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### Pronunciation

#### THE HAGUE COURT OF APPEAL

Civil law division

Case number Court of Appeal: 200.302.332/01

Case number District Court: C/09/571932 / HA ZA 19-379

#### Judgment of 12 November 2024

in the case of

**Shell Plc** ,

established in London, United Kingdom,

appellant,

attorney-at-law: *mr.* DF Lunsingh Scheurleer, with an office in Amsterdam,

and

**Foundation for Environment and People ,**

established in Amsterdam,

joint party on the side of Shell,

attorney-at-law: *mr.* DJB Bosscher, with an office in Halfweg,

versus

**1 Environmental Defense Association,**

established in Amsterdam,

**2. Greenpeace Netherlands Foundation ,**

established in Amsterdam,

**3. National Association for the Conservation of the Wadden Sea ,**

established in Harlingen,

**4. Foundation for the promotion of the Fossil Free movement ,**

established in Amsterdam,

**5. Both ENDS Foundation ,**

established in Amsterdam,

**6. Association of Young Environmentally Active** dissolved as of 1 September 2022),

established in Amsterdam,

the respondents,

attorney-at-law: *mr.* RHJ Cox, with an office in Maastricht.

Hereinafter the court refers to the parties as Shell, M&M and Milieudefensie et al.

## **1 Brief overview of the case**

This case revolves around the question whether Shell has the obligation to reduce its CO<sub>2</sub> emissions by 45% by 2030 relative to 2019 levels. Milieudefensie et al. have sought a court order to this effect on the basis that Shell acts unlawfully if it fails to reduce its emissions by 45%. In this judgment it is determined on the basis of objective factors that Shell has an obligation to counter dangerous climate change. However, this does not mean that the civil court is able to establish that Shell should reduce its CO<sub>2</sub> emissions by 45%, or any other percentage.

## **2 Course of the proceedings on appeal**

2.1 The course of the proceedings on appeal is evidenced by the following documents:

- the summons of 24 August 2021 with which Shell brought its appeal against the judgment given between the parties by The Hague District Court on 26 May 2021;
- Shell's statement of appeal with appendices (Exhibits S-1 - 121);
- Milieudefensie et al.'s defense on appeal with appendices (Exhibits MD-340 - 478);
- the judgment of 25 April 2023 in the interim proceedings for the joinder of M&M, with the court documents mentioned in that ruling;
- the records of the oral hearing of 6 June 2023;
- the statement after joining M&M;
- the document commenting on the exhibits of Shell of 19 September 2023;
- the document for a change of claim on appeal of Shell of 19 September 2023;
- Milieudefensie et al.'s defense on appeal after joinder with appendices (Exhibits MD-479 - 485);
- the document containing exhibits of Shell of 19 December 2023 with exhibits (Exhibits S-122 - 239);
- the document containing exhibits of Milieudefensie et al. of 19 December 2023 with exhibits (Exhibits MD-486 - 560);
- the reply of Milieudefensie et al. after the change of claim of Shell of 19 December 2023;
- the reply of Milieudefensie et al. in response to the document commenting on the exhibits of Shell of 19 December 2023;
- the document containing exhibits of M&M of 19 December 2023 with exhibits (Exhibits 5 - 31);
- the document containing exhibits of Shell of 5 March 2024 with exhibits (Exhibits S-240 - 285);
- the document containing exhibits of Milieudefensie et al. of 5 March 2024 with exhibits (Exhibits MD-561 - 579);
- the document containing exhibits of M&M of 5 March 2024 with exhibits (Exhibits 32 - 59);
- the pleading notes of Shell of 19 March 2024;
- the document containing exhibits of Shell of 19 March 2024 with exhibits (Exhibits S-286 - 289);
- the pleading notes of Milieudefensie et al. of 19 March 2024;
- the pleading notes of M&M of 19 March 2024;
- the document containing additional exhibits of Milieudefensie et al. of 2 April 2024 with exhibits (Exhibits MD-580 - 581).

2.2 Oral hearings were held on 2, 3, 4 and 12 April 2024 where the attorneys clarified the case based on the pleading notes, which were submitted to the court. Attorneys Lunsingh Scheurleer and Drenth spoke on behalf of Shell; attorneys Cox, Reij and Van Diem spoke on behalf of Milieudefensie et al. and attorney Bosscher spoke on behalf of M&M. M&M submitted an additional exhibit (Exhibit 60) on 12 April 2024. Records of the oral hearings were drawn up and sent to the parties.

### 3 Factual background

3.1 The district court established a number of facts in legal grounds 2.1 through to 2.6 of the contested judgment. In ground for appeal IX, Shell argued that when determining the facts, the district court erred in failing to fully identify and take into account the activities and climate objectives of Shell and the Shell Group. This ground for appeal by itself cannot lead to the reversal of the contested judgment. However, in this judgment the court will take into account what Shell has presented in ground for appeal IX and what Milieudefensie et al. have put forward against it. In all other respects, there is no dispute about the district court's finding of facts, so that the court will also proceed from those facts.

3.2 The following will first present a brief overview of (A) the phenomenon of climate change and (B) Shell's climate policy. A list of abbreviations used hereinafter will be included in an annex to this judgment.

#### A. Climate change

##### 1. General

- 3.3 Mankind has been using energy, primarily obtained by burning fossil fuels (coal, oil and gas), on a massive scale since the beginning of the Industrial Revolution. Carbon dioxide (CO<sub>2</sub>) is released in this process. Some of the released CO<sub>2</sub> is emitted into the atmosphere, where it lingers for hundreds of years, or even longer. The remainder of the released CO<sub>2</sub> is absorbed by the ecosystems of forests and oceans. This absorption capability is gradually decreasing due to deforestation and the warming of sea water.
- 3.4 CO<sub>2</sub> is the main greenhouse gas which, together with other greenhouse gases, captures heat emitted by the earth in the atmosphere. This is known as the greenhouse effect, which intensifies as more greenhouse gases end up in the atmosphere. This in turn increasingly warms the earth. The climate system has a delayed response to greenhouse gas emissions: greenhouse gases emitted today will not have their full warming effect for 30 to 40 years. Greenhouse gases other than CO<sub>2</sub> include methane, nitrous oxide and fluorinated gases. The unit 'parts per million' (hereinafter: ppm) is used to express the concentration of greenhouse gases in the atmosphere. The average CO<sub>2</sub> concentration in 2022 was about 417 ppm. There is a direct, linear link between human-caused greenhouse gas emissions, in part caused by the burning of fossil fuels, and global warming. The latest understanding is that the earth has now warmed by about 1.2°C relative to the average temperature at the beginning of the Industrial Revolution. Over the past decades, global CO<sub>2</sub> emissions have increased by 2% per year.

## 2. Scope 1, 2 and 3 emissions

- 3.5 The 'Greenhouse Gas Protocol' (GHG Protocol) is a global standard for the accounting and reporting of greenhouse gas emissions by companies, governments and other organizations. The GHG Protocol categorises a company's emissions in scope 1, 2 and 3 emissions:
- scope 1: direct emissions from installations that are owned or controlled in full or in part by the company;
  - scope 2: indirect emissions from third-party installations from which the company purchases electricity, steam or heat for its business activities;
  - scope 3: other indirect emissions not included in scope 2 generated in the company's value chain, including emissions generated from the use or consumption of products the company supplies to third parties, such as other organizations or consumers.
- Shell reports its greenhouse gas emissions in accordance with the GHG Protocol methodology.

## 3. Scientific consensus on climate change and mitigation pathways

- 3.6 The global impacts of climate change are apparent from the reports of the 'Intergovernmental Panel on Climate Change' (hereinafter: IPCC), the United Nations climate panel in place since 1988, among other sources. The IPCC is "the leading international body for the assessment of climate change". It focuses on gaining insight into all aspects of climate change through scientific research. The IPCC does not conduct research itself, but studies and assesses the most recent scientific and technical information that becomes available worldwide. The IPCC is not just a scientific but also an intergovernmental organization, of which 195 countries are a member, including the Netherlands.
- 3.7 It follows from IPCC reports and other sources that there has long been consensus among climate scientists that the Earth's average temperature should not increase by more than 2°C relative to the average temperature in pre-industrial times. If the concentration of greenhouse gases in the atmosphere stays below 450 ppm, climate science says there is a good chance that this target will be reached. From about 2015, further insight has shown that a safe temperature rise should not exceed 1.5°C with a corresponding concentration level of greenhouse gases of no more than 430 ppm.
- 3.8 The IPCC's 'Synthesis Report Climate Change 2023' states the following on the current state of affairs in its Summary for Policymakers:
- "A.2 Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (*high confidence*) . Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*) .

(...)

A.3 Adaptation planning and implementation has progressed across all sectors and regions, with documented benefits and varying effectiveness. Despite progress, adaptation gaps exist, and will continue to grow at current rates of implementation. Hard and soft limits to adaptation have been reached in some ecosystems and regions. Maladaptation is happening in some sectors and regions. Current global financial flows for adaptation are insufficient for, and constrain implementation of, adaptation options, especially in developing countries (*high confidence*) .

(...)

A.4 Policies and laws addressing mitigation have consistently expanded since AR5. Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions. (*high confidence*) ."

On future trends, the report states:

"B.1 Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modeled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*) . Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (*high confidence*) .

(...)

B.3 Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid, and sustained global greenhouse gas emissions reductions. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Likewise, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels. (*high confidence*)

(...)

B.4 Adaptation options that are feasible and effective today will become constrained and less effective with increasing global warming. With increasing global warming, losses and damages will increase and additional human and natural systems will reach adaptation limits. Maladaptation can be avoided by flexible, multi-sectoral, inclusive, long-term planning and implementation of adaptation actions, with co-benefits to many sectors and systems. (*high confidence*).

(...)

