1598] Article 3:296 DCC obliges the Court of Appeal – building on that duty of care - to establish a corresponding concrete legal obligation and impose it on Shell in the form of a concrete reduction obligation. This is all the more true because this duty of care is partly based on Articles 2 and 8 ECHR, which require effective and genuine protection against dangerous climate change. That is what the objections set out in ground of appeal no. 5 relate to.

1101 Article 3:296 DCC reads as follows:

> Article 3:296 DCC
> *1. Someone who is obliged, in relation to someone else, to give something, do something or refrain from doing something shall be ordered to do so by the court at the request of the person entitled hereto, unless it follows otherwise from the law, from the nature of the obligation or from a legal act.*

1102 In applying Article 3:296 DCC, a distinction can be made between the standard-setting phase and the remedying phase. The standard-setting phase concerns the establishment of the parties' obligations. The remedying phase concerns the court's choice to apply the remedy that is required to ensure the compliance with the duty of care.[1599] The order given to that effect ("injunction") must therefore be consistent with the legal obligation to be established beforehand ("*to do so*"). Due to this consistency

[1597] Judgment of the Court of Appeal, grounds 7.27, 7.55 up to and including 7.57, 7.61, 7.67 and 7.111.
[1598] See, in this regard, Chapter V of this Explanatory Submission.
[1599] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 561.

requirement, the issue of a prohibitive or mandatory injunction must be done with a certain degree of precision and specificity.[1600] In that context, a court is allowed, within the limits of the relief sought, to award less than what was sought. Awarding "something other" than the relief sought is also permitted, provided it can be regarded as being the lesser of what was sought.[1601]

[1600] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 641; J.L.R.A. Huydecoper, "*Reële executie*" *(Actual enforcement),* Deventer: Wolters Kluwer 2021, para. 16.
[1601] Judgment of the Dutch Supreme Court of 29 October 1993, ECLI:NL:HR:1993:ZC1116 (*Kraaiende hanen*).

1103 A court that has found, in proceedings on the merits, that a party has a specific legal obligation is required under Article 3:296 DCC to issue a mandatory or prohibitive injunction against that party (*"shall be ordered to do so by the court"*).[1602] The plaintiff will have a sufficient interest in such a mandatory or prohibitive injunction if it can contribute to preventing the alleged infringement of interests that is imminent.[1603] If the conditions for granting the requested injunction are met, the court therefore has no discretionary power to reject the injunction nevertheless.[1604] This has been established case law since the *Claas/Van Tongeren* judgment. In that judgment, the Dutch Supreme Court held that whether or not a requested injunction can be awarded does not depend on any further balancing of interests if an unlawful act has already been found to exist.[1605] This rule is widely endorsed among legal scholars.[1606]

1104 In the *Urgenda* judgment, the Dutch Supreme Court reiterated this rule and added that it constitutes "*a fundamental rule of a constitutional state*." Although the finding concerns the relationship with the government, the Supreme Court immediately pointed out that the nature of this rule is no different in horizontal relationships (*"just like anyone else*"):

> *"8.2.1 If the government has an obligation to do something, it may, just like anyone else, be ordered to do so by a court at the request of the entitled party (Art. 3:296 DCC). This is a fundamental rule of a constitutional state, which is enshrined in our legal system. With regard to the rights and freedoms of the ECHR, that rule is consistent with the right to effective legal protection under Article 13 ECHR, as mentioned in 5.5.1–5.5.3 above. Partly in connection with this fundamental rule, the Dutch Constitution provides that civil courts have jurisdiction to hear all claims, so that they can always provide legal protection if no such protection exists before another court."*[1607]

[1602] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 305 up to and including 320; C.J.J.M. Stolker, "*T&C Burgerlijk Wetboek*" (Text of & Comments on the Dutch Civil Code), Art. 3:296 DCC, Comment 8.2.11.

[1603] Judgment of the Dutch Supreme Court of 21 December 2001, *NJ* 2002, 217 (*Kernwapens*). See also the Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), para. 2.13. See also, in this regard, Section VII.2 of this Explanatory Submission.

[1604] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 556.

[1605] Judgment of the Dutch Supreme Court of 28 June 1985, ECLI:NL:HR:1985:AC8976 (*Claas/Van Tongeren*).

[1606] C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 152; P. Teunissen, "*Verbod en evenredigheid in het intellectuele-eigendomsrecht*" (Injunctions and proportionality in intellectual property law), Deventer: Wolters Kluwer 2024, p. 15; J.J. van der Helm, "*Het rechterlijk verbod en bevel als remedie*", Deventer: Wolters Kluwer 2023, pp. 213–215; *Asser/Sieburgh 6-IV* 2023/161; W.Th. Nuninga, "*Recht, Plicht en remedie of De belofte van de norm*" (Right, duty and remedy or the promise of the standard), Deventer: Wolters Kluwer 2022, pp. 29 up to and including 31.

[1607] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), with reference to the judgment of the Dutch Supreme Court of 28 September 2018, ECLI:NL:HR:2018:1806 (*X/Staat*); Dutch Parliamentary Records II 1979/80, 16 162, no. 3, pp. 6 and 10 (Explanatory Memorandum); Dutch Parliamentary Records II 1991/92, 22 495, no. 3, pp. 83 and 84 (Explanatory Memorandum).

1105 This interpretation of the arrangement of Article 3:296 DCC is consistent with the deterrent function of liability law. Liability law wishes to prevent violations of rights based on private law to the maximum possible extent. For this reason, courts have a mandatory duty, in the event of an imminent violation of the law, to order the parties to comply with their duties of care. For this reason, courts must also determine what concrete obligation is required by the duty-of-care standard in a given case.[1608]

1106 The foregoing applies even more emphatically in the case of duties of care relating to the protection against dangerous climate change afforded by Articles 2 and 8 ECHR. After all, the ECtHR requires that effective and genuine protection be provided against such risks.[1609] In the context of climate obligations, these provisions require, according to the ECtHR, CO_2 reductions that are linked to the remaining carbon budget. These required reductions can therefore be expressed as a percentage.[1610] So it is precisely in the case of obligations relating to the rights protected by Articles 2 and 8 ECHR that courts must go in search of a reduction percentage that is commensurate with the established infringement of rights.

1107 In this context, it is also important to note that it is deeply embedded and accepted in liability law that there is sometimes uncertainty as to which remedy will do precisely enough justice to the protection of the interest harmed by the violation of the standard. However, liability law rightly does not accept this as a basis for refraining from imposing a remedy. After all, this would have the unacceptable consequence that it *is* established that the wrongdoer must take action to protect the injured party's interests, but that the uncertainty about the precise remedy comes entirely for the injured party's account. This is also precluded by the precautionary principle, which is equally embedded in liability law.[1611]

1108 The obligation to estimate the damage of Article 6:97 DCC is a manifestation of the above. If the damage cannot be determined with precision, the courts must estimate it. This is understandable, because it is in any event established that the injured party has suffered some damage. In that case, that damage may not be for the injured party's account because the precise extent of the damage is uncertain.[1612] In this way, the courts fulfil their obligations under Article 3:296 DCC. This obligation applies equally to other court injunctions. In these cases, too, the uncertainty about the precise scope of the injunction must not result in no injunction being issued at all.

[1608] See, for example, J.J. van der Helm, "*Het rechterlijk bevel en verbod als* remedie", Deventer: Wolters Kluwer 2023, para. 593; C.C. van Dam, "*Aansprakelijkheidrecht*, The Hague: Boom juridisch 2023, para. 103-1; W.H. van Boom, *Efficacious enforcement in Contract and Tort*, The Hague: Boom juridische uitgeverij 2006, p. 7.

[1609] See, in this regard, Sections IV.5.2 and VI.3.5 of this Explanatory Submission.

[1610] See, in this regard, Section VI.3.5 of this Explanatory Submission.

[1611] E.R. de Jong, "*Voorzorgverplichtingen. Over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*" (Duties of care: on the setting of liability-law standards for uncertain risks), The Hague: Boom Juridisch 2016, p. 71. See also E.R. de Jong, "*Onzekerheid troef?"* in *NJB* 2014/305, p. 385.

[1612] J.R. Hebly, "*Schadevaststelling en tijd*" (Damage assessment and time), The Hague: Boom juridisch 2019, p. 63.

1109 This is all the more true because a prohibitory injunction or a mandatory injunction requiring certain measures to be taken is, essentially, often a preventive measure intended to prevent that an unlawful act takes place - and therefore that damage is caused.[1613] If a court must estimate the extent of the damage incurred pursuant to Article 6:97 DCC, it goes without saying that a court must also comply with its obligation to make an estimate when looking for the measure that determines to what extent damage can be prevented. This is no different from a normative perspective. If the obligation to estimate the damage would not apply when no damage has occurred yet, the preventive function of liability law would in fact be undermined.

1110 It follows from the foregoing that a court which finds that (i) Shell must reduce *more* of its CO_2 emissions than most companies, also in light of the human rights protected by Articles 2 and 8 ECHR, (ii) Shell's CO_2 reduction must be an appropriate contribution to the climate objectives of the Paris Agreement, and (iii) CO_2 emissions must have been drastically reduced by 2030 for that purpose, must also examine to what extent that obligation necessitates the issue of a commensurate reduction injunction. After all, in light of this duty of care to prevent or mitigate dangerous climate change, it is beyond dispute that Shell will in any event have to achieve substantial CO_2 reductions. In such a situation, the court may not throw up its hands simply because Shell has also raised arguments in this lawsuit that allegedly preclude the imposition of the global average reduction rate of 45% or because a whole range of different reduction percentages follows from the various modelled reduction scenarios. In any event, Article 3:296 DCC requires the court to examine in such a case which reduction percentage can be imposed in any event, whether or not as a minimum obligation.

1111 In the legal literature that has appeared in response to the challenged Judgment, all of this is widely endorsed. Van Dam has pointed out that a court must also determine a concrete reduction obligation via Article 3:296 DCC, partly in view of the effective and genuine protection required by Articles 2 and 8 ECHR.[1614] Bartman also believes that the Court of Appeal should have established a concrete reduction obligation (in any event a minimum obligation) on the basis of Article 3:296 DCC and speaks of a mismatch between the legal obligation established by the Court of Appeal and its enforceability, which is difficult to reconcile with Article 3:296 DCC.[1615] Faber[1616], Bleeker[1617] and Kautz[1618] reach conclusions along the same lines.

[1613] See, for example, K.J.O. Jansen, "*De rol van art. 6:162 BW in verbods- en gebodsacties*" (The role of Article 6:162 DCC in actions seeking prohibitory and mandatory relief) in *NTBR* 2020/40.
[1614] C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en standard zonder remedie*" in *AV&S* 2025/13, paras. 2.4.1 and 3.2.3.
[1615] S.M. Bartman, "*Het Shell CO_2-arest, mede bezien door een concernrechtelijke bril*" in *AA* 2025/1, p. 51
[1616] M.J. Faber, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JOR* 2025/81, para. 5.
[1617] T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *M en R* 2025/12, under "*Reductieverplichting*."

1112 In Section VI.3 of this Explanatory Submission, it has already been discussed at length that the relevant objective points of reference, together with the various modelled reduction scenarios, offer more than sufficient possibilities to attach a concrete reduction obligation in the form of a reduction percentage (or in any event a minimum percentage) to the duty of care to prevent or limit dangerous climate change as established by the Court of Appeal. The Court of Appeal should also have conducted that assessment in accordance with its obligations under Article 3:296 DCC. In that context, it was noted that this method leads to a reduction percentage ranging from 28.5% to 51.7%, depending on the extent to which the modelled reduction scenarios account for the limitations of the underlying IAM models and the extent to which normative corrections are made for that purpose. However, the Court of Appeal has completely failed to conduct this assessment.

1113 Finally, the relief sought by Milieudefensie et al. offered the Court of Appeal ample opportunities to determine a reduction percentage within that range for Shell pursuant to Article 3:296 DCC. After all, what Milieudefensie et al. had demanded, in a hierarchically structured statement of claim, was (in brief) the imposition of a reduction percentage within a range of 25% to more than 45%, and a court can always award something lesser than the relief sought. The Court of Appeal therefore had ample discretion to set a reduction percentage in line with Shell's duty of care to prevent or limit dangerous climate change.

1114 After ground of appeal no. 5.2, which contains only a follow-up objection, grounds of appeal nos. 5.3 up to and including 5.7 challenge the decision of the Court of Appeal in light of the foregoing. After reading the above, they are largely self-explanatory.

(a) Ground of appeal no. 5.3 points out that the Court of Appeal has overlooked the fact that Article 3:296 DCC requires a court to issue an injunction that is commensurate with the duty of care to prevent or limit dangerous climate change.

(b) Ground of appeal no. 5.4 points out that the relief sought by Milieudefensie et al. also gave the Court of Appeal ample opportunity to look, within that relief sought, for a reduction percentage that is applicable to Shell, and also that the Court of Appeal should have looked, on the basis of the relevant objective points of reference, the Common Ground method or even based on its own (overly narrow) scientific consensus standard, for a minimum CO_2 emission reduction percentage for Shell. This also follows from Article 3:296 DCC.

(c) Ground of appeal no. 5.5 complains about the fact that even though the Court of Appeal was uncertain about the precise reduction percentage that can be

[1618] R.E. Kautz, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, *JA* 2025/27, p. 269.

required of Shell, it should in any event have examined whether it could estimate that percentage, with or without with the assistance of a court-appointed expert. That obligation follows from Article 3:296 DCC and is implied in the obligation for courts to estimate the damage under Article 6:97 DCC.

(d) Ground of appeal no. 5.6 emphasises that the Court of Appeal has found that Shell must substantially reduce its emissions in order to make an appropriate contribution to the objectives of the Paris Agreement and must do *more* than most companies. In that light, and to comply with the effective and genuine protection against dangerous climate change required by Articles 2 and 8 ECHR, the Court of Appeal was also required under Article 3:296 DCC to determine a (minimum) reduction percentage by which Shell must reduce its CO_2 emissions.

(e) Ground of appeal no. 5.7 concludes with the objection that Article 3:296 DCC also allows room for a court to impose a variable reduction percentage on Shell. This follows not only from Article 3:296(1) DCC discussed above, but also from Article 3:296(2) DCC, which allows for the issue of an injunction subject to a condition.[1619] The Court of Appeal has failed to recognise this. For this reason, too, the judgment of the Court of Appeal cannot be upheld.

VI.7 The potential variability of reduction scenarios and reduction percentages does not preclude a concrete reduction obligation for Shell

1115 When the Court of Appeal found that no reduction percentage could be determined for Shell's Scope 3 emissions, it also attached meaning to the variability of the NZE Scenario. In the discussion of that Scenario in Section VI.3.7, it was already explained why that cannot be a reason for not keeping Shell to the reduction percentages resulting from it. In its conditional cross-appeal in cassation, Shell already announced the argument that the variability over time of the reduction percentages calculated by the modelled reduction scenarios in general precludes the acceptance of a percentage-based reduction obligation for Shell.

1116 That view is incorrect and undesirable for three reasons:

(a) the reasons for the differences between the reduction percentages included in the modelled reduction scenarios in fact *necessitate* a fixed reduction percentage (Section VI.7.1 of this Explanatory Submission);

(b) the nature of Shell's stringent obligation of means allows for the consideration of other interests (Section VI.7.2 of this Explanatory Submission); and

[1619] See S.M. Bartman, "*Het Shell CO_2 arrest, mede bezien door een concernrechtelijke bril*" in *AA* 2025/1, p. 51.

(c) court injunctions can, under certain circumstances, be lifted or lapse if Shell were to demonstrate that the required CO_2 reductions, due to changed circumstances, exceed what is required by the relevant objective points of reference and the various modelled reduction scenarios (Section VI.7.3 of this Explanatory Submission).

1117 In light of these three reasons, a balanced system exists that does justice to all the interests in proportion to their normative weight. That system is far preferable to the system advocated by Shell in which a court refrains from setting any reduction percentage applicable to Shell at all because circumstances might change in the future, which would be to the detriment of the present and future inhabitants of the Netherlands and the Wadden Sea region and would be fully to the benefit of Shell. Milieudefensie et al. will further explain this below for every reason individually.

VI.7.1 The reasons for the differences in the reduction percentages *necessitate* a fixed reduction percentage

1118 Section VI.3.7 of this Explanatory Submission has discussed at length that modelled reduction scenarios calculate different reduction percentages, depending on the extent to which the precautionary principle, the principle of intergenerational justice and the CBDR principle are factored in. This means that the fact that reduction percentages calculated by modelled reduction scenarios differ from each other - and so also that later percentages differ from earlier ones - is not a reason for refraining from determining a fixed reduction percentage on their basis. These differences are not evidence of variability, but are purely normatively determined. It is therefore the normative framework that determines which of those different reduction percentages applies to Shell.

1119 In addition, the modelled reduction scenarios will change as such - and thus within their own methodology - in the run-up to 2030 because the CO_2 reductions that are being achieved globally are insufficient. These changes are purely the result of the model. After all, reduction scenarios model how the reduction efforts to achieve net-zero CO_2 emissions by 2050 must be made. Chapters II and III of this Explanatory Submission have already discussed at length that it is generally accepted that global CO_2 reductions of 45% must have been achieved by 2030 to meet this climate target of the Paris Agreement or to at least keep it within reach. This will always be determined by the remaining carbon budget.

1120 If, in the run-up to 2030, the achieved CO_2 emission reductions are below the required level (or if CO_2 emissions even rise), this will mean that the same or even a larger CO_2 reduction must take place within a shorter period of time. The later a modelled reduction scenario is developed in the decade from 2020 to 2030, the *more* it will try to calculate

whether a global CO_2 emission reduction in line with the 1.5°C Paris Agreement target is still possible. To this end, the modelled reduction scenario will typically first look at whether a greater reduction in oil and gas production and consumption is possible and feasible.

1121 Logically, there will come a point in time between 2020 and 2030 when the remaining carbon budget is so small (and thus: when global CO_2 emissions have remained so high) that no modelled reduction scenario will consider it possible to still achieve the 1.5°C Paris Agreement target by reducing the oil and gas production and consumption or by deploying CDR technologies on a large scale. If a reduction scenario were to be developed in 2029, it would model that it will be impossible, or very difficult, for the oil and gas industry to have realistically reduced its CO_2 emissions by 2030 to achieve that goal. In that reduction scenario, everything will then be made dependent on very large-scale CO_2 reductions and the large-scale deployment of CDR technologies in the period from 2030 onwards, as no other option remains. This, of course, applies even more strongly if the oil and gas industry continues to grow until that point or even during that period, and its share of global CO_2 emissions continues to increase. In that case, a scenario for 2030 will become a full-scale overshoot scenario. In reality, the modelled reduction scenario in question will then conclude that the CO_2 reductions required by 2030 are no longer achievable.

1122 Therefore the fact that the reduction percentages calculated by modelled reduction scenarios may change is not a reason for not imposing a reduction obligation on Shell. After all, such changes are not the result of a smaller reduction effort, which might mean that too much would be demanded of Shell if a fixed reduction percentage were imposed on it by the Court. The opposite is true. It is precisely because the oil and gas industry and Shell are doing nothing and are maintaining or even increasing oil and gas production that insufficient emission reductions are taking place. This in turn forces climate science to adjust the modelled reduction scenarios and to increasingly rely on highly uncertain CDR technologies to keep the climate targets more or less within reach. The reasons for this variability are therefore valid and all the more reason to actually bind Shell to a fixed reduction obligation. Only in this way can an end be put to the reasons (which are highly detrimental to the climate) why the reduction percentages calculated by the modelled reduction scenarios inevitably change.

VI.7.2 Shell's stringent obligation of means offers room to allow for other compelling interests

1123 In the first-instance proceedings, the District Court ruled that Shell has a stringent obligation of means to reduce its Scope 3 emissions by 45% on balance by 2030. In this regard, Shell can be expected to take the necessary steps to eliminate or prevent the serious risks resulting from the CO_2 emissions generated by it and to use its influence to limit any ongoing consequences as much as possible. After all, it is Shell

that determines which energy products the Shell Group is offering. According to the District Court, a consequence of this stringent obligation could also be that Shell refrains from making new investments in the extraction of fossil resources and/or limits its production of fossil fuels.[1620] In the appeal and cassation proceedings, it must be assumed that this Scope 3 obligation of Shell is such a stringent obligation of means and is therefore not an obligation of result. The nature of this obligation as an obligation of means makes it even more acceptable to hold Shell to a fixed reduction percentage.

1124 A stringent obligation of means requires a party to do everything that can reasonably be required of it to achieve the desired result.[1621] This means that when the Court assesses whether Shell has fulfilled its stringent obligation of means, allowance can be made for circumstances that have prevented Shell - for reasons that are not attributable to or for the account of Shell - from achieving the required CO_2 reductions. If Shell demonstrates that it has genuinely and demonstrably made serious efforts to achieve the required percentage-based emission reductions via its influence on the demand and supply sides of the oil and gas market, yet has not fully succeeded nevertheless, liability law allows room for accepting that Shell *has* actually fulfilled its stringent obligation of means. As a result, the obligation will encourage Shell, for example, to actually work diligently on offering alternatives to the harder-to-abate sectors and to also focus its own investments on sustainable alternatives. In this way, Shell would be complying with its obligations via its influence on the demand and supply sides of the oil and gas market and create the flywheel effect envisioned by the UN climate regime and the various soft-law sources.

1125 The obligation of means is therefore also not diminished by the fact that Shell is tied to a fixed reduction percentage within it. After all, the fact that Shell has an obligation of means in respect of that fixed reduction percentage means that Shell does not have to fully achieve that percentage, as long as it *has* made the necessary efforts. So when the compliance with that stringent obligation of means is assessed, the reasons that may have prevented the full achievement of that reduction percentage may also be taken into account. In that light, there is no valid normative reason for already refraining from imposing a fixed reduction percentage when Shell's concrete reduction obligation is determined. After all, the consequence of this is that Shell has no obligation whatsoever, even though it is certain that it must start reducing its CO_2 reductions in practice.

1126 Finally, the foregoing is reinforced by the circumstance described in Section VI.7.1 that the reduction percentages calculated in the modelled reduction scenarios will change and will ultimately - due to the passage of time - model a reduction percentage of 0% for 2030, because the oil and gas industry and Shell have not (timely) reduced their

[1620] Decision of the District Court, grounds 4.1.4, 4.4.24, 4.4.25, 4.4.37, 4.4.39 and 4.4.45.
[1621] *Asser/Sieburgh 6-I* 2024/192.

CO_2 emissions, but may even have increased them. If a court were to attach consequences to this that are in favor of the oil and gas industry when determining the reduction percentage, this would actually encourage the oil and gas industry to make its customers even more dependent on oil and gas and, thereby, to increase global CO_2 emissions. By accepting a stringent obligation of means with a fixed reduction percentage, the oil and gas industry is encouraged to actually achieve the necessary CO_2 reductions.

VI.7.3 Court injunctions may be lifted or lapse under certain circumstances

1127 Finally, the rules for the lifting or lapsing of injunctions are sufficiently flexible to meet Shell's objections to a fixed reduction percentage. After all, Dutch liability law provides for a balanced system that, on the one hand, ensures that unlawful conduct can always be prevented through an injunction, while, on the other hand, allowance is made for rapidly changing (normative) circumstances. In light of that system, there is no need to immediately translate potential uncertainties about the level of a reduction percentage – namely: the possibility that the percentage might change in the future - into the legally unacceptable conclusion that a court must refrain from imposing such a percentage.

1128 The assessment of the unlawfulness of the alleged conduct will take place on the basis of the situation at the time the judgment is given.[1622] It is therefore *that* time that will be decisive for whether or not an injunction to offer protection against unlawful conduct will or will not be issued. No injunction will therefore be issued if any conduct ceases to be unlawful in the course of the legal proceedings.[1623] That is understandable. Courts cannot, of course, attach obligations to conduct that has become lawful (after the start of the lawsuit). Conversely, courts may not anticipate, to the detriment of the injured party, that the unlawful conduct may prove to be justified in the future.

1129 After a prohibitive or mandatory injunction has been issued, it can lapse on the ground that the conduct concerned is no longer unlawful because, for instance, a justification ground has arisen.[1624] The injunction can also lapse if essential conditions for issuing it no longer exist.[1625] This requires that the factors that led the court to issue the injunction have changed in weight to such an extent that the alleged conduct can no longer be considered to be unlawful.[1626] In such situations, the injunction will lapse by operation

[1622] Judgment of the Dutch Supreme Court of 26 May 1972, *NJ* 1972, 450 (*Hero/Seven-Up*). See also, for example, C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 95.
[1623] Judgments of the Dutch Supreme Court of 8 July 1992, *NJ* 1993, 488 (*VVN/Staat*) and 21 February 1975, *NJ* 1975, 456 and 457 (*Centrafarm/Sterling Drug en Winthorp*). See also, for example, C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel"*, Amsterdam: DeLex 2025, para. 95.
[1624] Judgment of the Dutch Supreme Court of 19 December 1952, *NJ* 1953, 642 (*Tilburg/Van Roessel*).
[1625] Judgment of the Dutch Supreme Court of 18 November 1983, *NJ* 1983, 272 (*Kluft/B en W*).
[1626] Judgment of the Dutch Supreme Court of 17 January 1984, *NJ* 1984, 802 (*De Telegraaf/A*).

of law. If a dispute arises between the parties on this matter, the enforcement court can decide the matter.[1627]

1130 This approach can also be used in the context of climate obligations and makes it possible to do justice, in a balanced way, to all the interests, while respecting the corresponding burden of pleading and burden of proof. This works as follows.

(a) Based on the relevant objective points of reference and the modelled reduction scenarios at the time judgment must be given, the Court can impose a concrete reduction obligation on Shell to have reduced its CO_2 emissions by a certain percentage by 2030 in order to protect (among other things) the relevant human rights. In this way, the system aligns with the crucial contribution to be made by Shell to achieve the climate goals or at least to keep them within reach. The burden of pleading and burden of proof in this regard rest, in principle, with Milieudefensie et al.

(b) If it becomes apparent, at any point *after* the imposition of the concrete reduction obligation and based on relevant new information, that the contribution to the climate goals required of Shell is, after all, more limited, the law offers ample opportunities to accommodate this. For this purpose, Shell must then, essentially, substantiate and produce evidence of the fact (i) that the legislature has meanwhile (lawfully) determined that the oil and gas industry and Shell do not have the reduction obligation with the corresponding reduction percentage as established by the court, (ii) that the climate targets can also be achieved with a lower contribution from the oil and gas industry in general and from Shell in particular or (iii) that a change in circumstances that justified Shell's concrete reduction obligation has occurred which is such that the CO_2 reduction concerned can no longer be required of Shell. In this way, the system accommodates Shell's interests and Shell will never be required to reduce its emissions beyond what Dutch liability law demands of it.

1131 This system is far preferable to Shell's approach. After all, that approach means that the Court must refrain, entirely to the detriment of the present and future inhabitants of the Netherlands and the Wadden Sea region and entirely to the benefit of Shell, from setting a concrete reduction percentage, even though it is evident that Shell must reduce its CO_2 emissions and must also do so based on liability law. The sole justification for this would then be that it might become apparent in the future that Shell can only be required to make a lower contribution. That is unacceptable and unnecessary. Moreover, in that view, no injunction could ever be imposed again,

[1627] Judgment of the Dutch Supreme Court of 19 December 1952, *NJ* 1953, 642 (*Tilburg/Van Roessel*). For a detailed discussion of these rules and the rules described above, see C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 308.

because a court injunction, by its very nature, is always based on the situation at the time the judgment is given. That, too, underscores the incorrectness of the legal view started out from by Shell.

VI.8 Conclusion

1132 This Chapter discussed the standards on the basis of which courts must determine a concrete reduction percentage for Shell: it must be done on the basis of the relevant objective points of reference and the modelled reduction scenarios. The standard of scientific consensus on a reduction percentage applicable to a company such as Shell, as used by the Court of Appeal, is therefore the wrong one.

1133 Building on this, this Chapter discussed that if the Court of Appeal had applied the right standard, it could have arrived at a reduction percentage of 45% applicable to Shell, or a reduction percentage within the range of (rounded) 30% to 45% or any other percentage. In any case, the Court of Appeal could have imposed a minimum percentage on Shell. In the view of Milieudefensie et al., that minimum percentage is (rounded) 30%. That minimum percentage is, essentially, the result of distribution efforts in which every normative choice made is in favour of the oil and gas industry and Shell. It is therefore the same percentage that all contracting states collectively must globally achieve as an absolute minimum for oil and gas reductions, and so one that must also be achieved by Shell, one of the largest players in the global oil and gas market.

1134 It was also observed that it is a misconception to assume that Shell's gas production is allowed to increase to replace more carbon-intensive coal. All emissions must decrease, including those from gas. The fact that Shell's customer base consists partly of harder-to abate sectors does not diminish the reduction percentage applicable to Shell either. After all, that factor is already allowed for in the calculated reduction percentages, while the harder-to-abate sectors are also working on CO_2 reductions themselves. Establishing a concrete reduction obligation for Shell will accelerate that process, whereas the result of the continued refusal to do so will be that those sectors become even *more* dependent on oil and gas use.

1135 Finally, this Chapter has discussed that a fixed reduction percentage fits within the system of Dutch liability law. The Court must not be misled by the suggestion that modelled reduction scenarios developed later in time could lead to entirely different reduction percentages. The reason for this is that changes in the reduction percentages are not the result of changing scientific insights, but of the insufficiency of the emission reductions achieved by the oil and gas industry. The variability of reduction percentages calculated in modelled reduction scenarios therefore actually *necessitates* the acceptance of a fixed reduction percentage. Moreover, Shell's stringent obligation of

means and the case law on the compliance with court injunctions provide sufficient normative flexibility to allow the reduction percentage set for Shell to lapse or to adjust it at a later stage. The burden of pleading and the burden of proof in respect of the reasons for such a lapse or such an adjustment rest with Shell. That system is far preferable to the view defended by Shell that it is not required to reduce its CO_2 emissions.

VII THE EFFECTIVENESS OF THE REDUCTION OBLIGATION

VII.1 Introduction

1136 In grounds 7.97 up to and including 7.110, the Court of Appeal has found that Milieudefensie et al. do not have a sufficient interest within the meaning of Article 3:303 DCC in their legal action seeking an injunction requiring Shell to limit its Scope 3 emissions by 45% (or any other percentage) by 2030. The Court of Appeal based this finding on its view that a comparison must be made between the situation with and without the award of the requested injunction. If the injunction can be complied with in a manner that cannot contribute to the interests defended by Milieudefensie et al. in this lawsuit, there is no interest within the meaning of Article 3:303 DCC, according to the Court of Appeal. The Court of Appeal also found that it would be possible for Shell to comply with a reduction injunction by limiting its (re)sales activities through its trading house, Shell Trading. According to the Court of Appeal, those activities would then be taken over by other market parties, who, in turn, could make use of the services of Shell Trading. To this, the Court of Appeal attached the conclusion that Milieudefensie et al. have no interest in the award of the injunction requiring Shell to reduce its CO_2 emissions.

1137 Milieudefensie et al. challenge this finding in cassation under ground of appeal no. 6. The first part of their objections concerns the interpretation of the law by the Court of Appeal regarding the interest requirement under Article 3:303 DCC. In that connection, Milieudefensie et al. have raised four (legal) objections, which essentially boil down to the following:

(a) Article 3:303 DCC does not require a comparison between the situation with and without the issued injunction (ground of appeal no. 6.2).

(b) The fact that it is possible to comply with a court injunction in a manner that does not contribute to the interests defended by a claimant does not mean that, for that reason alone, the claimant lacks an interest within the meaning of Article 3:303 DCC in the award of the relief seeking the issue of such an injunction (ground of appeal no. 6.3).

(c) The fact that a particular injunction can or could be complied with by a party in a manner that is in effective does not mean that the party concerned *will* (always and/or fully) comply with the injunction in such an ineffective manner (ground of appeal no. 6.4).

(d) In determining whether a party has a sufficient interest within the meaning of Article 3:303 DCC, it is not relevant what other persons or parties (if any) will do if the defendant complies with the injunction. This applies even more strongly to shared responsibilities, for instance in the case of the compliance with the duty of care to prevent or limit dangerous climate change established by the Court of Appeal (ground of appeal no. 6.5).

1138 Milieudefensie et al. have subsequently argued that the Court of Appeal's judgment can also not be upheld for other reasons, i.e. (i) issuing a reduction injunction against a company *is* actually effective (grounds of appeal nos. 6.6 up to and including 6.9), (ii) the reduction injunction *can* be effectively complied with and *is* even effective as a starting-point (grounds of appeal nos. 6.10 up to and including 6.17), (iii) the Court of Appeal was not tied to the duty of care established by the District Court (grounds of appeal nos. 6.18 up to and including 6.23) and (iv) the reasoning given by the Court of Appeal for the considerations and the operative part of the Judgment is incorrect or insufficient (grounds of appeal nos. 6.24 up to and including 6.33).

1139 Ground of appeal no. 7 then specifically challenges the finding of the Court of Appeal that the compliance by Shell with a reduction injunction by restricting its (re)sales activities via Shell Trading would make the injunction ineffective. After all, as a major player within the oil and gas industry, Shell Trading plays a crucial role upon which many hundreds of independent oil and gas products rely, from both a distribution and a finance perspective. The restriction of its activities would therefore certainly have an effect on the atmospheric CO_2 emissions, as Milieudefensie et al. have also substantiated, but to which the Court of Appeal has not responded, or has responded in an incomprehensible manner (grounds of appeal nos. 7.2 up to and including 7.11). This is all the more true if it does not concern the resale, but the sale of oil and gas produced by Shell (grounds of appeal nos. 7.12 and 7.13). Contrary to what the Court of Appeal assumed, it also follows from the report by Erickson et al. that a sales restriction would be effective (grounds of appeal nos. 7.14 and 7.15).

1140 Ground of appeal no. 8 also relates to the effectiveness of the reduction obligation. The objections raised in this ground of appeal are directed against the Court of Appeal's finding that a potential "warning function" of an emission reduction injunction for other fossil-fuel investors is too speculative and too remotely connected to Shell's alleged unlawful conduct to serve as a basis for such an injunction. That finding is incorrect because - particularly in the context of shared responsibilities – the *indirect* effects of an emission reduction injunction are also relevant in assessing its relevance or effectiveness (ground of appeal no. 8.2). Milieudefensie et al. have also substantiated those effects in great detail and in concrete terms, citing a large number of experts and specialists. The attention paid to this by the Court of Appeal pays is insufficiently comprehensible (grounds of appeal nos. 8.3 up to and including 8.6).