B.5 Limiting human-caused global warming requires net zero CO<sub>2</sub> emissions. Cumulative carbon emissions until the time of reaching net zero CO<sub>2</sub> emissions and the level of greenhouse gas emission reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C (*high confidence*) . Projected CO<sub>2</sub> emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50 %) (*high confidence*) .

(...)

B.6 All global modeled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade. Global net zero CO<sub>2</sub> emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (*high confidence*) "

And on the need for action in the short term, the report states the following:

"C.1 Climate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).

(...)

C.2 Deep, rapid, and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (*very high confidence*), and deliver many co-benefits, especially for air quality and health (*high confidence*). Delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*). Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies (*high confidence*)."

- 3.9 The IPCC also aims to identify potential mitigation pathways. To this end, it identifies scientific insights into potential strategies to address dangerous climate change and its consequences. The consensus is that mitigation pathways under which global CO<sub>2</sub> emissions are reduced by a net 45% by 2030 relative to 2010, and by a net 100% by 2050, maximise the likelihood of avoiding the most severe impacts of dangerous climate change (that is, global warming of no more than 1.5°C). The 'Summary for Policymakers' to the 2018 IPCC Special Report entitled 'Global warming of 1.5°C' states the following (p. 14):

"In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO<sub>2</sub> emissions decline by about 45% from 2010 levels by 2030 (40-60% interquartile range), reaching net zero around 2050 (2045-2055 interquartile range)."

And the 'Summary for Policymakers' to the report 'Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the IPCC Sixth Assessment Report' includes the following:

"In pathways that limit warming to 1.5°C (>50%) with no or limited overshoot global net CO<sub>2</sub> emissions are reduced compared to modelled 2019 emissions by 48% [36–69%] in 2030 and by 80% [61–109%] in 2040 (...)."

The IPCC has also described in its reports that in scenarios where warming is limited to 1.5°C, the consumption of coal, oil and gas will have to decrease. The following is stated on this consumption in the aforementioned IPCC report (p. 615):

"Coal consumption without carbon capture and storage (CCS) falls by 67-82% (interquartile range) in 2030 in scenarios limiting warming to 1.5°C (50%) with no or limited overshoot. Oil and gas consumption falls more slowly."

- 3.10 The 'United Nations Environment Programme' (UNEP) annually publishes an 'Emissions Gap Report' and a 'Production Gap Report'.

In the Emission Gap Reports, UNEP examines the gap between, on the one hand, the emission levels coinciding with warming of 2°C, 1.8°C or 1.5°C and, on the other hand, the emission levels that can be expected when UNFCCC member countries implement intended policy objectives (see below under 3.14). The 2023 report states that the countries' implementation of current global climate policies will result in a significant carbon budget overshoot. In doing so, there is a 50% chance that warming will be limited to 2.7°C. So there is also a 50% chance of the earth warming by more than 2.7°C.

The Production Gap Reports report on the gap between the countries' planned production of fossil fuels and the global production levels that are in line with global warming limited to 1.5°C. In short, each of these reports concludes that governments collectively still plan to produce far more fossil fuels in 2030 than would be consistent with a 2°C or 1.5°C warming. For instance, the 2023 Production Gap Report mentions the following as one of its 'key findings':

"Governments, in aggregate, still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C. The persistence of the global production gap puts a well-managed and equitable energy transition at risk."

UNEP's 2021 Production Gap Report further states that in order to keep a 1.5°C global warming in reach, production between 2020 and 2030 will have to decrease annually by (as a median) 11% for coal, 4% for oil and 3% for gas.

- 3.11 The International Energy Agency (IEA) is an intergovernmental organisation, which was founded in 1974 and consists of 30 member states, including the Netherlands. The 'World Energy Outlook' published by the IEA offers analyses and insights into developments in the energy market and what these developments signify for

energy security, environmental protection and economic developments. In recent years, the IEA has developed a number of scenarios showing what will happen when certain climate measures are adopted, or not, worldwide. For instance, in the 2019 World Energy Outlook, the IEA uses the 'Current Policies Scenario' (the scenario with no policy changes), the 'Stated Policies Scenario' (the scenario where planned measures are actually implemented) and the 'Sustainable Development Scenario' (which assumes a temperature rise of "well below 2oC ... and pursuing efforts to limit [it] to 1.5oC"). Lastly, the IEA introduced the 'Net Zero Emissions scenario 2050' (NZE scenario) in the 2020 World Energy Outlook. This is the scenario aiming for net zero emissions in 2050. The IEA website includes the following from its 2020 report:

"Decisions over the next decade will play a critical role in determining the pathway to 2050. (...) Total CO<sub>2</sub> would need to fall by around 45% from 2010 levels by 2030, meaning that energy sector and industrial process CO<sub>2</sub> emissions would need to be around 20.1 Gt, or 6.5 Gt lower than in the SDS in 2030."

The IEA released its report 'Net Zero by 2050, A Roadmap for the Global Energy Sector' in 2021. That report forecasts a reduction in CO<sub>2</sub> emissions under the NZE scenario of around 60% for coal, 35% for oil and 18% for gas in the period to 2030, with 2019 as the base year. The report states the following (p. 49):

"There are many possible paths to achieve net-zero CO<sub>2</sub> emissions globally by 2050 and many uncertainties that could affect any of them; the NZE is therefore a path, not the path to net zero emissions."

Two years later, in the report 'Net Zero Roadmap. A Global Pathway to Keep the 1.5oC Goal in Reach' (hereinafter: the 2023 update), the IEA arrived at other reduction rates, namely 28% for oil and 23% for gas in 2030.

The IEA further examined the extent to which new fossil fuel investments are consistent with climate goals. In its 2021 report, the IEA noted in this respect that there is no need for investment in new fossil fuel supply in the NZE scenario:

"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 unwavering policy focus on climate change in the net zero pathway results in a sharp decline in fossil fuel demand, meaning that the focus for oil and gas producers switches entirely to output – and emissions reductions – from the operation of existing assets".

In the 2023 update, the IEA warns that the NZE scenario leaves no room for planned fossil infrastructure investments (p. 150/151):

"Between 2023 and 2035, cumulative investments in fossil fuel supply, fossil-based power generation and end uses are currently planned to be USD 3.6 trillion higher than in the NZE Scenario, despite current net zero emissions pledges. Much of this investment would be for assets with long lives in which operations would need to be curtailed or lifetimes shortened if the goal of returning the temperature increase to below 1.5°C is to be achieved".

The IEA has also concluded in this report that in the NZE scenario, no new oil and gas projects are needed and that investments in existing fields and already approved projects will suffice (p. 16):

"No new long-lead time upstream oil and gas projects are needed in the NZE-scenario (...). Nonetheless, continued investment is required in existing oil and gas assets and already approved projects."

#### 4. *Climate change in the Netherlands*

- 3.12 In the Netherlands, per capita CO<sub>2</sub> emissions are relatively high compared to other industrialised countries. The effects of warming (currently about 0.8oC globally and in the Netherlands about 1.7oC above pre-industrial temperatures) are already noticeable in the Netherlands. In 2023, the Royal Netherlands Meteorological Institute (KNMI) published the report 'KNMI'23, climate scenarios for the Netherlands'. This report presents four climate change scenarios for the Netherlands, including the Caribbean Netherlands. The report replaces the climate scenarios compiled by the KNMI in 2014. KNMI'23 also shows that – depending on the amount of greenhouse gases that will still be emitted – heat waves, drought, floods, damage to ecosystems, threat to food production and damage to health are expected to become more severe in the future. Ongoing warming means that Dutch summers will become drier and winters wetter, with some uncertainty as to which scenario

will materialise: severe drying in summer (and a lower degree of wetting in winter) or severe wetting in winter (and a lower degree of drying in summer). The KNMI predicts a sea level rise of between 26-73 cm around 2100 in the most favourable scenario, to 59-124 cm in the most unfavourable scenario.

- 3.13 Climate change-related health problems for Dutch residents include heat stress, increasing infectious diseases, deteriorating air quality, increased UV exposure, and an increase in water-related and foodborne diseases. The climate consequences for the Netherlands in the coming decades will also largely consist of water challenges, such as flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinisation, wetting and drought. Periods of either drought and water shortage or problems due to excess water may occur on an annual basis. These changes and uncertainties in water availability will affect agriculture and biodiversity, but also the energy sector and industry. These include cooling water problems and poor river accessibility in case of drought, as well as network problems due to drought, flooding or other weather extremes.

#### 5. *Climate change conventions*

- 3.14 Globally, the negative impacts of dangerous climate change are recognised, including in the 'United Nations Framework Convention on Climate Change' (UNFCCC), adopted on 9 May 1992, (hereinafter also referred to as: the UN Climate Convention)<sup>1</sup>. The vast majority of the global community, including the Netherlands, has ratified this convention. The UN Climate Convention seeks to protect the planet's ecosystems and mankind and strives for sustainable development for the protection of current and future generations. Article 2 of this convention reads as follows:

"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved 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."

Article 7 of the UN Climate Convention established the Conference of the Parties (COP). The COP is the highest decision-making body within the convention organisation. The COP organises a climate conference (also referred to as: COP) almost every year.

- 3.15 During COP 3, agreement was reached on the Kyoto Protocol of 11 December 1997<sup>2</sup> to the UN Climate Convention. This protocol entered into force on 16 February 2005<sup>3</sup> and set more concrete reduction targets for the states parties for the period 2008 - 2012. On 22 April 2016, COP 21 culminated in the Paris Agreement.<sup>4</sup> This agreement specifies that global warming should be kept "well below 2°C" relative to the average temperature in pre-industrial times, aiming for a temperature rise of no more than 1.5°C. The parties to the agreement have to draw up national climate plans ("nationally determined contributions" or "NDCs"), which must be ambitious and whose ambition level must increase with each new plan. Numerous COPs have been held since 2016, at which the climate goals from the Paris Agreement were reaffirmed. For example, in 2020, the COP 26 in Glasgow confirmed that the Conference:

"22. Recognizes that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around midcentury as well as deep reductions in other greenhouse gases."