1141 According to Milieudefensie et al., the Judgment must be overturned for these reasons. Milieudefensie et al. will further explain the grounds of appeal related to these reasons below.

VII.2 The interest criterion in the context of duties of care

1142 In grounds of appeal nos. 6.2 up to and including 6.4, Milieudefensie et al. have, essentially, argued that the Court of Appeal applied the wrong standard in determining whether Milieudefensie et al. have a sufficient interest in the requested injunction within the meaning of Article 3:303 DCC. The Court of Appeal has wrongly found that, to answer the question whether a sufficient interest exists, a comparison must be made between the situation with and without the award of the injunction. The Court of Appeal also fails to recognise that the fact that *the possibility to comply with* an injunction in a manner that cannot serve the interest defended by a party in the lawsuit does not, in and of itself, mean that such party has no interest within the meaning of Article 3:303 DCC in the injunction sought by it.

1143 To demonstrate that the Court of Appeal has based its judgment on a wrong interpretation of the law, the doctrinal relationship between the duty of care under Article 6:162 DCC, the effect of Article 3:296 DCC and the concluding provision of Article 3:303 DCC will be discussed below. The dogmatic rationale behind these provisions is simple. The starting-point of liability law is that duties of care and the associated legal obligations can actually help to offer protection against the danger they seek to offer protection against. After all, if a different view were held, our liability law would accept meaningless standards. Building on this presumed effectiveness, Article 3:296 DCC requires courts to actually impose such legal obligations. In this way, courts effectuate the protection that liability law seeks to provide against the danger concerned. The starting-point therefore is, ultimately, that a sufficient interest within the meaning of Article 3:303 DCC always exists, because the compliance with the legal obligation can contribute to the protection against the danger concerned. An exception to this is possible only in exceptional cases. The mere possibility that a legal obligation might be complied with in an ineffective manner is insufficient for this purpose. On the contrary, liability law does not accept such an ineffective mode of compliance as the fulfilment of the legal duty. Milieudefensie et al. will explain the foregoing in more detail below.

VII.2.1 Duties of care presuppose the possibility of effective compliance

1144 Liability law, essentially, aims to protect individuals against risks that are greater than what is considered acceptable in society. In the words of Van Dam: liability law seeks to provide effective legal protection of rights and interests.[1628] The question of whether a duty of care exists is then, at its core, always a balancing of, on the one hand, the

[1628] C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom juridisch 2023, para. 105.

interest of the wrongdoer in freely pursuing their own interests and, on the other hand, the interest of the injured party in being shielded from damage caused by others. In cases where the injured party's interest in being protected against dangers and the associated damage outweighs the wrongdoer's interest in freely pursuing their own interests, the danger is so great that it warrants protection. The principle that *"every party bears their own losses"* is then abandoned. It is precisely there where a duty of care arises. The aim is to thus provide protection against dangers that are considered to be unacceptable in society.[1629]

1145 Given this protective purpose, the existence of a duty of care presupposes that the compliance with the associated legal obligation can actually protect the interests of the persons whom that standard seeks to protect. After all, the duty of care is intended to bring about that protection.[1630] Any other view is inconceivable, because it would have as its consequence that liability law sets standards that *must* be complied with, yet are ineffective at the same time. Such a notion would fundamentally conflict with the protective nature of liability law. Liability law therefore understandably presupposes that the compliance with duties of care can actually contribute to the protection intended to be offered by them.

1146 In the *Jetblast* judgment[1631], the Dutch Supreme Court underlined the presumed effectiveness discussed above. The question to be answered in that case was whether the airport operator of Sint Maarten - where the beginning of the runway is located close to the public road running behind it – had acted negligently and thus unlawfully in relation to the persons on that public road by failing to take measures that could have protected them from harm resulting from the jet blast caused by aircraft. Jetblast is a very strong backward airflow from the jet engine of aircraft taking off, which can blow away persons standing behind it. The airport operator had argued that by placing warning signs at the rear of the runway and installing a fence, they had done everything they might have been required to do.

1147 This presented the Dutch Supreme Court with the question of what may be required of the airport operator to comply with its duty of care. In this regard, the Supreme Court held the following:

> *"3.4.3* (…) *In determining whether a warning can be considered an adequate measure for protection against a specific danger, it is of*

[1629] For further details on this subject, see Section IV.3 of this Explanatory Submission.
[1630] J.J. van der Helm, "*Het rechterlijk verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 69; W.H. van Boom, *Efficacious Enforcement in Contract and Tort*, The Hague: Boom Juridische uitgevers 2006, p. 7.
[1631] Judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*).

> *decisive importance whether this warning can be expected to lead to an act or omission that avoids this danger."*[1632]

1148 The Supreme Court thus discussed the question what the relationship between duties of care and the resulting legal obligations is in more *abstract* terms. In assessing the adequacy of the concrete obligations that necessarily result from the duty of care, the Supreme Court considered the justified expectation regarding their effectiveness to be of decisive importance.[1633] This is entirely consistent with the rationale of liability law discussed above. After all, liability law presupposes that duties of care actually provide protection. As a result, they also require concrete obligations that can actually achieve or contribute to the achievement of the intended protection.

1149 The same line of reasoning can be found in the *Urgenda* judgment. One of the central questions to be answered in that lawsuit was how the Dutch State could fulfil its obligation to achieve a CO_2 reduction of at least 25% before 2020. In that regard, the Supreme Court considered:

> *"5.3.2* (…) *If it is clear that the real and immediate risk referred to above in paras. 5.2.2 and 5.2.3 exists, states are obliged to take appropriate steps without having a margin of appreciation. The states do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable."*[1634]

1150 Although there are various modes of compliance with the legal obligation of the Dutch State, the requirement following from the duty of care that the chosen mode of compliance can actually lead to achieving the intended reduction remains. This requirement ensures that the protection against dangerous climate change that the duty of care intends to provide can also be achieved in actual fact.

1151 The obligation to take measures that are - expected to be - effective applies even more strongly where a duty of care, as in the present case, partly follows from Articles 2 and 8 ECHR. After all, those provisions require that the protection against the dangers they seek to offer protection against is *effective*, not illusory. Sections IV.5.2 and VI.3.5 of this Explanatory Submission have already discussed at length that Articles 2 and 8 ECHR require effective legal protection against dangerous climate change. This means that the obligations arising from these Articles must actually be capable of contributing to the prevention of such dangerous climate change.

1152 The foregoing does not, of course, imply that duties of care exist or can be fulfilled only if the protection against the danger is actually guaranteed. In that case, liability law

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[1632] Judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*).
[1633] Judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*).
[1634] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

would want to offer an unattainable guarantee of safety. What matters is that the wrongdoing party takes measures that can at least reasonably *be expected* to be effective.[1635] This also follows from the *Turnster* judgment, in which the Dutch Supreme Court held that safety measures were called for, even though they "*would not be sufficient in all cases*" to prevent or limit damage.[1636]

1153 It follows from the foregoing that the possibility that there are (potential) modes of compliance with a legal obligation that are ineffective, at the outset, in offering protection against a particular danger does not preclude the imposition of such a legal obligation. Conversely, if an ineffective mode of compliance exists, this will always lead to the conclusion that the duty of care does not permit that mode of compliance, or, in other words, that the legal obligation following from the duty of care has not been effectively fulfilled through that mode of compliance.[1637] That was essentially also the situation in the *Jetblast* judgment, in which the ineffective measures taken by the airport operator did not constitute compliance with its legal obligation.[1638]

1154 Following the Court of Appeal's judgment in the present case, legal authors have also pointed out that this is precisely the shortcoming in the Court of Appeal's reasoning on the point of the effectiveness. The potential compliance with the emission reduction injunction via Shell Trading is not a mode of compliance if no effectiveness whatsoever can be expected from it.[1639] Castermans and Lukkes have noted the following:

> *"In light of this, it is hard to imagine that a decision to stop reselling fossil fuels - knowing full well that this decision would have no effect on GHG emissions - could have been considered as the proper fulfilment of the above-mentioned stringent obligation of means. Is it appropriate for such a company to opt for a measure for which it is known at the outset that it will have no effect whatsoever on the level of GHG emissions, even if part of those emissions are no longer its own emissions? As far as we are concerned, this is a rhetorical question, and it is difficult to*

[1635] C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 823.
[1636] Judgment of the Dutch Supreme Court of 6 October 1995, *NJ* 1998, 190 (*Turnster*).
[1637] See also, in this regard, the case law of the Dutch Supreme Court on the interpretation of prohibitory and mandatory relief. This always concerns the question of how the issued prohibitory or mandatory injunction should be interpreted. Reference is then made to the duty of care to which the prohibitory or mandatory injunction is linked, as evidenced by judgment of the Supreme Court of 18 February 1966, *NJ* 1966, 208 (*Klokkenspel*). See also the judgments of the Supreme Court of 5 April 2002, *NJ* 2003, 356, 20 May 1994, *NJ* 1994, 652 (*Van Weezenbeek/Het Financieele Dagblad*), 29 March 1985, *NJ* 1985, 592 (*Konsumenten Kontakt/Electrorama*), 27 June 1969, *NJ* 1969, 365 (*Carl Zeiss Jena/Jenaer Glaswerk*) and 3 January 1964, *NJ* 1964, 445 (*Lexington*).
[1638] Judgment of the Dutch Supreme Court of 28 May 2004, ECLI:NL:HR:2004:AO4224 (*Jetblast*).
[1639] See, for example, A.G. Castermans & J.A. Lukkes, "*Norm en effectiviteit bij klimaataansprakelijkheid*" (Standard and effectiveness in the case of climate liability) in *AV&S* 2025/14; A.G. Castermans & J.A. Lukkes, "*Drie arresten over gebod, causaliteit en klimaatschade*" (Three judgments on mandatory injunctions, causality and climate damage) in *AV&S* 2025/7; M.J. Faber, "*Milieudefensie/Shell: tussen verplichting en veroordeling. Hoe het hof afdwaalde van de weg naar Parijs*" (Between obligation and injunction. How the Court of Appeal strayed from the road to Paris) in *MvO* 2024/10&11, pp. 255 up to and including 256.

> *see what ground of appeal Milieudefensie should have raised on this point to object to this."*[1640]

1155 In another article, Castermans and Lukkes summarise this aspect even more succinctly:

> *"In this consideration, the Court of Appeal appears to have lost sight of the general obligation to "limit CO2 emissions in order to combat dangerous climate change" as previously established by it. The assumption that Shell, in complying with the injunction, could opt for a measure for which it is already known at the outset that it will have no effect whatsoever on the volume of GHG emissions already conflicts with Shell's responsibility to do its part to combat dangerous climate change."*[1641]

Therefore a mode of compliance that is ineffective at the outset is not a mode of compliance.

VII.2.2 Obligation of courts to establish a legal duty (Article 3:296 DCC)

1156 Article 3:296 DCC sets forth the limits within which a plaintiff is entitled to an injunction requiring the defendant to comply with the legal obligation that follows from a duty of care. According to the Dutch Supreme Court, a mandatory or prohibitive injunction to that effect can, as a rule, be readily awarded outside the context of summary relief proceedings once the unlawfulness has been established. In proceedings on the merits, there is no scope for any further balancing of interests here, according to the Supreme Court in its *Claas/Van Tongeren* judgment:

> *"3.3* (…) *After all, once the unlawfulness of the conduct in respect of which a prohibitory injunction is sought has been established, this prohibitory injunction can, as a rule, be readily awarded and this award - barring some exceptions that are not relevant here - does not depend on any further balancing of interests; it should be noted that this does not apply in the case of summary relief proceedings."*[1642]

1157 The Dutch Supreme Court reiterated this rule in its *Urgenda* judgment and added that it is "*a fundamental rule of constitutional democracy*." Although the reasoning pertains to the relationship with the government, the Supreme Court immediately pointed out (*"as anyone may be*") that the nature of this rule is no different in horizontal relationships:

> *"8.2.1 If the government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party (Article 3:296 DCC). This is a fundamental rule of constitutional*

[1640] A.G. Castermans & J.A. Lukkes, "*Drie arresten over gebod, causaliteit en klimaatschade*" in *AV&S* 2025/7, para. 3.3.
[1641] A.G. Castermans & J.A. Lukkes, "*Norm en effectiviteit bij klimaataansprakelijkheid*" in *AV&S* 2025/14, para. 4.
[1642] Judgment of the Dutch Supreme Court of 28 June 1985, *NJ* 1986, 356 (*Claas/Van Tongeren*).

> *democracy, which has been enshrined in our legal order. As far as the rights and freedoms set out in the ECHR are concerned, this rule is consistent with the right to effective legal protection laid down in Article 13 ECHR referred to above in 5.5.1-5.5.3. Partly in connection with this fundamental rule, the Dutch Constitution stipulates that civil courts have jurisdiction over all claims, so that they can always grant legal protection if no legal protection is offered by another court."*[1643]

1158 With the above finding, the Supreme Court followed the system of Article 3:296 DCC, which - through the use of the word "*wordt*" (in Dutch, meaning "shall") is formulated in imperative terms:

> Article 3:296 DCC
> 1. Someone who is obliged, in relation to someone else, to give something, do something or refrain from doing something shall be ordered to do so by the court at the request of the person entitled hereto, unless it follows otherwise from the law, from the nature of the obligation or from a legal act.

1159 Therefore the compliance with legal duties occupies centre stage within the frameworks of Articles 6:162 BW and 3:296 BW. The court has no margin of appreciation in this regard.[1644] That is also easy to understand: if liability law seeks to offer protection to injured parties via duties of care, the court must also compel the wrongdoer to comply with that legal duty at the request of injured parties.

1160 Finally, the above is consistent with the view widely held by legal scholars that liability law does not merely seek to compensate damage, but actually also has a deterrent function. For this reason, too, remedies aimed at ensuring compliance with liability rules, such as mandatory and prohibitory injunctions, should, as a rule, be awarded.[1645]

VII.2.3 It is sufficient that an injunction can contribute to the protection against danger

1161 A party seeking compliance with another party's legal obligation under Article 3:296 DCC must have sufficient interest in doing so. This is arranged in Article 3:303 DCC. The legal ground for this "interest test" lies in procedural economy. Courts must refrain

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[1643] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), with reference to the judgment of the Dutch Supreme Court of 28 September 2018, ECLI:NL:HR:2018:1806; Dutch Parliamentary Records II 1979/80, 16 162, No. 3, pp. 6 and 10 (Explanatory Memorandum); Dutch Parliamentary Records II 1991/92, 22 495, No. 3, pp. 83 and 84 (Explanatory Memorandum).

[1644] C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 152; P. Teunissen, "*Verbod en evenredigheid in het intellectuele eigendomsrecht*" (Prohibitory injunctions and proportionality in intellectual property law) Deventer: Wolters Kluwer 2024, p. 15; J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 556 up to and including 560; W. Th. Nuninga, "*Recht, plicht, remedie of De belofte van de norm*", Deventer: Wolters Kluwer 2022, pp. 39 up to and including 41.

[1645] C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 103-1; W.H. van Boom, Efficacious Enforcement in Contract and Tort, The Hague: Boom Juridische Uitgevers 2006, p. 7.

from assessing and awarding relief sought that will not have a real (reasonable) effect for the plaintiff.[1646]

1162 Since liability law presupposes that the compliance with duties of care can contribute to the protection against the dangers they seek to offer protection against, and Article 3:296 DCC compels courts to order the wrongdoer to comply with the legal obligation corresponding with the duty of care, the role of Article 3:303 DCC is limited by its very nature. The sufficient interest required by Article 3:303 DCC is presumed to exist.[1647] This is understandable in light of the presumed effectiveness of the compliance with duties of care discussed above. The required interest in seeking relief aimed at ensuring the compliance with a legal obligation - an injunction – will therefore only be lacking if it is established at the outset that the compliance with that legal obligation could not in any way contribute to the protection that the duty of care seeks to provide. After all, only then would it be pointless for a court to award the relief sought.

1163 Conversely, this means that the interest requirement is quickly met and that this requirement must be applied with restraint.[1648] The requirements set forth in Article 3:303 DCC in the context of injunctive relief are twofold: first, there must be a *real threat* of one or more violations of a specific written or unwritten legal standard.[1649] Second, it is sometimes assumed that the plaintiff's interest must be directly involved in this real threat.[1650] So if a plaintiff seeks protection due to the real threat of an infringement of their interests caused by a violation of a standard that protects those interests, their application for injunctive relief must be awarded. The standard for "sufficient interest" logically follows from this. It is sufficient that the prohibitory or mandatory injunction *can contribute* to preventing the alleged imminent infringement of interests. After all, in that case, the mandatory injunction will satisfy the presumption implied in the duty of care that its compliance can contribute to preventing the dangers it seeks to offer protection

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[1646] C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 130; J. van Baars, "*Point d'intérêt, point d'action"*, Amsterdam: Buijten en Schipperheijn 1971, p. 155.

[1647] See A.W. Jongbloed, "*GS Vermogensrecht"* (Green series on property law), Art. 3:303 DCC, note 2.

[1648] J.J. van der Helm, "*Het rechterlijk verbod als remedie*" (The prohibitory injunction as a remedy), Deventer: Wolters Kluwer 2023, para. 312.

[1649] See, for example, the judgment of the Dutch Supreme Court of 21 December 2001, *NJ* 2002, 217 (*Kernwapens*). See also J.J. van der Helm, "*Het rechterlijk verbod als remedie"*, Deventer: Wolters Kluwer 2023, paras. 304, 305 and 311 up to and including 313, which show that this requirement, essentially, has the same effect via Articles 3:296 and 3:303 DCC.

[1650] This requirement is read into the words "*jegens een ander*" (meaning "in relation to each other") in Article 3:296 DCC. Opinions differ on whether this criterion applies via Articles 3:296 and 3:303 DCC, or whether an assessment against the relativity requirement under the substantive law of Articles 6:162 and 6:163 DCC is sufficient. See J.J. van der Helm, "*Het rechterlijk verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 325 up to and including 361; C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 128. This issue is not relevant to this case, as it is not in dispute that the duty of care to prevent or limit dangerous climate change serves to protect the interests of the persons whose interests Milieudefensie et al. is defending in this lawsuit.

against.[1651] This applies even more strongly in the case of an obligation to act rather than an obligation to refrain from acting.[1652]

1164 The opinion of Procurator General Langemeijer and Advocate General Wissink regarding the *Urgenda* judgment must also be understood in the context of the above. According to Langemeijer and Wissink, it may be assumed, for a prohibitive or mandatory injunction, that the plaintiff's interest is already sufficient if the injunction sought *can contribute* to preventing the alleged imminent impairment of interests:

> *"2.10 It follows from the foregoing that awarding a prohibitory or mandatory injunction sought by a plaintiff pursuant to Article 3:296 in conjunction with Article 6:162 DCC does not require any demonstrable or imminent harm or any cause-and-effect relationship with an unlawful act already committed. What is required, however, is an imminent impairment of interests as a result of the feared unlawful act. This follows, on the one hand, from the above-mentioned interest requirement of Article 3:303 DCC and, on the other hand, from the unlawfulness requirement of Article 6:162 DCC* (…).
>
> *2.13 By analogy, it may also be assumed, for a prohibitory or mandatory injunction sought by a plaintiff, that the plaintiff's interest in such an injunction is sufficient if the prohibitory or mandatory injunction can contribute to preventing the alleged imminent impairment of interests* (…)*"*[1653]

1165 For the same reasons, an injunction does not have to be fully effective or have the potential to be able to eliminate the entire threat. It is sufficient that the injunction *can contribute* to this. This follows from the judgment regarding the blocking of *The Pirate Bay*.[1654] In that case, Stichting Brein had sought an injunction requiring the internet service providers to block their subscribers' access to *The Pirate Bay*. Through this website, internet users could download copyrighted material without consent. The Dutch Supreme Court ruled that it is sufficient, in the context of the interest requirement, that the blocking - insofar as it cannot prevent the infringements – makes the

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[1651] J.J. van der Helm, "*Het rechterlijk verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 277 and 278. See also W.H. van Boom, *Efficacious Enforcement in Contract and Tort*, The Hague: Boom Juridische uitgevers 2006, p. 7. They point out that a substantive standard serves a purpose, and that purpose is served by enforcing that substantive standard. According to them, this means that remedies are effective *when they can lead* to the attainment of the purpose intended by the substantive standard.

[1652] Van Nispen notes that the application of Article 3:303 DCC appears to be necessary only in the case of a negative performance (inaction). See C.J.J.C. van Nispen, "*Sancties in het Vermogensrecht*" (Sanctions in property law), Deventer: Wolters Kluwer 2018, p. 31.
See also the commentary of Ras (regarding the limited role of Article 3:303 DCC in actions seeking mandatory and prohibitory injunctions) on the judgment of the Dutch Supreme Court of 17 September 1993, HR 17 September 1993, *NJ* 1994, 118 (*Severin/Detam*).

[1653] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*).

[1654] Judgment of the Dutch Supreme Court of 13 November 2015, ECLI:NL:HR:2015:3307 (*Stichting Brein/Ziggo et al.*).

infringements more difficult and strongly discourages internet users from committing them. It was therefore not required that the injunction would lead to a complete cessation of all copyright infringements:

> *"4.4.2 Brein is seeking an injunction requiring Ziggo et al. to block their subscribers' access to TPB. The Court of Appeal has assessed the effectiveness of the injunction sought against the objective aimed for by Brein to completely eliminate (all possible) infringements of the copyrights of the owners committed via the internet, or at least through the use of (BitTorrent) websites. In doing so, the Court of Appeal has failed to recognise that even if certain measures cannot lead to a complete cessation of all copyright infringements, they may still be compatible with the proportionality requirement of Article 52(1) of the Charter. After all, it follows from paragraphs 62–63 of the CJEU's UPC Telekabel Wien judgment that the mere fact that a blockade is or can be circumvented does not render the blockade ineffective. It is sufficient that the blocking measure - insofar as it cannot prevent the infringements – renders the infringements more difficult and strongly discourages internet users from committing them."*[1655]

1166 The effect of Article 3:303 DCC described above can also be seen in rectification injunctions. In such cases, too, their effectiveness is not always guaranteed.[1656] However, this does not preclude the court from issuing such injunctions. Illustrative of this are two judgments of the Dutch Supreme Court in which an injunction requiring a rectification had been issued, but the defendant had added comments to the rectification text. As a result, the purpose of the rectification was not achieved in the end. The fact that it was possible that the rectification injunction would be complied with in a potentially ineffective manner did not have to prevent the court from issuing this injunction.[1657] With this ineffective compliance, the defendant had simply failed to comply with the established legal duty.

1167 Finally, two interrelated aspects are relevant in the case of duties of care aimed at preventing or mitigating dangerous climate change. First, dangerous climate change can ultimately only be solved if all the actors responsible for it fulfil their individual legal obligations. So in this case there is a collection of shared responsibilities. Additionally, it is important to note that, according to Article 13 ECHR, an effective remedy must always be provided to ensure the compliance with rights derived from the ECHR.[1658]

[1655] Judgment of the Dutch Supreme Court of 13 November 2015, ECLI:NL:HR:2015:3307 (*Stichting Brein/Ziggo et al.*). See also the judgment of the Court of Justice of the European Union of 27 March 2014, C-314/12 (*UPC/Telekabel Wien*).

[1656] C.C. van Dam, "*Aansprakelijkheidsrecht*", The Hague: Boom Juridisch 2023, para. 1107.

[1657] Judgments of the Dutch Supreme Court of 23 February 2007, *NJ* 2007, 433 and 20 May 1994, *NJ* 1994, 652 (*Van Weezenbeek/Het Financieele Dagblad*).

[1658] See, in this regard, Section VI.3.5 of this Explanatory Submission.

Chapters IV and V of this Explanatory Submission have already discussed that the duty of care to prevent or mitigate dangerous climate change is grounded in, for instance, the human rights protected by Articles 2 and 8 ECHR, which have horizontal effect. The Court of Appeal also rightly ruled that this is the case in grounds 7.6 up to and including 7.11, 7.18 and 7.25 up to and including 7.27. Effective protection against dangerous climate change can ultimately only be achieved if all the contributors fulfil their respective responsibilities. According to the Court of Appeal, Shell rightly has such a shared responsibility.

1168 So in the case of duties of care consisting of shared responsibilities, an effective remedy consists of an injunction requiring the fulfilment of that shared responsibility. Logically, the fact that other parties with a shared responsibility may attempt to evade their own responsibility cannot preclude this. This does not detract from the intended effectiveness of everyone's fulfilment of their shared responsibility in a normative sense. Simply put: if that were the case, the climate problem would never be solved, because every time an injunction requiring the fulfilment of a shared responsibility is issued, the party concerned could keep pointing to others as an argument for its ineffectiveness. The requirement of an effective remedy actually prevents that problem by always requiring *everyone* to fulfil the shared responsibility.[1659] It must therefore be possible to enforce that fulfilment via a court of law.[1660]

VII.2.4 The existence of one potentially ineffective mode of compliance is irrelevant

1169 The foregoing leads to the conclusion that the Court of Appeal has erred in its Judgment. The question whether an interest exists does not involve a comparison between the situation with and without the issue of a reduction injunction. It is sufficient that the injunction *can* contribute to the interests defended by the party seeking the injunction. Moreover, the mere fact that there is a conceivable ineffective mode of compliance does not in itself already mean that there is no interest in the injunction being issued. After all, a legal CO_2 reduction obligation based on the duty of care to prevent or limit dangerous climate change implies that the compliance with that injunction can be effective in preventing or limiting dangerous climate change: if this were different, this

[1659] See, in the same vein, C.C. van Dam, "*Shell/Milieudefensie: een norm zonder verplichting en schendingen zonder remedie*" in *AV&S* 2025/13, para. 3.2.5. See also W. Th. Nuninga and G. Veldt, "*Normstelling voor deelverantwoordelijkheid in het ongeschreven recht*" (Setting standards for shared responsibilities in unwritten law) in C.G. Breedveld-De Voogd et al., "*Sluitertijd"* (Shutter speed), Wolters Kluwer 2020, pp. 109 up to and including121, who devote their entire article to shared responsibilities and conclude that, precisely in the case of such responsibilities, the defence that others will co-contribute to the damage due to the nature of the shared responsibilities cannot be accepted.

[1660] See ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change), paras. 430 and 431; IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights), para. 325; ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 442. See also the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 5.7.7 up to and including 5.7.9. See also the Court of Appeal of Brussels of 30 November 2023, 2021/AR/15gs, grounds 259 up to and including 261; BVerfG 24 March 2021, 1 *BvR* 2656/18 (*Neubauer*), grounds 119 up to and including 203; U.S. Supreme Court 2 April 2007, 549 U.S. 497 (2007) (*Massachusetts et al./EPA*), pp. 22 and 23.

legal obligation would not exist (or be able to exist). The fact that one potential mode of compliance with an injunction - out of all the various conceivable modes of compliance - would not be effective does not negate the interest in the award of such an injunction. If that mode of compliance were to be chosen, it would simply not be considered as compliance with the legal obligation incumbent upon Shell.

1170 Finally, the Court of Appeal has made a reasoning error. The fact that a particular injunction can or will be complied with by a party in an ineffective manner does not also mean that the party concerned *will* actually comply with it (always and completely) in that ineffective manner and, consequently, that the situation with or without the injunction is the same. It is equally conceivable that the party concerned will choose for a mode of compliance that is to the benefit of the plaintiff and the interests represented by them. If an effective mode of compliance is conceivable and can thus contribute to preventing the imminent infringement of interests, the interest requirement of Article 3:303 DCC is met. For these reasons, the grounds of appeal nos. 6.2 up to and including 6.4, which deal with this issue, must succeed.

VII.3 What third parties might do is irrelevant under Article 3:303 DCC

1171 The Court of Appeal's reasoning relies almost exclusively on the idea that the CO_2 reduction achieved by Shell will be negated by third parties who will take over Shell's activities. After all, the Court of Appeal argues in ground 7.106 that the reduction in Shell's (re)sales activities will result in this company disappearing from the value chain, after which the fossil fuels (that have already been produced) will reach the end consumer after all via another intermediary. Ground of appeal no. 6.5 points out that the Court of Appeal has overlooked the fact that it is not relevant, in determining whether a party has a sufficient interest within the meaning of Article 3:303 DCC, what others will (perhaps) do if the defendant complies with the injunction. This applies even more strongly in the case of shared responsibilities such as the duty of care to prevent or limit dangerous climate change.

1172 The starting-point is that a court will issue an injunction against the person with a legal duty to do or refrain from doing something.[1661] The issue of a mandatory or prohibitory injunction against someone other than the person with the legal duty is, in principle, not possible.[1662] In other words: a legal duty is individualised, and compliance with that duty presupposes - due to the above-mentioned starting-point of liability law - that such compliance can have effect. After all, the compliance with the legal duty will eliminate the risk or can in any event contribute to such elimination.

[1661] Judgments of the Dutch Supreme Court of 4 February 1983, *NJ* 1985, 21 (*Gemeente Hei- en Boeicop/Bogerd*) and 21 January 1983, *NJ* 1983, 252 (*Lucky Luyk*).
[1662] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 7.3.3.

1173 This means that what third parties (might) do plays no role in the context of the interest test under Article 3:303 DCC. All that is relevant is that there is a legal duty that threatens to be breached, and that the party seeking the injunction belongs to the group that is protected by that legal duty.[1663] A party cannot evade their liability for un unlawful act by pointing to acts and omissions of third parties.[1664] This also, and above all, ignores the essential nature of the legal duty: legal duties are presumed to be effective and exist in order to be complied with, regardless of whether others engage in the same conduct.[1665]

1174 Another reason why it is easy to understand why the potential conduct of third parties is irrelevant, is that it is speculative in nature. It is impossible to predict with certainty how third parties will behave if a defendant complies with a mandatory or prohibitive injunction. Moreover, a court is not in a position to determine this with sufficient precision, because those third parties are not parties to the legal proceedings. This speculative aspect also means that no meaning can be attached to the potential conduct of third parties. After all, the compliance with duties of care would be blocked in that case by speculations about the potential conduct of others.

1175 In its *Urgenda* judgment, the Dutch Supreme Court emphasised – specifically in the context of obligations to prevent or limit dangerous climate change - that the actions of third parties are irrelevant. The Supreme Court ruled that the legal obligation incumbent upon the Dutch State requires it to *contribute* to preventing dangerous climate change. This constitutes a shared responsibility. In that context, the defence that third parties will continue to cause the danger or will not fulfil their share of the responsibility cannot be accepted:

> "5.7.7. *Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in*

[1663] A.G. Castermans & W. Th. Nuninga, "*Urgenda als civielrechtelijk geschil*" (Urgenda as a civil-law dispute) in *MvV* 2020/12, p. 434.
[1664] K.J.O. Jansen, "*GS Onrechtmatige daad"*, Art. 6:162 DCC, note 7.3.5.1.
[1665] See A.G. Castermans & J.A. Lukkes, "*Drie arresten over gebod, causaliteit en klimaatschade*" in *AV&S* 2025/7, para. 3.3; T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November 2024, ECLI:NL:GHDHA:2024:2099 (*Milieudefensie et al./Shell*), *M en R* 2025/12, issue 1.

accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2."[1666]

1176 Procurator General Langemeijer and Advocate General Wissink concluded, along the same lines, that a minor share of responsibility in connection with the global climate problem does not exempt the Dutch State from its duty of care in this case:

> *"4.202* (…) *In our opinion, the Court of Appeal has thus rightly ruled that the individual responsibility of the Dutch State implies that the State may have a legal obligation to reduce the Dutch greenhouse gas emissions, even if those reductions alone cannot solve the global climate problem."*[1667]

1177 These considerations are consistent with the manner in which the Dutch Supreme Court approaches this issue in a purely horizontal situation. As explained in Section VII.2.3 of this Explanatory Submission, the *The Pirate* Bay judgment concerned the question of whether the website The Pirate Bay had to be blocked by internet service providers at the request of Stichting Brein, because illegal digital files were being offered for downloading on that website. The internet service providers had argued that the relief sought should be dismissed because such a block would be pointless. After all, there were many other active websites to which internet users would immediately turn. Therefore, only an injunction requiring that all relevant websites would be blocked could be awarded by a court, according to the internet providers.

1178 The Supreme Court, however, ruled that the fact that other websites would not be blocked did not preclude the existence of a sufficient interest in an injunction requiring the blocking of The Pirate Bay's website. With this finding, the Supreme Court approved a "step-by-step" approach:

> *"4.4.3 The Court of Appeal's finding (in ground 5.24) that relief such as the one sought in this lawsuit can only be awarded if (all) other (relevant) BitTorrent sites had also been sued also reflects an erroneous interpretation of the law. There is no support for such a requirement in the European or national legislation. Without further arguments, it is also unclear why Brein would not have an interest to be respected in law in starting to block* ***one*** *of those sites. The finding of the Court of Appeal that the "step-by-step approach" advocated by Brein in this context would result, if its claim were awarded, in a violation of the*

[1666] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
[1667] Opinion of Procurator General Langemeijer and Advocate General Wissink prior to the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:PHR:2019:887 (*Urgenda*).

proportionality requirement under Article 52(1) of the Charter, is therefore incorrect."[1668]

1179 It clearly follows from this judgment that potential substitution effects (*"if Shell reduces its emissions, others will fill the gap*") are not relevant when assessing Shell's own share of responsibility for reducing its CO_2 emissions.[1669] Within the framework of Article 3:303 DCC, the only (relative) question to be answered is whether, in relation to the persons whose interests are defended by Milieudefensie et al., a legal duty threatens to be breached by Shell and whether Shell's compliance with the injunction can lead to the fulfilment of that legal duty and, thereby, to the protection of those interests. The conduct of others is irrelevant in this regard. After all, those others are not being held accountable in court for fulfilling their obligations, which, incidentally, may be identical or similar in nature.[1670] Ground of appeal no. 6.5 must therefore also succeed.