#### 6. *Climate policy of the European Union*

- 3.16 At the level of the European Union (hereinafter also: the EU or Union), there is also legislation in place to tackle dangerous climate change. Article 37 of the Charter of Fundamental Rights of the European Union states: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Article 191 of the Treaty on the Functioning of the European Union (TFEU) sets out the EU's environmental objectives: the Union's policies shall contribute, inter alia, to the promotion at the international level of measures to deal with regional or global environmental problems, and in particular the fight against climate change. The European Union has given climate policy an increasingly prominent role in recent years. A



Commission communication dated 11 December 2019 outlined the 'European Green Deal' for the European Union and its citizens.<sup>5</sup> The European Green Deal comprises a new growth strategy to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy, with net zero greenhouse gas emissions from 2050 and economic growth decoupled from fossil resource use. The European Green Deal covers various policy initiatives needed for sustainable development.

- 3.17 As part of the European Green Deal, the European Climate Law<sup>6</sup> was created in 2021. This law contains concrete targets regarding greenhouse gas emissions within the Union. In doing so, the European Union is contributing to the climate goals of the Paris Agreement. Article 2(1) of the European Climate Law stipulates that net greenhouse gas emissions within the European Union must be reduced to zero by 2050. Under Article 4 of the European Climate Law, the binding climate target is a reduction in net greenhouse gas emissions of at least 55% by 2030 relative to 1990 levels.
- 3.18 The target to reduce net greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels is elaborated in 'Fit for 55'. This is a package of aligned proposals to achieve this target by updating legislation and adjusting policies.<sup>7</sup>

### *7. Dutch climate legislation*

- 3.19 The Dutch Climate Act<sup>8</sup> provides a framework for developing policies aimed at a permanent and gradual reduction of greenhouse gas emissions in the Netherlands with the purpose of curbing global warming and climate change. The act now obliges the Netherlands (following amendment of the Climate Act by the act of 23 July 2023, Bulletin of Acts and Decrees 2023, 271) to reduce net greenhouse gas emissions to zero by 2050 at the latest and to strive for negative greenhouse gas emissions after 2050 – in accordance with Article 2(1) of the European Climate Law. To achieve this goal for 2050, the aim is to reduce greenhouse gas emissions by 55% in 2030 and to achieve fully carbon-neutral electricity generation in 2050. Pursuant to the Climate Act, the government must periodically draw up a climate plan, which, among other things, sets out the main lines of the policy by which the government intends to achieve the goals set out in the Climate Act.
- 3.20 In late 2023, the Climate Fund (Temporary Provisions) Act<sup>9</sup> was adopted, making €35 billion available for climate measures in the period up to 2030. The spending purposes are (in short) a greenhouse-gas-neutral energy supply by 2050 and the promotion of energy-efficient and renewable energy techniques. Furthermore, cabinet Rutte IV decided on a 'bespoke approach' to meet the 55% CO<sub>2</sub> reduction target by 2030. This approach consists of a number of components that encourage and support the largest industrial emitters to make accelerated reductions. The final element of this tailor-made approach is that binding agreements are reached with companies on sustainability efforts. In this context, the Dutch state has since concluded an (non-binding) 'Expression of Principles' with Shell, which includes a commitment by Shell in the Netherlands to reduce CO<sub>2</sub> emissions from activities under its operational control by 3.9 megatonne.

### *Shell and the Shell group*

#### *1. General*

- 3.21 Shell is a public limited company incorporated under the laws of England and Wales and based in the United Kingdom. Shell is the principal holding company of the Shell Group, an integrated energy company whose activities include exploration, extraction, production, transportation, trading, sales and marketing of energy products. (Hereinafter, the Shell Group will also be referred to as 'Shell', depending on the context). By far the majority of energy products sold by Shell are oil and gas. In 2023, Shell's energy sales were made up of 48% oil products, 22% LNG and 21% pipeline gas, together accounting for 91% of total energy sales. The remainder consisted of electricity and biofuels (7% and 2% of total energy sales in 2023, respectively). Shell does not produce or sell coal. Shell generated US\$ 323 billion in revenue in 2023, making it one of the largest oil and gas companies in the world.
- 3.22 Shell is the ultimate shareholder of more than 1,100 companies established around the world. As the principal holding company, Shell determines the overall policy of the Group. Shell reports on the Group's consolidated performance and maintains investor relations. The companies in the Group are responsible for implementing and executing the general policy.
- 3.23 The general policy adopted by Shell as the principal holding company includes climate policy. Shell's board has "primary oversight" over the climate policy. The board "reviews [the] energy transition strategy periodically and oversees its implementation and delivery" (Shell Annual Report and Accounts 2023).
- 3.24 As the principal holding company, Shell reports on the CO<sub>2</sub> emissions from fossil fuels produced and sold by the Group. Shell does so on the basis of the GHG Protocol. Of the total emissions reported by Shell, about 95%

consists of scope 3 emissions.

The majority of the scope 3 emissions consists of emissions from the combustion of oil and gas sold by Shell, of which about one-third is produced by Shell itself (see below under 3.42 et seq.).

## 2. *Shell's climate goals*

- 3.25 In 1986, the Shell Group issued an internal report on climate change, entitled 'The Greenhouse Effect'. This report was published in 1988. This report warns of the dangers of climate change caused by greenhouse gas emissions. A 1991 Shell information film called 'Climate of concern' also warned of these dangers. A brochure with the title 'Climate Change, what does Shell think and do about it' from March 1998, states the following about the role of the Shell companies in the evolving energy markets:

"They 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."

- 3.26 In 1998, a new business was created within the Shell group called 'Shell International Renewables'. This business focused on new forms of energy, such as wind and solar power, afforestation and biomass energy. In 1999, Shell placed an advertisement in the Financial Times stating, among other things, the following:

"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."

This business was dissolved in 2009. In a press conference on 17 March 2009, Shell announced that it would no longer make major investments in wind and solar power, and that it did not expect hydrogen to play an important role in the energy market in the near future. Its future investments in renewable energy would focus on biomass in particular.

- 3.27 On 16 May 2014, Shell wrote the following in an open letter to its investors:

"We are writing this letter in response to enquiries from our shareholders regarding the "carbon bubble" or "stranded assets" issue. (...) Shell believes that the risks from climate change will continue to rise up the public and political agenda. We are already taking steps to minimize our emissions, and we are preparing the company for when legislation and markets will support more significant action to mitigate CO<sub>2</sub>.

However, we concur with the view in the recent intergovernmental Panel on Climate Change ("IPCC") report that there is a high degree of confidence that global warming will exceed 2°C by the end of the 21st century. (...) However, because of the long-lived nature of the infrastructure and many assets in the energy system, any transformation will inevitably take decades. This is in addition to the growth in energy demand that will likely continue until mid-century, and possibly beyond. The world will continue to need oil and gas for many decades to come, supporting both demand, and oil & gas prices. As such, we do not believe that any of our proven reserves will become "stranded".

- 3.28 In 2016, Shell established the 'New Energies' business. Shell intended to invest \$1 billion to \$2 billion annually and through to 2020 within this initiative in lower-carbon solutions, such as biofuels, hydrogen, solar and wind power and electric car charging facilities.
- 3.29 In late 2017, Shell announced its 'Net Carbon Footprint Ambition'. Shell announced that it wanted to reduce the net CO<sub>2</sub> intensity of the energy products it sells by about 50% by 2050, with an interim reduction of about 20% by 2035.
- 3.30 In 2018, Shell published the 'Sky Report' containing the Sky scenario for the development of future energy systems. Shell has used this scenario to support and test its business decisions. The scenario assumes that society will reach net-zero emissions by 2070. Besides rapid growth of renewable energy sources, the scenario foresees continued demand for oil and gas. To still achieve climate neutrality, the scenario calls for a significant expansion of CO<sub>2</sub> capture and reuse. In the scenario, fossil fuels will still account for 22% of total energy supply in 2070, of which oil and gas will account for 16%. In 2050, this could be 45%, of which oil and gas will account for 33%. The report also states the following:

"From 2018 to around 2030, there is clear recognition that the potential for dramatic short term change in the energy system is limited, given the installed base of capital across the economy and available technologies,

even as aggressive new policies are introduced.”

3.31 The 2018 ‘Shell Energy Transition Report’ states the following:

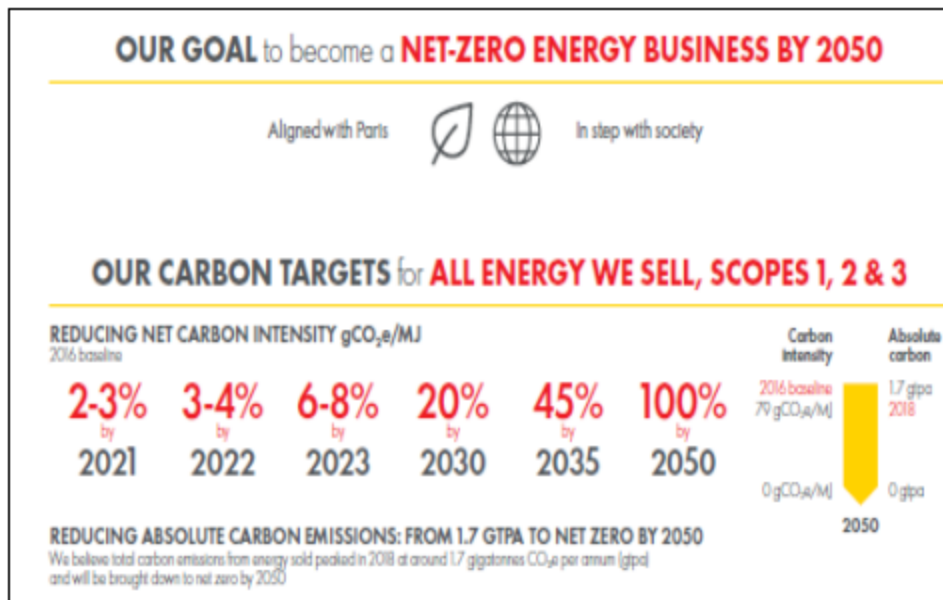
“Although, we have no immediate plans to move to a net-zero emissions portfolio, in November of 2017, we announced our ambition to reduce the Net Carbon Footprint of the energy products we sell in accordance with society’s implementation of the Paris Agreement’s goal of holding global average temperature to well below 2°C above pre-industrial levels. Accordingly, assuming society aligns itself with the Paris Agreement’s goals, we aim to reduce our Net Carbon Footprint, which includes not only our direct and indirect carbon emissions, associated with producing the energy products which we sell, but also our customers’ emissions from their use of the energy products that we sell, by 20% in 2035 and by 50% in 2050.”