VII.4 Issuing a reduction injunction against a company and against Shell is effective

1180 In ground 7.106, the Court of Appeal considers that the fact that any reduction in greenhouse gas emissions has a positive effect on combating climate change does not necessarily mean that a reduction obligation imposed on a specific company will also have such a positive effect. According to the Court of Appeal, this is certainly not the case if the reduction obligation can also be achieved by selling fewer fossil fuels. Grounds of appeal nos. 6.8 and 6.9 challenge this finding with arguments that are fairly obvious. They do not require any detailed explanation.

1181 Ground of appeal no. 6.8 points out that the compliance with a reduction injunction by an individual company *can*, of course, lead to a reduction in atmospheric CO_2 emissions and can thereby contribute to preventing or mitigating dangerous climate change, even (and especially) if this occurs as a result of a reduction in the sale of fossil fuels. That is almost self-evident. After all, climate change is ultimately determined to a relevant extent by the combined Scope 1, 2 and 3 emissions of all companies and other relevant actors taken together. That is actually also acknowledged by the Court of Appeal itself in grounds 3.3 up to and including 3.5 of the Judgment.

1182 On top of this, the Court of Appeal itself has identified a series of circumstances from which it follows that companies such as Shell contribute to climate change through their business operations and CO_2 emissions, and that it is within their power to contribute to preventing it. The finding of the Court of Appeal regarding ineffectiveness is at odds

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[1668] Judgment of the Dutch Supreme Court of 13 November 2015, ECLI:NL:HR:2015:3307 (*Stichting Brein/Ziggo et al.*).
[1669] See E.R. de Jong, "*Derden in algemeenbelangacties: vloek of zegen?*" (Third parties in public-interest actions: curse or blessing?), *NTBR* 2024/9, Issue 4, pp. 63 and 64.
[1670] See also the judgment of the Court of Appeal of The Hague of 12 February 2024, ECLI:NL:GHDHA:2024:191 (*Oxfam Novib et al./Staat*), ground 5.45. That case concerned a prohibition imposed on the State regarding the export of F-35 parts to Israel. The fact that other countries might continue exporting these parts, so that the parts would reach Israel in equal measure anyway, did not detract from the State's own legal obligation.

with these circumstances and is therefore incomprehensible. It concerns the following circumstances:

(a) In ground 7.27, the Court of Appeal itself established that companies such as Shell make a significant contribution to the climate problem and have it within their power to contribute to combating it. This is one of the reasons why the Court of Appeal concluded that companies such as Shell also have a duty of care to limit their CO_2 emissions. The starting-point of the Court of Appeal therefore is that an injunction requiring emission reductions by Shell actually is or could be effective. These considerations can therefore not be reconciled with each other in a comprehensible manner.

(b) In ground 7.53, the Court of Appeal found it relevant that governments have stressed that companies also have their own duty to reduce their emissions. They have this duty precisely because, by doing so, they actually contribute to preventing or mitigating dangerous climate change. For this reason, too, there is an incomprehensible contradiction in the Judgment of the Court of Appeal.

(c) In ground 7.57, the Court of Appeal proceeds on the assumption that companies other than Shell also have a duty of care to reduce CO_2 emission. This implies that the Court of Appeal has assumed that the compliance with that duty by other companies, certainly in combination with Shell's compliance, will have a beneficial effect on preventing or limiting dangerous climate change. Again, this leads to an inherent contradiction in the Judgment of the Court of Appeal.

(d) In ground 7.59, the Court of Appeal finds that the use of fossil fuels is imposed from the supply side of the market and that this can seriously slow down the energy transition. This underscores that the Court of Appeal also recognises that it is precisely on the supply side of the market - and so also with regard to the sale of fossil fuels - that measures must be taken to combat dangerous climate change. This presupposes that such measures can also be effective. This is incompatible with the Court of Appeal's finding on the point of effectiveness.

(e) In grounds 7.59 and 7.61, the Court of Appeal considers that the social responsibility of fossil-fuel producers requires them to take into account, when investing in fossil-fuel production, the negative consequences of a further expansion of the fossil-fuel supply for the energy transition, (partly) due to the infrastructural, institutional and behavioural carbon lock-in effect resulting from investments in the exploration, extraction, production, transport and distribution of fossil fuels. These considerations presuppose that these actions of fossil-fuel producers will also have an actual effect on atmospheric CO_2 emissions and thereby contribute to preventing or limiting dangerous climate change. The

finding of the Court of Appeal regarding ineffectiveness is inconsistent with these considerations.

1183 Ground of appeal no. 6.9 specifically challenges the finding of the Court of Appeal to the extent that it were to imply that a reduction in Shell's sales of fossil fuels could not lead to a reduction in atmospheric CO_2 emissions and thereby contribute to preventing or mitigating dangerous climate change. Even *if* Shell were to fulfil the reduction obligation by merely reducing its sales (and not also, in part, by reducing production or in any other manner), such a finding is inconsistent with various considerations of the Court of Appeal to the contrary:

(a) In ground 7.26, the Court of Appeal found that fossil-fuel consumption is largely responsible for creating the climate problem, that addressing climate change is something that cannot wait and that everyone has a responsibility to combat the danger posed by it.

(b) In ground 3.21, the Court of Appeal noted that Shell is one of the largest oil and gas companies in the world, with 91% of its energy sales consisting of oil and gas.

(c) In ground 7.55, the Court of Appeal ruled that *more* can be expected of Shell - in light of its obligation to contribute to preventing dangerous climate change - than of most other companies, because it has been a major player in the fossil-fuel market for over a hundred years and holds a prominent position in this market.

1184 These considerations are inconsistent with the conclusion that a restriction of sales by Shell would or could not lead to any reduction in atmospheric CO_2 emissions and thus could not contribute to preventing or mitigating dangerous climate change. Since the consumption of fossil fuels is largely responsible for this, 91% of Shell's sales consist of oil and gas and Shell is a major player with a prominent position in the fossil-fuel market, it is self-explanatory that a sales restriction will have an effect on atmospheric CO_2 emissions.

VII.5 The injunction can be effectively complied with and is, in principle, effective

1185 The issue of an injunction requiring a company - and, more specifically, Shell to reduce emissions will undoubtedly have an impact on atmospheric CO_2 emissions. In any case, such an injunction *can* have that effect. For the effectiveness of an emission reduction injunction, support can be found in a virtually endless number of points of reference. These points of reference can be found in, for instance, the UN climate regime and the soft-law sources developed in line with it. The Court of Appeal itself has also used a large part of them as its starting-point for determining Shell's duty of care to prevent or limit dangerous climate change. Furthermore, a reduction injunction will limit the carbon

lock-in effect. Milieudefensie et al. have also pointed out various potentially effective ways of complying with an emission reduction injunction and has also explained that it is unlikely that Shell would comply with such an injunction (in full) via the route of Shell Trading. Based on this, Milieudefensie et al. have explained in detail that and why a reduction injunction reduction can and will be effective. This is dealt with in grounds of appeal nos. 6.10 up to and including 6.17, which Milieudefensie et al. will further elaborate on below.

VII.5.1 The UN climate regime, soft law and the Court of Appeal start out from the effectiveness of non-state climate action

1186 First of all, it follows from the UN climate regime and the soft-law sources for business enterprises that non-state climate action is effective.[1671] The Decision under the Paris Agreement, for example, points out that action by non-state actors is of great importance for achieving the objectives of the Paris Agreement:

> *"The Conference of the Parties* (…)
>
> *118. Welcomes the efforts of non-Party stakeholders to scale up their climate actions, and encourages the registration of those actions in the Non-State Actor Zone for Climate action platform* (…)*;*
>
> *133. Welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities, and other subnational authorities;*
>
> *134. Invites the non-Party stakeholders referred to in paragraph 133 above to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate action platform referred to in paragraph 117 above."*[1672]

1187 Precisely to achieve the goal of preventing and mitigating dangerous climate change, the UN climate regime thus calls for action by non-state actors. According to the contracting parties, non-state action will not only have a direct effect on CO_2 emissions[1673], but will also lead to a synergy between state and non-state action. When states see that non-state actors are making commitments and undertaking ambitious climate action, this will also give states the confidence to develop more ambitious policies. This, in turn, will help companies to accelerate their own actions. Non-state

[1671] See, in this regard, Section II.2 of this Explanatory Submission for further details.
[1672] Exhibit MD-148 (IPCC AR4 SR). See also the Decision of the District Court, ground 2.4.7
[1673] For further details on this subject, see Section II.2.2 of this Explanatory Submission.

and state action thus create a flywheel effect.[1674] It follows from this that the UN climate regime and the contracting parties *do* actually start out from the effectiveness of action and expect action by non-state actors.

1188 In line with the above, the UNEP has emphasised that countries need non-state actors to scale up their climate action in accordance with the objectives of the Paris Agreement in order to achieve the climate goals. In that context, the UNEP has also noted that the potential for emission reductions to be achieved by non-state actors (the mitigation potential) is very large.[1675] In the words of the UNEP:

> *"Businesses, cities, regions, investors, civil society groups, and other non-state and subnational actors [NSAs] play an increasingly important role in raising ambition and accelerating implementation. The Paris Agreement institutionalized the engagement of NSAs in achieving long-term climate goals and created an ongoing process to catalyse climate commitments made by NSAs, including net-zero targets (Chan, Ellinger, and Widerberg 2018; Hale 2016; Hsu et al. 2018)."*[1676]

1189 According to the UNEP, the value of action by non-state actors lies not only in the emission reductions achieved by those non-state actors themselves, but also in the flywheel effect described above.[1677]

1190 Every soft-law source developed by international organisations also proceeds from the premise that voluntary action by companies will actually contribute to reducing atmospheric CO_2 emissions and, thereby, to preventing or mitigating dangerous climate change. In this context, Milieudefensie et al. will devote some attention to a number of important soft-law sources, which have already been discussed in greater detail in Section IV.5.4 of this Explanatory Submission.

1191 The OECD Guidelines leave no room for doubt regarding the expected effectiveness of non-state action. The chapter in these Guidelines on non-state action starts with the following passage:

> *"Enterprises play a key role in advancing sustainable economies and can contribute to delivering an effective and progressive response to global, regional and local environmental challenges, including the urgent threat of climate change. Within the framework of laws,*

[1674] For further details, see Sections II.2.3 and II.2.4 of this Explanatory Submission.
[1675] Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, paras. 74 up to and including 76 (including quotations); Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 141 up to and including 145 (including quotations).
[1676] Exhibit MD-368 (UNEP Emissions Gap Report 2021), p. 28.
[1677] Motion in Reply to Motion commenting on exhibits of Milieudefensie et al. dated 19 December 2023, paras. 74 up to and including 76 (including quotations); Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 18 October 2022, para. 495; Notes of the Oral Arguments (1) in the First Instance of Milieudefensie et al. dated 1 December 2020, paras. 144 and 145 (including quotations).

> *regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, enterprises should conduct their activities in a manner that takes due account of the need to protect the environment, and in turn workers, communities and society more broadly, avoids and addresses adverse environmental impacts and contributes to the wider goal of sustainable development. Enterprises can be involved in a range of adverse environmental impacts. These include, among others:*
>
> *a) climate change;* (…).*"*[1678]

1192 The OECD Guidelines themselves are, if possible, even clearer about the important role of business enterprises and the expected effects of their actions on preventing or mitigating dangerous climate change:

> OECD Guidelines
> *76.* (…) *Enterprises should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science, including as assessed by the Intergovernmental Panel on Climate Change (IPCC).*
>
> *77. This includes the introduction and implementation of science-based policies, strategies and transition plans on climate change mitigation and adaptation as well as adopting, implementing, monitoring and reporting on short, medium and long-term mitigation targets. These targets should be science-based, include absolute and also, where relevant, intensity-based GHG reduction targets and take into account scope 1, 2, and, to the extent possible based on best available information, scope 3 GHG emissions.* (…).[1679]

1193 It also follows from various other soft-law sources that it is widely accepted that what business enterprises do themselves in terms of Scope 1, 2 and 3 reductions will lead to real climate results. For example, the Race to Zero Initiative,[1680] the UN Expert Report,[1681] the Net Zero Guidelines[1682] and the 1.5°C Business Playbook[1683] all start out from the premise that all business enterprises must make every effort to reduce emissions in line with the 1.5°C target. The starting-point here is an absolute reduction

[1678] Exhibit MD-492 (OECD Guidelines 2023), p. 33 (Dutch translation). See also the judgment of the Court of Appeal, ground 7.22.
[1679] Exhibit MD-492 (OECD Guidelines 2023), paras. 76 and 77 (Dutch translation). The Court of Appeal apparently also had this passage in mind in ground 7.22.
[1680] Exhibit MD-491 (Race to Zero Progress Report 2022).
[1681] Exhibit MD-487 (UN Expert Report).
[1682] Exhibit MD-488 (ISO Net Zero Guidelines 2022).
[1683] Exhibit MD-490 (ERI 1.5°C Business Playbook 2023).

of 50% in Scopes 1, 2 and 3, and *more* if companies are able to do so.[1684] The Court of Appeal itself has also enumerated these initiatives in ground 7.23 under b. up to and including d. and points out that they require action from companies.

1194 The Net Zero Guidelines, for instance, stipulate the following:

> *"The organization should set targets consistent with a 50% reduction in global GHG emissions by 2030 (from a 2018 global baseline), achieving net zero by 2050 at the latest, and supporting global efforts to limit global warming to 1.5 °C above pre-industrial temperatures."*[1685]

1195 The Net Zero Guidelines also emphasise that business enterprises are required to:

> *"take full responsibility for reducing Scope 1, Scope 2 and Scope 3 emissions without shifting undue responsibility for GHG emissions to another organization."*[1686]

1196 Another good example is the UN Expert Report, which includes the following passage in which, as also evident from the findings of the Court of Appeal in ground 7.23 under e., the following is observed:

> *"While governments must take the lead in reducing emissions, action by non-state actors is critical to achieving global net zero.* (…)
>
> *All non-state actors must reduce emissions as fast as possible, aligning or exceeding national targets, roadmaps and timelines. Those that have the capacity to move faster than a 50% reduction by 2030 and net zero by 2050 should do so, while some developing country non-state actors may require more support on their path to net zero."*[1687]

1197 Moreover, as the Court of Appeal itself also notes in ground 7.99, the Net Zero Guidelines and the 1.5°C Business Playbook can help Shell influence its customers' choices. These tools therefore give Shell, also according to the Court of Appeal, the ability to also influence the demand side of the market. This implies that compliance with the recommendations will have an effect on the use of fossil fuels and thus on atmospheric CO_2 emissions.

1198 All of the above is further confirmed by the OPGCC, the PCOE and the Oxford Report.[1688] All these sources also proceed on the assumption that corporate action contributes to the prevention or mitigation of dangerous climate change. For this reason,

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[1684] See also the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 37, 38 and 40.
[1685] Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 8.2.1.
[1686] Exhibit MD-488 (ISO Net Zero Guidelines 2022), para. 9.1.2 under l).
[1687] Exhibit MD-487 (UN Expert Report), pp. 15 and 16.
[1688] See also the judgment of the Court of Appeal, grounds 7.23 under f., g. and h.

they call for corporate action. In this connection, the Oxford Report points out that companies, alongside governments, have their own responsibility. It further follows from the PCOE that multinational companies have a more stringent reduction obligation than other companies. In ground 7.23 under f. and h., the Court of Appeal itself again refers to these frameworks and their contents as discussed above. On top of this, the Court of Appeal considers these frameworks to be relevant in the context of Shell's duty of care to prevent or mitigate dangerous climate change, as evidenced by ground 7.55 of the Judgment.

1199 Finally, it is important that the CSDDD takes as its starting-point that companies must take action to limit their CO_2 emissions in order to prevent or mitigate dangerous climate change. This was already discussed in Sections IV.5.5, V.6.2 and V.6.9 of this Explanatory Submission. The CSDDD therefore presupposes that these emission reductions are actually effective.

1200 Partly in light of the frameworks and soft-law sources discussed above, the Court of Appeal subsequently concludes, and rightly so, in ground 7.99 that Shell *also* has influence on the demand side of the fossil market and, by extension, that Shell also has influence on its Scope 3 emissions in that way:

> *"7.99 Several of the instruments discussed above presuppose corporate responsibility for scope 3 emissions as well. Examples are the EU ETS2, the CSRD, the CSDDD and the OECD guidelines. Moreover, the reporting of scope 3 emissions takes place on the basis of the GHG Protocol, which is considered the standard worldwide (see above under 3.5). It is therefore too easy to say that Shell has no influence on scope 3 emissions, even though Shell's power in this regard may be somewhat limited. In this context, it is important to note that tools have been developed that can help Shell influence its customers' choices. Examples include ISO's Net Zero Guidelines and the 1.5 oC Business Playbook (see above under 7.23 under c). That Shell has some influence regarding the scope 3 emissions also follows from the fact that it has formulated scope 3 targets itself (see above under 3.33, 3.34 and 3.41)."*[1689]

1201 In light of the foregoing, grounds of appeal nos. 6.10 and 6.11 argue, in different ways, that the Court of Appeal's finding that the issue of an injunction requiring Shell to reduce its CO_2 emissions cannot contribute to limiting CO_2 emissions is incorrect, or at least insufficiently reasoned. First of all, the UN climate regime, the soft-law sources discussed above and the CSDDD all presuppose that corporate action *is* actually effective. They even consider such action to be crucial and, for that very reason,

[1689] Judgment of the Court of Appeal, ground 7.99.

encourage it. The Court of Appeal has therefore based Shell's duty of care to prevent or mitigate dangerous climate change in part on those sources and, moreover, the Court of Appeal itself assumes that Shell has influence on its Scope 3 emissions. This is simply incompatible with the finding that compliance with an emission reduction injunction is not or cannot be effective.

1202 Grounds of appeal nos. 6.12 and 6.13 further add to the foregoing that Milieudefensie et al. have extensively argued, based on the UN climate regime and the findings of the UNEP, why it follows from this that action by non-state actors is crucial for combating dangerous climate change. These submissions are enumerated in grounds of appeal nos. 6.12 under (i) up to and including (v). From those submissions, it also follows that and why action by companies can be effective. After all, those submissions underscore that it is widely recognised among the parties to the Paris Agreement, and also widely within the UN, that non-state action contributes to, and is even crucial for, preventing or limiting dangerous climate change. From this it follows that an injunction requiring a company to reduce its emissions will also have an effect, or at least can have effect. The Court of Appeal has wrongly failed to pay any attention to these arguments.

VII.5.2 A reduction injunction will lead to a smaller carbon lock-in effect

1203 Milieudefensie et al. have further argued that a reduction injunction is effective because it will limit the carbon lock-in effect. That effect, which is discussed in detail in Section II.3.3 of this Explanatory Submission, is as simple as it is disastrous. The Court of Appeal clearly explained the carbon lock-in effect in ground 7.59:

> *"7.59* (…) *A carbon lock-in effect could occur primarily in the infrastructure field. The exploration, and extraction, production, transportation and distribution of fossil fuels require significant initial investments. Once these investments are made, they cannot be reversed and can only be recovered with the realised infrastructure. Because of their scale, these investments have a long payback period. Parties that have invested in fossil infrastructure therefore have an incentive to keep using this infrastructure for as long as possible. Since the marginal cost of using the infrastructure is relatively low, fossil fuels can be offered at low prices. This makes it difficult for sustainable alternatives to compete with them. Furthermore, there are institutional and behavioural lock-in effects: institutions and users focus on the use of fossil fuels and are then difficult to dissuade from using them. The use of fossil fuels thus imposed from the supply side of the market can seriously slow down the energy transition."*[1690]

[1690] Judgment of the Court of Appeal, ground 7.59.

1204 In ground 7.61, the Court of Appeal understandably attached consequences to this looming carbon lock-in effect. In that ground of its judgment, the Court of Appeal first addressed the expected positive effects of limiting both the demand for and the supply of oil and gas on achieving the Paris Agreement climate goals. The Court of Appeal also acknowledged the need to prevent the carbon lock-in effect and expressed its opinion on what may be expected of Shell in that regard:

> *"7.61. To keep the climate goals of the Paris Agreement within reach, emissions will have to be drastically reduced by 2030. The court of appeal deems it plausible that this will require not only taking measures to reduce demand for fossil fuels, but also limiting the supply of fossil fuels. The social standard of care, interpreted on the basis of Articles 2 and 8 ECHR and soft law such as the UNGP and OECD guidelines, requires producers of fossil fuels to take their responsibility in this respect. It is reasonable to expect oil and gas companies to take into account the negative consequences of a further expansion of the supply of fossil fuels for the energy transition also when investing in the production of fossil fuels. Shell's planned investments in new oil and gas fields may be at odds with this. In these proceedings, however, the court of appeal does not have to answer the question of whether Shell's planned investments in new oil and gas fields are in violation of its social standard of care. At issue in these proceedings is whether an obligation can be imposed on Shell to reduce its scope 1, 2 and 3 emissions by 45%, 35% or 25%."*[1691]

1205 In short, the supply of and demand for fossil fuels must be limited in order to prevent or mitigate dangerous climate change. The carbon lock-in effect poses a threat to this, which Shell must counteract based on its duty of care to prevent or mitigate dangerous climate change.

1206 It logically follows from these findings that measures taken to counter the carbon lock-in effect are or can be effective. In this connection, Milieudefensie et al. have repeatedly pointed out that a reduction injunction *is* actually effective because it precisely counteracts this very dangerous carbon lock-in effect and (conversely) makes investments in sustainable alternatives more attractive. After all, a reduction injunction will make investments in the exploration and operation of new oil and gas fields unprofitable. As a result, the pressure to operate those fields in full – in view of the associated costs – will disappear and, in line with this, investing in sustainable alternatives will become more attractive. This, in turn, will result in a decrease in both the supply of and demand for fossil fuels and lead (conversely) to an increase in the supply of and demand for sustainable energy sources.[1692] That is precisely the effect

[1691] Judgment of the Court of Appeal, ground 7.61.
[1692] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 118; Statement of Defence on

described by the Court of Appeal in grounds 7.59 and 7.61. A reduction injunction will therefore certainly be effective, or at least has the potential of being effective.

1207 In light of the foregoing, ground of appeal no. 6.14 challenges the finding of the Court of Appeal that a reduction injunction cannot be effective. After all, it follows from the foregoing that such an injunction - due to its positive effect on the carbon lock-in effect – will or can actually be effective, and that such effectiveness is also consistent with the Court of Appeal's own findings in grounds 7.59 and 7.61. For that reason, too, it is impossible to see, without any further reasoning (which has not been provided), why the Court of Appeal reached the conclusion that a reduction injunction would not be effective.

VII.5.3 Milieudefensie et al. have identified various effective modes of compliance

1208 Furthermore, the finding that a reduction injunction would not be effective is contradicted by a whole range of modes of compliance presented by Milieudefensie et al. the effectiveness of which is either quite obvious, or was, in any event, wrongly not examined by the Court of Appeal, because it focused on the comprehensive compliance with a potential reduction injunction via Shell Trading. Grounds of appeal nos. 6.15 under (i) up to and including (iv) and 6.16 refer to those modes of compliance identified by Milieudefensie et al. and argue that the Court of Appeal wrongly failed to give them due consideration. These arguments are self-explanatory and require only limited elaboration.

1209 The most obvious mode of compliance pointed out by Milieudefensie et al. is outlined in ground of appeal no. 6.15 under (i). Shell can limit its own production and sale of fossil fuels. Shell has full control over its own production and sales, so that this mode of compliance can be realised by Shell.[1693] Moreover, this mode of compliance will require no further efforts, as Shell can, in fact, largely achieve that goal by operating its current oil and gas fields until they are depleted. At the same time, it could cease exploring for and operating new oil and gas fields.[1694] This approach fits within the 1.5°C scenario and leads to production restrictions and, consequently, to an actual reduction in atmospheric CO_2 emissions.[1695]

1210 The Court of Appeal itself has also acknowledged the effectiveness of this mode of compliance. First, in ground 7.106, the Court of Appeal takes as its starting point that

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Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under 138).

[1693] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 122; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 243 up to and including 248 and 628; Summons of Milieudefensie et al. dated 5 April 2019, para. 612.

[1694] Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 19 and 20; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 595.

[1695] Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 19 and 20; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 595.

there is (possibly) a relationship between production restrictions and CO_2 emission reductions, as the District Court also established in ground 4.4.50 of the Decision. The mode of compliance described above is a form of production restriction. Second, with this mode of compliance, Shell would be complying with its obligation (which was established by the Court of Appeal itself in grounds 7.59 and 7.61, and is therefore, logically, also effective, according to the Court of Appeal,) to consider the negative consequences of a further expansion of the fossil-fuel supply for the energy transition in order to prevent the dangerous carbon lock-in effect.

1211 Milieudefensie et al. have, second, pointed to an effective mode of compliance that can be considered as a variant of the first mode of compliance as discussed above in ground of appeal no. 6.15 under (ii). In line with its duty of care as established by the Court of Appeal in grounds 7.59 and 7.61, Shell can phase out its investments in new oil and gas fields and (conversely) invest that capital in sustainable alternatives. The world's dependence on fossil fuels and the need to recoup the investments made in oil and gas fields would thereby decrease, while Shell would become an investor and supplier of sustainable alternatives. Due to the increased attractiveness of sustainable alternatives resulting from a decreasing supply of fossil fuels, other (fossil-fuel) companies and investors will also invest in those alternatives.[1696] With such a phase-out, Shell would act precisely in line with the requirements necessary to counter the carbon lock-in effect and would comply with the reduction injunction in a very effective manner.[1697] After all, as said, that carbon lock-in effect is the greatest obstacle to the energy transition and poses a major risk of exceeding the 1.5°C target.[1698]

1212 Grounds of appeal nos. 6.15 under (iii) and (iv) further refer to modes of compliance that build upon a mode of compliance whereby Shell will focus more on sustainable alternatives. The sale of fossil-fuel *assets* to comply with the reduction injunction will generate proceeds that Shell can invest in the growth of its renewable energy division. Global emissions will consequently decrease as Shell expands the supply of renewable energy and the price of that energy will fall accordingly.[1699] In addition, Shell could, for example, convert gas stations into charging stations, which could have positive climate effects.[1700]

[1696] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 118; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under 130); Notes of the Oral Arguments (9) in the First Instance of Milieudefensie et al. dated 17 December 2020, paras. 3 up to and including 5.

[1697] Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 118; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 35 under 138).

[1698] Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 51; Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 12; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 634 and 660; Summons of Milieudefensie et al. dated 5 April 2019, paras. 788 up to and including 791.

[1699] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 49.

[1700] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 47 and 48.

VII.5.4 The compliance with the reduction injunction via Shell Trading is highly unlikely

1213 In grounds 7.102 up to and including 7.108, the Court of Appeal found - in summary - that Shell could comply with a reduction injunction in an ineffective manner by phasing out its (re)sales activities via Shell Trading. However, this does not yet mean that Shell would actually choose to comply with such a reduction injunction (in full) by taking that road, rather than (also) choosing for one of the effective modes of compliance described above. However, the finding that Shell will actually choose this allegedly ineffective mode of compliance *is* necessary in the Court of Appeal's approach in ground 7.102, because it also requires there that the situation with and without the award of the reduction injunction may not be different. That would only be the case if Shell actually chooses to comply with the reduction injunction in an ineffective manner.

1214 In this regard, too, there is a significant omission in the Court of Appeal's reasoning. Milieudefensie et al. have pointed out that it is unlikely that Shell would (fully) comply with a reduction injunction via Shell Trading, as Shell's trading division is one of the most profitable parts of the entire Shell group.[1701] In the run-up to the announcement of the second-quarter 2025 profit figures, the Dutch newspaper *Financieel Dagblad* confirmed this through Shell's CEO in an article dated 7 July 2025:

> *"Shell's internal trading activities are often among its biggest profit generators. CEO Wael Sawan said in March that his traders have not lost money in a single quarter over the past ten years."*[1702]

1215 In Section VII.8 of this Explanatory Submission, Milieudefensie et al. will discuss Shell Trading in more detail. It will become clear there that Shell Trading is a large company that possesses, for example, a very large infrastructure of its own, its own fleet and its own storage capacity for fossil fuels. It is relevant to note here that the Court of Appeal merely notes *the possibility* that Shell might dismantle its most profitable division to comply with the reduction injunction. However, the Court of Appeal has failed to examine whether such a mode of compliance is actually foreseeable, partly in light of the argument raised by Milieudefensie et al. that Shell Trading is highly profitable.

1216 In reality, it is of course far more likely that Shell would opt for a mode of compliance that is more favourable to Shell in several respects. As already previously discussed, Shell could choose, with a view to this, to reduce its production and its investments in new oil and gas fields, in line with the obligations established by the Court of Appeal itself in grounds 7.59 and 7.61. Moreover, such a choice is more likely because Shell,

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[1701] Court record of the oral hearing on Appeal dated 2, 3, 4 and 12 April 2024, p. 35, last paragraph, and p. 36, first 9 lines: *"Compliance with the reduction injunction via the production or trading division only does not seem to be logical.* (…) *Complying with the injunction via the trading division only would mean that almost nothing will remain of the trading division, while this is actually a highly profitable part of the company*."

[1702] "*Shell meldt tegenvallers bij handelsactiviteiten*" (Shell reports setbacks in trading activities) in *Financieel Dagblad*, 7 July 2025, available at https://fd.nl/bedrijfsleven/1561247/shell-meldt-tegenvallers-bijhandelsactiviteiten.

when selecting a mode of compliance, will also consider other important factors, such as its license to operate vis-à-vis employees, shareholders, politicians and the general public.[1703] It is to be expected that, in that light, too, Shell will prefer to maintain its profitable trading activities with Shell Trading as much as possible and will therefore opt to halt investments in new oil and gas fields and move towards sustainable alternatives.

1217 Ground of appeal no. 6.17 points out that the Court of Appeal has failed to examine in any way whether Shell will actually comply with the reduction injunction via Shell Trading and that, as a result, the Court of Appeal also wrongly failed to pay any attention to the submissions of Milieudefensie et al. on this point. Without such an examination, it is unclear why the Court of Appeal concluded that a reduction injunction would not be effective nevertheless.

VII.6 The Court of Appeal is not bound by the decision of the District Court when assessing the effectiveness of the injunction

1218 In ground 7.101, the Court of Appeal proceeded on the assumption that Shell is allowed to fulfil its duty of care to prevent or limit dangerous climate change in any manner of its choosing. The Court of Appeal based this assumption on the fact that Milieudefensie et al. did not challenge the District Court's finding that Shell has the freedom to determine how it will comply with the duty of care established by the District Court. The Court of Appeal then concluded that, because of that freedom, it is possible that Shell will opt for an ineffective mode of compliance. According to the reasoning of the Court of Appeal, this precludes a "sufficient interest" within the meaning of Article 3:303 DCC on the part of Milieudefensie et al. That conclusion is incorrect, or at least it is insufficiently reasoned.

1219 Section VII.2 of this Explanatory Submission set forth that the duty of care – whose fulfilment the reduction injunction seeks to ensure - *also* determines in what manner that reduction injunction must be complied with. After all, the legal obligation resulting from the duty of care and the associated injunction are part of the same continuum. It also became clear that liability law requires a defendant to choose a mode of compliance that can be expected to provide the protection against the risk that the obligation concerned seeks to protect. The question of what an injunction requiring compliance with a legal duty requires a defendant to do must therefore always be answered on the basis of the established duty of care from which the legal obligation arises.

1220 This means that to answer the question of whether Milieudefensie et al. have a sufficient interest within the meaning of Article 3:303 DCC in Shell's compliance with the reduction injunction sought, the duty of care to prevent or limit dangerous climate change as

[1703] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 11.

established *by the Court of Appeal* and the resulting legal obligation resulting play a central role. After all, the question to be answered is *what* legal obligation that duty of care gives rise to. To that end, the Court of Appeal should therefore have done the following: (i) examine the extent of the CO_2 reduction required by the duty of care established by the Court of Appeal and (ii) issue an injunction in line with that legal obligation. Following from this, the question that follows from Article 3:303 DCC must be answered, i.e. whether that reduction injunction can be complied with in a manner that can contribute to the protection of the interests that the duty of care established by the Court of Appeal seeks to protect and that Milieudefensie et al. is defending. This therefore requires an interpretation of the duty of care established *by the Court of Appeal*.

1221 The question of what the injunction requiring compliance with the duty of care established *by the Court of Appeal* requires Shell to do and whether that injunction is effective is therefore entirely unrelated to the duty of care previously established *by the District Court*. After all, that is not the duty of care from which the Court of Appeal must derive a legal obligation and on the basis of which a corresponding injunction must be issued by it. By extension, the District Court's considerations regarding how an injunction issued by it can be complied with to fulfil the duty of care established by it are not relevant to the question of how the duty of care established by the Court of Appeal must be complied with. As a result, it is also not relevant that Milieudefensie et al. did not challenge the District Court's findings regarding Shell's freedom to choose a mode of compliance with the injunction issued by the District Court. After all, that injunction and the permitted modes of compliance with the injunction do not occupy centre stage in the appeal proceedings.

1222 A simple example based on the *Bussluis* judgment[1704] will make the relevance of the distinction between the duty of care established in the first-instance proceedings and the duty of care established in the appeal proceedings more comprehensible and more concrete. The *Bussluis* case concerned the situation where a municipality had constructed a bus gate, which is a slot in the road surface with the width of a city bus axle that prevents passenger cars from passing through the gate. The case centred on the question of whether this bus gate posed a danger to motorists due to the risk of driving into the slot. Let us suppose that the District Court had found that the bus gate constituted a danger and had ordered the municipality to take measures of its own choosing that would eliminate the danger. The municipality took an appeal to the judgment, arguing that there was no danger. Suppose the Court of Appeal had then also ruled that there was a danger because no barriers had been installed. The associated legal obligation thus requires the municipality to install barriers to prevent the danger. The key issue in the appeal would then centre on the question whether a

[1704] Judgment of the Dutch Supreme Court of 20 March 1992, *NJ* 1993, 547 (*Bussluis*).

claimant has a sufficient interest in an injunction requiring the municipality to comply with the installation of barriers. For the answer to the question, it is irrelevant that the District Court previously ruled that the municipality was allowed to prevent that danger in multiple ways and issued a broader injunction with a view to this. So in the context of the interest requirement, only the duty of care established by the Court of Appeal and the injunction attached to it occupy centre stage.