3.32 Since 2019, Shell has reported its net CO<sub>2</sub> intensity annually. According to Shell, net CO<sub>2</sub> intensity means:

“Shell’s net carbon intensity is the average intensity, weighted by sales volume, of the energy products sold by Shell. In other words, it’s the average amount of greenhouse gas emissions which are produced for each unit of energy that we sell, and which is used by our customers.”

3.33 Shell included its adjusted ambitions for the Shell Group in its ‘Responsible Investment Annual Briefing’ of April 2020, aimed at its investors. According to this briefing, Shell aims to achieve a net-zero reduction of its scope 1 and 2 emissions by 2050 or earlier. For scope 3 emissions, Shell aims to reduce net CO<sub>2</sub> intensity by 30% by 2035 and by 65% by 2050 relative to 2016.

3.34 In the ‘Powering Progress’ strategy, introduced by Shell in 2021, the target to reduce the net CO<sub>2</sub> intensity of scope 3 emissions has been tightened, with a planned reduction, relative to 2016, of 2-3% in 2021, 3-4% in 2022, 6-8% in 2023, 20% in 2030, 45% in 2035 and 100% in 2050, “in step with society”. Reducing the net CO<sub>2</sub> intensity of scope 3 emissions by 100% by 2050 will also reduce the absolute scope 3 emissions to (net) zero. These targets are presented as follows in ‘Shell’s Energy Transition Strategy 2021’ report:



3.35 As part of the Powering Progress strategy, Shell has also set a target to reduce its own net scope 1 and 2 emissions by 50% by 2030 relative to 2016. Shell has also expressed the expectation that by 2019 its annual oil production will have reached a peak, and that its total oil production will decrease by 1-2% year-on-year from 2019 until 2030. On its investments in renewable energy, Shell has noted the following:

“We are investing around \$ 1 billion every year in low-carbon energy such as charging for electric vehicles, hydrogen, biofuels and electricity generated by wind and solar power. We plan on increasing that to around \$ 2 billion, provided that we can find the right commercial opportunities.”

3.36 Presenting its fourth-quarter figures for 2023, Shell expressed the expectation that by 2025, about 50% of its total spending will go to products and services that are low-emission or emission-free.

3.37 In addition, in 2023, Shell revised its expectation that annual oil production would decline by 1-2% per year until 2030. After a number of divestments, Shell now expects to maintain its oil production until 2030. At the ‘Capital Markets Day’ on 14 June 2023, Shell stated the following in this regard:

"When we launched our Powering Progress strategy... we said that we expected a gradual decline in our oil production of around 1-2% a year to the end of 2030.

We have achieved that reduction earlier than expected through targeted divestments ... and now expect to maintain our liquids production of approximately 1.4 million barrels of oil equivalent a day to the end of the decade".

3.38 In the 'Shell Energy Transition 2024' report, Shell states that it plans to grow its LNG sales by 20-30% by 2030 relative to 2022.

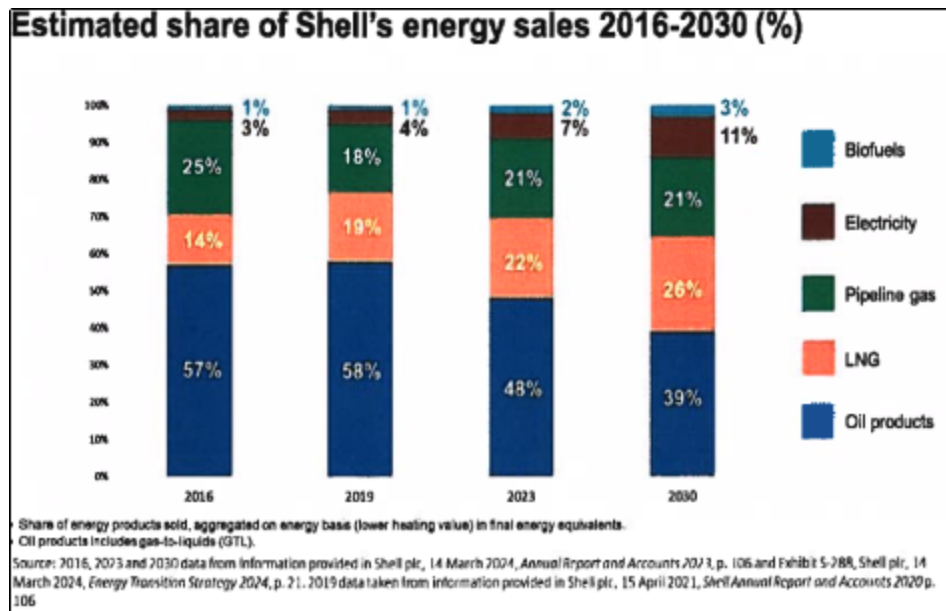
3.39 Furthermore, in this report, Shell revised downwards its target to reduce the CO2 intensity of its total energy portfolio (scope 1, 2 and 3) by 20% by 2030, relative to 2016, to 15-20%, and abandoned its target to reduce the CO2 intensity of its total energy portfolio by 45% by 2035 relative to 2016. As an explanation for abandoning the latter target, Shell has referred to "uncertainty in the pace of change in the energy transition." In response to a question from the court, Shell has explained that by this it means, among other things, changes in government policy choices, infrastructure and consumer behaviour over time, and that it will continue to adjust its strategy to take such changes into account.

3.40 Shell has also abandoned the expectation that by 2025, around 50% of its total spending will be on products and services that are low-emission or emission-free. In response to a question from the court, Shell has indicated that following feedback from analysts and investors, it has opted for a yardstick that expresses planned low-carbon investments in terms of capex (capital expenditure). Shell currently expects to spend \$10-15 billion in capex on low-carbon energy solutions from 2023 to the end of 2025.

3.41 In the 'Shell Energy Transition Strategy 2024' report, Shell set a new ambition to reduce customer emissions from the use of its oil products by 15-20% by 2030 relative to 2021. To achieve this reduction, Shell will sell fewer oil products and support its customers in switching to electric mobility and low-carbon fuels.

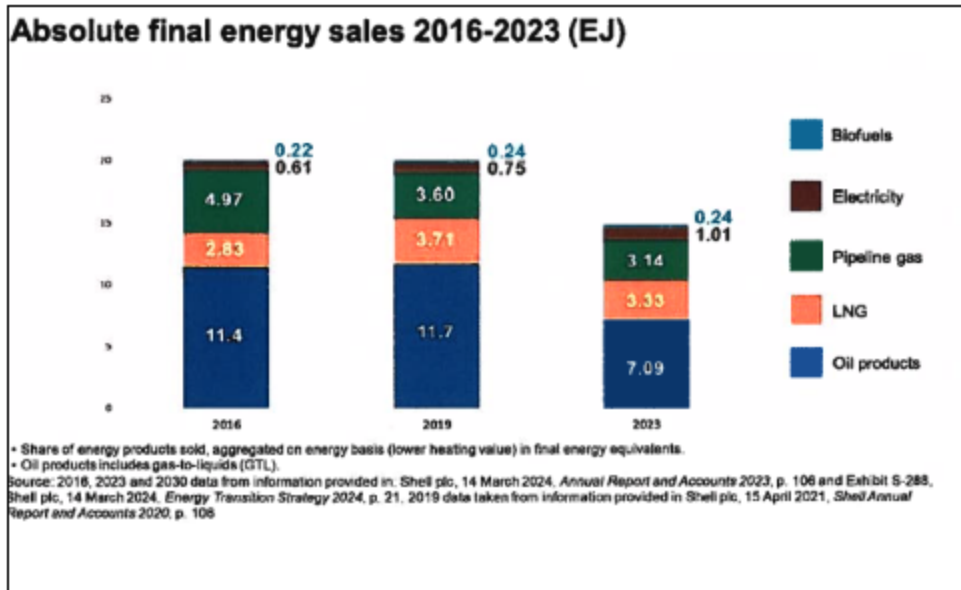
### 3. Shell's (projected) sales of energy products between 2016 and 2030

3.42 The following diagram shows the (projected) shares of different energy products in Shell's total sales of

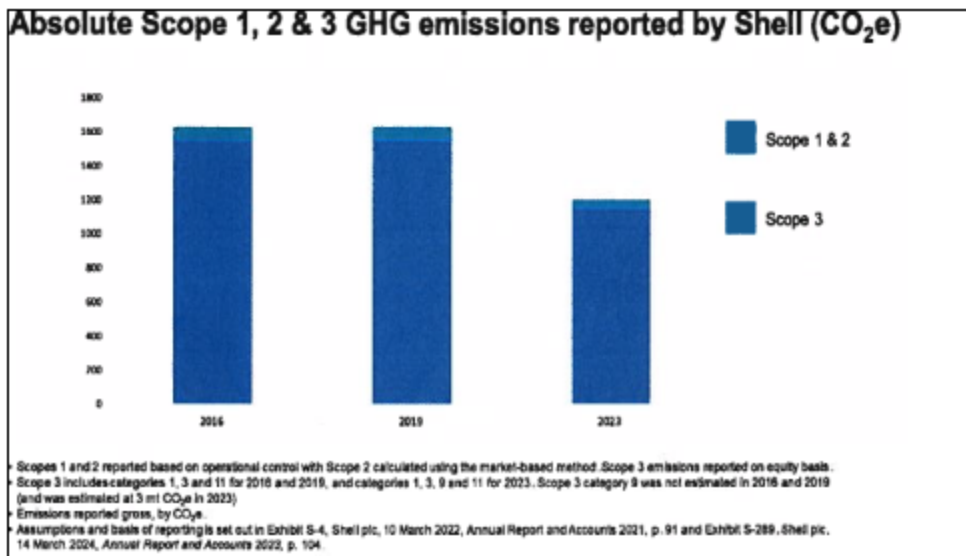


energy products between 2016 and 2030. This diagram shows that the share of oil products fell from 57% to 48% between 2016 and 2023, and will continue to fall from 48% to 39% between 2023 and 2030. This decline is offset by an increase in the share of gas (pipeline gas and LNG), from (aggregate) 39% in 2016, to 43% in 2023 and 47% in 2030. The share of biofuels remains limited (from 1% in 2016 to 2% in 2023 and 3% in 2030). The share of electricity increases from 3% in 2016 to 7% in 2023 and 11% in 2030.

3.43 The following diagram shows Shell's absolute sales of energy products in the period 2016 expressed in EJ (Exajoule, or 10<sup>18</sup> joules). It shows that total sales of oil products and gas fell, from 19.2 EJ in 2016 to 13.56 EJ in 2023, a decrease of 29%. Sales of oil products declined the most, from 11.4 EJ in 2016 to 7.09 EJ in 2023, down 37%. Sales of gas (pipeline gas and LNG) are down 17%, from 7.8 EJ in 2016 to 6.47 EJ in 2023. Biofuel sales remained roughly the same, while electricity sales increased slightly.



3.44 The following diagram shows Shell's absolute scope 1, 2 and 3 greenhouse gas emissions over the period 2016-2023 (expressed in CO<sub>2</sub> equivalent (CO<sub>2</sub>e)). The diagram shows that scope 1, 2 and 3 emissions remained roughly the same between 2016 and 2019, and decreased in 2023 relative to 2019.



3.45 The table below shows Shell's individual scope 1, 2 and 3 emissions over the period 2016-2023 in absolute numbers (in million tonnes of CO<sub>2</sub> equivalent). By far the majority of emissions (about 95%) are scope 3 emissions. These are down from 1,551 in 2019 to 1,147 in 2023 (a 26% decrease).

	2016	2019	2020	2021	2022	2023	Target 2030	Target 2050
scope 1	72	70	63	60	51	50	50% relative to 2016	0
scope 2	11	10	8	8	7	7	50% relative to 2016	0
scope 3	1,545	1,551	1,305	1,299	1,174	1,147	No target	0

3.46 Scope 3 emissions are broken down as follows (in million tonnes of CO<sub>2</sub> equivalent):

<b>Scope 3 emissions</b>	2016	2019	2020	2021	2022	2023
Purchased goods and services (category 1)	172	178	147	147	144	154
Fuel and energy related activities (not included in Scope 1 and 2) (category 3)	89	102	103	136	115	112
Downstream transport/ distribution (category 9)	-	-	-	6	5	3
Use of sold products (category 11)	1,284	1,271	1,054	1,010	910	878
- own production	593	564	452	380	332	319
- 3rd party products	681	708	602	630	578	559

As shown in this table, by far the biggest portion of scope 3 emissions consists of emissions from fuels sold (category 11). Of these, about one-third is made up of emissions from fuels produced and sold by Shell, and two-thirds are emissions from fuels produced by third parties and sold by Shell. In the period 2019-2023, emissions from own products sold by Shell decreased the most (43%, compared to 21% for emissions from third-party products sold by Shell). The strong(er) decrease in emissions from own products sold by Shell is due to divestments of production activities in this period (see below under 3.37).

#### 4. *Shell's (projected) production of oil and gas between 2016 and 2030*

3.47 The following table shows Shell's (projected) oil and gas production in 2016, 2019, 2023 and 2030 (in 1,000 barrels of oil equivalent per day):

<b>Oil and gas production</b>	2016	2019	2023	2030
Oil	1,679	1,823	1,454	~1,400
Gas	1,830	1,790	1,285	-
Total	3,509	3,613	2,739	-

3.48 As the table shows, oil production fell by 20% between 2019 and 2023, and gas production fell by 28% during that period. Until 2030, Shell expects to keep its oil production the same at around 1.4 million barrels per day. As noted earlier, Shell plans to grow its LNG sales by 20-30% between 2022 and 2030. Shell has not disclosed how much of these additional sales will come from expanding its own production.

#### 5. *(Projected) investment in fossil fuels and low-carbon energy solutions*

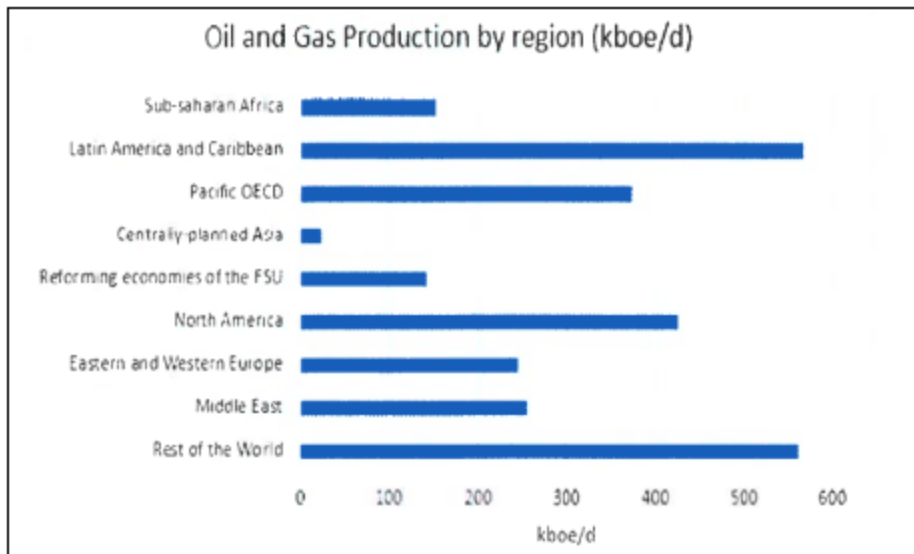
3.49 Shell plans to invest around \$40 billion in its upstream oil and gas business over the period 2023-2025. It is important to note that without investment, the amount of oil that can be extracted from a field decreases by

about 5% every year. For each of these years, the investment is expected to look approximately as follows: (i) \$8 billion to maintain oil production at current levels, mainly in existing positions and basins where oil has already been discovered, (ii) \$2 billion in existing LNG projects, and (iii) \$3 billion in new LNG production. Between 2023 and 2030, Shell expects to invest around \$ 100 billion in upstream oil and gas activities.

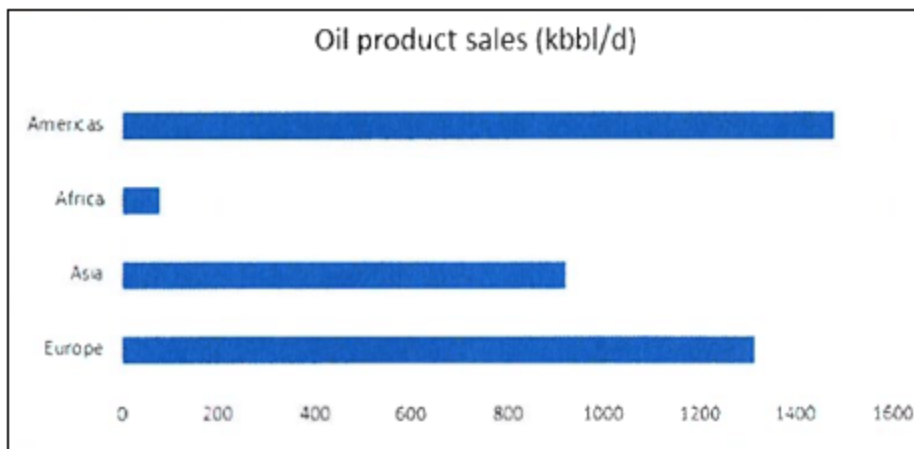
- 3.50 Shell will invest a total of about \$ 10-15 billion in low-carbon energy solutions between 2023 and the end of 2025. Shell has made no announcements about investments in low-carbon energy solutions in the years after 2025.
- 3.51 Shell expects about a quarter of its total oil and gas production in 2030 to come from fields that were not producing in 2021. This will include around 80 fields. Furthermore, Shell expects that between 2024 and 2030, around 50-60% of capital expenditure on oil and gas production will go to fields not currently producing oil and gas.

#### 6. Regional distribution of Shell's oil and gas production and sales

- 3.52 The following graph shows the regional distribution of Shell's oil and gas production (expressed in 1,000 barrels of oil equivalent per day (kboe/d)).