1223 In light of the foregoing, grounds of appeal nos. 6.19 up to and including 6.21 point out (in brief) that the Court of Appeal wrongly assumed - in determining what the duty of care to prevent or mitigate dangerous climate change established by the Court of Appeal gives rise to – that the duty of care established by the District Court and the freedom allowed to Shell by the District Court in terms of how Shell would comply with it are relevant. That is incorrect. The findings of the District Court regarding the duty of care and the legal obligation attached to it are separate from the duty of care established by the Court of Appeal and the legal obligation attached to it. The fact that Milieudefensie et al. did not challenge the findings of the District Court therefore means, at most, that it is established on appeal that Shell has the freedom to determine itself how it can give effect to the duty of care established by the District Court. However, this says nothing about the legal obligations following from the duty of care established by the Court of Appeal.

VII.7 The duties of care established by the District Court and the Court of Appeal require an actual reduction in atmospheric CO_2 emissions

1224 Furthermore, the line of reasoning of the Court of Appeal overlooks the fact that both the duty of care established by the District Court and the duty of care established by the Court of Appeal require Shell to take reduction measures that *actually* contribute or can contribute to the reduction of *atmospheric* CO_2 emissions. The duties of care established by the District Court and the Court of Appeal do not permit Shell to take measures that cannot lead to such a reduction. Since the Court of Appeal must start out from the duty of care established by itself in the assessment of whether there is a sufficient interest on the part of Milieudefensie et al., it follows from this alone that Shell cannot comply with the injunction in the ineffective manner envisaged by the Court of Appeal. See grounds of appeal nos. 6.22 and 6.23.

1225 Incidentally, the fact that Shell is not allowed to opt for a mode of compliance that is ineffective at the outset also applies if - as the Court of Appeal has also done - the duty of care established by the District Court and the freedom allowed for the mode of compliance are taken as the starting-point. After all, *that* duty of care also requires measures that can actually lead to a reduction in atmospheric CO_2 emissions. The Court of Appeal's interpretation to the contrary is incorrect or, at the very least, insufficiently reasoned. This is addressed in grounds of appeal nos. 6.24 up to and

including 6.33. The arguments presented there are largely self-explanatory. Milieudefensie et al. will briefly elaborate on the arguments below.

VII.7.1 Interpretation of court judgments

1226 The arguments largely revolve around the interpretation of the judgments of the District Court and the Court of Appeal. What exactly do the duties of care established by the District Court and the Court of Appeal, and the reduction injunction issued by the District Court, entail? The Dutch Supreme Court has answered the question how such an interpretation should be carried out. According to established case law of the Dutch Supreme Court, the operative part of a judgment must be interpreted with due regard for the reasoning that has led to the operative part of the judgment.[1705] In that interpretation, the purpose and scope of the operative part must serve as guidance.[1706]

1227 The judgments of the Supreme Court focus on the interpretation of the operative part of the judgment. That is understandable, as issues of interpretation often arise in compliance disputes. Yet, the standard for the interpretation of judgments has a broader scope. If considerations in a judgment must be interpreted, the other considerations on which the court partly based those considerations will also be relevant. After all, considerations can build on each other, which requires that they must be understood in context with each other. From a normative perspective, it makes no difference of course whether it is the operative part of a judgment or other considerations in a judgment that must be interpreted. After all, in both cases, it is a court judgment that must be interpreted. The standard discussed above and (in particular) the purpose and scope of the considerations therefore also determine how the considerations of the District Court and the Court of Appeal that led to the operative part should be interpreted.

1228 Another thing that can be relevant when a court's considerations are interpreted is the party debate hidden behind those considerations. After all, the court's considerations are often its response to the party debate. This means that the party debate can shed light on what the court intended.

1229 In Section VII.2 of this Explanatory Submission, it was already discussed at length, for that matter, that a duty of care always requires that measures are taken that can actually prevent or mitigate the danger against which the duty of care seeks to offer protection. This is all the more true if the duty of care also follows from Article 2 and/or 8 ECHR, since these provisions require *effective* – and not illusory - legal protection against the dangers against which the provisions seek to offer protection.[1707] After all, it is

[1705] See, for example, the judgments of the Dutch Supreme Court of 12 April 2024, ECLI:NL:HR:2024:588 (*Vesteda*), 10 June 2022, ECLI:NL:HR:2022:854, 4 March 2016, ECLI:NL:HR:2016:369 (*Volvo*), 27 June 2014, ECLI:NL:HR:2014:1532 and 23 January 1998, *NJ* 2000, 544 (*Kruidvat/Lancôme*).
[1706] See, for example, the judgments of the Dutch Supreme Court of 23 February 2007, *NJ* 2007, 433 and 20 May 1994, *NJ* 1994, 652.
[1707] See also, in this regard, Section VI.3.5 of this Explanatory Submission.

inconceivable that a duty of care could exist that *does* seek to offer protection against a specific danger, but does not give rise to an obligation to take measures that could lead to such protection. The duty of care would then fail to meet a basic requirement of liability law: providing protection against the dangers that the liable party must take action against. A duty of care that permits an ineffective mode of compliance is, in other words, a *contradiction in terms*.

VII.7.2 The duty of care established by the Court of Appeal is aimed at an *actual* CO_2 reduction

1230 Against the backdrop of the foregoing, it is first of all clear that the duty of care established by the Court of Appeal must be understood to mean that only measures that can effectively contribute to the reduction of atmospheric CO_2 emissions may be taken.

1231 Ground of appeal no. 6.22 identifies all the relevant considerations in the Judgment that point to the above-mentioned interpretation. Firstly, the Court of Appeal itself has repeatedly referred to an obligation to limit CO_2 emissions *in order* to prevent dangerous climate change and to *decrease* and *reduce* CO_2 emissions. In that light, the duty of care clearly already requires measures that can actually contribute to that. If this were different, there would be no measures capable of achieving that effect. The scope of the duty of care also follows from the fact that the Court of Appeal has found that Shell must make *an appropriate contribution* to the climate objectives of the Paris Agreement. Such a contribution cannot, of course, be made by taking measures that are not expected to be effective. Finally, the Court of Appeal partly based the duty of care on Articles 2 and 8 ECHR, which require *effective* legal protection. From this it also follows that the duty of care requires measures that can be expected to be effective and, in any case, does not permit measures that are already ineffective at the outset.

1232 To the above, ground of appeal no. 6.23 adds the legal objection that the duty of care to prevent or limit dangerous climate change necessitates measures that can actually contribute to reducing atmospheric CO_2 emissions. The fact this duty of care imposes such an obligation is, in light of the foregoing, virtually self-evident. After all, the duty of care aims to provide protection against dangerous climate change, requires a contribution to the Paris Agreement goals and is partly based on Articles 2 and 8 ECHR, which seek to provide effective legal protection. This means that measures must be taken that can actually contribute to the reduction of CO_2 emissions into the atmosphere.

VII.7.3 The duty of care established by the District Court is aimed at an *actual* CO_2 reduction

1233 Just like the judgment of the Court of Appeal, the Decision of the District Court “breaths” that Shell must take measures that can actually contribute to the reduction of atmospheric CO_2 emissions. This means that the freedom allowed to Shell by the District Court does not extend so far as to allow Shell to select modes of compliance

that cannot be expected to be effective. The interpretation by the Court of Appeal makes a caricature of the carefully reasoned considerations of the District Court and of the balance the District Court tried to strike between, on the one hand, Shell's duty of care and, on the other hand, its freedom of enterprise. This is what grounds of appeal nos. 6.24 up to and including 6.33 address. Given their elaboration in the Notice of Appeal in Cassation, these grounds of appeal do not require a detailed explanation.

1234 From what grounds of appeal nos. 6.25 up to and including 6.27 demonstrate, it can be inferred that it was the intention of the District Court that Shell would take measures that can actually contribute to preventing or mitigating dangerous climate change. That interpretation is self-evident. After all, the District Court referred to a need to limit the concentration of greenhouse gases as well as to Shell's obligation to eliminate or prevent the serious risks of CO_2 emissions. Furthermore, the District Court pointed to Shell's obligation to prevent or limit the negative consequences of those CO_2 emissions and to contribute to reducing CO_2 emissions. The District Court also ruled that Shell may be required to make sacrifices to combat dangerous climate change, and that companies have a responsibility of their own to meet the reduction targets. In addition, the District Court also partly based the duty of care on Articles 2 and 8 ECHR. Those provisions require effective protection against dangerous climate change. From this it already follows that the duty of care established by the District Court also requires Shell to take measures that can actually contribute to reducing atmospheric CO_2 emissions.

1235 The reasoning of the District Court culminates in an injunction requiring Shell to reduce its combined annual level of all CO_2 emissions *into the atmosphere* associated with the business activities of and energy products sold by the Shell Group (Scopes 1, 2 and 3) by 45% in 2023 relative to the 2019 level. The operative part of the judgment itself thus already makes it clear that the reduction must concern emissions into the atmosphere. Due to the explicit reference *to "into the atmosphere*" and also in view of the underlying considerations discussed above, this injunction unquestionably requires Shell to take measures that can actually contribute to the reduction of CO_2 emissions into the atmosphere. This sets the outer limit of the freedom that Shell has in this regard. With its finding that the reduction injunction also permits modes of compliance that are ineffective at the outset, the Court of Appeal has, in this light, interpretated the operative part of the Decision of the District Court and the underlying considerations in an incomprehensible way.

1236 Ground of appeal no. 6.28 further clarifies the background to the District Court's consideration regarding the freedom afforded to Shell. Referring to the *Urgenda* judgment, Shell had argued that the Supreme Court had left the Dutch State the freedom in that judgment to determine how the State would achieve the emission reduction required by the injunction. According to Shell, that freedom is not available to Shell, as it is a private company.[1708] Milieudefensie et al. countered that Shell does

[1708] Notes of the Oral Arguments in the First Instance of Shell dated 1 December 2020, para. 19; Statement of Defence

actually have the freedom to choose how it will fulfil its duty of care. For example, Shell has the freedom to determine where in the world and via which business units it will achieve CO_2 reductions.[1709] To that extent, Shell therefore *does* have freedom of choice. The District Court responded to this by finding that Shell has the freedom to choose how it will fulfil its duty of care. To that end, it may shape the corporate policy of the Shell Group entirely as it sees fit. After all, the obligation to reduce its CO_2 emissions is global in scope and concerns the policies of the entire Shell Group. The District Court thus struck a nuanced balance between Shell's freedom of enterprise and the fulfilment of its duty of care. Consequently, the District Court could not possibly have intended to mean that Shell can also choose an ineffective mode of compliance.

VII.7.4 The interpretation of the District Court's considerations is insufficiently reasoned

1237 Furthermore, the question concerning the interpretation of the District Court's consideration that Shell has the freedom to choose how it will comply with the issued injunction was the subject of the party debate on appeal, in view of the Druce Report. That Report suggests that Shell can comply with the District Court's reduction injunction in an ineffective manner by selling its oil and gas *assets*. With this, Shell tried to argue that the freedom granted to it by the District Court could result in no reduction of the CO_2 emissions into the atmosphere at all.

1238 In the context of that argument based on the Druce Report, Milieudefensie et al. have provided a detailed and reasoned explanation that and why the District Court's consideration in question and the freedom granted to Shell by the District Court do not, of course, imply that modes of compliance that are not capable of contributing to the reduction of CO_2 emissions into the atmosphere are also permitted. Ground of appeal no. 6.29 under (i) up to and including (vii) summarises these arguments, which primarily concern points already discussed above in the context of the interpretation of the operative part and the relevant considerations of the District Court. It follows from all the considerations relevant in this regard that Shell, admittedly, does have freedom in choosing the mode of compliance it will use, but *must* take measures that can actually contribute to preventing or limiting dangerous climate change and thus can lead to an actual reduction in CO_2 emissions into the atmosphere. Conversely, Shell is not allowed to take measures that cannot be effective.

1239 In light of these detailed arguments, the Court of Appeal could not take as its starting-point, without any further reasoning, that the District Court's consideration concerned means that any mode of compliance - no matter how ineffective it is - is permitted, and then conclude that this consideration should be started out from on appeal. The Court

of Shell dated 13 November 2019, paras. 408 up to and including 413.

[1709] Notes of the Oral Arguments (6) in the First Instance of Milieudefensie et al. dated 15 December 2020, paras. 110 up to and including 112; Notes of the Oral Arguments in the First Instance (3) of Milieudefensie et al. dated 3 December 2020, para. 100.

of Appeal has not devoted a single word to the question of how the District Court intended that freedom to be used and what the parties would in that case be bound to within that context in the appeal proceedings. In light of the detailed arguments of Milieudefensie et al. on this point, the Court of Appeal *was* required to follow that interpretation route. This is pointed out in ground of appeal no. 6.30.

1240 Grounds of appeal nos. 6.31 and 6.32 shed further light on the finding of the Court of Appeal from the perspective of the Dutch Supreme Court's criterion that an injunction must always be complied with and interpreted in light of the purpose and scope of the operative part of the judgment, meaning that the operative part must also be interpreted in that light. That criterion also leads to the conclusion that it was the intention of the District Court that Shell should take measures, within the freedom allowed to it, that can actually contribute to the reduction of CO_2 emissions into the atmosphere. After all, the purpose and scope of the operative part imply that Shell must take measures that result in a reduction of CO_2 emissions into the atmosphere by 2030. This follows not only from the operative part itself (which explicitly talks of *"into the atmosphere*"), but also from the considerations also already mentioned above that led to the operative part. According to the purpose and scope of the operative part, emissions must *actually* be reduced. The argument that Shell is allowed to comply with the injunction in a manner that is ineffective at the outset is incompatible with this.

1241 Finally, it is pointed out in ground of appeal no. 6.33 that the clarification of the operative part in line with the interpretation discussed above that Milieudefensie et al. have requested would not result in an adverse change in the operative part. After all, what is requested is not a *change in* the operative part to the detriment of Shell, but an *interpretation* of the operative part in light of the considerations relevant to it and of its purpose and scope. Thus to the extent that the Court of Appeal found in grounds 5.3 or 7.5 that the requested clarification *would* actually result in an adverse change in the operative part, that finding can therefore not be upheld with the success of the objections discussed above.

VII.8 Restriction of sales and the effectiveness of the reduction obligation

1242 In grounds 7.97 up to and including 7.110, the Court of Appeal sets out the reasons - building on the erroneous notion discussed in the preceding Sections that the duty of care to prevent or limit dangerous climate change permits an ineffective mode of compliance - why the issue of a reduction injunction against Shell would be ineffective. That reasoning breaks down into the following arguments:

(a) Shell could comply with the reduction injunction by (partially) ceasing its trade in fossil fuels from third parties via Shell Trading instead of implementing a production restriction (the effectiveness of which is acknowledged by the Court

of Appeal in grounds 7.106 and 7.107). This would amount to a restriction of the (re)sale activities of oil and gas via Shell Trading. Other parties could take over the sale of oil and gas, and Shell Trading could offer its services to those substitute sellers. Therefore, it is not necessary for those substitute sellers to have the logistical and financial capabilities of Shell Trading.

(b) In their expert report, Erickson et al. do not explain how a restriction on the sale of fossil fuels by a specific company could lead to price increases for end-users, which in turn could lead to a decrease in demand for fossil fuels.

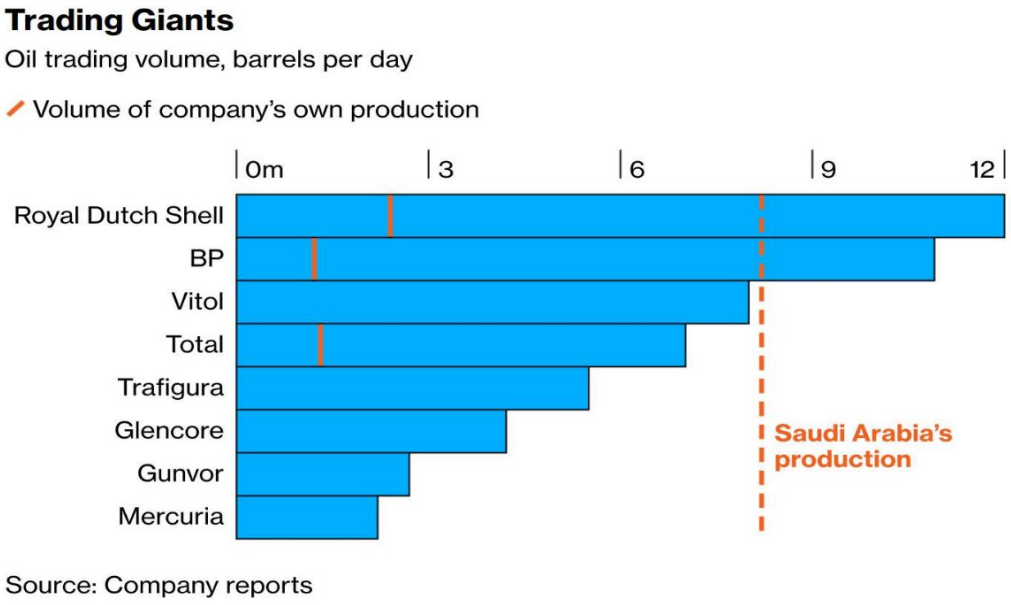
1243 These considerations are based on a lack of understanding of (i) the role and position of Shell Trading in the global procurement and sale of oil and gas and (ii) the contents of the report by Erickson et al.[1710] Furthermore, the considerations of the Court of Appeal do not constitute an adequate response to the arguments put forward by Milieudefensie et al. on this point. They have set out in detail that complying with the reduction injunction by curtailing Shell Trading's activities will, in fact, be highly effective. Moreover, that is something that Erickson et al. *have* explicitly pointed out. Milieudefensie et al. will further explain this below.

VII.8.1 The role of Shell Trading

1244 In the proceedings before the fact-finding courts, Milieudefensie et al. have explained the crucial role played by Shell Trading - a group of legal entities established across the world[1711] - in the oil and gas market as well as what the effect would be for the production and sale of oil and gas and (consequently) for atmospheric CO_2 emissions if Shell Trading were to scale back its activities. That pivotal role essentially breaks down into two parts: (i) Within the Shell Group, Shell Trading handles the procurement, storage, transportation, distribution and sale of oil and gas produced by the Shell Group itself and by third parties, including oil and gas from hundreds of larger and smaller independent oil and gas producers, and (ii) Shell Trading also acts as a financier for some of these oil and gas producers or assists them in obtaining financing. The compliance with the reduction injunction via Shell Trading would entail a downsizing of Shell Trading and thus a curtailment of its crucial role within the oil and gas market. This would affect the production and use of oil and gas for numerous reasons. To understand this, a slightly deeper insight into the role of Shell Trading is required.

[1710] Exhibit MD-561 (Expert Letter from Erickson et al. date 24 February 2024).
[1711] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 18.

1245 Shell Trading is the most important global player in the market for oil and gas procurement and sales.[1712] The figure published by Bloomberg shown below illustrates the top position of Shell Trading in the market:[1713]



1246 This figure shows not only that Shell Trading is the largest player in the oil trading market, but also that the largest part of Shell's trading volume consists of third-party products. The orange vertical bar indicates that of the approximately 12 million barrels of oil traded by Shell daily, only about 2.6 million barrels originate from its own production.

1247 To be able to play this role, Shell Trading is one of the few players in the market to have its own distribution network, which consists (among other things) of its own fleet of oil tankers, LNG carriers (the world's largest fleet) and other types of vessels. Furthermore, it operates its own refineries and storage terminals across the globe to process and store large quantities of oil and gas in anticipation of future delivery opportunities. As a result, Shell Trading has its own distribution network that it uses not only for its own production, but actually also, and primarily, for the procurement and (re)sale of oil and gas from other producers.[1714] In this way, Shell trading serves hundreds of independent oil and gas producers who do not have their own infrastructures, distribution systems

[1712] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 23 and 24.
[1713] Exhibit MD-563D (Bloomberg article, 30 March 2021), p. 7. See also the Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 23.
[1714] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 20; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 934.

and/or trading networks to sell the oil and gas produced by them to end consumers. So for those oil and gas producers, the (re)sale via Shell Trading is a necessary intermediate step to sell their products.[1715] Shell Trading thus forms a linchpin in the flow of oil and gas that takes place throughout the entire value chain.[1716] In this context, Shell itself has also pointed out that, as the world's largest trader, it can offer economies of scale to the customers of Shell Trading.[1717]

1248 Shell Trading also has an important financing function for the hundreds of independent oil and gas companies served by it. It finances these companies and assists them in obtaining financing.[1718] With this financing function, Shell Trading ensures that independent oil and gas companies can continue to extract and produce oil and gas, and thus continue to make use of Shell Trading's (re)sale services. Erickson et al. have pointed out in this regard that Shell makes no secret of this either. Shell acknowledges that it promotes the production of other oil and gas companies by offering finance to them and by guaranteeing the offtake and procurement of the oil and gas produced by them.[1719] By doing so, Shell is, essentially, outsourcing part of its oil and gas production. From Shell's perspective, this is understandable: the independent oil and gas producers constitute an important source of marketable oil and gas for Shell and thus an important element in the "raison d'être" of Shell Trading. After all, Shell Trading trades more fossil fuels produced by third parties than fuels produced by Shell itself.

1249 Finally, Shell Trading also plays a role in protecting its own risks and those of its customers through derivatives trading, because these derivatives cover the risks of price fluctuations in the market. In this way, Shell Trading therefore acts as a risk manager, both for itself and for the independent oil and gas companies served by it.[1720]

1250 Recently, Shell succinctly summarised the important role of Shell Trading within the oil and gas industry, which cannot easily be replaced, during its presentation at the Capital Markets Day 2025:

> *"We don't often speak about our Trading and Supply capabilities. But our scale and our global footprint are unparalleled across the industry. We have been developing these capabilities and positions for decades,*

[1715] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 22.
[1716] Response to the questions of the Court of Appeal of Milieudefensie et al. 12 dated April 2024, p. 32; Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 19 up to and including 23.
[1717] Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 31 and 32; Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 24.
[1718] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 25 up to and including 27; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 934.
[1719] Exhibit MD-469 (Expert Letter by Erickson et al. dated 16 September 2022), p. 8. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 934.
[1720] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 27.

> *which makes them hard to replicate, as the map of our global assets highlights.*
>
> *As a result, Trading has demonstrated consistent performance resulting in tangible value creation, delivering an average uplift of around 2 percent to our Return on Average Capital Employed over the past decade. Indeed, across this time we have not lost money across our commodity classes in any quarter. This is an underappreciated and undervalued aspect of Shell that is fundamental to the integrated nature of the company. And looking ahead, we expect our Trading and Supply capabilities to continue contributing 2 to 4 percent return on capital employed uplift.*
>
> *This uplift is possible because our scale in energy markets is simply unmatched. We have the largest LNG capacity among our peers, and one of the world's largest LNG shipping fleets representing 10 percent of the global market. Beyond LNG, we trade more than 8 million barrels of crude daily, and in 2024, we physically traded more than 10 billion litres of low-carbon fuels. With hundreds of supply points worldwide, this portfolio represents one of the largest energy trading capabilities globally."*[1721]

1251 In light of this pivotal role in distribution and financing, limiting the activities of Shell Trading in the area of (re)sale in order to comply with the reduction injunction would naturally have an effect on the production and use of oil and gas and, consequently, on the emissions of CO_2 into the atmosphere. Milieudefensie et al. have also provided a detailed elaboration of this in the proceedings before the lower courts. After all, if Shell were to phase out its (re)sale activities via Shell Trading, the hundreds of oil and gas products dependent on Shell Trading would have (much) less access to that distribution network; this network, as Shell itself acknowledges, offers them economies of scale. Nor would Shell Trading in that case continue to finance those independent oil and gas products or hedge their risks through derivatives trading. This therefore means, by definition, that their (future) production will decline or even cease entirely. After all, their distribution will, to the extent still possible, become more expensive due to higher costs and less favourable financing options.[1722] The prices of their products are therefore certain to rise.[1723]

[1721] See https://www.shell.com/investors/investor-presentations/capital-markets-day-2025/_jcr_content/root/main/Section/promo_1962010312_cop/links/item2.stream/1742946934533/a0469c1b242bab16541ae48f6348a482a3c33d39/cmd25-slides-with-prepared-remarks.pdf, pp. 20 and 21.

[1722] Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, p. 32; Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 25, 26, 30, 31, 37 and 38.

[1723] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 30, 37 and 38.

1252 In this context, it is relevant that Shell only has an interest in maintaining its distribution network and financing function as long as it can also proceed with the (re)sale of the products. After all, that sale determines, to a significant degree, the profit that Shell is primarily concerned with. So maintaining the distribution and financing structure goes hand in hand with its (re)sale activities, so its sale of fossil fuels cannot simply be separated from its other activities. This means that Shell does not provide its distribution and financing services as an end in itself, but as a means to secure the procurement of oil and gas.

1253 Milieudefensie et al. have further pointed out that this crucial role played by Shell Trading cannot simply be filled by others, and certainly not with the same level of efficiency and at the same low cost, because there are virtually no other players of a similar scale and size as Shell Trading. Moreover, Shell has been active in this field for nearly 100 years and has built up knowledge, expertise, capacity, relationships and trust over those years that cannot be replaced by another party in a matter of months or years.[1724] The part of Shell's presentation at the Capital Markets Day 2025 cited above underscores that Shell itself also acknowledges this crucial role, in part due to its decades-long history.

1254 Erickson et al., among others, have described the above-mentioned effect in detail in their report and conclude as follows:

> *"This is an additional channel through which Shell's business decisions influence the wider market for oil and gas, both in the short and longer term. For example, it is reasonable to assume that if Shell shifted its business model more decisively toward low-emissions solutions, this would (i) depress consumer demand not only for the oil and gas produced by Shell but also for the oil and gas produced by independent producers that is on-supplied by Shell (e.g., due to an associated shift in Shell's marketing and distribution strategy), (ii) reduce the supply of oil and gas supplied by those independent producers (due to those independent producers facing higher costs for marketing and distribution), or both (i) and (ii)."*[1725]

1255 In short, Shell Trading is a key player in the oil and gas industry on which many hundreds of independent oil and gas products rely, in terms of both distribution and finance. Due to its crucial role in the oil and gas market, Shell Trading's role cannot simply be replaced by another player. At any rate, this is not possible without some market impact. If the opposite were true, this would mean that Shell Trading, as the largest trader in the global oil and gas market, has no added value whatsoever for that

[1724] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 31.
[1725] Exhibit MD-469 (Expert Letter by Erickson et al. dated 16 September 2022), p. 8. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 934.

market. That is therefore not the case. For that reason, complying with the reduction injunction by limiting the (re)sale activities - and thereby downsizing – Shell Trading will undoubtedly be effective.

VII.8.2 Downsizing Shell Trading would lead to the loss of other services provided by Shell Trading

1256 In light of the foregoing, it becomes clear why the reasoning of the Court of Appeal does not stand up to the laws of logic and, in any case, does not constitute an adequate response to the essential arguments raised by Milieudefensie et al. on this point. This is explained in grounds 7.2 up to and including 7.6. In light of the foregoing, they require only a limited further explanation.

1257 Ground of appeal no. 7.2 points out that the reasoning of the Court of Appeal regarding the restriction of the (re)sale activities and the role of Shell Trading is incomprehensible. The Court of Appeal first proceeds on the assumption that Shell could comply with the reduction injunction by limiting its activities consisting of the (re)sale of oil and gas purchased from third parties. Those (re)sale activities take place via Shell Trading. This means, therefore, that Shell would downsize Shell Trading's activities and that Shell Trading would therefore shrink. The concrete consequences of this are: fewer ships, a smaller network, fewer storage facilities and fewer loans for oil and gas products. The Court of Appeal has also acknowledged this consequence in ground 7.110 by assuming that this mode of complying with the reduction injunction would lead to a downsizing of Shell Trading.

1258 Given the crucial role of Shell Trading described above, its downsizing would also mean lower oil and gas production and/or, at the very least, a more expensive supply of oil and gas, as Milieudefensie et al. have explained in detail. There is no substitute for Shell Trading, nor is one readily conceivable. However, in ground 7.108, the Court of Appeal dismisses that argument with the finding that Shell Trading could continue to offer its services to the market so that the substitute sellers could continue to make use of them. Thus, in the view of the Court of Appeal, Shell Trading will continue to carry out its activities, so that nothing changes for the substitute sellers. That is incomprehensible. Due to the restriction of the (re)sales activities, Shell Trading will actually shrink, which means it cannot simultaneously continue to offer its services to those substitute sellers at the same level. In other words: in its line of reasoning, the Court of Appeal allows Shell Trading to act in two capacities that are incompatible with each other: downsizing to comply with the reduction injunction and, at the same time, continuing to offer its services to the market at the same level, so that the substitute sellers can continue to offer their oil and gas products at the same level and at the same prices. These two things cannot be true at the same time.

1259 Grounds of appeal nos. 7.3 up to and including 7.6 discuss, in various forms, why the judgment of the Court of Appeal is insufficiently reasoned. These grounds of appeal speak for themselves and therefore require little further explanation. In summary, they point out that Milieudefensie et al. have argued in great detail and supported by documentation in the lower courts that Shell Trading fulfils the pivotal role within the oil and gas market described above, and that the effect of its downsizing through the divestiture of its (re)sale activities would be, as explained above, that hundreds of independent oil and gas producers would scale back their production or, at the very least, would have to sell their products at higher prices, all of which would result in a declining demand. The Court of Appeal has simply failed to pay any attention to those detailed arguments and reached the conclusion - which cannot be true in the real world - that Shell Trading could wind down its activities without any effect on the (re)sale of oil and gas and, at the same time, continue to offer its services (in full). If the Court of Appeal had considered the arguments presented by Milieudefensie et al., it could never have reached that conclusion.

VII.8.3 The finding of the Court of Appeal regarding the downsizing of Shell Trading goes beyond the scope of the legal dispute

1260 Moreover, Shell has never taken the position that it could wind down the activities of Shell Trading in order to comply with the reduction injunction, while at the same time being able to continue to offer its logistical and financial services to the market. It is understandable that Shell did not take that position. After all, Shell, too, must have realised that Shell Trading cannot downsize *and* continue to offer the same level of services to the market at the same time. Those two things are incompatible, certainly within the business model and corporate structure of Shell Trading. By following this line of reasoning nonetheless, the Court of Appeal has exceeded the scope of the legal dispute.

1261 In any case, the Judgment constitutes the surprise decision that was taken is impermissible. After all, if Milieudefensie et al. had surmised that the Court of Appeal wanted to take this road, they should have had the opportunity to draw the Court of Appeal's attention to the pivotal role of Shell Trading even more emphatically than they have already done and explain that the role of Shell Trading envisaged by the Court of Appeal runs up against the impossibilities described above. This is addressed in grounds of appeal nos. 7.7 and 7.8.

VII.8.4 The role of Shell Trading envisaged by the Court of Appeal still concerns Shell's Scope 3 emissions

1262 Furthermore, the reasoning of the Court of Appeal fails to recognise that if Shell were to continue all its activities (with the exception of its (re)sale activities) via Shell Trading, the reduction in Shell's Scope 3 emissions would not be equal to the CO_2 emissions

associated with the oil and gas products no longer sold by Shell Trading, as the Court of Appeal has assumed. The reason for this is that the CO_2 emissions associated with those oil and gas products still fall (in part) within Shell's Scope 3 emissions through the continued activities of Shell Trading, meaning that Shell's Scope 3 emissions would only decrease to a limited extent with this mode of compliance. In any event, the Court of Appeal has not indicated that it has taken this consequence into account. Milieudefensie et al. will explain this in more detail.

1263 The GHG Protocol, which is relevant for CO_2 emission reporting, defines Scope 3 emissions as the other indirect emissions (not included in Scope 2) arising *in the value chain* of a company.[1726] They therefore also include emissions arising from the use or consumption of products a company supplies to third parties, such as other organisations or consumers. The Court of Appeal itself has also taken this definition as its starting-point.[1727] These are the emissions arising from sources owned or controlled by third parties in an organisation's value chain, such as the business customers or consumers of an organisation.

1264 The GHG Protocol distinguishes fifteen categories of Scope 3 emissions. Category 15 concerns the financial services that a company provides to other organisations or consumers. The GHG Protocol describes this category as follows:

> *"This category includes Scope 3 emissions associated with the reporting company's investments in the reporting year, not already included in Scope 1 or Scope 2. This category is applicable to investors (i.e., companies that make an investment with the objective of making a profit) and companies that provide financial services. Investments are categorized as a downstream Scope 3 category because the provision of capital or financing is a service provided by the reporting company.[8] Category 15 is designed primarily for private financial institutions (e.g., commercial banks), but is also relevant to public financial institutions (e.g., multilateral development banks, export credit agencies, etc.) and other entities with investments not included in Scope 1 and Scope 2."*[1728]

1265 Project financing also comes under this category. The GHG Protocol describes this as follows:

> *"Long-term financing of projects (e.g., infrastructure and industrial projects) by the reporting company as either an equity investor (sponsor) or debt investor (financier)."*[1729]

[1726] See also, in this regard, Section II.2.4 of this Explanatory Submission.
[1727] Judgment of the Court of Appeal, ground 3.5.
[1728] Exhibit RK-19 (GHG Protocol), p. 51.
[1729] Production RK-19 (GHG Protocol), p. 52 (table in the bottom left-hand corner).

1266 As already previously discussed, Shell Trading not only performs a distributive function, but also provides financing to the hundreds of independent oil and gas producers whose products are (re)sold by Shell. These financing activities fall under Category 15 as distinguished in the GHG Protocol. If Shell Trading were to continue all its activities - with the exception of (re)sale – the CO_2 emissions associated with the production by these hundreds of oil and gas producers and the use of their products would therefore still be attributed to Shell, to the extent that these emissions are partly the result of those financing activities.

1267 This is another reason why the line of reasoning of the Court of Appeal runs aground. After all, the Court of Appeal has assumed that Shell will meet the Scope 3 requirements by reducing the sale of oil and gas from third parties via Shell Trading, even if Shell Trading continues its other activities. This overlooks the fact that the financing activities of Shell Trading also count under Scope 3 and must therefore be added up to the reduction achieved by winding down the (re)sale activities. A significant portion of the CO_2 emissions associated with those oil and gas products must therefore still be attributed to Shell in that case. The Court of Appeal has failed to take this into account in any way. This is pointed out in ground of appeal no. 7.9.