- 3.53 The regional distribution of Shell's oil sales (in kbbl/d (= average daily sales in 1,000 barrels of crude oil)) is broadly as follows:



- 3.54 Shell does not provide a detailed breakdown of pipeline gas and LNG sales by region. Upstream gas not used for LNG is sold locally, in line with the above regional breakdown of oil and gas production. Since the Russian invasion of Ukraine, demand for LNG in Europe has increased. Shell sells most of its LNG in Asia (Japan, South Korea, Taiwan, China, South and South East Asian countries).

## 4 The proceeding before the district court

### 4.1 Following a change of claim, Milieudefensie et al. in essence have made the following claims:

#### 1. for a declaratory decision:

a) that the aggregate annual volume of CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of Shell and the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell Group constitutes an unlawful act towards Milieudefensie et al. and (i) that Shell must reduce this emission volume, both directly and through the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell Group, and (ii) that this reduction obligation must be achieved relative to the emission level of the Shell Group in the year 2019 and in accordance with the global temperature objective of Article 2 section 1 under a of the Paris Agreement and the related best available (UN) climate science;

b) that Shell acts unlawfully towards Milieudefensie et al. if Shell, both directly and through the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell Group:

principally: has not reduced or caused to be reduced by at least 45%, or at least net 45%, by the end of 2030, the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of the Shell Group, relative to 2019 levels;

alternatively: has not reduced or caused to be reduced by at least 35%, or at least net 35%, by the end of 2030, the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of the Shell Group, relative to 2019 levels;

further in the alternative: has not reduced or caused to be reduced by at least 25%, or at least net 25%, by the end of 2030, the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of the Shell Group, relative to 2019 levels;

2) an order that Shell, both directly and through the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell Group, limits or causes to be limited the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of the Shell Group to such an extent that this volume at year-end 2030:

principally: will have reduced by at least 45%, or at least net 45%, relative to the 2019 level;

alternatively: will have reduced by at least 35%, or at least net 35%, relative to the 2019 level;

further in the alternative: will have reduced by at least 25%, or at least net 25%, relative to the 2019 level;

3) that Shell be ordered to pay the costs of the proceedings.

### 4.2 Insofar as relevant on appeal, the district court:

1. declared the collective claims of Milieudefensie et al. inadmissible insofar as they serve the interest of the entire world population in curbing dangerous climate change caused by CO<sub>2</sub> emissions;
2. dismissed the claims for declaratory decisions;
3. ordered Shell, both directly and through the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell Group, to limit or cause to be limited the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere (scope 1, 2 and 3) associated with the business activities and sold energy-carrying products of the Shell Group to such an extent that this volume will have reduced by at least net 45% at year-end 2030, relative to the 2019 level;
4. ordered Shell to the costs of the proceedings on the part of Milieudefensie et al., including subsequent costs and statutory interest.

### 4.3 The district court considered as follows as regards the reduction obligation imposed on Shell, based on the unwritten social standard of care laid down in Article 6:162 Dutch Civil Code (DCC).

- The right to life (Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>10</sup> (ECHR) and Article 6 of the International Covenant on Civil and Political Rights<sup>11</sup> (ICCPR), the right to respect for private and family life (Article 8 ECHR and Article 17 ICCPR) and the values enshrined



therein are factored into the interpretation of the unwritten social standard of care. These provisions also provide protection against the effects of dangerous climate change due to global warming caused by CO<sub>2</sub> emissions. It follows from (among other sources) the UN Guiding Principles on Business and Human Rights (UNGPs) that the responsibility of companies to respect human rights is a global standard of behaviour to which all companies are expected to adhere, wherever they operate. It is not enough for companies to monitor developments and follow the measures states take.

- A great deal can be expected of Shell in terms of its responsibility to refrain from infringing on the human rights of others and to address negative impacts on human rights in which it plays a part. This also follows from the UNGPs, which stipulates that a company should endeavour to prevent or mitigate adverse human rights impacts that are directly linked to its activities, products or services through its business relations, even if the company itself has not contributed to those adverse impacts.
- Due to Shell's far-reaching control and influence over the Shell Group, Shell's reduction obligation is an obligation of results for emissions associated with the Shell Group's own activities (scope 1).
- With regard to business relations (including end-users) of the Shell Group, the Shell Group has a significant best-efforts obligation to minimise the CO<sub>2</sub> emissions it generates. Shell has control and influence over its suppliers' scope 2 emissions through its procurement policy. Through the energy package it produces and sells, Shell has control and influence over the Shell Group's scope 3 emissions released by end-users, even though it will have to take into account existing commitments. With due observance of its existing commitments, Shell is free to decide not to make new investments in exploration and fossil fuels, and to change the energy package offered by the Shell Group.
- The consensus in climate science is that mitigation pathways providing for a 45% reduction by 2030 relative to global CO<sub>2</sub> emissions in 2010, and a net 100% reduction by 2050, maximise the likelihood of avoiding the most severe impacts of dangerous climate change (that is, warming to a maximum of 1.5°C). Furthermore, it is generally accepted that there should be room for scenarios with negative emissions. The absolute reduction of 45% by 2030 claimed by Milieudefensie et al. goes beyond this and is therefore disregarded.
- Activities of the Shell group are covered by the ETS system. These emission allowances relate to scope 1 emissions. The ETS system has an indemnifying effect up to the reduction percentage it seeks to achieve. This means that Shell does not have an additional obligation with respect to scope 1 and 2 emissions in the EU that fall under the system and scope 3 emissions of end-users in the EU.

## 5 The claims on appeal

- 5.1 Shell has submitted ten grounds for appeal and has requested the court of appeal to reverse the contested judgment and to declare, by way of a provisionally enforceable ruling, that Milieudefensie et al. have no cause of action, or at least to dismiss Milieudefensie et al.'s claims, and to order Milieudefensie et al. to pay the costs of the proceedings in both instances, plus subsequent costs and statutory interest.
- 5.2 In the document for a change of claim on appeal Shell has indicated that it no longer maintains its objections to the application of Dutch law to the claims brought by Milieudefensie et al. This concerns the (sub) grounds for appeal developed under the umbrella of ground for appeal IV against the district court's decisions that led to the ruling that Dutch law applied. Shell does uphold the part of ground for appeal IV in which it is argued that account must be taken of local safety regulations and rules of conduct in all countries where the conduct in question takes place (statement of appeal, nos. 10.5.2(d) and 10.5.18).
- 5.3 Milieudefensie et al. have requested the court of appeal to uphold the contested judgment, if necessary with amendment of the grounds, and to order Shell to pay the costs of the appeal proceedings, plus subsequent costs and statutory interest. In addition, Milieudefensie et al. want that the court of appeal:
  - ☐ further clarifies how Shell should deal with CO<sub>2</sub> offsets when fulfilling its reduction obligation, in the sense that Shell has a significant best-efforts obligation to minimise the use of CO<sub>2</sub> offsets;
  - ☐ considers that Shell's legal obligation should be characterised as an obligation of results, or clarifies that the significant best-efforts obligation does not mean that Shell may make the necessary proactive action to reduce its scope 1, 2 and 3 emissions dependent on customers' action;
  - ☐ clarifies that the ETS system has no indemnifying effect at all, or that the court of appeal clarifies, confirms and upholds the district court's interpretation that any indemnifying effect cannot detract from complying with the reduction order;

□ clarifies that Shell cannot meet the reduction obligation by selling its assets.

- 5.4 M&M has requested the court of appeal to overturn the contested judgment and declare that Milieudéfensie et al. have no cause of action, or at least to dismiss their claims, and order Milieudéfensie et al. to pay the costs of the proceedings on appeal, plus subsequent costs and statutory interest.
- 5.5 Shell has objected to Milieudéfensie et al.'s request for the court of appeal to clarify the contested judgment on four points. Shell is of the opinion that Milieudéfensie et al. should have instituted cross-appeal proceedings for this, which they have failed to do.

## 6 Standing of Milieudéfensie et al.

- 6.1 The district court correctly considered on the issue of Milieudéfensie et al. having a cause of action that access to the Dutch courts is governed by Dutch law. Furthermore, the district court correctly considered that for the admissibility of Milieudéfensie et al. under the then applicable Section 119a (1) of the New Civil Code Transition Act, Article 3:305a DCC, applicable until 1 January 2020, was decisive. After the district court's judgment, Section 119a (1) of the New Civil Code Transitional Act was amended, but that does not result in a different assessment framework now than in the first instance.12
- 6.2 As previously considered, the district court ruled that the interest of present and future generations of the entire world population is not suitable for pooling and that the collective claims are declared inadmissible insofar as they serve the interest of the entire world population. In the district court's view, the interest of current and future generations of Dutch residents and (for the Waddenvereniging) (the inhabitants of) the Wadden Sea region, located partly in the Netherlands, is suitable for pooling. Shell has challenged this view in ground for appeal VII. This ground for appeal does not succeed.
- 6.3 It follows from Article 3:305a DCC (old) that a foundation or association with full legal capacity may bring a claim for the protection of similar interests of other persons, insofar as it serves these interests pursuant to its articles of association. The requirement of similarity entails that the interests the claim seeks to protect must be suitable for pooling so as to promote an efficient and effective legal protection of the interested parties.13 By pooling interests, the points of dispute and claims raised by the action can be adjudicated in one proceeding, without the need to consider the particular circumstances on the part of individual interested parties.14 With respect to environmental interests, it has long been accepted that they are suitable for pooling.15 The interests of residents of the Netherlands in preventing dangerous climate change have also been deemed sufficiently similar.16
- 6.4 These proceedings relate to the protection of individual citizens in the Netherlands and the Wadden Sea region from dangerous climate change. Although dangerous climate change will not have the same consequences for everyone, those consequences are to a large extent similar for everyone in the Netherlands and the Wadden Sea region. In terms of territory, this is a relatively limited area and the consequences of climate change will be more or less the same in that limited area. The interests of citizens in the Netherlands and the Wadden Sea region to be protected are therefore sufficiently similar and are suitable for pooling in these proceedings. The court also takes into account that an efficient and effective legal protection can only be guaranteed by a collective action. It is hardly conceivable, and therefore undesirable from the point of view of legal protection, that all individual citizens of the Netherlands and the Wadden Sea region who are supporters of Milieudéfensie et al. would (have to) bring proceedings against Shell individually in order to seek protection in their interest in preventing dangerous climate change.
- 6.5 The fact that, as Shell argues, citizens in the Netherlands have different views on the pace and manner in which the energy transition in the Netherlands should be effected does not detract from the similarity of the interests invoked by Milieudéfensie et al.
- 6.6 Shell has argued that the reduction order claimed by Milieudéfensie et al. is at odds with the interests of energy affordability and security of supply. M&M also believes that affordability and security of supply would be compromised if an emission reduction order were imposed on Shell. By extension, both parties argue that Milieudéfensie et al. do not meet the requirement that the interests of the persons for whose benefit the legal proceedings have been brought are sufficiently safeguarded. That argument fails. Article 3:305a(2) DCC, in force until 1 January 2020, provided that a claimant had no standing if the action did not sufficiently safeguard the interests of the persons on whose behalf the claim was brought. In the currently applicable Article 3:305a DCC, this requirement is included in the first section and section 2 specifies when this requirement is met. At the same time, section 6 stipulates that section 2, part a to e, does not apply when the action is brought for (summarised) an idealistic purpose. The court will not apply the requirements set out in the current section

because (i) the current Article 3:305a DCC does not apply to these proceedings and (ii) if it did, section 6 would apply, so that the requirements set out in section 2 part a to e would not apply to Milieudefensie et al.

6.7 This does not alter the fact that even under the old law to be applied in these proceedings, the interests on whose behalf the claim was brought must be sufficiently safeguarded. This requirement was introduced as of 1 July 2013 and aimed to prevent abuse of the regime in class actions.<sup>17</sup> The introduction of this requirement was not aimed at preventing that interests subject to differing political views could be the subject of collective action. The court also sees no reason to assume that the interests on whose behalf the proceedings were brought are not sufficiently safeguarded by (in this case) Milieudefensie et al.

6.8 Lastly, Shell argues in the context of the issue of cause of action that this case concerns a political issue. M&M believes that Milieudefensie et al. should be declared to have no standing because the claims are not suitable for civil litigation. The court addresses this question elsewhere in this judgment (see below under 7.52). For the purpose of cause of action, it is sufficient to establish that Milieudefensie et al. invoke that Shell has a legal obligation to reduce its CO<sub>2</sub> emissions. If such a legal obligation can be identified, the fact that political choices must be made to combat dangerous climate change and the fact that not everyone will agree on those choices, do not stand in the way of the admissibility of a collective claim.

6.9 The district court assessed whether the other conditions of Article 3:305a DCC (old) were met and decided in the affirmative for Milieudefensie et al. The court of appeal sees no reason to rule otherwise.

## 7 Substantive assessment of the appeal

### A. Introduction

7.1 Milieudefensie et al.'s claims are based on the notion of an unlawful act (Article 6:162(2) DCC): according to Milieudefensie et al., Shell is acting in violation of what is generally accepted under unwritten law if Shell does not reduce its CO<sub>2</sub> emissions by 45% (or at least 35% or 25%) by 2030 relative to 2019 levels.

7.2 Whether Shell is acting in violation of under unwritten law pertaining to proper social conduct, must be determined on the basis of the circumstances of the case. This social standard of care is interpreted as much as possible on the basis of objective starting points, such as legislation, general legal principles, fundamental rights, case law and/or expert reports. In the following, these objective starting points will be used to discuss whether Shell is in breach of an unwritten social standard of care when it fails to reduce its CO<sub>2</sub> emissions in the manner claimed by Milieudefensie et al.

7.3 The court will therefore not assess (specifically) using the so-called 'Kelderluik' factors<sup>18</sup> whether a social standard of care exists under which Shell is obliged to reduce its CO<sub>2</sub> emissions by a certain percentage. The Kelderluik factors are used in case law to assess whether, assuming a dangerous situation, the social standard of care requires certain safety measures to be taken. The Kelderluik factors are focused on the creation of dangerous situations. The dangerous climate change occurring worldwide is not entirely equivalent to hazardous situations to which the Kelderluik factors tend to be applied. Whatever the case, ultimately these Kelderluik factors also constitute an interpretation of the general social standard of care. The question to be answered in this judgment is whether on the basis of this general social standard of care, an obligation on Shell can be assumed that requires it to reduce its CO<sub>2</sub> emissions by a certain percentage.

7.4 This judgment is structured as follows:

- ☐ Chapter B is about climate change and human rights. This chapter discusses that protection against dangerous climate change should be considered a human right.
- ☐ Chapter C deals with the indirect horizontal effect of human rights. This chapter examines the direct effect of the right to protection against dangerous climate change in private relationships.
- ☐ Chapter D focuses on the European Union's climate legislation. This chapter addresses how Milieudefensie et al.'s claims relate to existing climate legislation.
- ☐ Chapter E presents an interim review. This chapter answers the question to what extent it can be established on the basis of chapters B to D that Shell has a legal obligation to limit its CO<sub>2</sub> emissions.
- ☐ Chapter F considers whether new investments in oil and gas violate the social standard of care and what a positive answer to that question would mean for the claims of Milieudefensie et al.
- ☐ In chapter G, the court discusses Shell's obligations regarding scope 1 and 2. This chapter will draw conclusions on the justification of the claims of Milieudefensie et al. regarding scope 1 and 2.

□ Chapter H covers Shell's obligations with regard to scope 3. This chapter will discuss whether Shell can be compelled to adhere to the average global reduction percentage of 45%, or whether a sectoral standard applicable to Shell can be formulated. Lastly, this chapter will touch on the question of the effectiveness of the scope 3 claims.

- 7.5 The court of appeal will not consider the requests for clarification of the judgment of the district court made by Milieudefensie et al. (for this, see above under 5.3). These requests would have the effect of amending the operative part of the judgment in a negative sense for Shell. However, Shell should not be placed in a worse position as a result of its own appeal and Milieudefensie et al. did not institute cross-appeal proceedings.

## Climate change and human rights

### 1. General

- 7.6 Milieudefensie et al. have invoked the provisions of Articles 2 and 8 ECHR. Article 2 ECHR protects the right to life. This article not only encompasses the prohibition to kill, but also the positive obligation to take measures to protect life. Article 8 ECHR protects the right to respect for private and family life. Below, the court will discuss a number of important judgments and regulations that have established that protection against dangerous climate change is considered a fundamental right, not only in the Netherlands but also elsewhere in the world, which is protected by these or similar articles. The following are discussed in succession: the *Urgenda* judgment (section 2); the judgment *Verein Klimaseniorinnen Schweiz v. Switzerland* and foreign case law (section 3); and resolutions and reports (of bodies) of the United Nations (section 4).

### 2. The *Urgenda* judgment

- 7.7 In the *Urgenda* judgment<sup>19</sup>, the Supreme Court held that the protection of Articles 2 and 8 ECHR not only applies to specific individuals but also to society or the population as a whole. The latter is the case, among other situations, when it comes to environmental hazards. When environmental hazards threaten an entire area, Articles 2 and 8 ECHR offer protection to residents of that area. The Supreme Court ruled that the obligation to take appropriate measures under Articles 2 and 8 ECHR includes the obligation of states to take preventive measures against an impending danger, even if it is not certain that the danger will materialise. This may include both mitigation measures (measures to prevent the materialisation of the danger) and adaptation measures (measures to absorb or soften the consequences of that materialisation). Which measures are appropriate in the given case depends on the circumstances of the case, according to the case law of the European Court of Human Rights (ECtHR), the Supreme Court stated.
- 7.8 The Supreme Court further concluded in the *Urgenda* judgment that the Netherlands has an obligation under Articles 2 and 8 ECHR to 'do its part' to prevent dangerous climate change, even if it is a global problem. When specifying the positive obligations incumbent on the State under Articles 2 and 8 ECHR, the Supreme Court held that invoking the consensus in the international community and climate science on the extent to which industrialised countries should reduce greenhouse gas emissions, i.e. by a percentage of 25-40% by 2020, is possible. Moreover, the target of achieving a minimum reduction of 25% in 2020 is in line with what the State itself considers necessary as a target for other years (2030, 2050 and 2100). This target can therefore be regarded as an absolute minimum in the context of the State's positive obligation under Articles 2 and 8 ECHR to take appropriate measures to prevent dangerous climate change, the Supreme Court found. The Supreme Court upheld the judgment of the court of appeal - in which the State had been ordered to reduce greenhouse gas emissions by 25% by the end of 2020.

### 3. The ECtHR: *Verein Klimaseniorinnen Schweiz v. Switzerland*

- 7.9 The ECtHR held in a judgment of 9 April 2024 (*Verein Klimaseniorinnen Schweiz v. Switzerland*)<sup>20</sup> that it follows from article 8 ECHR that a state has a positive obligation to do 'its part' to protect its citizens from the adverse effects of dangerous climate change. The ECtHR considered the following:

"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 and effective, not theoretical and illusory (see, for instance, *H.F. and Others v. France*, cited above, § 208 in fine; see also paragraph 440 above)."

7.10 The ECtHR also considered that - given the urgency of countering the adverse effects of climate change and the consensus that exists within states parties on the overall targets for reducing greenhouse gas emissions - there is only a limited "margin of appreciation" regarding the commitment of states to counter climate change. Regarding the choice of means to achieve the targets (including the policy choices to be made), the ECtHR found that states have a "wide margin of appreciation".