VII.8.5 Relevance of the comparison between Shell Trading and Enron

1268 Grounds of appeal nos. 7.10 and 7.11 challenge the finding of the Court of Appeal in ground 7.108, in which the Court of Appeal ruled that the comparison made by Milieudefensie et al. between the revenue of Enron and Shell Trading generated with their oil and gas trade does not hold up. That finding is insufficiently reasoned in light of the arguments raised by Milieudefensie et al. Milieudefensie et al. will now explain this.

1269 In the context of the question of whether a sales restriction via Shell Trading would have an effect on the CO_2 emissions into the atmosphere, a debate about the comparison with Enron's bankruptcy was held. Shell argued, citing the Druce Report, that Enron was also an intermediary in oil and gas and that its bankruptcy in 2001 made no actual difference to the use of oil and gas. In Shell's view, the same would apply if Shell Trading were to cease or limit its activities.

1270 Milieudefensie et al., supported by Erickson et al., then addressed in detail the significant differences between Enron's market position and Shell Trading's market position. To that end, Milieudefensie et al. essentially argued the following:

(a) Enron's position is not comparable with Shell's position. Enron was primarily an intermediary that generated margins through intermediary trade, but added little market value to the traded goods otherwise. The position of Shell Trading is quite different.[1730]

[1730] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 33.

(b) Erickson et al. have pointed out that in the year 2000, the year before its bankruptcy, Enron was earning approximately USD 1 per barrel of oil and gas traded as an intermediary. That is less than 10% of the oil and gas prices at the time. According to Erickson et al., this low margin per barrel implies that Enron was largely engaged in trading *"commodity and futures contracts,"* namely in paper trade rather than physical trade.[1731]

(c) By comparison: in 2022, Shell was earning approximately USD 86 per barrel of oil and gas traded, which is equivalent to more than 80% of the oil and gas prices applicable in 2022. This shows that Shell adds much more value to the market per traded barrel.[1732]

(d) It is evident that the market will feel the disappearance of a legal entity that adds more value to the market *more* acutely than the disappearance of a legal entity that adds only a fraction of that value to the market. In other words, Shell and Enron are incomparable entities, so the market impact they have cannot be compared either.[1733]

1271 Enron was, essentially, nothing more than an oil and gas speculator acting as an intermediary without adding any real value. This is reflected in the limited margin it earned in that role: $1 per barrel. Shell Trading fulfils a completely different function and has a completely different position in the market, as already discussed at length above. Without Shell Trading, much of the oil and gas simply would not reach the market, or would do so only at a higher cost. This is reflected in the value adder per barrel by Shell: USD 86. This means that Shell's added value is much higher than Enron's. This underscores the fact that a speculative intermediary like Enron can be replaced fairly easily. Shell Trading, on the other hand, with (among other things) its large fleet, substantial storage capacity and financial services, is not easy to replace. This is partly reflected in the value that Shell adds to a barrel of oil or gas. All of this aligns seamlessly with the conclusion, which Erickson et al. also endorse, that a restriction on the (re)sale activities via Shell Trading will have an effect on the atmospheric CO_2 emissions.

1272 The response of the Court of Appeal to these arguments is incomprehensible. In ground 7.108, the Court of Appeal merely finds that the amount of USD 86 does not merely cover the costs of Shell Trading, but also Shell's total exploration and production costs. While this is true in itself, it does no justice to the arguments put forward by Milieudefensie et al. Firstly, this finding of the Court of Appeal fails to address the

[1731] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 34.
[1732] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 35. See also the Response to the Questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, p. 31.
[1733] Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 35. See also the Response to the questions of the Court of Appeal of Milieudefensie et al. dated 12 April 2024, pp. 31 and 32.

argument that Enron was merely a speculating intermediary and therefore did not hold the same market position as Shell Trading. Furthermore, the finding of the Court of Appeal does not explain why the positions of Enron and Shell Trading *are* comparable. After all, the enormous difference in added value still supports the conclusion endorsed by Erickson et al. that Enron was not providing any real added value and was therefore easily replaceable, whereas this does not apply to Shell Trading. This is all the more true because that added value underscores the accuracy of the crucial and virtually irreplaceable factual role that Shell Trading plays in the oil and gas market as described by Milieudefensie et al.

VII.8.6 Effectiveness of a restriction of the sale of oil and gas products produced by Shell

1273 Grounds of appeal nos. 7.12 and 7.13 further challenge the potential interpretation of the finding of the Court of Appeal that the compliance with the reduction injunction in the form of a restriction on the sale of oil and gas produced by Shell itself would not be effective. The objections raised in respect of this point are self-evident. A restriction of the sale of oil and gas produced by Shell itself is, of course, also a restriction of its own production. The Court of Appeal has acknowledged in ground 7.106 that a production restriction can, in any case, be effective. In view of this, it is not logically consistent to assume that a restriction of the sale of oil and gas produced by Shell would not be effective.

1274 Moreover, the acceptance of such a mode of compliance would fall outside the scope of the legal dispute, as Shell has not relied on it. This is also understandable, since Shell, too, must have realised that this mode of compliance would amount to an effective production restriction.

VII.8.7 The Erickson et al. report *does* address the effectiveness of a sales restriction

1275 In ground 7.107, the Court of Appeal rules as follows regarding the contents of the Erickson et al. Report:

(a) In their report, Erickson et al. do not explain how a sales restriction for fossil fuels imposed on a specific company could lead to price increases for end consumers, which in turn could lead to a decrease in the demand for fossil fuels.

(b) After all, their study concerns the effects on the consumption of fossil fuels *of a production restriction* in a specific region. Such a restriction extending to an entire region is of a fundamentally different nature than a sales restriction applicable to a specific company. Moreover, a production restriction is less easy to compensate for by other market participants than a sales restriction.

1276 So according to the Court of Appeal, Erickson et al. only dealt with production restrictions that, moreover, apply to an entire region. In its view, the Report does not discuss the effects of sales restrictions. That conclusion cannot be followed. Erickson et al. clearly explained why a sales restriction would also lead to a reduction in the CO_2 emissions into the atmosphere. Also, Erickson et al. have taken the special position of Shell Trading into account, which has already been discussed in detail above. For the sake of clarity, Milieudefensie et al. will now quote the full relevant passage from the Report of which the Court of Appeal reproduced only a limited part in ground 7.105:

> *"Furthermore, it is not just a reduction in oil or gas production (meaning, in this context, extraction) that would affect the final price to consumers, but any number of activities undertaken to comply with the RO, whether they reduce supply "at the point of sale or "between extraction and sale. Indeed, Shell is a major, integrated oil and gas company that produces and purchases petroleum (both oil and gas), transports it around the world, refines and processes it, and sells it to final customers. The company has approximately US$200 billion worth of physical assets, including onshore and offshore oil and gas drilling and production equipment; refineries; oil and LNG tankers; storage facilities; and sales facilities. Constraints or increases in costs anywhere along the extensive process of producing and selling oil and gas could increase the price to final consumers. In other words, link (a) of Erickson et al.'s (2022) causal chain stands, regardless of whether one is looking broadly at all supply (from point of extraction to point of final sale) or simply oil and gas extraction."*[1734]

1277 Milieudefensie et al. pointed out this conclusion and subsequently explained - in part by reference to the special market position of Shell Trading, which Erickson et al. have also endorsed - why a restriction of the (re)ale activities of Shell Trading would be effective as well. After all, partly in light of that special position, such a restriction will be accompanied by price increases and consequently by a reduced consumption of fossil fuels. That is precisely what Erickson et al. describe in the preceding passage.[1735]

1278 This means that the Court of Appeal is making a mistake on this point. The Report by Erickson et al. does not only concern the effects of a production restriction on the consumption of fossil fuels in a specific region, but *also* discusses a sales restriction. Furthermore, Erickson et al. explain in very precise terms why such a sales restriction, particularly in light of the pivotal role of Shell Trading, will affect the price and the use

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[1734] Exhibit MD-561 (Expert Letter from Erickson et al. dated 24 February 2024), p. 3.

[1735] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 37 and 38. See also the Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, para. 59, in which Milieudefensie et al. contrast the report by Erickson et al. with the UNEP report referred to therein concerning supply constraints. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 935 (quotation).

of oil and gas. The judgment of the Court of Appeal is therefore too simplistic, which is addressed in grounds of appeal nos. 7.14 and 7.15.

VII.9 Sufficient interest and indirect effects of a reduction obligation

1279 In ground of appeal no. 8, Milieudefensie et al. raise a fundamental question regarding the notion of "interest" under Article 3:303 DCC. In ground 7.109, the Court of Appeal found - building on its incorrect understanding of the concept of interest, which has already been discussed at length in Section VII.2 - that a potential signalling effect of a reduction injunction for other fossil fuel investors is too speculative and too far removed from Shell's alleged unlawful conduct to be able to serve as an interest in a reduction injunction.

1280 First and foremost, this finding does no justice to the ways in which the reduction injunction will also have an effect on third parties (and thus globally), as put forward by Milieudefensie et al. After all, Milieudefensie et al. did not merely discuss a signalling effect on other investors, but also pointed out the effect this would have on the actions of other relevant actors as will still be discussed below; moreover, Milieudefensie et al. further particularised those effects, which involved much more than a signalling effect or speculations and far-removed effects.

1281 Furthermore, the finding of the Court of Appeal and the ways in which a reduction injunction would also have an indirect effect on the reduction of atmospheric CO_2 emissions as explained by Milieudefensie et al. in any event requires that an answer to the question how the notion of interest should be interpreted in cases such as the present one. These are cases in which an interest group defends a public interest relating to climate problems under Article 3:305a DCC caused by the action or inaction of a very large number of relevant actors collectively. A reduction injunction fulfils an important function within the complex global system that results in dangerous climate change. In that context, a large number of actors bear their own share of the responsibility.

1282 It is precisely in such cases - where only the fulfilment of the share of responsibility of all relevant actors will lead to an effective solution - that there are good reasons to *also* consider, for the effectiveness question, the expected effect that the reduction injunction and the underlying decision on the unlawful conduct will have on third parties bearing a share of the responsibility. Examples include other oil and gas producers, fossil-fuel investors and other key system players who contribute to the climate crisis by failing to take climate action. Such an interpretation of the interest requirement would also prevent the effectiveness question from being continually undermined by pointing to the lack of climate action by other relevant actors. Accepting such a notion of interest would therefore be in line with the protection that the duty of care to prevent or limit

dangerous climate change seeks to provide. Liability law and the notion of interest under Article 3:303 DCC also provide ample scope for this. Milieudefensie et al. will elaborate on this below.

VII.9.1 The interest requirement encompasses the effectiveness of an injunction in view of the action of third parties

1283 In Section VII.2 of this Explanatory Submission, it was already noted that, for the purpose of accepting that a sufficient interest within the meaning of Article 3:303 DCC exists, it is sufficient that an injunction *can contribute* to the effective protection against the danger the duty of care seeks to offer protection against. The interest requirement does not impose any further requirements on the *manner in which* that protection is exactly effectuated if an injunction is issued and complied with.

1284 The starting-point is, of course, that protection is offered as a result of the compliance with the injunction by its addressee: the defendant. In that case, there is a direct connection between the compliance and the intended protection. However, the question of effectiveness is not limited to this. Legal scholarship assumes that a preventive remedy such as an injunction is to be considered effective if it allows for substantive rights to be enforced *directly or indirectly*.[1736] So even if the protection is provided via the subsequent conduct of parties other than the defendant themselves, an injunction can still be effective, as Van der Helm has explicitly pointed out:

> *"One of the goals of national liability law and procedural law* [is] *preventing* (…) *and discouraging others from repeating the unlawful conduct. That discouragement can take the form of the deterrent effect of a remedy and can, to that extent, also have an effect extending beyond the parties. However, in the case of a preventive injunction or prohibition, that requirement (under national law) does not entail anything special for the operative part of the judgment: a mandatory or prohibitory injunction simply has specific contents (namely compliance with a legal obligation), and it is difficult to make the mandatory or prohibitory injunction stronger to also deter others from engaging in certain conduct, not to mention that it is questionable whether others will allow their conduct to be influenced by it* (…). *The deterrent effect therefore lies in the mandatory or prohibitory injunction as such, because it (i) confirms which conduct is or is not permitted and (ii) makes it clear that compliance with a standard can actually be enforced."*[1737]

1285 It follows from this that an injunction can also be effective if its effect is that others - certainly those who are also bound by the same duty of care – start acting in accordance

[1736] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 285.
[1737] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 286.

with that duty, so that the protection the duty seeks to offer is actually offered. This, in turn, is consistent with the purpose of liability law to provide effective protection. The fact that this protection is partly achieved via conduct in conformity with the standard by parties other than the addressee of the injunction does not alter this.

1286 Moreover, the question of the effectiveness of an injunction in which compliance with a legal duty is required is coloured by the nature of the liability standard and the nature of the danger that standard seeks to offer protection against. After all, whether and how effective protection will be provided by an injunction in a specific case always depends, logically, on the manner in which a danger will materialise and how a duty of care is intended to offer protection against that danger.

1287 This is particularly evident in situations where the danger is caused by collective action or inaction. A duty of care that seeks to offer protection against such a collectively caused danger inherently requires that all actors act in accordance with that duty. They all bear a shared responsibility to comply with the duty of care that seeks to offer protection against that danger. In such cases, effective legal protection will, in the end, only be provided if *all* actors also act in accordance with their shared responsibility.

1288 Building on this, it will be obvious - in the context of the question of the effectiveness of an injunction – that in the case of such shared responsibilities, weight is also carried by the effect of the issue of and compliance with an injunction on the other parties with a share of the responsibility. After all, the collective fulfilment of these shared responsibilities will lead to the averting of the collective danger that the obligation seeks to prevent. In other words: in the case of individual responsibilities, effectiveness is primarily assessed at the individual level, because the compliance by the individual leads to the intended protection; however, in the case of collective responsibilities, the effectiveness is also a collective issue. For this reason, the way in which other relevant actors will respond to an injunction requiring the fulfilment of a shared responsibility also plays a role in the question of effectiveness.

1289 It should be clear that dangerous climate change is the most pressing example of this type of danger, which is caused by collective action (or rather, inaction) and can only be countered through collective action. For this reason, it is also self-evident that all relevant actors must fulfil their shared responsibility in order to ultimately provide protection against the danger this obligation seeks to prevent. Legal scholarship therefore also holds that, in assessing the effectiveness of a reduction injunction to be issued against Shell to fulfil its duty of care to prevent or mitigate dangerous climate change, the way in which others will respond to that injunction and the precedential effect of the reduction injunction are also relevant.[1738]

[1738] See, for example, T.R. Bleeker, Commentary on the judgment of the Court of Appeal of The Hague of 12 November

VII.9.2 The judgment of the Court of Appeal is incorrect, is insufficiently reasoned or is reasoned in an incomprehensible manner

1290 In light of the legal framework discussed above, grounds of appeal nos. 8.2 up to and including 8.6 challenge the manner in which the Court of Appeal has interpreted the interest requirement in grounds 7.102 and 7.109 in particular. What the objections of Milieudefensie et al. come down to is that the Court of Appeal wrongly found that the expected conduct of parties other than Shell in response to the reduction injunction is irrelevant, in part because it was said to be speculative in nature or the connection was too far-removed. In light of the foregoing, the objections are largely self-explanatory and require only limited elaboration.

1291 Ground of appeal no. 8.2 points out that the Court of Appeal based its decision on an overly narrow (and therefore wrong) interpretation of the law, because the way in which others - such as fossil fuel investors and producers - will respond to a reduction injunction *is* relevant to the interest and effectiveness issues. This applies in any case to the duty of care to prevent or limit dangerous climate change, because this concerns a collectively caused danger that can only be countered through joint action by the relevant actors and – thereby - through compliance with shared responsibilities. The correctness of this follows from the legal framework set out above.

1292 Grounds of appeal nos. 8.3 under (i) up to and including (xi) and 8.4, explain in detail that Milieudefensie et al. have comprehensively substantiated their arguments that and how the reduction injunction will also affect the action of parties other than Shell and how such action will contribute to preventing or mitigating dangerous climate change by reference to expert reports from Erickson et al., Rotmans and Loorbach, Van Wijnbergen and Van der Ploeg as well as by reference to the IPCC, the UN Secretary-General and various UN Special Rapporteurs.

1293 The various described effects differ in nature. Milieudefensie et al. will mention a number of them below. Buyers of oil and gas fields will consider the existing and potential future legislation and factor that risk into their purchasing decisions. This will naturally reduce oil and gas production. A reduction injunction will increase investors' perception of the risk of fossil-fuel projects, which will reduce the financing options for new oil and gas fields. The risk profiles of the fossil-fuel industry have indeed increased as a result of

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2024, *M en R* 2025/12, under the heading "*Effectiviteit en voldoende belang*" (Effectiveness and sufficient interest); E.M. Appel, "*De uitspraak van het gerechtshof Den Haag in Milieudefensie c.s./Shell. Zes lessen voor toekomstige klimaatzaken"* in *MvV* 2025/4, pp. 168 and 169; E.R. de Jong, "*Urgenda en de beoordeling van macro-argumenten*" in *MvV* 2019/4, pp. 140 and 141; T.R. Bleeker, "*Voldoende belang in collectieve acties: drie maal artikel 303 BW*" (Sufficient interest in class actions: three instances of Article 3:303 DCC) in *NTBR* 2018/20, Issue 5, p. 149; T.R. Bleeker, *"Nederlands klimaatbeleid in strijd met het EVRM*" ('Dutch climate policy in violation of the ECHR) in *NTBR* 2018/39, Issue 9, p. 293.

the Decision. This trend will lead to a reduced use of oil and gas. This applies even more strongly because Shell, due to its unique position, is capable of developing highly complex oil and gas fields. For other oil and gas producers, this is much more difficult. Combined with the higher risk profiles and more limited financing options, this means that other oil and gas producers will also refrain from developing those oil and gas fields. This, too, will lead to a reduced use of oil and gas.

1294 Furthermore, the reduction injunction will lead investors and producers to sell their infrastructure and/or transform it into sustainable infrastructure. They may, for example, convert gas stations into charging stations and industrial areas into storage sites for CCS activities. On top of this, Shell is a systemic player in the energy market. A complete ecosystem of parties has emerged around Shell. That entire system will shift if Shell is required to reduce $_{its}$ CO_2 emissions. The broader energy market will be pushed toward sustainability if Shell is required to reduce its emissions. More generally, litigation and the resulting legal developments will lead to a changing sense of norms that will accelerate the energy transition.

1295 The reduction injunction will therefore mean that many other parties playing a significant role in the climate efforts will start behaving in line with the duty of care to prevent or limit dangerous climate change. This applies not only to oil and gas producers, but also, for example, to investors and financiers. In this way, a reduction injunction issued against Shell will ensure that other relevant actors will also start acting in accordance with their shared responsibility. All these effects *do* actually play a role in the question of the effectiveness of a reduction injunction, and the Court of Appeal should therefore have taken them into account when assessing in the interest issue under Article 3:303 DCC.

1296 Ground of appeal no. 8.4 further argues that it is impossible to see, in light of the detailed arguments presented by Milieudefensie et al. as discussed in ground of appeal no. 8.3 under (i) up to and including (xi), why the Court of Appeal would consider the matter to be speculative in nature or concern a connection that is too far-removed. After all, the cited experts and professionals have precisely explained how the reduction injunction, through the response to it by other relevant players, will have an effect on reducing the extraction and use of oil and gas. They have even pointed out on multiple occasions that the reduction injunction imposed by the Decision is *already* having that effect. As a result, there is a direct and by no means speculative relationship between the reduction injunction and that effect.

1297 In ground of appeal no. 8.5, Milieudefensie et al. set out that the Court of Appeal, in its finding that Milieudefensie et al. had highlighted the signalling effect of a reduction injunction, has interpreted the arguments of Milieudefensie et al. in an incomprehensibly narrow manner, as these arguments encompass much more. After all, as discussed

above, they have substantiated, in a meticulous way and based on the findings of experts and specialists, that, and how, the reduction injunction will contribute – via the response to it by parties other than Shell - to the reduction of CO_2 emissions into the atmosphere. Characterising the substance of those arguments as nothing more than a "signalling effect" of the injunction does not do justice to them.

1298 Finally, in ground of appeal no. 8.6, it is explained that the Court of Appeal attributes an incomprehensible dual meaning to the role of third parties' action in response to the injunction. On the one hand, the Court of Appeal has attached value to the conduct of third parties to the detriment of the effectiveness of the reduction injunction by assuming in grounds 7.100 up to and including 7.110 that others will take over Shell's activities as a result. But on the other hand, the Court of Appeal considers it irrelevant to the question of whether the reduction injunction is effective that there will also be parties who, in response to the injunction, *will* in fact start acting in a manner that benefits the effectiveness of that very same reduction injunction. If that finding is not already incorrect for the reasons mentioned above, it is in any case incomprehensible due to its contradictory nature.

VIII OTHER TOPICS

1299 The preceding Chapters discussed in detail (among other things) the major dangers and risks of climate change and the background, development and scope of Shell's duty of care. Milieudefensie et al. also explained there why, and how, the Court of Appeal should have imposed a concrete reduction obligation on Shell to reduce its CO_2 emissions by a certain percentage by 2030. In that context, Milieudefensie et al. explained a large part of the grounds of their principal appeal in cassation and raised a defence against the majority of the grounds set out in Shell's conditional cross-appeal in cassation.

1300 In this final Chapter of this Explanatory Submission, a number of more isolated topics will be addressed; although they are related to the foregoing to a greater or lesser extent, they require separate discussion nevertheless. To that end, Milieudefensie et al. will first discuss the remaining topics covered by their principal appeal in cassation (Section VIII.1 of this Explanatory Submission), after which they will address the other issues raised in Shell's conditional cross-appeal in cassation (Section VIII.2 of this Explanatory Submission).

VIII.1 Explanation to the principal appeal in cassation of Milieudefensie et al.

VIII.1.1 Emissions with respect to Scope 1 and 2 (ground of appeal no. 2)

1301 In grounds 7.63 up to and including 7.66, the Court of Appeal assessed the admissibility of the relief sought by Milieudefensie et al. seeking an injunction requiring Shell to reduce its CO_2 emissions in Scopes 1 and 2 by 45%. The Court of Appeal dismissed that relief sought on the following grounds:

(a) Milieudefensie et al. have argued that a legal obligation threatens to be breached, because Shell will not have reduced its emissions by at least 45% by the end of 2030 relative to the 2019 level. The counterargument raised by Shell was that it has set a target to reduce these emissions by 50% by 2030 relative to the 2016 level. It is not in dispute between the parties that this target is higher than the 45% reduction relative to the 2019 level, as demanded by Milieudefensie et al. According to Milieudefensie et al., a legal obligation threatens to be breached nevertheless, because Shell has frequently adjusted its policy and this target offers no guarantee whatsoever of any further or lasting emission reductions (ground 7.64);

(b) The Court of Appeal does not accept this argument because (i) Shell has committed to this target in its business plan, in documents filed with the Securities

and Exchange Commission and during the Capital Markets Day in June 2023, (ii) in its 2024 Energy Transition Progress Report, among other publications, Shell has outlined how it will achieve this target, and (iii) Shell has already largely achieved this target: by the end of 2023, Shell had reduced its Scope 1 and 2 emissions by 31% compared to 2016. The mere fact that Shell has previously watered down targets cannot in any event justify the finding that it is likely that Shell will not have reduced its Scope 1 and 2 emissions by 45% by 2030 (ground 7.65); and

(c) no imminent violation of a legal obligation with regard to Scope 1 and 2 has therefore been established. To that extent, the relief sought by Milieudefensie et al. cannot be awarded (ground 7.66).

The threshold of "likelihood of non-compliance" is too high (ground of appeal no. 2.2)

1302 As the conclusion of ground 7.65 demonstrates, the Court of Appeal has answered the question of whether a legal obligation threatens to be violated by Shell based on the criterion of whether Shell's non-compliance with its reduction obligation with respect to Scope 1 and 2 is *likely*. Ground of appeal no. 2.2 points out that the Court of Appeal has thereby applied a criterion that is too strict. Milieudefensie et al. will explain this below.

1303 Section VII.2.2 of this Explanatory Submission has already discussed that the interest requirement constitutes the final step in a court's assessment of whether a plaintiff's claim is admissible. If a court has established the violation of a legal standard, it must, in principle, issue an injunction requiring the compliance with that legal obligation without any further weighing of interests.[1739] That also follows from Article 3:296 DCC. Article 3:303 DCC does still require, however, a (sufficiently) real and imminent threat of a violation of the legal obligation for the issue of a prohibitory or mandatory injunction.[1740] This is based on the understandable idea that other people or parties should not be burdened with injunctive relief if there is no reason for assuming that they will violate the standard.[1741]

1304 However, the threshold that applies for the real threat of a breach of a legal obligation is low. This is primarily related to the above-mentioned principle that the court must award the prohibitory or mandatory relief sought without any further weighing of interests. Secondly, this low threshold stems from the rule that the existence of an interest within the meaning of Article 3:303 DCC is presupposed if a legal action is brought.[1742] A high threshold is inconsistent with these principles. Consequently, courts

[1739] Judgment of the Dutch Supreme Court of 28 June 1985, *NJ* 1986, 356 (*Claas/Van Tongeren*).
[1740] Judgment of the Dutch Supreme Court of 21 December 2001, *NJ* 2002, 217 (*Kernwapens*).
[1741] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, para. 310.
[1742] C.J.J.C. van Nispen, "*Het rechterlijk verbod en bevel*", Amsterdam: DeLex 2025, para. 137; A.W. Jongbloed, *GS*

must apply the interest requirement with restraint. They must not judge too quickly that there is no interest on the side of the plaintiff. An excessively high threshold would undermine the effectiveness of the remedy. Only in striking cases may courts conclude that an interest within the meaning of Article 3:303 DCC is lacking.[1743]

1305 The applicable standard also makes itself felt in the burden of pleading and the burden of proof. Because an interest within the meaning of Article 3:303 DCC is presumed to exist, no high standards apply, logically, to the plaintiff's burden of pleading and burden of proof. After all, that would seriously undermine that presumption. It is sufficient to present all the facts from which it follows that the defendant is required to end the unlawfulness.[1744] The burden of pleading and the burden of proof therefore do not relate to the *likelihood* of a breach of a legal obligation.

1306 In light of the foregoing, it is not true that a mandatory or prohibitory injunction may be awarded only if the defendant is *likely* to fail to fulfil their legal duty. Such a high threshold would be inconsistent with the principles discussed above and would seriously diminish the envisaged preventive and protective function of a mandatory or prohibitory injunction. In this light, the Court of Appeal has applied an overly strict standard by requiring that it must be *likely* that Shell will not have reduced its Scope 1 and 2 emissions by 45% by 2030 and also by assessing the watering down of Shell's targets against that standard.

The finding of the Court of Appeal relies on non-existent documents and overlooks the conditional nature of the targets and the attitude and position of Shell (grounds of appeal nos. 2.4 up to and including 2.10)

1307 Grounds of appeal nos. 2.4 up to and including 2.10 challenge, from various angles, the manner in which the Court of Appeal has reasoned its judgment. The first relevant point here is that the Dutch Supreme Court has provided several points of view that are relevant in assessing whether there is a sufficiently real threat of a breach of a legal obligation. These points of view are: (i) the severity of the violation, (ii) the conduct of the party breaching the standard, also seeing any prior warnings, (iii) the manner and the context in which the party breaching the standard had committed to complying with the legal obligation, and (iv) the position taken by that party regarding the unlawfulness of their actions.[1745]

1308 All warning lights turn red if one examines the policy intentions expressed by Shell and its subsequent choices in more detail than the Court of Appeal appears to have done in

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Vermogensrecht", Art. 3:303 DCC, note 2.

[1743] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 310 and 312.

[1744] C.J.J.C. van Nispen, "*Het rechterlijk bevel en verbod*", Amsterdam: DeLex 2025, para. 137.

[1745] Judgment of the Dutch Supreme Court of 23 February 1990, *NJ* 1990, 663 (*Verheijen Seeds/Rijk Zwaan*). See also C.J.J.C. van Nispen, "*Het rechterlijk bevel en verbod*", Amsterdam: DeLex 2025, para. 146.

the Judgment. All the targets and promises formulated by Shell in policy documents always come, in fact, with extensive and significant conditions attached. Furthermore, Shell's statements on these matters consistently refer back to those conditions. In addition, Shell has argued, in three court instances already, that it has no binding obligations regarding its CO_2 emissions. In line with this, Shell has significantly watered down its targets, particularly since its new CEO took office in 2023. All relevant points of view of the Dutch Supreme Court therefore indicate that there is indeed a real threat of a violation by Shell of its legal obligation regarding its Scope 1 and 2 emissions.

1309 To this, the objections relating to the reasoning set forth in grounds of appeal nos. 2.4 up to and including 2.10 are devoted. What they highlight in particular is that the Court of Appeal's reasoning, which is based on four sources specifically named by the Court of Appeal - a business plan, documents filed with the SEC, the Energy Transition Progress Report 2024 and a commitment expressed during the Capital Markets Day in June 2023 – is, in reality, built on quicksand. Milieudefensie et al. will now explain this.

The judgment of the Court of Appeal is based on non-existent documents (ground of appeal no. 2.4)

1310 Firstly, there is no such thing as a Shell business plan, and no document with that name or of that nature has been submitted by any of the parties in court. A brief search of the case documents reveals how this non-existent document came to be included in the reasoning of the Court of Appeal. In the Speaking Notes on Appeal devoted to Shell's defence that Milieudefensie et al. lack interest in the relief sought within the meaning of Article 3:303 DCC[1746], Shell mentions a business plan from which it allegedly follows that Shell's objective is to reduce its Scope 1 and 2 emissions by *more* than what Milieudefensie et al. are demanding. That passage from its Speaking Notes was, in turn, based on Shell's SEC filing of 28 October 2021 (that has been introduced in the preceding sentence). That SEC filing refers to a 2022 business plan:

> *"Our 2022 business plan will reflect this new target, which we are committed to delivering regardless of whether we win or lose our appeal against the ruling."*[1747]

1311 At the time of that SEC filing, no business plan existed yet. This is why the filing uses the phrase *"will reflect*." Subsequently, based on this passage from the SEC filing, Shell took the position that those targets are also included in the business plan. The Court of Appeal then accepted that argument without any critical scrutiny and thereby lost sight of the fact that in reality no document bearing the name "business plan" exists, that Shell did therefore not submit any such document in court and that the Court of Appeal

[1746] Speaking Notes on Appeal (Hearing Day 2 – Part 4 of 4) of Shell dated 3 April 2024, paras. 11.2.2 and 11.2.3 (closing sentence).
[1747] Speaking Notes on Appeal (Hearing Day 2 – Part 4 of 4) of Shell dated 3 April 2024, para. 11.2.3 (footnote 94).

would therefore haven been unable to examine it in order to check and accept the accuracy of Shell's submission. This alone constitutes a serious flaw in the reasoning of the Court of Appeal.

1312 There is also no such thing as an Energy Transition Progress Report 2024, to which weight is also attached by the Court of Appeal in its reasoning. The Court of Appeal appears to be conflating different sources from different years with different contents on relevant points. What *does* exist is an Energy Transition Strategy 2024[1748] and there *are* Energy Transition Progress Reports for 2021[1749] and 2022[1750] So for this point, too, it is unclear and impossible to check which information in these documents the Court of Appeal has actually considered and attached importance to. This is all the more concerning because the Court of Appeal also uncritically accepted the existence and contents of the business plan and the SEC filing as being true.

1313 It makes a significant difference whether the Court of Appeal looked at Shell's older intentions (from 2021 and 2022) or at its more recent targets (from 2024). After all, since 2023 – when Shell's new CEO, Wael Sawan, was appointed - Shell has significantly adjusted its business strategy in the direction of a greater profit maximisation and, as a result, it has abandoned various reduction targets to an important extent. From 2023 onwards, the focus has shifted even more strongly towards investments in oil and gas, with a strong emphasis on LNG. This includes investments in new oil and gas fields totalling USD 50 to 60 billion[1751], which the Court of Appeal itself has also disapproved of in grounds 7.60 and 7.61. From 2023 onwards, Shell has also abandoned its plans to reduce its oil production; it will maintain production at the same level from then on.[1752] In addition, Shell has abandoned, among other things, various low-carbon activities and associated targets. For example, it has scaled back its targets for investment in renewable electricity, lowered the target consisting of 2.5 million charging stations for electric vehicles to 200,000 public charging stations, cancelled offshore wind, hydrogen and biofuels projects and cut, or suggested to cut, 15% of the jobs in the Renewable & Energy Solutions division.[1753]

1314 The above is reflected in the Energy Transition Strategy 2024, in which Shell indicated, among other things, that it has lowered its targets for the average carbon intensity of its products in 2030 from 20% to 15% to 20%. The target to reduce the carbon intensity of its products by 45% by 2035 has been completely abandoned in that strategy.[1754] The

[1748] Exhibit S-288 (Shell Energy Transition Strategy 2024).
[1749] Exhibit MD-380 (Shell Energy Transition Progress Report 2021).
[1750] Exhibit S-163 (Shell Energy Transition Progress Report 2022).
[1751] Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 113 and 114.
[1752] Annex to the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 2 up to and including 5; Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 116.
[1753] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 117.
[1754] Written Arguments of Milieudefensie et al. dated 19 March 2024, para. 124. See also the judgment of the Court of Appeal, ground 3.39.

Court of Appeal also noted this watering down in ground 3.39 and found in ground 3.40 that Shell has also abandoned its expectation that by 2025 approximately 50% of its total expenditure would concern low-emission or emission-free services and products.

1315 Incidentally, Shell has also fully continued its policy of moving away from alternative energy sources since the Judgment. In September 2025, for example, it announced that the construction of a large biofuel plant in Rotterdam would not go ahead,[1755] whereas that same project was still an important part of its reduction targets in its Energy Transition Progress Report 2021 published in September 2021.[1756]

1316 In light of the foregoing, it therefore makes a significant difference whether the Court of Appeal based its decision on documents and promises from 2021 and 2022 or from 2024; consequently, it is also important for the Court of Appeal to provide sufficient insight into its reasoning on this point. If the Court of Appeal has considered the promises from 2021 and 2022, it has overlooked the subsequent developments indicating that Shell's promises are not set in stone. If it has considered the Energy Transition Strategy 2024, it is incomprehensible why the Court of Appeal has not seen any real threat of a breach of Shell's legal obligation to reduce its Scope 1 and 2 emissions in that Strategy. Consequently, the Court of Appeal should have been much clearer on this point, since the comprehensibility of its reasoning hinges in part on the specific documents considered by it. This is addressed in ground of appeal no. 2.4.

The Court of Appeal has overlooked the conditionality of Shell's targets and actions (grounds of appeal nos. 2.5 and 2.6)

1317 In line with the foregoing, grounds of appeal nos. 2.5 and 2.6 point out that Shell always surrounds its targets and commitments in all relevant policy documents with strong conditionalities using an extensive range of terms, and that Shell could also abandon those targets again for commercial and policy reasons. This is also what Shell does in practice.

1318 Shell always describes the reduction targets it sets in its policy documents - such as the Energy Transition Progress Report for 2021 and 2022, the Shell Annual Report 2023 and the Energy Transition Strategy 2024 - in conditional terms, to which Shell adds a lengthy disclaimer at the end of the document. Its most recent Fourth Quarter 2025 Update Note from January 2026 also contains this disclaimer.[1757] According to this disclaimer, Shell's targets and commitments are conditional ("forward-looking statements"), are based on management's current expectations and assumptions and

[1755] See https://www.shell.nl/over-ons/nieuws/2025/shell-hervat-bouw-biobrandstoffenfabriek-in-rotterdam-niet-.html.
[1756] Exhibit MD-380 (Shell Energy Transition Progress Report 2021), p. 20.
[1757] See https://www.shell.com/news-and-insights/newsroom/news-and-media-releases/2026/shell-fourth-quarter-2025-update-note.html.

can materially change due to certain circumstances.[1758] These circumstances are dependent almost each time on aspects of profit maximisation or policy vision.[1759] This leads to the following disclaimer:

> *"Forward-looking statements are statements of future expectations that are based on management's current expectations and assumptions and involve known and unknown risks and uncertainties that could cause actual results, performance or events to differ materially from those expressed or implied in these statements. Forward-looking statements include, among other things, statements concerning the potential exposure of Shell to market risks and statements expressing management's expectations, beliefs, estimates, forecasts, projections and assumptions. These forward-looking statements are identified by their use of terms and phrases such as "aim," "ambition," "anticipate," "believe," "could," "estimate," "expect," "goals," "intend," "may," "milestones," "objectives," "outlook," "plan," "probably," "project," "risks," "schedule," "seek," "should," "target," "will" and similar terms and phrases. There are a number of factors that could affect the future operations of Shell and could cause those results to differ materially from those expressed in the forward-looking statements included in this report."*[1760]

1319 The Scope 1 and 2 targets that Shell routinely describes as a "forecast" or an "aim" also fall under this category.[1761] As already discussed above, Shell has significantly backtracked on its targets and promises, both in word and deed, particularly since 2023. Milieudefensie et al. have also consistently emphasised this in the lower courts.[1762] This conditional nature of Shell's forward-looking statements was even an important argument for Shell in cassation to not consider itself bound by the targets it had set.[1763]

1320 It follows from all of this that two key points of view identified by the Dutch Supreme Court already indicate that there is a real threat of a breach of a legal obligation: (i) the manner and the context in which the party breaching the standard has committed themselves to complying with the legal obligation, and (ii) the manner in which the party breaching the standard is behaving. After all, Shell's targets are always formulated in very conditional terms, while several policy and commercial choices have been made

[1758] Annex to the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 2 up to and including 5.
[1759] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 708 and 709.
[1760] Exhibit MD-380 (Shell Energy Transition Progress Report 2021), p. 35. Exhibit S-288 (Shell Energy Transition Strategy 2024), p. 60, contains the same disclaimer. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 708 and 709.
[1761] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 649 and 1108.
[1762] Annex to the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, para. 7; Written Arguments of Milieudefensie et al. dated 19 March 2024, paras. 113 up to and including 117 and 124.
[1763] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 182.

and included in the Energy Transition Strategy 2024 by Shell that significantly undermine those targets, certainly since 2023.

1321 In light of the foregoing, grounds of appeal nos. 2.5 and 2.6 argue that the finding of the Court of Appeal that there is no real threat of a violation of Shell's obligation to reduce its Scope 1 and 2 CO_2 emissions by 45% also fails to meet the standard of reasoning from this perspective. After all, the Court of Appeal has based that conclusion largely on policy documents containing significant disclaimers and terminology that attach a high degree of conditionality to the targets set forth in them, and this conditionality has materialised even more strongly in practice since 2023. In light of this, the Court of Appeal could not rely on those documents without any further reasoning, which has not been provided, to the extent that such documents even exist.

SEC filing and Capital Markets Day 2023 (grounds of appeal nos. 2.7 up to and including 2.9)

1322 Grounds of appeal nos. 2.7 and 2.8 focus on how the Court of Appeal has assessed the *documents filed with the SEC*. That finding, too, as just discussed in the context of the explanation of ground of appeal no. 2.4 regarding the *business plan*, is based on the Speaking Notes on Appeal devoted to Shell's defence that Milieudefensie et al. have no interest in the relief sought within the meaning of Article 3:303 DCC.[1764] In those Speaking Notes, Shell asserts that the 2021 SEC filing shows that it has set a higher reduction target than the one demanded by Milieudefensie et al.. However, that assertion is again based on the reference in that SEC filing to the non-existent *2022 business plan*. So in reality, that assessment is also based on a non-existent document that was not submitted in court. The Court of Appeal's reasoning is thus insufficient in that respect as well.

1323 Furthermore, the *2022 business plan* referenced in the SEC filing will also be subject to the disclaimers and conditionalities discussed in the context of grounds of appeal nos. 2.5 and 2.6, which have translated into a significantly watered-down policy since 2023 in practice. In that light, too, it is not clear why the Court of Appeal partly support its conclusion that there is no real threat of a violation of Shell's obligation to reduce its Scope 1 and 2 CO_2 emissions by 45% on that plan.

1324 Ground of appeal no. 2.9 challenges the significance attached by the Court of Appeal to the commitment by Shell's CEO during the Capital Markets Day 2023. That commitment meant that Shell's reduction targets regarding Scope 1 and 2 "*remain unchanged*." The ground of appeal points out that it is impossible to (partly) infer from this that Shell will fulfil its obligation to reduce its CO_2 emissions in Scopes 1 and 2 by

[1764] Speaking Notes on Appeal (Hearing Day 2 – Part 4 of 4) of Shell dated 3 April 2024, paras. 11.2.2 and 11.2.3 (closing sentence).

45%. After all, the comment simply indicates that Shell will not change its targets and will thus maintain all the associated conditionalities and uncertainties. The policy decisions made later and the watering down of its other targets demonstrate that the commitment of Shell's CEO was actually of little substance in practice.

Shell has each time disputed the existence of a legal duty regarding Scope 1 and 2 (ground of appeal no. 2.10)

1325 Finally, ground of appeal no. 2.10 challenges the reasoning of the Court of Appeal based on the Supreme Court's last point of view: the position of the party breaching the standard regarding the unlawfulness of their actions. It should be clear that this point of view also points to a real threat of a violation of a legal duty by Shell in this case.

1326 Since the first-instance proceedings, Shell has consistently disputed that it has a duty of care to prevent or limit dangerous climate change. According to its conditional cross-appeal in cassation, too, Shell has no reduction obligations based on private law, neither in Scope 1 and 2, nor in Scope 3. In the context of the discussion of Shell's defence based on Article 3:303 DCC, Milieudefensie et al. have also pointed to this denial by Shell.[1765] That position underscores - certainly in conjunction with all the conditionalities and factual policy choices described above - that it is far from certain that Shell will fulfil its reduction obligations regarding its Scope 1 and 2 emissions. On the contrary, everything indicates, also in cassation, that Shell does not consider itself bound by these obligations and that, in meeting its targets, it will primarily be guided by its own interests. The Court of Appeal should also have taken this denialist stance of Shell into account in its Judgment, but failed to do so.

VIII.1.2 No decision on the requested declaratory decision (ground of appeal no. 9)

1327 Grounds of appeal nos. 9.1 and 9.2 argue that the Court of Appeal, based on the positive side of the devolutive effect of the appeal, should have decided on the declaratory judgment sought by Milieudefensie et al. or the lesser relief implied in it.

1328 In the first-instance proceedings, Milieudefensie et al. had requested the court to give (among other things) the following declaratory decision.

> *"4.1 (…) a declaratory decision stating:*
>
> *a) that the combined annual volume of CO_2 emissions into the atmosphere (Scopes 1, 2 and 3) associated with the business activities and energy products sold by Shell and the companies and legal entities it normally includes in its consolidated financial statements and with which it forms the Shell Group, is unlawful*

[1765] Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 1107.

> *vis-à-vis Milieudefensie et al., and (i) that Shell must reduce this emission volume, both directly and via the companies and legal entities it normally includes in its consolidated financial statements and with which it forms the Shell Group, and (ii) that this reduction obligation must take place relative to the emission level of the Shell Group in 2019 and in accordance with the global temperature target set forth in Article 2(1)(a) of the Paris Agreement and the associated best available (UN) climate science* (…)*."*[1766]

1329 The District Court denied this requested declaratory decision because Milieudefensie et al. had no interest in it anymore due to the issue of the reduction injunction:

> *"4.5.9. The second part of the relief sought under 1(a), which amounts to a declaratory decision regarding the reduction obligation of RDS, is also denied. Since the District Court considers the requested reduction injunction to be admissible, it finds that Milieudefensie et al. have insufficient interest in the award of such declaratory decisions."*[1767]

1330 The Court of Appeal subsequently found in grounds 8.1, 8.2 and 9 that Shell's appeal was successful, that the Decision would therefore be overturned and that the relief sought by Milieudefensie et al. would be denied.

1331 In reaching this conclusion, the Court of Appeal fails to recognise that, based on the positive side of the devolutive effect of the appeal, it should have examined whether the requested declaratory decision (or the lesser relief implied in it) could be awarded nevertheless. This is not altered by the fact that the District Court had rejected the requested declaratory decision, because that rejection was based entirely on a lack of interest caused by the issue of the requested reduction injunction. The rejection of the requested declaratory decision therefore had no adverse effect on the operative part of the first-instance judgment. Milieudefensie et al. could not, therefore, be expected to bring a cross-appeal against the rejection of the requested declaratory decision. After all, as the District Court had correctly ruled, the 45% reduction injunction relative to the 2019 level had been awarded, meaning there was no longer any interest in granting the requested declaratory decision to the effect that Shell must reduce its CO_2 emissions. As a result, there was nothing in the operative part of the judgment that Milieudefensie et al. could object to.

1332 Because Shell's grounds for appeal were found to be valid, Milieudefensie et al. have an interest in the consideration of the requested declaratory decision now. That interest

[1766] Court of Appeal, ground 4.1. See also the Motion amending the Statement of Claim of Milieudefensie et al. dated 21 October 2020, under the relief sought
[1767] Decision of the District Court, ground 4.5.9.

already exists due to the *res judicata* effect of the operative part of the Decision and of the underlying considerations. For that reason, the Court of Appeal should have decided on it after all.

1333 This system of the devolutive effect of the appeal regarding relief sought that could not be awarded by a court due to a lack of interest is also demonstrated by the legal literature:

> *"This concerns the non-consideration and rejection of a party's submissions and defences which did not have an adverse effect for that party on the operative part of the first-instance judgment, which means that that party cannot be expected to take an appeal to such non-consideration or rejection. If a ground of appeal raised by the opposing party is found to be valid, that first mentioned party may still obtain an interest in the consideration of their relevant submission or defence in the first-instance proceedings, in the sense that this submission or defence, if valid, could have a favourable effect on the judgment on appeal for that party. In that case, the appellate court is required - if necessary, ex officio, no cross-appeal is required for this* (…) *- to consider that submission or defence (after all)."*[1768]

1334 In addition, legal scholars have written that the consideration of submissions or defences based on the devolutive effect of the appeal will, in any event, be mandatory if the appellate court would otherwise be forcing the respondent to take an appeal from a judgment that fully finds in favour of the respondent.[1769] Formally, judgment was not fully given in favour of Milieudefensie et al. in the operative part in the first-instance proceedings, since the District Court denied the requested declaratory decision, but the reason for this denial was that a reduction injunction had been awarded. This means that the District Court fully found in favour of Milieudefensie et al. in the operative part of the Decision*, as a result of which* they no longer had an interest in the requested declaratory decision. It would run counter to the rationale of the positive side of the devolutive effect of the appeal if Milieudefensie et al. were required to file a cross-appeal after all in that case.

1335 In view of the foregoing, the positive side of the devolutive effect of the appeal required the Court of Appeal to consider the declaratory decision sought in the first-instance proceedings. The Court of Appeal wrongly failed to do so. The court of remittal will therefore have to examine whether the declaratory decision sought and the duty of care

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[1768] H.J. Snijders & A. Wendels, "*Civiel Appel*", Deventer: Kluwer 2009, para. 219. See also the Opinion of Advocate General Spier prior to the judgment of the Supreme Court of 30 March 2012, ECLI:NL:PHR:2012:BU8514, para. 4.10. See also, for example, the judgment of the Dutch Supreme Court of 14 October 2022, ECLI:NL:HR:2022:1447.

[1769] H.J. Snijders & A. Wendels, *Civil Appeal*, Deventer: Kluwer 2009, para. 223. See also the Opinion of Advocate General Lückers prior to the judgment of the Dutch Supreme Court of 19 April 2019, ECLI:NL:PHR:2019:118, para. 2.26. See, for example, the judgment of the Dutch Supreme Court of 19 April 2019, ECLI:NL:HR:2019:637.

established by the Court of Appeal are consistent with each other. Milieudefensie et al. will briefly explain below that this is indeed the case and that this duty of care, in any event, corresponds with what can be considered as the lesser of that requested declaratory decision. They therefore have every interest in the setting aside of the Judgment on this point.

1336 In ground 7.67, the Court of Appeal has held that Shell has an obligation to make an appropriate contribution to the climate objectives of the Paris Agreement. Furthermore, in grounds 7.27, 7.53, 7.57 and 7.111, the Court of Appeal has found that Shell has an obligation to reduce its CO_2 emissions in Scopes 1, 2 and 3, thus recognising that Shell must reduce its CO_2 emissions in line with the Paris Agreement climate objectives.

1337 These established obligations fall well within the scope of the declaratory decision sought by Milieudefensie et al. After all, the Court of Appeal has determined that Shell has an obligation to reduce its Scope 1, 2 and 3 CO_2 emissions, whereas the declaratory decision sought by Milieudefensie et al. required the Court to find (i) that Shell must reduce the volume of its CO_2 emissions, both directly and via the companies and legal entities it normally includes in its consolidated financial statements and with which it forms the Shell Group, and (ii) that this reduction obligation must be complied with relative to the emission level of the Shell group of the year 2019 and in line with the global temperature target of the Paris Agreement and the associated best available climate science. This declaratory decision is therefore fully consistent with the duty of care established by the Court of Appeal, so the decision could have been awarded.

1338 Furthermore, a court may always award less than what the plaintiff has demanded, if the lesser is implied in the relief sought.[1770] This also applies to declaratory decisions requested by a plaintiff. This first of all requires that the factual basis of the relief sought and of the lesser award are the same, so that the facts underlying the relief sought can also support the lesser award.[1771] Second, the lesser award may be awarded only if it is sufficiently clear that the plaintiff would like to obtain such lesser award.[1772] Third, the plaintiff's wish to obtain the lesser award must be known to the defendant.[1773] The award of a declaratory decision that is less far-reaching than the one sought is not uncommon.[1774]

[1770] R.L. Bakels, "Courts are bound by the relief sought and decide only on the basis of information about which the parties have been heard," para. 11.4, in: A.W. Jongbloed & A.L.H. Ernes, "*Burgerlijk procesrecht praktisch toegelicht*" (Dutch law of civil procedure explained in practice), Deventer: Kluwer 2014.

[1771] Opinion of Advocate General Wesseling-Van Gent prior to the judgment of the Supreme Court of 21 October 2005, ECLI:NL:PHR:2005:AT8246, para. 2.18.

[1772] Opinion of Advocate General Van Peursem prior to the judgment of the Dutch Supreme Court of 5 April 2019, ECLI:NL:PHR:2018:1521, para. 2.10; Opinion of Advocate General Wesseling-Van Gent prior to the judgment of the Dutch Supreme Court of 21 October 2005, ECLI:NL:PHR:2005:AT8246, para. 2.18.

[1773] J.J. van der Helm, "*Het rechterlijk bevel en verbod als remedie*", Deventer: Wolters Kluwer 2023, paras. 607 up to and including 614.

[1774] Judgment of the Dutch Supreme Court of 5 November 1982, *NJ* 1984, 125. See also the Opinion of Advocate General

1339 The declaratory decision sought by Milieudefensie et al. in any event also encompasses, as the lesser, the duty of care established by the Court of Appeal, while the requirements discussed above are also met. First of all, the factual basis for the duty of care established by the Court of Appeal is the same as the basis for the requested declaratory decision. That is self-evident. The set of facts presented by Milieudefensie et al. in support of their relief sought has already led the Court of Appeal to establish the duty of care, and thus also supports the requested declaratory decision.

1340 Furthermore, it is sufficiently clear from the case documents that Milieudefensie et al. also wish to obtain the lesser award. The summons shows that Milieudefensie et al. concluded their claim with the following relief sought: *"at least to render any such decision as the Court may consider appropriate*."[1775] This already demonstrates that Milieudefensie et al. were willing, if necessary, to settle for less than the relief sought by them.[1776] Furthermore, Milieudefensie et al. have explained that the purpose of the relief sought is to remedy the unlawfulness of Shell's conduct.[1777] The fact that the wording of an operative part in which that unlawfulness is established is also implied in the requested declaratory decision is in line with this.

1341 Finally, Shell could also have known that this was what Milieudefensie et al. wants. This is demonstrated, among other things, by Shell's Statement of Defence in the First Instance, in which Shell interpreted Milieudefensie's arguments as follows:

> *"316.* (…) *After all, they have submitted that RDS has a duty of care with regard to preventing dangerous climate change. According to Milieudefensie et al., this duty of care entails that RDS must reduce the CO_2 emissions of Shell companies and, on top of this, the CO_2 emissions caused by the end-users of Shell products, and that it is has failed to comply with that alleged duty of care* (…).
>
> *318. The arguments of Milieudefensie et al. boil down to the fact that RDS is wrongfully failing to reduce the CO_2 emissions of other Shell companies and, by extension, of the end-users of their products* (…)*."*[1778]

Verkade prior to the judgment of the Dutch Supreme Court of 14 December 2007, ECLI:NL:PHR:2007:BB3762, para. 4.2 and the Opinion of Advocate General Wesseling-Van Gent prior to the judgment of the Dutch Supreme Court of 21 October 2005, ECLI:NL:PHR:2005:AT8246, para. 2.17.

[1775] Summons of Milieudefensie et al. dated 5 April 2019, p. 235.

[1776] R.L. Bakels, "Courts are bound by the relief sought and decide only on the basis of information about which the parties have been heard," para. 11.4, in: A.W. Jongbloed & A.L.H. Ernes, "*Burgerlijk procesrecht praktisch belicht",* Deventer: Kluwer 2014.

[1777] Motion explaining the amendment of the relief sought of Milieudefensie et al. dated 6 November 2020, paras. 7, 8 and 31.

[1778] Statement of Defence of Shell dated 13 November 2019, paras. 316 and 318.

1342 The above quotations show that Shell has understood that the relief sought by Milieudefensie et al. *also* encompasses the lesser, namely a general duty of care and a reduction obligation. In addition, Shell has argued the following:

> *"4.* (…) *RDS is not subject to any unwritten legal standard requiring it to limit the CO_2 emissions attributed to it by Milieudefensie et al.* (…).
>
> *18* (…) *while RDS has previously explained that it bears no responsibility for those emissions in a legal sense and has no obligation to reduce them* (…).
>
> *21. As RDS explained in its Statement of Defence in the First Instance, the "Kelderluik factors" invoked by Milieudefensie et al. do not provide a basis for accepting an unwritten legal standard that is applicable to RDS and that would require RDS to limit CO_2 emissions."*[1779]

1343 These quotations show that Shell has defended itself against the existence of a general reduction obligation, which confirms that Shell has understood the relief sought to mean that it also encompasses the award of the lesser.

1344 In light of the foregoing, the duty of care to prevent or limit dangerous climate change established by the Court of Appeal in any event comes within the scope of the lesser of the relief sought, since it has the same factual basis as the relief sought, was intended by Milieudefensie et al. and was known to Shell. For that reason, the Court of Appeal should in any event have awarded the corresponding declaratory decision sought by Milieudefensie et al.

VIII.1.3 Follow-up complaint (ground of appeal no. 10)

1345 Ground of appeal no. 10 contains only two follow-up objections, i.e.:

(a) the success of the objections (or any of the objections) formulated in grounds of appeal nos. 1 or 3 up to and including 8 also vitiates the finding of the Court of Appeal in ground 7.111 (ground of appeal no. 10.1); and

(b) the success of the objections (or any of the objections) formulated in grounds of appeal nos. 1 up to and including 9 also vitiates the finding of the Court of Appeal in grounds 8.1, 8.2 and 9 (ground of appeal no. 10.2).

These objections require no further explanation.

VIII.2 Defence against Shell's conditional cross-appeal in cassation

[1779] Motion in Reply with Explanation regarding Amendment of Statement of Claim of Milieudefensie et al. dated 1 December 2020, paras. 4, 18 and 21.

VIII.2.1 Admissibility of the Court of Appeal's considerations regarding new oil and gas fields (ground of appeal no. 4)

1346 Ground of appeal no. 4 of Shell's conditional cross-appeal in cassation targets grounds 7.58 up to and including 7.62, in which the Court of Appeal, in summary, considered the following:

(a) Further investments in oil and gas fields may lead to infrastructural, institutional, and behavioural carbon lock-in effects. Despite its awareness of the carbon lock-in effect, Shell has opted for a policy in which its oil supply remains unchanged and its gas supply will increase very significantly by 20% to 30%; this involves (in total) USD 100 billion in investments in oil and gas activities, more than half of which will be in oil and gas fields that are not currently producing oil and gas.[1780]

(b) Emissions from fossil fuels will have to be drastically reduced, and to that end, measures will need to be taken on both the demand and the supply side. Consequently, oil and gas companies will have to take responsibility and, when investing in oil and gas production, take into account the negative consequences of an expansion of the supply of fossil fuels for the energy transition. New investments in oil and gas fields may therefore be at odds with this.[1781]

(c) Because the relief sought by Milieudefensie et al. is aimed at a percentage-based reduction, the foregoing cannot lead, according to Shell, to the awarding of any part of what they are demanding.[1782]

1347 Shell's objections to these considerations, according to their introduction, are twofold in purpose. First, Shell intends to prevent that the objections raised by Milieudefensie et al. regarding the reasoning of the Judgment which are partly based on these considerations are successful.[1783] Shell presents eight points objections to the reasoning of the Court of Appeal.[1784] They, essentially, indicate that several of its considerations in grounds 7.67 up to and including 7.96 - which lead to the conclusion that no percentage-based reduction obligation can be established for Shell's Scope 3 emissions - do not comprehensibly relate to its earlier considerations regarding the existence of the duty of care (grounds 7.1 up to and including 7.57). Furthermore, according to Shell, those considerations do not comprehensibly relate to the above-mentioned grounds in which the Court of Appeal ruled that investments in new oil and gas fields may be at odds with its duty of care (grounds 7.58 up to and including 7.62).

[1780] Judgment of the Court of Appeal, grounds 7.59 and 7.60.
[1781] Judgment of the Court of Appeal, grounds 7.61.
[1782] Judgment of the Court of Appeal, ground 7.62.
[1783] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 195.
[1784] Statement of Defence in Cassation of Shell dated 7 November 2025, footnote 507. See, in this regard, the Notice of Appeal in Cassation of Milieudefensie et al. dated 11 February 2025, paras. 1.30, 3.47, 3.48, 3.50, 4.31, 5.6, 6.8 and 6.14.

Second, Shell aims to prevent, by raising these objections, that it will become bound by the potential *res judicata* effect of these findings.[1785]

1348 Ground of appeal no. 4.1 first argues that the contested considerations exceed the scope of the legal dispute and, in light of the relief sought by Milieudefensie et al., should have not have been included in the judgment by the Court of Appeal. In addition, Shell argues that these considerations do not support the operative part of the judgment (in which the relief was denied), so that they have no bearing on the admissibility of the relief sought by Milieudefensie et al. Furthermore, Shell contends that the considerations conflict with the system of grounds for appeal and the principle of *reformatio in peius*, because Milieudefensie et al. did not seek this relief, the District Court ruled that Shell has the freedom to determine how it will fulfil the stringent duty of care incumbent upon it and the Court of Appeal's considerations are not based on a cross-appeal filed by Milieudefensie et al.[1786] Finally, the objection identifies - due to this alleged limitation of the stringent duty of care - a contradiction in the Court of Appeal's reasoning.[1787]

1349 In ground of appeal no. 4.2, Shell argues that the Court of Appeal's considerations in grounds 7.58 up to and including 7.62 are inadmissible and/or violate the *audi et alteram* principle, because Shell could not reasonably have expected these considerations.[1788] This objection therefore essentially constitutes a repetition of the objection formulated in ground of appeal no. 4.1 that the challenged considerations exceed the scope of the legal dispute.

1350 These objections cannot succeed. Milieudefensie et al. will discuss the objections jointly.

The considerations are well within the scope of the legal dispute

1351 It should first be noted that the challenged considerations are well within the scope of the legal dispute and (therefore) cannot constitute a surprise decision either. Building on this, there is also no decision that is impermissible from a procedural objective or contrary to the *audi et alteram* principle. Milieudefensie et al. will explain this on the basis of the party debate (described in brief).

1352 Partly in support of the relief sought by them, Milieudefensie et al. have repeatedly pointed out throughout this lawsuit that Shell's current policy does not contribute to the objectives of the Paris Agreement. In that regard, Milieudefensie et al. have also consistently argued, referring to the figures mentioned by the Court of Appeal, that Shell

[1785] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 196.
[1786] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 197 up to and including 201.
[1787] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 197 and 202.
[1788] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 203 and 204.

intends to invest very heavily in new oil and gas fields, that those investments will prevent its emissions from decreasing and that the carbon lock-in effect will be reinforced by those investments. In this context, Milieudefensie et al. have, among other things, pointed to the reports of the UNEP, the IEA and the UN Expert Group[1789], which the Court of Appeal has also cited. [1790] Furthermore, they have pointed out that the stringent duty of care established by the District Court requires Shell, if necessary, to refrain from making new investments in the extraction of fossil resources and/or to limit their production.[1791] Furthermore, Milieudefensie et al. have argued and substantiated that the CO_2 emissions of Shell associated with its oil and gas production would already drop by approximately 45% if Shell were to stop developing new oil and gas fields.[1792] This means that these the submissions of Milieudefensie et al. can be found in all the considerations of the Court of Appeal.

1353 Shell has responded to these arguments both in the first-instance proceedings and on appeal. In the first-instance proceedings, Shell argued, as a defence against the position of Milieudefensie et al., that investments in new oil and gas fields are necessary to close the gap between supply and demand.[1793] On appeal, Shell's defence essentially consisted of the submission that the demand for oil and gas justifies these investments. In line with this, Shell pointed out that it would arrange for its LNG activities to increase by 20% to 30%, that investments in oil would remain at the same level and that investments in gas would rise.[1794] In short, Shell argued that it was allowed to make these decisions within the scope of its legal obligations.

1354 The Court of Appeal summarised this debate between the parties in grounds 7.58 up to and including 7.60, basing its description of the level of the intended investments on the figures cited by Milieudefensie et al. and Shell themselves. Shell is also rightly not

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[1789] See, for example, the Oral Arguments on Appeal (Part 4) of Milieudefensie et al. dated 4 April 2024, paras. 100 up to and including 112, 119 and 128; the Oral Arguments on Appeal (Part 3) of Milieudefensie et al. dated 4 April 2024, paras. 109 and 110; the Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 50 up to and including 54; the Annex to Oral Arguments on Appeal (Part 2) of Milieudefensie et al. dated 4 April 2024, paras. 17 up to and including 20; the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 677 up to and including 688, 716 and 815; the Opening Arguments on Appeal (Part 2) of Milieudefensie et al. dated 2 April 2024, para. 2; the Written Arguments on Appeal of Milieudefensie et al. dated 18 March 2024, paras. 104, 105, 109, 110, 121 and 122. See also, for example, the Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, paras. 78 and 79; the Motion explaining Amendment of Statement of Claim of Milieudefensie et al. dated 6 November 2020, para. 29; the Summons of Milieudefensie et al. dated 5 April 2019, paras. 589 and 790.

[1790] Judgment of the Court of Appeal, ground 7.58.

[1791] See, for example, the Opening Arguments on Appeal (Part 1) of Milieudefensie et al. dated 2 April 2024, para. 57; the Written Arguments of Milieudefensie et al. dated 18 March 2024, paras. 121 and 122; the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 879 and 1053.

[1792] Rejoinder of Milieudefensie et al. dated 12 April 2024, paras. 24 and 32; Motion in Reply to Motion commenting on Exhibits of Milieudefensie et al. dated 19 December 2023, para. 95; Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, para. 687.

[1793] Statement of Defence of Shall dated 13 November 2019, paras. 145 up to and including 151.

[1794] See, for example, the Response to the questions of the Court of Appeal of Shell dated 12 April 2024, paras. 9.1.1, 9.2.8 and 9.2.15; the Annex to the Speaking Notes on Appeal of Shell (Hearing Day 2) dated 3 April 2024, paras. 1.5 up to and including 1.11.

complaining about the fact that the Court of Appeal interpreted the case documents in an incomprehensible manner in these considerations.

1355 In light of the debate between the parties as summarised above and its interpretation by the Court of Appeal, Shell cannot maintain that the Court of Appeal's considerations exceed the scope of the legal dispute or came as a surprise to it, meaning that Shell was unable to provide an adequate response. The *audit et alteram* principle has therefore not been violated. After all, Milieudefensie et al. have pointed out that investments in new oil and gas fields lead to a further carbon lock-in effect and are inconsistent with the stringent duty of care established by the District Court. Shell has defended itself against this by position by referring to fossil-fuel supply and demand. In that light, it cannot have come as a surprise that the Court of Appeal found that these investments *may* be at odds with Shell's duty of care. Nor is it clear why the Court of Appeal should even have refrained from making these considerations in light of this debate between the parties, as Shell is still arguing. For this reason, this part of Shell's ground of appeal must fail.

Res judicata, obiter dicta and duty to provide a reasoning

1356 The further examination of Shell's objections raises the question whether the Court of Appeal's considerations in grounds 7.58 up to and including 7.62 have the force of *res judicata* and are *obiter dicta* (superfluous considerations), which will be discussed. Next, the question arises whether that characterisation has consequences for the eight objections that were enumerated by Shell and were directed by Milieudefensie et al. in their principal appeal in cassation at the considerations in grounds 7.67 up to and including 7.96, insofar as they also point to their incomprehensible relationship with the considerations in grounds 7.58 up to and including 7.62.

1357 Milieudefensie et al. will first set out that the doctrines of *res judicata* and *obiter dicta* are closely related.

(a) Res judicata. Pursuant to Article 236(1) of the Dutch Code of Civil Procedure, *res judicata* covers all the considerations of a court regarding the legal relationship in dispute which support the judgment given. This therefore means, in and of itself, that the considerations challenged by Shell have not acquired the force of *res judicata* between the parties, as they have not led to the award of any part of the relief sought.

(b) Obiter dicta. Obiter dicta are superfluous considerations which are characterised by the fact that they have no bearing on the operative part of the judgment.[1795]

[1795] See, for example, T.F.E. Tjong Tjin Tai, "*GS Burgerlijke Rechtsvordering*" *(GS Civil Procedure)*, Article 30 of the Dutch Code of Civil Procedure, note 3.

> This characterisation is relevant, because what follows from is that there is no interest within the meaning of Article 3:303 DCC in bringing an appeal against them. That interest is lacking because the *obiter dicta* do not support the judgment, and so a successful challenge of these considerations cannot lead to the reversal of the judgment. Logically, this lack of interest applies in general to considerations that have not led to a judgment against the party seeking to exercise the legal remedy.[1796]

1358 Consequently, Shell cannot independently challenge the considerations in grounds 7.67 up to and including 7.111 that are favourable to it and support the judgment, and Milieudefensie et al. have no independent interest in challenging the considerations in grounds 7.1 up to and including 7.62 that are favourable to them. Nor can the parties independently challenge grounds 7.58 up to and including 7.62, as these considerations do not support the operative part of the judgment. To the extent that Shell's objections proceed on the assumption that grounds 7.58 up to and including 7.62 do not constitute *obiter dicta*, they lack factual basis.

1359 The next question to be answered is whether, and if so, how, such non-supporting considerations play a role in a court's duty to reason its judgment. With regard to this duty of a court to reason its judgment, established case law holds that every court decision must be reasoned to at least such an extent that it provides sufficient insight into the underlying line of thought so that the decision can be checked and accepted, both by the parties to the lawsuit and by third parties, including, in the event of an appeal, the appellate court.[1797] This means that the considerations of a court must make it clear, on sufficiently comprehensible grounds, why the court arrived at the operative part of its judgment (i.e. the decision to award or not award the relief sought). This implies that all considerations supporting the operative part must meet the above-mentioned minimum requirement.

1360 From the perspective of cassation proceedings, this reasoning requirement means that the relationship between the considerations that support the judgment and the other considerations of the court may not be incomprehensible. After all, without this, those supporting considerations do not provide sufficient insight into a court's line of thought. If, for instance, there are contradictions with other parts of the judgment that cannot be understood without any further reasoning (which has not been provided), then the reasoning provided to explain the operative part of the judgment fails to meet this

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[1796] See, for example, B.T.M. van der Wiel et al., "*Cassatie*" *(Cassation)*, Deventer: Wolters Kluwer 2019, no. 198; F.E. Vermeulen, "*Kwesties van belang: artikel 303 BW in Cassatie*" (Issues of importance: Article 3:303 DCC in cassation) in: P.J.M. von Schmidt auf Altenstadt et al. (eds.), *Middelen voor Meijer*, The Hague: Boom Juridische uitgevers 2013, p. 408, with reference to the judgment of the Dutch Supreme Court of 20 January 1984, *NJ* 1987, 295 (*Leutscher/Van Tuyn et al.*).

[1797] Judgment of the Dutch Supreme Court of 4 June 1993, ECLI:NL:HR:1993:ZC0986 (*Vredo/Veenhuis*).

requirement.[1798] When determining whether the relationship between that reasoning and other considerations is comprehensible and thus sufficiently clarifies the court's decision, it is therefore irrelevant whether those latter considerations are, from the perspective of Article 236 of the Dutch Code of Civil Procedure and Article 3:303 DCC, supporting considerations. After all, that does not detract from the contradiction and, consequently, from the insufficient comprehensibility of the required reasoning.

1361 This lawsuit illustrates the above. Naturally, Milieudefensie et al. may complain in cassation that the relationship between the considerations in grounds 7.67 up to and including 7.96, which partly led to the denial of their Scope 3 reduction relief, and (among other things) the duty of care established for Shell in grounds 7.26, 7.27 and 7.55 up to and including 7.57, is incomprehensible, even though those latter considerations clearly did not lead to the denial of the relief sought. On the contrary, they are actually favourable to Milieudefensie et al. Shell is therefore rightly not arguing that Milieudefensie et al. are not allowed to raise this issue of incomprehensibility due to the non-supportive nature of those considerations.

1362 This is no different for the eight objections in the principal appeal in cassation of Milieudefensie et al. cited by Shell concerning the incomprehensible reasoning of the supporting considerations in grounds 7.67 up to and including 7.96 in light of the non-supporting considerations in grounds 7.58 up to and including 7.62. There is no comprehensible relationship between the considerations in grounds 7.67 up to and including 7.96, which are challenged by those objections, and various considerations in grounds 7.58 up to and including 7.62; as a result, the Court of Appeal's reasoning cannot explain in a sufficiently comprehensible manner why the relief sought was denied. In other words: for that reason, the supporting considerations fail to meet the applicable reasoning requirements. This is the valid point raised by the eight objections to the Court of Appeal's reasoning as formulated by Milieudefensie et al., which Shell is targeting in its ground of appeal no. 4. To the extent that Shell is arguing that the nature of grounds 7.58 up to and including 7.62 as *obiter dicta* precludes the success of the objections raised by Milieudefensie et al. regarding the reasoning, Shell's ground of appeal cannot succeed for that reason either.

Reformatio in peius and violation of the Dutch system for raising grounds of appeal

1363 Finally, Shell is arguing that the District Court ruled that Shell has the freedom to determine how it will fulfil its stringent obligation of means to reduce its CO_2 emissions by 45%. According to Shell, the considerations in grounds 7.58 up to and including 7.62 amount to a restriction of that freedom. Those considerations therefore conflict with the *reformatio in peius* prohibition or with the Dutch system for raising grounds of appeal,

[1798] See, for example, B.T.M. van der Wiel et al., "*Cassatie"*, Deventer: Wolters Kluwer 2019, nos. 43 and 44.

because these considerations are not based on cross=-appeal of Milieudefensie et al., according to Shell.

1364 This ground of appeal fails. First, Shell is challenging a non-supporting consideration here, also according to Shell itself[1799]. It has already been discussed above that such a ground of appeal always fails, because an interest within the meaning of Article 3:303 DCC is lacking. The ground of appeal already fails for this reason alone. Second, Shell is overlooking the fact that the *reformatio in peius* prohibition has no bearing on non-supporting considerations. The prohibition means that a party may not be placed in a worse position as a result of its own appeal, unless a cross-appeal was brought[1800]. This will only be the case if the operative part of the judgment on appeal turns out to be less favourable than the operative part in the first-instance proceedings and no cross-appeal has been made.[1801] A non-binding consideration does not lead to a less favourable position. Shell's position has, in fact, only improved as a result of its appeal, because the Court of Appeal overturned the operative part of the Decision of the District Court. For that reason, it is equally unclear why the judgment of the Court of Appeal would conflict with the Dutch system for raising grounds of appeal. On the contrary, in light of the debate between the parties, the Court of Appeal was actually at liberty to include these non-supporting considerations in its judgment.

1365 Finally, the considerations of the Court of Appeal in grounds 7.58 up to and including 7.62 are by no means inconsistent with Shell's stringent obligation of means. It is evident that a sharp increase in Shell's gas production and sales accompanied by constant oil production and sales may be at odds with Shell's CO_2 emission reduction obligation. The nature of the stringent obligation of means does not alter this. What *is* incomprehensible is that the Court of Appeal first (rightly) determined that Shell must reduce its CO_2 emissions because all relevant objective points of reference indicate this, but then failed to impose a concrete reduction obligation nevertheless. This forms the essence of the appeal in cassation brought by Milieudefensie et al. The ground of appeal fails.

VIII.2.2 Shell's duty of care and the role of courts in law-making (ground of appeal no. 5)

1366 Ground of appeal no. 5 of Shell's conditional cross-appeal essentially covers two separate issues:

(c) The respective roles of the courts and the legislature (ground of appeal no. 5.1); and

[1799] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 195.
[1800] See e.g. *Asser Procesrecht/Bakels, Hammerstein &Wesseling-van Gent 4* 2022/123.
[1801] The fact that the doctrine is linked to the operative part of a judgment also follows from the fact that a cross-appeal *can* lead to a worse position. After all, a cross-appeal only has to be filed (barring very exceptional cases) if the operative part of the judgment contains decisions that are detrimental to the appellant filing the cross-appeal.

(d) The relationship between Shell's duty of care and the substantive and procedural law applicable in the Netherlands (ground of appeal no. 5.2).

Ground of appeal no. 5.3 then contains a number of follow-up objections. Milieudefensie et al. will discuss these grounds of appeal below.

The respective roles of the courts and the legislature (ground of appeal no. 5.1)

1367 In ground of appeal no. 5.1, Shell is arguing that a Dutch court would exceed its law-making role by accepting a duty of care under Article 6:162 DCC that results in a concrete reduction obligation. That ground of appeal is further divided into six lines of argument, each of which adopts a different perspective to support the main contention. Ground of appeal no. 5.1.1 approaches the issue from the perspective - which Shell has made its central argument - that the problem of dangerous climate change is essentially a distributional issue that national governments and the EU must resolve. Ground of appeal no. 5.1.2 then presents the legal system again as well as the cases that *have* been arranged in it as a relevant criterion. Ground of appeal no. 5.1.3 presents alleged interests related to Dutch security and foreign policies as reasons for not imposing a reduction obligation on Shell. Ground of appeal no. 5.1.4 points out that the objective points of reference on which Shell's duty of care is based do not bind Shell. Ground of appeal no. 5.1.5 again raises the argument that a duty of care would undermine the European and international level playing field for companies such as Shell. Finally, ground of appeal no. 5.1.6 argues that the right to effective legal protection cannot lead to a concrete reduction obligation either.

1368 Milieudefensie et al. first of all note that these arguments largely reiterate Shell's position that no duty of care to prevent or mitigate dangerous climate change can be applicable to Shell, and that such a duty would conflict with EU law. The only difference is the guise in which those arguments are presented. In this ground of appeal, that guise takes the form of a constitutional-law perspective. In Chapters III up to and including VI of this Explanatory Submission, Milieudefensie et al. have already elaborated in very great detail why these arguments do not preclude the acceptance of a duty of care and a concrete reduction obligation from either a Dutch or an EU perspective. That explanation also clarifies why Shell's arguments, in their new "constitutional" guise, cannot succeed. In essence, these reasons boil down to the following:

(a) Article 6:162 DCC and the applicable method of legal reasoning based on objective points of reference - which is generally accepted and which was also used by the Court of Appeal (and was not challenged in cassation) - leads to a duty of care and a concrete reduction obligation. This is all the more true because courts must provide effective legal protection. The legal system and the situations

arranged in it do not alter this. On the contrary, Article 6:162 DCC is, in fact, an integral part of the legal system.[1802]

(b) The ECHR obligations incumbent upon the State and courts to protect citizens against dangerous climate change also lead to a requirement for courts to impose a concrete reduction obligation on Shell.[1803]

(c) EU law does not preclude a duty of care imposed for Shell, but rather encourages such national obligations for companies in line with the UN climate regime, which also promotes such obligations, and the soft-law sources partly developed in that context.[1804]

(d) Urgent societal interests, such as those relating to energy security or safety, do not play an independent role in determining Shell's duty of care, but can, at most, be taken into account in determining Shell's concrete reduction obligation; in this way, they can therefore potentially influence the level of the reduction percentage applicable to Shell. The Court of Appeal did not get round to this. Furthermore, within the system of liability law, such interests may constitute a justification or justify a reliance on Article 6:168(1) DCC, provided that Shell demonstrates - possibly with the assistance of national governments that fear such dangers - that those societal interests are actually at risk. Shell has failed to do so in all three instances. All Shell has done is offering suggestions that it has not made concrete.[1805]

(e) Even if a change in circumstances were to occur after the establishment of Shell's duty of care, both Dutch liability law and procedural law *and* the nature of the stringent obligation of means imposed on Shell regarding its Scope 2 and 3 emissions provide ample flexibility. After all, such changed circumstances could be taken into account in determining whether Shell has fulfilled its stringent obligation of means or cause the reduction injunction issued by the court to lapse. The burden of pleading and the burden of proof rest with Shell in this regard. The issue of a concrete reduction injunction is therefore consistent with Dutch liability law and Dutch law of procedure.[1806]

1369 With these findings, the answer to the question regarding the role of the courts in relation to the role of the Dutch and EU legislature as well as the role of the executive branch has also been answered, which means that the ground of appeal fails. Within its law-developing powers and within the limits of Dutch and EU law, courts are allowed to

[1802] See, in this regard, Chapters IV up to and including VI of this Explanatory Submission.
[1803] See, in this regard, Section VI.3.5 of this Explanatory Submission.
[1804] See, in this regard, Sections V.6.2 up to and including V.6.8 of this Explanatory Submission.
[1805] See, in this regard, Section V.8.1 of this Explanatory Submission.
[1806] See, in this regard, Section VI.7 of this Explanatory Submission.

establish a duty of care and a concrete reduction obligation. Courts are also required to do so in light of the ECHR and on the basis of Dutch law. Since all these arguments have already been discussed in the preceding Chapters, Milieudefensie et al. will now focus in particular on the respective roles of the courts, the legislature and the executive branch and what role the aspects cited by Shell play within that division of roles. To further refute the objections raised in this part of the ground of appeal, Milieudefensie et al. will, as much as possible, refer back to the relevant Sections of this Explanatory Submission in which they were addressed to avoid unnecessary repetition.

Constitutional relationships and law-making in the case of an unwritten standard of care

1370 First and foremost, it is important to note that Shell's objections set out in ground of appeal no. 5.1 are based on various aspects playing a role in the division of tasks between the judicial, legislative and executive branches. For instance, the objections concern topics such as policy-making discretion, margin of appreciation and the primacy of politics in important legal-political choices. However, the objections conflate and confuse these aspects to a significant extent, with the result that Shell loses sight of the boundaries within which courts establish duties of care. In the following, Milieudefensie et al. will therefore briefly discuss how the respective roles of the judiciary, legislative and executive branches must be delineated.

Legal obligations, policy-making discretion and margin of appreciation

1371 When a court is faced with the question of which legal obligations the government has, it must distinguish between (on the one hand) the legal obligations themselves and (on the other hand) the policy-making discretion and margin of appreciation available to the government *in complying* with those legal obligations. In their assessment, courts will consider the policy-making discretion and margin of appreciation accorded to the government in complying with legal obligations. That is the domain of the legislative and executive branches. This division of tasks is related to the fact that governments can fulfil the legal obligations they have in a democratically justified manner by making policy choices and with due regard for the associated interests. What constitutes appropriate measures to comply with such obligations in a concrete case is therefore, as a matter of principle, a matter for the government to decide.[1807]

1372 If legal obligations are based on the ECHR, the *margin of appreciation* may also play a part. The doctrine of the margin of appreciation primarily determines the intensity of the ECHR's review in relation to the contracting states. Building on this, the margin of

[1807] See, for example, the judgments of the Dutch Supreme Court of 3 October 2025, ECLI:NL:HR:2025:1435 (*F-35*), ground. 4.8.2; 26 June 2020, ECLI:NL:HR:2020:1148 (*IS-reizigers*), ground 3.10.3, 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), grounds 6.1 and 6.2, 6 February 2004, ECLI:NL:HR:2004:AN8071 (*VJV/State*), ground 3.4, 29 November 2002, ECLI:NL:HR:2002:AE5164 (*X/State*), ground 3.3 and 21 December 2001, *NJ* 2002, 217 (*Kernwapens*), ground 3.3.

appreciation relates to the discretion allowed by the ECtHR to the contracting states in complying with their ECHR obligations.[1808] In this context, the ECtHR ruled in its *KlimaSeniorinnen* judgment that contracting states have a limited margin of appreciation when it comes to complying with the climate obligations arising from the ECHR.[1809] So here it does not concern the relationship between the judiciary, legislature and executive branches, but the relationship between the ECHR and the contracting states.

Remedying an identified deficiency in the law and the primacy of politics

1373 In addition to the situations described above, civil courts must safeguard their position vis-à-vis the legislature when they carry out their law-shaping and law-interpreting functions. This therefore does not concern the question discussed above of when courts encroach upon the government's policy-making discretion and margin of appreciation, but rather the limits within which courts can establish what the civil law is. In the context of courts' task to interpret and develop the law, the basic principle is that it the courts are not tasked with making choices about how society should be organised and governed. After all, those are political choices.[1810]

1374 It follows from this primacy of politics that a court that identifies a deficiency in the law cannot always step in. The answer to the question of whether a court can remedy such a deficiency depends on whether this requires the court to make choices related to government policies or to make important legal-political choices. This was the issue to be decided in the *Arbeidskostenforfait* judgment of the Dutch Supreme Court, which found that the general increase in the lump-sum deduction for labour costs benefited only a limited group of employees and was therefore contrary to the principle of equality. The legal scheme was therefore non-binding. The next question was how this inequality could be remedied. *That* is where a deficiency in the law had become apparent. The Supreme Court held that courts cannot remedy that deficiency in the law, because doing so would require policy choices that cannot be made by courts.[1811]

1375 If there is a deficiency in the law, a court may be able to remedy it without having to make political choices. There is scope for this if there is a broadly prevailing legal conviction[1812] or if the legal system and the cases that *are* regulated by it provide

[1808] For a detailed discussion of this, see J.H. Gerards, "*EVRM – Algemene beginselen*", The Hague: Sdu 2011, p. 74 et seq.
[1809] ECHR 9 April 2024, no. 53500/20 (*Verein KlimaSeniorinnen Schweiz/Switzerland*), para. 543. See also the judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), ground 6.3.
[1810] See in detail M.E. Bruning, "*De rechtsvormende taak van de civiele rechter*" *(The law-making role of civil courts)*, The Hague: Boom 2025, p. 280; M.W.C. Feteris, "*Signalen van de Hoge Raad naar de wetgever*") (Signals from the Dutch Supreme Court to the legislator), *RegelMaat* 2018, p. 349 et seq.
[1811] Judgment of the Dutch Supreme Court of 12 May 1999, ECLI:NL:HR:1999:AA2756 (*Arbeidskostenforfait*), ground 3.15. See also the judgment of the Dutch Supreme Court of 4 November 1994, *NJ* 1995, 249 (*Afstammingsrecht*).
[1812] Judgment of the Dutch Supreme Court of 15 January 1960, *NJ* 1960, 84 (*Panhonlibco*). See also the judgment of the Dutch Supreme Court of 31 January 2019, *NJ* 1919, p. 161 (*Lindenbaum/Cohen*), in which that broadly prevailing legal conviction justified the acceptance of the unwritten standard of care.

sufficient guidance for remedying that deficiency.[1813] If the deficiency in the law results in a violation of fundamental rights, the importance of providing effective protection against such a violation will help to determine whether a court may remedy the deficiency in the law.[1814] All these questions will only come up for discussion if there is a deficiency in the law.[1815]

Establishing an unwritten duty of care

1376 The issues discussed above do not arise, however, when a court must determine what obligations a business has toward citizens based on the unwritten duty-of-care standard of Article 6:162 DCC. In that purely horizontal relationship, the court will not be encroaching upon any policy-making discretion or margin of appreciation of the government. There is also no question of a deficiency in the law in such cases. After all, Article 6:162 DCC requires that parties conduct themselves in accordance with what is appropriate in society. The court will answer that question based on all relevant objective points of reference. So it is these points of reference that determine whether or not a party has a particular obligation. They therefore point the way when answering the question whether, in a concrete case, something can be required of a party, and if so, what.[1816]

1377 Thus when courts perform an assessment against Article 6:162 DCC, there can be no question of a deficiency in the law that needs to be remedied. After all, based on this principle established by the legislature, a duty of care either will or will not exist in a concrete case. Courts are uniquely equipped, and have even been expressly empowered by the legislature, to examine and determine the existence and scope of that duty of care. The relevant societal interests are "baked into" that determination as the starting-point, because the objective points of reference reflect the way in which the various interests carrying the most weight in society must be balanced against each other.

1378 This explains why the question whether a court has gone beyond the boundaries of its law-making role in connection with government policies, broader societal interests, policy choices or distributional issues never comes up for discussion in the case law regarding the determination and interpretation of the unwritten duty of care in horizontal relationships,. The central issue in such cases is whether the interests of the injured party outweigh the interests of the wrongdoer. *That* is where the duty of care arises. Any pressing societal interests can subsequently be considered, at most, when the duty

[1813] Judgment of the Dutch Supreme Court of 30 January 1959, *NJ* 1959, 548 (*Quint/Te Poel*).
[1814] Judgment of the Dutch Supreme Court of 12 July 2024, ECLI:NL:HR:2024:977 (*Huwelijk personen van gelijk geslacht*), grounds 3.3.1 and 3.3.2.
[1815] For an in-depth overview of legal scholarship and case law in this area, see M.E. Bruning, "*De rechtsvormende taak van de civiele rechter"*, The Hague: Boom 2025, pp. 280–306, in which he discusses a long series of cases that share the starting-point that there is a deficiency in the law that needs to be remedied.
[1816] See, in this regard, Sections IV.2 up to and including IV.5 of this Explanatory Submission.

of care is made concrete, either as a justification ground or as a ground for relying on Article 6:168(1) DCC.[1817]

1379 The foregoing can be easily illustrated by means of three examples. Shell's argument could be applied *mutatis mutandis* to all of these examples, which immediately underscores the invalidity of Shell's argument.

(a) In cases of *liability of banks* for non-transparent financial products, the question to be answered is always what standard of care should have been observed by the bank in relation to its (prospective) clients.[1818] In this type of cases, the debate that Shell wishes to be held - namely, whether such a duty of care conflicts with government policy regarding banks in the financial system or whether it affects, for example, the competitive position of the Netherlands and its banks – never takes place. It is the interests of the bank and the interests of the (prospective) clients that stand opposite each other and must be weighed against each other when the bank's duty of care is determined.

(b) Societal interests relating to asbestos also play no role in the *liability of asbestos processors* for asbestos-related diseases[1819]. In those cases, the issue is not whether asbestos, of and in itself, was useful as a fire-resistant material at the time. What is also not the issue is whether, under the heading *of the "asbestos trilemma,"* the liability of asbestos processors might conflict with the way in which the government would wish to regulate fire risks, the danger of asbestos and public health for the entire asbestos industry. In this type of cases, too, the interests of asbestos processors are weighed against the interests of workers who face serious health risks due to asbestos exposure.

(c) In cases dealing with the *liability of mining operators* for salt discharges into the Rhine vis-à-vis downstream river users, the issue revolved around the question of whether mining operators must cease their discharges in light of their own interests relative to the affected interests of the downstream users.[1820] In this type of cases, the question of whether a court could step in does not arise, as this is a distribution issue regarding the use of the river Rhine. There is also no relevant *river trilemma* between the interests of the river as a common resource with multiple functions, the usefulness of salt mining for European industry and its end-users and the interests of downstream users in having clean water.

[1817] See, in this regard, Section V.8.1 of this Explanatory Submission.
[1818] See, for example, the judgments of the Dutch Supreme Court of 24 December 2010, ECLI:NL:HR:2010:BO1799 (*Fortis/Bourgonje*), 5 June 2009, ECLI:NL:HR:2009:BH2815 (*T/Dexia*), 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/B.*) and 5 June 2009, ECLI:NL:HR:2009:BH2822 (*Stichting Gedupeerden Spaarconstructie/Aegon*).
[1819] See, for example, the judgment of the Dutch Supreme Court of 25 November 2005, ECLI:NL:HR:2005:AT8782 (*Eternit*).
[1820] See, for example, the judgment of the Dutch Supreme Court of 23 September 1988, *NJ* 1989, 743 (*Kalimijnen*).

1380 The absence of the aspects of “policy-making discretion”, “margin of appreciation” and “primacy of politics” in the case scenarios described above has to do with the fact that the central question in such cases is always what the unwritten duty of care entails or does not entail for a private party. That question is unrelated to the government’s policy-making discretion or margin of appreciation in complying with its legal obligations or to the discretion of courts in interpreting the law in the event of a deficiency in the law. The case scenarios concern the question assigned to courts of what the unwritten duty of care requires in a concrete case. This involves a balancing of interests between the interests of the injured party and the wrongdoer, in which courts have objective points of reference at their disposal.

1381 Therefore the respective roles of the courts and the legislature in the context of such unwritten duties of care is, in reality, the mirror image of what Shell has sketched in this regard. The courts establish an unwritten duty of care based on the tools available to them for shaping the law for that purpose. If the relevant objective points of reference point to a duty of care, the courts must accept it. If the legislature ultimately determines that such a duty of care is too far-reaching in view of societal or other interests, it may still limit or further shape such obligations by introducing legislation. It can use its legislative power for this purpose. In this way, every actor within the state system plays the role assigned to them based on the standards provided by the law.

1382 Recently, the Dutch State Secretary for Justice and Security endorsed this view. In response to parliamentary questions regarding the role of courts in climate issues, the State Secretary replied, among other things:

> *“There is no question of general policy-making when courts shape the law. Be that as it may, a court judgment in a concrete case may have broader societal implications. It is up to the legislature to respond to this, if desired.”*[1821]

1383 This actually happens in practice. On several occasions, the legislature has enacted court interpretations of the duty-of-care standard in order to codify the relevant duty of care, to further determine the scope of such a duty, or, conversely, to limits its scope. Milieudefensie et al. will give three examples.

(a) Following a number of court judgments regarding the unlawfulness of *misleading and comparative advertising*[1822], the legislature introduced Articles 1416a up to and including 1416c DCC (old) in 1980.[1823] The new rules are now laid down in

[1821] Response from State Secretary Van Bruggen (Justice and Security) dated 19 March 2026, in response to the “*Aanhangsel Handelingen”* (Annex to the Parliamentary Proceedings) 2025/26, No. 1209, answer to question 10.
[1822] See, for example, the judgments of the Dutch Supreme Court of 18 February 1966, *NJ* 1966, 208 (*Dutch Carillon Association*), 26 June 1953, *NJ* 1954, 90 (*Hyster Karry Krane*) and 22 November 1934, *NJ* 1935, 529.
[1823] See, for example, C.J.J.C. van Nispen, *GS Tort*, Art. 6:194 BW, note A3.

Articles 6:194 up to and including 6:196 DCC. According to the legislative history, one of the aims of these rules is to further determine the (existing) civil liability.[1824] When the law was enacted, the legislature also set limits on its scope of application, for example by creating a less far-reaching duty of care for publicity media and by establishing that unmistakable exaggerations do not constitute misleading advertising.[1825] A further limitation follows from Article 6:194a(2) DCC, which enumerates the conditions under which comparative advertising *is* permitted.

(b) In response to a number of court judgments regarding the unlawfulness of causing *damage to cables and pipelines*[1826], the legislature amended the WION (the Dutch Underground Networks Information Exchange Act; now known as the WIBON). The current Article 2(2) of this act codifies the excavator's obligation to excavate with due care. The explanatory memorandum to the WION further notes that court judgments had been given in which the gravamen of liability had been shifted to the excavator and that it was the aim of the WION to better balance the division of responsibilities between excavators and cable and pipeline operators.[1827] If damage is caused to a pipeline or cable located outside the legal margins of the designated location, the network operator - and not the excavator - is liable, according to the explanatory memorandum.[1828] With this act, the legislature corrected the distribution of obligations between the excavator and the network operator as established in the case law.

(c) In 1982, the Dutch Supreme Court ruled, based on the standard of due care, that *a refusal to cooperate with a rabbinical divorce decree* may be unlawful.[1829] In 2023, this standard was laid down in Article 827(1)(e) of the Dutch Code of Civil Procedure. In doing so, the legislature sought to remove any doubt about the existence of this duty of care. At the same time, the legislature sought to provide guidance for the balancing of interests between (on the one hand) the right to self-determination and the protection of the private life of one party and (on the other hand) the right to freedom of religion of the other party.[1830] According to the legislature, there may be compelling interests meaning that a refusal to cooperate with a rabbinical divorce decree is not unlawful. Such an assessment must be made based on all the circumstances of the case.[1831]

[1824] *Dutch Parliamentary Records II* 1975/76, 13 611, no. 3, p. 4 (Explanatory Memorandum).
[1825] *Dutch Parliamentary Records II* 1975/76, 13 611, No. 3, pp. 7 and 10 (Explanatory Memorandum).
[1826] See, for example, the judgments of the Dutch Supreme Court of 4 October 1996, *NJ* 1997, 64 (*Eneco/Van Baarsen*) and 2 October 1998, *NJ* 1998, 831 (*Nacap/Shellfish*). See also, in great detail, F.J. van Velsen, *GS Tort,* note VIII.3.4.
[1827] Dutch Parliamentary Records II 2005/06, 30 475, no. 3, p. 12 (Explanatory Memorandum).
[1828] Dutch Parliamentary Records II 2005/06, 30 475, No. 3, p. 13 (Explanatory Memorandum).
[1829] Judgment of the Dutch Supreme Court of 22 January 1982, *NJ* 1982, 489.
[1830] *Dutch Parliamentary Records II* 2019/20, 35 348, No. 3, pp. 2 and 3 (Explanatory Memorandum).
[1831] *Dutch Parliamentary Records II* 2019/20, 35 348, No. 3, p. 4 (Explanatory Memorandum).

1384 In view of all the foregoing, ground of appeal no. 5.1 fails, as all the formulated objections stem from a conflation and confusion of the legal principles discussed above that govern the distribution of roles among the judiciary, legislature and executive branches. Milieudefensie et al. will briefly elaborate on this below for each ground of appeal individually, with a brief discussion of the inaccuracy of various factual or other assumptions on which Shell's objections are based.

Policy-making discretion, margin of appreciation and primacy of politics (ground of appeal no. 5.1.1)

1385 In ground of appeal no. 5.1.1, Shell argues, in brief, the following. The acceptance of the existence of a duty of care and a corresponding concrete reduction obligation is linked to various distributional issues regarding GHG emissions. The central question here is how the energy transition should be shaped, taking into account all relevant political, economic, safety, environmental and broader policy considerations. In the *Urgenda* judgment, the Dutch Supreme Court therefore held that decisions about emission reductions within the Dutch constitutional system are taken by the government and parliament, which have considerable discretion in this regard. The ECtHR also ruled in its *KlimaSeniorinnen* judgment that the contracting states have a *margin of appreciation* when deciding how they will comply with their treaty-based climate obligations. This court case, according to Shell, falls within that domain that has been left to the government, which requires a balancing of various interests, political choices and adaptation to changing circumstances. To illustrate this point, Shell cites an energy measure taken by Germany (the closure of nuclear power plants) and two extraordinary events with energy implications (the temporary import of LNG following the tsunami disaster in Japan and the Russian invasion of Ukraine).[1832]

1386 This ground of appeal continues with the argument that states have legislative and policy instruments at their disposal to regulate the use of energy. Civil courts must limit the scope for political considerations as little as possible at the outset and give the legislative and executive branches the leeway to make such considerations based on the concrete circumstances of the case, which cannot be foreseen at this time. This is all the more true because Shell's duty of care may also apply to other companies. According to Shell, this is not altered by any scientific consensus, because scientific reports and IAM models are not intended to be applied to companies and cannot give a normative or scientific answer to the question of the emission reductions to be achieved for a country, sector or energy source. After all, they are based on countless assumptions and value judgments regarding the distribution of emission reductions, which are up to the legislature to make.[1833]

[1832] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 211 up to and including 217.
[1833] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 218 up to and including 220.

1387 In all fairness, Milieudefensie et al. must say that this objection meanders widely and relies on many divergent ideas and arguments, so that they are not always easy to follow. The core of the objections is - if Milieudefensie et al. see it right - that the solution to dangerous climate change is a policy-based distribution issue, and that the policy-making discretion of the government, the margin of appreciation left to the contracting states by the ECtHR and the primacy of political choices left to the legislature prevent civil courts from imposing a duty of care and a corresponding concrete reduction obligation for Shell under Article 6:162 DCC. Two emergency situations (the tsunami disaster in Japan and the Russian invasion of Ukraine) that led to two government measures (the closure of nuclear power plants[1834] and increased LNG imports) are presented in support of that argument.

1388 In light of the foregoing, the invalidity of this argument is evident. Shell is wrongly taking a number of constitutional aspects - which can only play a role when legal obligations of the government must be assessed and/or an identified deficiency in the law must be remedied - completely out of context. Shell then attempts to embed those aspects in the manner in which the court establishes a horizontally applicable duty of care within the meaning of Article 6:162 DCC. This constitutes a confusion and misinterpretation of those aspects.

1389 The policy-making discretion and margin of appreciation of public authorities when they comply with their legal obligations, the margin of appreciation of public authorities when they comply with their obligations under the ECHR and the political primacy of the legislature in the context of an identified deficiency in the law play no role whatsoever in reality when answering the question what the constitutional position of a court is when it establishes an unwritten duty of care that a company has. Based on the relevant objective points of reference, the court must determine what the company in question is required to do. This follows from Article 6:162 DCC. If those objective points of reference point to liability, the court must draw that conclusion and establish a duty of care. To ensure the compliance with that duty, the court must impose a concrete reduction obligation that is in line with that duty of care. This does not require the court to use any particular restraint.

1390 Urgent societal interests therefore play *no* role when the duty of care is established. At most, they can play a role when Shell's concrete reduction obligation is established they can then potentially influence the level of the reduction percentage applicable to Shell. The Court of Appeal did not get round to this. Furthermore, such interests may provide a justification ground or justify a reliance on Article 6:168(1) DCC if the company actually substantiates, in concrete terms and possibly with the assistance of the relevant

[1834] Shell is also suggesting that Germany's decision to close power plants was choice based purely on policy considerations. In reality, that decision had to do with the Japanese tsunami: see, for example, https://nos.nl/artikel/2092028-fukushima-leidde-tot-herbezinning-op-kernenergie.

authorities, that, why and to what extent such interests stand in the way of the compliance with its duty of care. Shell has failed to do so in three instances. The mere fact that demand for oil and gas has temporarily increased due to two government measures in response to two emergency situations is entirely insufficient for this purpose. Incidentally, the increased import of LNG by the Netherlands and Germany as an emergency measure merely illustrates that the EU is far too dependent on foreign gas and must reduce that dependence by utilising its own renewable energy. That is precisely what the EU is therefore doing.[1835] Shell is also not complaining that the Court of Appeal should have assessed these interests in the context of a justification ground or Article 6:168(1) DCC. For this reason, the ground of appeal fails in full.

The system of Dutch law and the relationship with EU law (ground of appeal no. 5.1.2)

1391 Ground of appeal no. 5.1.2 reiterates that a concrete reduction obligation does not fit within the system of Dutch law and the cases that *are* actually regulated in it. According to the ground of appeal, the Dutch legislature and the EU legislature have explicitly not opted for such an obligation. Furthermore, Dutch and EU legislation is constantly evolving, as evidenced by the watering-down of the CSDDD with Omnibus. Before the Dutch and EU legislators introduce new legislation, they conduct a thorough investigation into its expected effects and implement changes if, for example, they are required by the energy security. They also perform a proportionality and subsidiarity test. Additionally, there is no consensus in society regarding a reduction obligation for Shell. All of this requires courts to exercise restraint, according to Shell's ground of appeal.[1836]

1392 The ground of appeal already fails because it is based on the assumption that the system of the law and the cases it does regulate preclude a duty of care. This is a repetition of ground of appeal no. 2.1. In the discussion of this ground of appeal in Section V.8.1 of this Explanatory Submission, it was already explained in detail that Shell is confusing several legal doctrines. The system of the law is relevant when sources of obligations must be identified that are *not* regulated by law in order to thereby remedy a deficiency in the law. That doctrine plays no role when a duty of care based on Article 6:162 DCC must be established. That must be done on the basis of the relevant objective points of reference. This was also already discussed in detail in Sections IV.3 up to and including IV.5 of this Explanatory Submission.

1393 The argument that the Dutch legislature deliberately refrained from introducing a duty of care for Shell is also a repetition of ground of appeal no. 2.1. As already discussed in Section V.8.1 of this Explanatory Submission, this conclusion cannot in any way

[1835] See, in this regard, Sections III.3 and V.6.3 of this Explanatory Submission.
[1836] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 221 up to and including 224.

follow from the sources gathered by Shell for this purpose. On the contrary, the legislature actually did not see a reason in the Decision and the reduction injunction against Shell included in it to take action.

1394 From a European perspective, this objection is a repetition of the argument in ground of appeal no. 1 that a duty of care would conflict with EU law. It was already discussed in Sections V.6.2 up to and including V.6.8 that EU law - which, incidentally, covers only a very limited portion of Shell's emissions – in fact leaves room for more far-reaching national measures and that a duty of care regarding CO_2 reduction does not conflict with EU law. Moreover, the EU measures do not constitute a comprehensive and balanced package of measures, but rather a patchwork of rules that represented the best that could be achieved at EU level.

1395 Finally, the suggestion that rules under Dutch or EU law could flexibly respond to changing requirements regarding (for example) energy security reflects an unrealistic view of those instruments. Both Dutch and European legislative processes take years to complete. The legislative process for the CSDDD spanning many years is a clear example of this; on top of this. the subsequent implementation period will also take many years. It is untenable to argue that these frameworks can be used or are even intended to accommodate changing views on energy security. This is essentially a convenient argument by Shell to evade its own duty of care. If Shell truly believed that it should be possible to accommodate a changing situation, it should, in fact, welcome the existence of a stringent obligation of means to limit its CO_2 emissions. After all, Dutch liability law offers the flexibility that a multi-year legislative process could never provide. This was discussed in Sections VI.7.2 and VI.7.3 of this Explanatory Submission.

1396 Incidentally, Chapter VI of this Explanatory Submission already addressed the fact that it is highly unlikely that the reduction target for oil and gas in the period up to and including 2030 will decrease to Shell's benefit. The longer the world postpones the achievement of that reduction target and clings to fossil energy, the greater the carbon lock-in effect will become and the greater the reduction effort for oil and gas will ultimately become. From this it follows that Shell's ground of appeal is based on incorrect and unrealistic premises. The ground of appeal fails.

Security and foreign policy interests (ground of appeal no. 5.1.3)

1397 Ground of appeal no. 5.1.3 argues that a duty of care and a corresponding concrete reduction obligation are incompatible with interests lying in the areas of security and foreign policies, and that these aspects require courts to exercise special restraint. In this context, Shell has also raised the changing geopolitical landscape as an argument. The ground of appeal links these interests to the interest of energy security and to the

assertion that oil and gas will continue to play a significant role in that connection. To support this, Shell points out that the Netherlands and Germany have asked it to supply more LNG in response to the invasion of Ukraine and the EU's reduction of Russian gas imports. Furthermore, the ground of appeal notes that the EU recognises the role of gas for security interests as well as mentioning that NATO bases receive gas via a Central European pipeline system. Finally, Shell argues that it operates in 70 foreign countries and that those countries have the freedom to determine how they can and wish to achieve emission reductions. Imposing and effectuating the duty of care that Shell has could potentially interfere with matters reserved to foreign states, which are for the legislative and executive branches to decide.[1837]

1398 The ground of appeal cannot succeed for a number of reasons. First of all, it again builds on the notion that societal interests - which Shell, in this ground of appeal, extends not only to international security and foreign interests, but even to the interests of 70 foreign states - require courts to exercise special restraint when establishing an unwritten duty of care. That is not true, as has already been explained several times above. In this court case, Shell's own duty of care based on Article 6:162 DCC must be determined. The relevant objective points of reference are decisive for this. These points of reference, incidentally, are also based to a very significant extent on international legal sources, which *also* take into account the (energy) interests of foreign states. So (again) this court case is not about the policy-making discretion and margin of appreciation of governments in complying with their legal obligations, the margin of appreciation of governments in complying with their ECHR obligations or the political primacy of the legislature in the context of an identified deficiency in the law.

1399 Furthermore, it is impossible that the interests cited by Shell could lead to the conclusion that Shell cannot be required to reduce its CO_2 emissions at all. This applies even more strongly because a concrete reduction target for 2030 does not mean that no oil or gas, or hardly any oil or gas, can be used, as the ground of appeal is suggesting. On the contrary, 55% of the CO_2 reduction target must be achieved between 2030 and 2050. So during that period, there is still ample room for the use of oil and gas, although this use must be largely phased out over that 20-year period in order to reach net zero by 2050. During that period, oil and gas can therefore also be used in the energy mix to a significant extent, partly in view of the interests cited by Shell. In that light, it is also difficult to see why the fact that the EU, too, recognises that gas will for the time being continue to play a role in the energy mix – also in view of security interests - and the fact that NATO bases use gas would preclude a reduction obligation on Shell's part.

1400 Furthermore, all countries in the world are required to reduce their CO_2 emissions in line with the remaining carbon budget based on, for example, the UN climate regime

[1837] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 225 up to and including 229.

and human rights treaties such as the ECHR. This also follows from the recent Advisory Opinions of the ICJ[1838] and the IACtHR.[1839] This was already addressed in Sections II.2 and IV.5.2 of this Explanatory Submission. Furthermore, it was already made clear that the oil and gas industry will have to make a very substantial contribution to this, because 48% of global CO_2 emissions stem from oil and gas use. In Chapter VI of this Explanatory Submission, Milieudefensie et al. argued that, as far as they are concerned, the absolute minimum for the required reductions in oil and gas consumption is (rounded) 30% and that, in reality, a significantly higher contribution is expected from the oil and gas industry. This therefore means that all countries in the world will have to contribute to the required reductions in oil and gas consumption, in line with the 1.5°C target of the Paris Agreement. In that light, it is impossible to maintain that no CO_2 reductions can be demanded of Shell, one of the world's largest CO_2 emitters, because such reductions might result in a decrease in oil and gas use in other countries. That is, in fact, actually precisely what those countries' obligations require them to achieve.

1401 Also, the ground of appeal hinges on an argument that actually underscores the importance of moving away from oil and gas use: the importance of energy security and the geopolitical risks. Milieudefensie et al. have already discussed these aspects in Section III.3 of this Explanatory Submission. The war in Ukraine made it clear that the EU was heavily dependent on gas supplies from Russia. The loss of those supplies forced countries to purchase LNG from (among others) Shell at very high prices. As a result, the gas prices for end-users rose to exorbitant levels. This situation, which was lucrative for Shell, arose precisely *because* the EU had not yet sufficiently transitioned away from oil and gas. Shell capitalised on that sudden shortage and supplied LNG as an alternative. The fact that Shell now wishes to expand its LNG position means that the EU's unstable energy security and geopolitical position will persist. However, those interests are best served by a reduced dependence on oil and gas. The EU recognises this as well, as set out in Section V.6.3 of this Explanatory Submission.

1402 Finally, Milieudefensie et al. note that Dutch liability law and the nature of the stringent obligation of means for Scope 2 and 3 actually *do* offer sufficient flexibility to do justice to any actual pressing interests that may arise and that mean that Shell cannot be blamed for not having met its reduction obligation in full. That approach is far preferable to the route Shell seeks to take, i.e. that Shell is not required to achieve any CO_2 reduction based on risks it has failed to make concrete, despite all relevant objective points of reference and modelled reduction scenarios pointing in the opposite direction. This was already addressed in Sections VI.7.2 and VI.7.3 of this Explanatory Submission. For this reason, the ground of appeal fails.

[1838] ICJ 23 July 2025, No. 187 (Obligations of States in respect of climate change).
[1839] IACtHR 29 May 2025, OC-32/25 (Climate Emergency and Human Rights).

The non-binding nature of international instruments (ground of appeal no. 5.1.4)

1403 In ground of appeal no. 5.1.4, Shell argues that the international instruments relied on by Milieudefensie et al. (in particular human rights treaties and other treaties, such as the Paris Agreement) are not binding on Shell, not even if Shell respects or supports those instruments. Shell sees a fundamental difference here compared to the *Urgenda* ruling and other court cases relating to the demarcation from the political domain, such as the court cases known as *SGP*,[1840] *Box 3*[1841] and *Huwelijk personen van gelijk geslacht* (same-sex marriages in Aruba and Curaçao).[1842] According to Shell, these were all court cases against the State in which the Dutch Supreme Court ruled that there was no impermissible interference with the political domain, whereas this court case concerns a duty of care based purely on private law.[1843]

1404 The ground of appeal starts out from a fundamentally wrong understanding of the role of international treaties and human rights when the unwritten duty of care is determined and of the division of roles between the judiciary and legislature branches. While the above-mentioned international treaties and human rights do not (as a principle) bind companies such as Shell, every single one of them is an objective point of reference that is relevant in determining an unwritten duty of care and has a horizontal effect in that context.[1844] The Court of Appeal rightly applied those instruments in this manner.[1845] Shell is actually not arguing that this method is wrong, but has rightly not contested the framework applied by the Court of Appeal in ground 7.2.

1405 In addition, Shell has rightly observed that in the court cases against the Dutch State cited in the ground of appeal, the central question was each time whether the court had encroached upon the legislature's domain. However, this observation does not make the ground of appeal any stronger. Milieudefensie et al. have already discussed at length above that this constitutional issue only plays a part in relation to the government. The determination of an unwritten duty of care of a private party is based on the relevant objective points of reference. In that context, the division of roles among the courts, the legislature and the executive branch does not play a role in the manner suggested by Shell. The ground of appeal fails.

Shell's duty of care and the level playing field (ground of appeal no. 5.1.5)

1406 Ground of appeal no. 5.1.5 again argues that a duty of care for Shell and an associated concrete reduction obligation would disrupt the European and global level playing field

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[1840] Judgment of the Dutch Supreme Court of 9 April 2010, ECLI:NL:HR:2010:BK4549 (*SGP/Staat*).
[1841] Judgment of the Dutch Supreme Court of 24 December 2021, ECLI:NL:HR:2021:1963 (*Box 3*).
[1842] Judgment of the Dutch Supreme Court of 12 July 2024, ECLI:NL:HR:2024:977 and ECLI:NL:HR:2024:978 (*Huwelijk personen van gelijk geslacht*).
[1843] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 230.
[1844] See, in this regard, Sections IV.2 up to and including IV.5 of this Explanatory Submission.
[1845] See, in this regard, Section V.4 of this Explanatory Submission.

for companies such as Shell, because the Netherlands would be the only country to have such an obligation. In this connection, the ground of appeal again refers back to ground of appeal no. 1, in which Shell argues that it is partly for this reason that EU law does not permit national reduction obligations. According to the ground of appeal, the Dutch constitutional system therefore precludes courts from imposing such an obligation, which would have major consequences for the entire economy and society.[1846]

1407 To the extent that the ground of appeal builds on Shell's arguments based on EU law, it already fails for the reasons set forth in the discussion of ground of appeal no. 1 in Sections V.6.2 up to and including V.6.8 of this Explanatory Submission. Milieudefensie et al. refer to those Sections here for the sake of brevity.

1408 The ground of appeal is also unsuccessful because it lacks precision, as it does not make clear exactly what it is aimed at. It first presents the level playing field as an interest that apparently should lead courts to exercise restraint, but then links that to the alleged significant consequences for the entire economy and society, which are not fleshed out in any detail. This is incomprehensible, because the concept of a level playing field relates to the business arena. The ground of appeal fails to clarify why consequences in that arena would *also* have (significant) consequences for the entire economy and society. The ground of appeal also fails to clarify in what respect the alleged disruption of the level playing field actually harms Shell's interests. Shell has never made this concrete before the lower courts either.[1847]

1409 Furthermore, by applying objective points of reference, courts do nothing more than determining what Dutch liability law requires of companies such as Shell. These objective points of reference make it clear that the duty of care incumbent upon companies such as Shell is deeply embedded in (for example) human rights, principles of international law and sources of soft law. That duty of care therefore binds all companies identified by these objective points of reference to the extent to which they can and must contribute to solving the climate problem. So in that respect, the level playing field is not distorted either.

1410 Moreover, it is by no means impossible that oil and gas companies in other jurisdictions will also be required to achieve concrete CO_2 reductions. After all, the duty of care under Dutch law overlaps significantly with similar doctrines in many other countries. This was already discussed in Sections IV.5.1 and IV.5.2 of this Explanatory Submission. The criteria for hazardous negligence and the alignment with human rights and soft-law sources form a virtually universal starting-point for the way in which duties of care are

[1846] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 231.
[1847] See, in this regard, the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 259 et seq.

fleshed out. For the ICJ, too, these aspects served as an important basis for establishing a duty of care relating to the climate for nation states. It is therefore more likely that other countries have similar duties of care and that Shell and other major players in the oil and gas industry comparable to Shell are subject to similar obligations in those jurisdictions.

1411 In the lower courts, Milieudefensie et al. also pointed out that climate cases against Shell, other oil and gas companies and other fossil-intensive industries have been and are being brought in multiple jurisdictions. This was also addressed in Section V.6.8 of this Explanatory Submission. In France[1848] and Belgium[1849], for example, legal proceedings are underway against TotalEnergies. In Switzerland, residents of the island of Pari are demanding a percentage-based CO_2 reduction obligation from the concrete company Holcim.[1850] In the United States as well, a number of lawsuits against oil and gas companies are pending that can be decided at state level.[1851] Meanwhile, litigation aimed at CO_2 emission reductions has also started in Japan,[1852] Italy,[1853] New Zealand[1854] and Poland.[1855] It is expected that many more dozens, and perhaps even hundreds, of court cases will be brought both in the Netherlands and abroad.[1856] It is relevant to note here that the *Urgenda* ruling has been emulated worldwide, has led to various landmark rulings in many jurisdictions[1857] and is essentially the precursor to the *KlimaSeniorinnen* ruling. The shaping of the law by a Dutch court thus has significant cross-border implications. The Decision has also already served as inspiration for a growing number of lawsuits.[1858]

[1848] Statement of Defence on Appeal of Milieudefensie et al., 18 October 2022, para. 980 and footnote 780. See https://www.asso-sherpa.org/climate-case-totalenergies-hearing-on-merits. For the status quo, see, for example, https://www.climatecasechart.com/document/notre-affaire-a-tous-and-others-v-total_85ea.

[1849] For the status quo, see, for example, https://www.climatecasechart.com/document/hugues-falys-fian-greenpeace-ligue-des-droits-humains-v-totalenergies-the-farmer-case_5077.

[1850] Statement of Defence of Milieudefensie et al. date 18 October 2022, para. 980 and footnote 780. For the status quo, see, for example, https://zg.ch/de/gerichte/zivil-und-strafrechtspflege/kantonsgericht#MitteilungA120239; https://www.climatecasechart.com/document/asmania-et-al-vs-holcim_f2ce. See also E.H.P. Brans & X.W. de Vries, "*De lange arm van het klimaataansprakelijkheidsrecht*" in *MvV* 2026/2, pp. 39 and 40.

[1851] Statement of Defence of Milieudefensie et al. dated 18 October 2022, para. 390. See also the Oral Arguments on Appeal (Part 1) of Milieudefensie et al. dated 4 April 2024, para. 103.

[1852] For the status quo, see, for example, https://www.climatecasechart.com/document/youth-climate-case-japan-for-tomorrow_74f6.

[1853] For the status quo, see, for example, https://www.climatecasechart.com/document/greenpeace-italy-et-al-v-eni-s-p-a-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-s-p-a_d341.

[1854] For the status quo, see, for example, https://www.climatecasechart.com/document/smith-v-fonterra-co-operative-group-limited_33b2.

[1855] For the status quo, see, for example, https://www.climatecasechart.com/document/greenpeace-poland-v-pge-giek_9581; https://www.climatecasechart.com/document/clientearth-v-polska-grupa-energetyczna_cdf4.

[1856] Statement of Defence of Milieudefensie et al. dated 18 October 2022, para. 390. See also the Oral Arguments on Appeal (under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 89 and 90.

[1857] Oral Arguments in the First Instance (2) of Milieudefensie et al. dated 1 December 2020, paras. 124 up to and including 127.

[1858] Oral Arguments on Appeal *(*under *"Effectiviteit"* (Effectiveness)) of Milieudefensie et al. dated 4 April 2024, paras. 67 and 68.

1412 Of course the fact that a Dutch court is the first court to recognise the duty of care to prevent or mitigate dangerous climate change does also not mean that such a duty could not exist in general terms, as Shell is arguing. After all, that would imply that such a duty of care could never exist, since it would always have to be affirmed for the first time in some jurisdiction. Furthermore, market players themselves are already adapting their conduct to standards that are set based on their own risk analyses. This means that legal proceedings are not always necessary to compel the relevant players to act in compliance with the standards. This has been recognised, for example, by the IPCC[1859] and experts Rotmans and Loorbach.[1860]

1413 The argument that the level playing field for Shell would be disrupted also overlooks the fact that all countries, in light of their own international and human rights obligations, will have to contribute to the required reductions in oil and gas consumption, in line with the 1.5°C target of the Paris Agreement. In that respect, too, the level playing field is therefore not disrupted.

1414 Finally, the fact that a duty of care to prevent or limit dangerous climate change may have "significant consequences for the entire economy and society" does not detract from the existence of such a duty either. As already observed several times above, societal interests cannot lead courts to refrain from determining what a party is required to do under liability law. Compelling societal interests can, at most, play a role in determining Shell's concrete reduction obligation and can thus potentially influence the level of the reduction percentage applicable to Shell. The Court of Appeal did not get round to this. Such interests may also provide a justification ground or justify a reliance on Article 6:168(1) DCC, provided that a party provides a sufficiently concrete substantiation, whether or not supported by the relevant authorities, and the consequences thus specified do actually carry a great deal of weight. That is not what Shell has done. Furthermore, the legislature may intervene if it considers that a particular duty of care goes too far. That is not what the Dutch legislature has done following the Judgment requiring Shell to achieve a 45% CO_2 reduction, in all likelihood because it did not fear the consequences outlined by Shell at all. The ground of appeal fails.

Effective legal protection, public-law regulations and the effectiveness of the reduction injunction (ground of appeal no. 5.1.6)

1415 Ground of appeal no. 5.1.6 argues that the right to effective legal protection does not justify the intervention by a court in the political balancing of interests to be made in the context of the energy transition. To this end, Shell is essentially arguing the following:

[1859] Exhibit MD-478 (IPCC AR6 WGIII H13), pp. 13 up to and including 30 and 13 up to and including 31.
[1860] Exhibit MD-471 (Expert Report by Rotmans and Loorbach), pp. 2 up to and including 4. See also the Statement of Defence on Appeal of Milieudefensie et al. dated 18 October 2022, paras. 939 up to and including 955.

(i) it has no duty of care to prevent or mitigate dangerous climate change, (ii) Shell has no treaty-based obligation to protect human rights and does not possess the necessary legislative or enforcement state powers to do so, (iii) the Dutch and EU frameworks already provide effective legal protection, and a reduction obligation for Shell would not provide any relevant additional legal protection, and (iv) the reduction injunction is ineffective, and it is unlikely that courts in other countries will issue such an injunction.[1861]

1416 It should be noted that it was already demonstrated in Chapter IV and Sections V.1 up to and including V.5 of this Explanatory Submission that all objective points of reference, including the human rights, indicate that Shell has a duty of care to prevent or mitigate dangerous climate change, and that the Judgment of the Court of Appeal is therefore correct to that extent. In line with this, Chapter VI of this Explanatory Submission discussed the fact that those same objective points of reference and the modelled reduction scenarios indicate that Shell must reduce its Scope 1, 2 and 3 emissions by a percentage within the range of (rounded) 30% to 45% or any other reduction percentage, depending on the degree of normative correction. The right to effective legal protection and to an effective remedy under Articles 2, 8 and 13 ECHR is incorporated in the determination of the law based on objective points of reference. This was addressed in Section VI.3.5 of this Explanatory Submission. Building on this, it is virtually self-evident that the right to effective legal protection only reinforces the conclusion that Shell has a reduction obligation. For this reason, the ground of appeal fails.

1417 The fact that Shell is not directly bound by obligations based on treaty law[1862] does not, of course, detract from its duty of care. After all, the relevant treaty rights seek to offer protection against dangerous climate change and constitute an important objective point of reference with horizontal implications within the context of Article 6:162 DCC. This is all the more true because human rights violations caused by dangerous climate change are to an important extent attributable to the production and use of oil and gas. Governments are therefore not the primary perpetrators of human rights violations. At most, they can attempt to regulate oil and gas emissions through legislation and policies. The primary responsibilities based on human rights law actually lies with the parties whose products cause the danger to the largest degree. This includes Shell. Therefore the human rights play an even stronger role when Shell's duty of care is fleshed out. This has already been discussed in detail in Chapters IV and V of this Explanatory Submission.

[1861] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 232 up to and including 235.

[1862] Incidentally, Shell is indeed bound by Article 8 ECHR, which has direct effect. This was already discussed in Section VI.3.5 of this Explanatory Submission, in which Milieudefensie et al. explained this based on the judgment of the Dutch Supreme Court of 9 January 1987, *NJ* 1987, 928 (*Edamse Bijstandsvrouw*).

1418 The view advocated by Shell that the Dutch and EU systems already provide sufficient legal protection against dangerous climate change and against Shell's role in climate change it is somewhat surprising. Shell operates globally, and its products are therefore used by the whole world. As already discussed in Section V.3.5, its CO_2 emissions exceed those of every country in the world, except China, the United States, India and Russia. The impact of this affects, among others, the inhabitants of the Netherlands and the Wadden Sea region. The idea that the Dutch and European efforts to limit CO_2 emissions from their territories provide sufficient legal protection against this is, in that light, manifestly incorrect. When introducing the CSDDD, the EU legislator itself also recognised that the system in place at that time offered insufficient protection and that the EU's sustainability goals could only be achieved with the help of non-state actors.[1863] This underscores the invalidity of Shell's argument.

1419 Shell's concluding argument that the reduction injunction would be ineffective has already been refuted in Chapter VII of this Explanatory Submission. Such a reduction injunction *is* actually effective for numerous reasons and does justice to the shared responsibility of Shell to address dangerous climate change. Shell's desire that courts in other countries will not issue a reduction injunction based on the duty-of-care standards applicable there is the cornerstone of its argument. Shell has not provided any justification whatsoever as to why the foreign legal systems do not provide a basis for such an injunction. In reality, that possibility is realistic due to the strong affinity between the various civil systems. That, too, was already discussed by Milieudefensie et al. above and in Sections IV.5.1 and IV.5.2 of this Explanatory Submission as well as in the context of their defence against ground of appeal no. 5.1.5. The ground of appeal fails.

The relationship between Shell's duty of care and the substantive and procedural law applicable in the Netherlands (ground of appeal no. 5.2)

1420 In ground of appeal no. 5.2, Shell packages part of its arguments discussed above as a lack-of-standing defence. The ground of appeal is directed at both the finding of the Court of Appeal that Shell has a duty of care to prevent or limit dangerous climate change[1864] and the finding of the Court of Appeal that Milieudefensie et al. have standing.[1865] Substance-wise, the argument is the same: the energy transition requires a balancing of societal interests, including the interest of energy security. Courts are not equipped to weigh those interests against each other in civil proceedings. That weighing must be left to the legislature and to the executive branch. According to Shell, this means that the boundaries of a public-interest action have been exceeded, because

[1863] See, in this regard, Section V.6.2 of this Explanatory Submission.
[1864] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 237 (challenging grounds 7.11, 7.17, 7.26, 7.27, 7.52 and 7.53).
[1865] Statement of Defence in Cassation of Shell dated 7 November 2025, para. 238 (challenging grounds 6.1 up to and including 6.9).

the similarity requirement has not been met, or at least because there are divergent interests within the constituency of Milieudefensie et al. that they cannot adequately safeguard.[1866]

1421 The reason why this ground of appeal fails is, again, that this court case is not about the government's legal obligations. There is also no deficiency in the law. Therefore the doctrines of policy-making discretion, margin of appreciation and the primacy of politics do not apply here. This was already addressed in the first part of this Section. In this court case, the only question occupying centre stage is whether Shell has a duty of care towards the inhabitants of the Netherlands and the Wadden Sea region to prevent or limit dangerous climate change. Courts have not only been empowered by the legislature to decide whether this is the case under Article 6:162 DCC, but are also sufficiently equipped to do so. Under Article 13 of the Dutch General Provisions Act ("*Wet algemene bepalingen*"), courts even have the obligation to do so. The ground of appeal not only overlooks this, but also systematically underestimates courts.

1422 In Chapter IV and Sections V.1 up to and including V.5 of this Explanatory Submission, it has already been discussed that the various relevant objective factors lead to the conclusion that Shell has a duty of care to prevent or mitigate dangerous climate change. In the discussion of ground of appeal no. 2 in Section. 8.1 of this Explanatory Submission, among other places, it was already described at length that compelling societal interests do not play an independent role in this regard, but can, at most, play a role when Shell's concrete reduction obligation is determined. As a result, they can perhaps have an effect on the level of the reduction percentage applicable to Shell. The Court of Appeal did not get round to this. Furthermore, such interests may constitute a justification ground or justify a reliance on Article 6:168(1) DCC, provided that Shell has substantiated those interests sufficiently concretely. Shell has consistently limited itself to general remarks on this point. The legislature has not seen any reason to intervene in view of the reduction obligation imposed on Shell by the Decision either.[1867] So in reality, the energy security is not a genuine interest that detracts from Shell's duty of care, even apart from the fact that it is actually served by a faster phase-out of fossil fuels.[1868] For these reasons, the ground of appeal fails.

1423 The argument that the requirement of similarity has not been met also fails. In ground 6.3, the Court of Appeal rightly held - and this was not challenged on appeal - that the requirement of similarity under Article 3:305a(1) DCC (old)[1869] is met. The reasoning of

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[1866] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 236 up to and including 241.
[1867] See, in this regard, Sections V.6.8 and V.8 of this Explanatory Submission.
[1868] See, in this regard, Sections III.3 and V.6.3 of this Explanatory Submission.
[1869] The summons was issued prior to the entry into force of the current Article 3:305a DCC. This means that the standing of Milieudefensie et al. must be assessed in this case on the basis of Article 3:305a DCC (as previously in force). The Court of Appeal has also proceeded on this basis in grounds 6.1 up to and including 6.9 – a point that was not challenged in cassation.

the Court of Appeal on this point is correct. According to the parliamentary history, the answer to the question of whether the interests involved are similar depends entirely on the circumstances of the case.[1870] It is not the type of relief sought that is decisive here, but whether the interests involved in the relief sought *are suitable for aggregation.* Whether aggregation is possible depends in part on the nature of the relief sought.[1871] The questions to be answered must have sufficient commonality and it must be possible to abstract from the particulars of individual cases to such an extent that the assessment could not possibly differ from an assessment in individual cases.[1872] To this end, it is sufficient that a decision on the relief sought can be taken without having to consider the special circumstances arising on the side of the individual interested parties.[1873] This means that the interests do not need to be exactly the same in terms of their nature and substance.[1874] The fact that the interested parties take opposing positions - and thus that there are conflicting interests - does not stand in the way of the similarity of the interests.[1875] The fact that (a part of) the constituency being represented does not wish to pursue the class action does not affect such similarity either.[1876]

1424 It has long been accepted that environmental interests lend themselves to aggregation.[1877] In its *Urgenda* judgment, the Dutch Supreme Court subsequently held that the interests of the inhabitants of the Netherlands in preventing dangerous climate change are also sufficiently similar. Its reasoning on this point is clear:

> *"5.9.2 Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. Especially in*

[1870] Dutch Parliamentary Records II 1991/92, 22 486, No. 3, p. 24 (Explanatory Memorandum).
[1871] Dutch Parliamentary Records II 1991/92, 22 486, No. 3, p. 24 (Explanatory Memorandum).
[1872] Dutch Parliamentary Records II 2017/18, 34 608, No. 6, p. 18 (first citation) and p. 23 (second citation).
[1873] Judgment of the Dutch Supreme Court of 26 February 2010, ECLI:NL:HR:2010:BK5756 (*PlazaCasa*). See also the judgments of the Dutch Supreme Court of 20 September 2019, ECLI:HR:2019:1400 (*VEB/BP*), 27 November 2015, ECLI:NL:HR:2015:3399 (*ABN Amro/Stichting Belangenbehartiging Gedupeerde Beleggers*), 27 November 2009, ECLI:NL:HR:2009:BH2162 (*World Online*), 13 October 2006, ECLI:NL:HR:2006:AW2080 (*Y/Stichting Vie d'Or*), 13 October 2006, ECLI:NL:HR:2006:AW2077 (*DNB/Stichting Vie d'Or*) and 23 December 2005, ECLI:NL:HR:2005:AU3713 (*Safe Haven*). See also the Opinion of Advocate General De Bock prior to the judgment of the Supreme Court of 11 February 2022, ECLI:NL:PHR:2021:834 (*Trafigura/SVDTCI*), para. 5.13 and footnote 107.
[1874] Judgment of the Dutch Supreme Court of 20 September 2019, ECLI:HR:2019:1400 (*VEB/BP*). See also the Opinion of Advocate General De Bock prior to the judgment of the Dutch Supreme Court of 11 February 2022, ECLI:NL:PHR:2021:834 (*Trafigura/SVDTCI*), para. 5.14. See also C.M.D.S. Pavillon, "*Leent het materiële privaatrecht zich voor de afwikkeling van massaschade*?" (Is substantive private law suitable for mass claims settlement?) in *RM Themis* 2019/4, p. 167.
[1875] Judgment of the Dutch Supreme Court of 26 February 2010, ECLI:NL:HR:2010:BK5756 (*PlazaCasa*). See also the Opinion of Advocate General Huydecoper prior to the judgment of the Dutch Supreme Court of 26 February 2010, ECLI:NL:PHR:2010:BK5756 (*PlazaCasa*), paras. 16 and 17.
[1876] Judgment of the Dutch Supreme Court of 9 April 2010, ECLI:NL:HR:2010:BK4549 (*SGP/Staat*).
[1877] Judgment of the Dutch Supreme Court of 27 June 1986, ECLI:NL:HR:1986:AD3741 (*Nieuwe Meer*).

> *cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective. This is also in line with Article 9(3) in conjunction with Article 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 Article 13 ECHR* (…)*."*[1878]

1425 The same applies to the relief sought by Milieudefensie et al. against Shell. The relief sought is, firstly, an injunction requiring Shell to comply with its duty of care to prevent or mitigate dangerous climate change. Secondly, a declaratory decision stating that Shell is acting unlawfully is being sought. The assessment of this relief sought is not in any way dependent on the assessment of the individual interests of the inhabitants of the Netherlands and the Wadden Sea region. They are sufficiently similar. Therefore the fact that Shell believes that the interests it is defending should also be taken into account when that duty of care is determined does not detract from their similarity.

1426 The same applies to the safeguarding requirement, which was introduced solely to provide courts with an instrument to exclude interest groups with questionable motives[1879] and must therefore be applied with restraint[1880]. In this context, the key questions are (i) to what extent the parties concerned will ultimately benefit from the class action if the relief sought is awarded?, and (ii) to what extent it is possible to rely on the fact that the organisation that is acting as the plaintiff possesses sufficient knowledge and skills to conduct the litigation?[1881] To this end, all relevant circumstances of the case are of importance.[1882] It is not apparent why the aspects cited by Shell would be relevant in that regard. After all, the arguments discussed above are unrelated to the benefits to be enjoyed by the inhabitants of the Netherlands and the Wadden Sea region if the relief sought by Milieudefensie et al. is awarded, and is also unrelated to the capabilities of Milieudefensie et al. to conduct this lawsuit. Shell is also not raising any specific objections to grounds 6.4 up to and including 6.7, in which the Court of Appeal concluded in an understandable manner and based on the right criterion that the safeguarding requirement is met in this connection. The ground of appeal fails.

1427 At the very end of its document, Shell also argues that courts have insufficient tools to oversee the compliance with the reduction injunction, which is irrevocable and static in nature and therefore cannot be adjusted. Furthermore, neither the enforcement judge

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[1878] Judgment of the Dutch Supreme Court of 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
[1879] Dutch Parliamentary Records II 2011/12, 33 126, No. 3, p. 5 (Explanatory Memorandum).
[1880] Dutch Parliamentary Records II 2011/12, 33 126, No. 3, pp. 4 and 5 (Explanatory Memorandum). See also K. Rutten, "*Ontvankelijkheid van een 305a-organisatie*" (Admissibility of an Article 305a organisation) in *TOP* 2018/4, p. 32 ff.
[1881] Dutch Parliamentary Records II 2011/12, 33 126, No. 3, p. 12 (Explanatory Memorandum). See Dutch Parliamentary Records II 2012/13, 33 126, No. 7, pp. 12 and 13. See also the Opinion of Advocate General De Bock prior to the judgment of the Dutch Supreme Court of 11 February 2022, ECLI:NL:PHR:2021:834 (*Trafigura/SVDTCI*), para. 5.16.
[1882] Dutch Parliamentary Records II 2011/12, 33 126, No. 3, pp. 12 and 13 (Explanatory Memorandum). See also Dutch Parliamentary Records II 2012/13, 33 126, No. 7, pp. 8–13. See also the Opinion of Advocate General De Bock prior to the judgment of the Supreme Court of 11 February 2022, ECLI:NL:PHR:2021:834 (*Trafigura/SVDTCI*), para. 5.16.

nor the District Court are able to exercise permanent supervision, according to Shell. Milieudefensie et al. have already addressed this point in detail in their discussion of ground of appeal no. 2 in Section V.8.1 as well as in Section VI.7 of this Explanatory Submission. Dutch liability and procedural law offer ample flexibility to intervene in a reduction injunction if there are very compelling reasons to do so. Furthermore, Shell has a stringent duty of care with respect to Scope 2 and 3. If Shell produces evidence that it *has* actually made substantial efforts, but has been unable to fully achieve the required CO_2 reductions nevertheless, its failure to achieve the percentage will not constitute a breach of its duty of care. Shell must make these efforts on its own initiative. The fact that a court cannot always exercise oversight does not, of course, alter this.

1428 This approach is far preferable to the rigid position Shell has maintained before three courts: one of the wealthiest companies in the world, with CO_2 emissions that rival those of all other countries in the world – except for four countries – is not required to do anything towards citizens who will suffer from the dangerous climate change caused in part by Shell's activities. The legal responsibility for this lies solely with the government and the citizens themselves. This position is as unsympathetic as it is incorrect.

Follow-up objections (ground of appeal no. 5.3)

1429 In ground of appeal no. 5.3, Shell merely raises a number of follow-up objections,[1883] which share the fate of grounds of appeal nos. 5.1 and 5.2 discussed above and therefore cannot lead to the overturning of the Judgment of the Court of Appeal.

[1883] Statement of Defence in Cassation of Shell dated 7 November 2025, paras. 242 and 243.

IN CONCLUSION:

Milieudefensie et al. seek a reversal in their principal appeal in cassation by the Supreme Court, while making any such further decision as the Supreme Court deems appropriate, and a dismissal of the conditional cross-appeal, in each case while ordering Shell and M&M to pay the costs. Milieudefensie et al. further request the Supreme Court of increase the awarded legal costs by the statutory interest, to be calculated with effect from the fourteenth day after the date on which the Dutch Supreme Court gives judgment.

Counsel
[signature] [signature]

This Written Explanatory Submission contains 254,333 words.

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