7.11 From this case law of the ECtHR, Shell has drawn the conclusion that civil courts should exercise restraint with regard to "managing climate change", including in civil law relationships. However, the fact that the ECtHR grants states a (wide) margin of appreciation as to the means to be deployed to combat climate change does not imply that the civil courts would be unable to rule that the social standard of care entails that there is a concrete legal obligation on the part of Shell to combat climate change. After all, the assumption of that legal obligation may equally leave room in the assessment of the means necessary to fulfil the legal obligation. Moreover, this concerns the ECtHR's restraint in reviewing states' policies. It does not follow from this case law that national courts must exercise the same restraint where the protection of fundamental rights contained in the ECHR is concerned.

7.12 Case law outside Europe has also assumed that human rights can be invoked to protect against the effects of climate change. This is apparent from, inter alia, the following decisions.**21**

□ In the 2015 *Leghari* judgment of the Lahore High Court in Pakistan, the Pakistani court considered that climate change poses a serious threat to access to water and food, among other things, and that this fact constitutes a violation of the right to life.**22**

□ In 2018, Colombia's Supreme Court found that Amazon deforestation leads to CO2 emissions into the atmosphere, which causes the greenhouse gas effect and in turn results in the degradation of ecosystems and water resources. The Supreme Court ruled that this is a serious attack on fundamental rights, including the right to life.**23**

□ In 2022, the Brazilian Federal Supreme Court ruled that climate change is a constitutional matter and that treaties on climate change are a species of treaties on human rights:**24**

"16. Contrary to what the Presidency of the Republic and the Office of the Solicitor General claim, the issue pertaining to climate change is a constitutional matter. Along these lines, Article 225, *caput* and paragraphs, of the Constitution expressly establishes the right to an ecologically balanced environment, imposing on the Public Power the duty to defend, preserve and restore it for present and future generations.(...)

17. Along the same lines, the Constitution recognizes the supralegal character of the international treaties on human rights to which Brazil is a party (...). And there is no doubt that the environmental issue fits the hypothesis. As the representative of UNEP in Brazil, during the public hearing, clearly stated: "There are no human rights on a dead or sick planet" (p. 171). Treaties on environmental law are a species of the genus human rights treaties and enjoy, for this reason, supranational status. Thus, there is no legally valid option of simply omitting to combat climate change."

□ The US judgment in the 2023 climate case *Held v. State of Montana* found that the effects of dangerous climate change fall within the scope of the fundamental right to a “clean and healthful environment” as contained in the Montana Constitution. The District Court considered, inter alia: **25**

“49. Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, climate is included in the “clean and healthful environment” and “environmental life support system.”

50. Montana’s climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHG’s and climate change.”

□ In the 2024 *Ranjitsinh* judgment of the Indian Supreme Court, the court reasoned as follows about the link between Articles 21 and 14 of the Indian Constitution and climate change: **26**

“Article 21 recognises the right to life and personal liberty while article 14 indicates that all persons shall have equality before law and the equal protection of laws. These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change.”

#### 4. The United Nations

7.13 The (organs of the) United Nations have adopted a number of reports and resolutions in which protection from dangerous climate change is identified as a human right. For example, on 8 October 2021, the United Nations Human Rights Council adopted resolution 48/13 recognising the human right to a clean, healthy and sustainable environment. The Human Rights Council encourages states to take appropriate measures:

“(a) To build capacities for the efforts to protect the environment in order to fulfil their human rights obligations and commitments, and to enhance cooperation with other States, the Office of the United Nations High Commissioner for Human Rights, the rest of the United Nations system and other relevant international and regional organizations, agencies, convention secretariats and programmes, and relevant non-State stakeholders, including civil society, national human rights institutions and business, on the implementation of the right to a clean, healthy and sustainable environment, in accordance with their respective mandates;

(b) To continue to share good practices in fulfilling human rights obligations relating to the enjoyment of a clean, healthy and sustainable environment, including by exchanging knowledge and ideas, building synergies between the protection of human rights and the protection of the environment, bearing in mind an integrated and multisectoral approach and considering that efforts to protect the environment must fully respect other human rights obligations, including those related to gender equality;

(c) To adopt policies for the enjoyment of the right to a clean, healthy and sustainable environment as appropriate, including with respect to biodiversity and ecosystems;

(d) To continue to take into account human rights obligations and commitments relating to the enjoyment of a clean, healthy and sustainable environment in the implementation of and follow-up to the Sustainable Development Goals, bearing in mind the integrated and multisectoral nature of the latter.”

7.14 In a report dated 26 July 2022, the Special Rapporteur on Climate Change of the United Nations Human Rights Council concluded as follows:

“We are faced with a global crisis in the name of climate change. Throughout the world, the rights of people are being denied as a consequence of climate change. This includes a denial of the right to, inter alia, life, health, food, development, self-determination, water and sanitation, work, adequate housing and freedom from violence, sexual exploitation, trafficking and slavery. Human-induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. The human right to a clean, healthy and sustainable environment was endorsed by the Human Rights Council in its resolution 48/13. Urgent action is needed to address the climate change crisis. The set of recommendations below require urgent attention by the General Assembly.”

7.15 The United Nations General Assembly adopted resolution 76/300 on 28 July 2022, in which it:

“(1) Recognizes the right to a clean, healthy and sustainable environment as a human right;

(2) Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

(3) Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;

(4) Calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."

7.16 In short, the (organs of the) United Nations also recognise the right to a clean, healthy and sustainable environment as a human right. They call on states to protect their citizens from the negative impacts of dangerous climate change.

## 6. Conclusion

7.17 It follows from the above that there can be no doubt that protection from dangerous climate change is a human right. It is recognised worldwide that states have an obligation to protect their citizens from the adverse effects of dangerous climate change. Not surprisingly, the ECtHR has considered that: "climate change is one of the most pressing issues of our times".<sup>27</sup> It is primarily up to legislators and governments to take measures to minimise dangerous climate change. That being said, companies, including Shell, may also have a responsibility to take measures to counter dangerous climate change. The doctrine of the indirect horizontal effect of human rights is important for this purpose. This doctrine is discussed and elaborated on in the next chapter, focusing on 'protection against dangerous climate change'.

### Indirect horizontal effect of human rights

#### 1. General

7.18 In Dutch law, fundamental rights generally do not have horizontal effect. Fundamental rights have vertical effect, i.e. they apply in the citizen-government relationship. This does not alter the fact that the values embodied in fundamental rights are of such great importance to society as a whole that such rights can also be invoked, at least to some extent, by citizens in their relationship with a private company. Therefore, when dealing with private relationships, the court may include fundamental rights – or the values embodied in them – in its considerations when applying general private law concepts, such as conflict with what is proper social conduct according to unwritten law. This is referred to as indirect horizontal effect of fundamental rights. European Union law also allows some fundamental rights from the Charter to be applied in horizontal situations.<sup>28</sup>

7.19 In the following, the court will look more closely at the direct effect of the human right to protection against dangerous climate change in private relationships. The following are successively discussed: the 'UN Guiding Principles on Business and Human Rights' (section 2), the 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (section 3), as well as a number of other soft law instruments (section 4).

#### 2. UN Guiding Principles on Business and Human Rights

7.20 The – not legally binding – UNGP were unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. The UNGP provides that companies should respect human rights. Principle 11 of the UNGP reads as follows:

"Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

The commentary to the UNGP notes that the means by which a company fulfils its responsibility to respect human rights should be proportionate to, among other things, the size of the organisation. Companies should proceed with due diligence on negative human rights impacts that the company causes or contributes to through its own activities. Furthermore, the UNGP stipulate that companies are expected to take preventative or mitigating measures. Shell has endorsed the UNGP.

#### 3. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

7.21 The 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (hereinafter: the OECD guidelines) – originally dating from 2011, revised in 2023 – assume that internationally operating companies have responsibilities with regard to (impending) human rights violations they face in the course of their activities. The OECD guidelines contain "legally non-binding principles and standards for responsible business

conduct, in accordance with applicable laws and internationally recognised standards". Shell has endorsed the 2011 OECD guidelines. Chapter IV (Human Rights) of these guidelines stipulates the following:

"States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts."

7.22 The OECD guidelines also include a chapter on environmental protection and climate change since 2023. This new chapter VI stipulates the following:

"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, 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.

In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise associated with the operations, products and services of the enterprise over their full life cycle, including by carrying out risk-based due diligence, as described in Chapter II, for adverse environmental impacts (...).
2. Conduct meaningful engagement with relevant stakeholders affected by adverse environmental impacts associated with an enterprise's operations, products or services.
3. Consistent with the scientific and technical understanding of the risks, where there are threats of serious or irreversible damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty or pathways as a reason for postponing cost-effective measures to prevent or minimise such damage
4. (...)
5. Continually seek to improve environmental performance, at the level of the enterprise and, where appropriate, entities with which they have a business relationship, including by:
  - a) adopting technologies, where feasible best available technologies, to improve environmental performance;
  - b) developing and providing products or services that have no undue environmental impacts; are safe in their intended use; are durable, repairable and can be reused, recycled, or disposed of safely and that are produced in an environmentally sound manner that uses natural resources sustainably, minimises as far as possible energy and material input as well as generation of pollution, greenhouse gas emissions and waste, in particular hazardous waste;
  - c) promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including by providing relevant and accurate information on their environmental impacts (for example, on greenhouse gas emissions, impacts on biodiversity, resource efficiency, reparability and recyclability or other environmental issues). (...)"



The commentary to this chapter mentions, among other things, that companies have an important role in contributing to the reduction of greenhouse gases to net zero, in keeping with the best available science as established by the IPCC. To this end, companies should set reduction targets (short-, medium- and long-term) not only for scope 1 and 2, but also, if applicable, for scope 3.

#### 4. *Other initiatives*

7.23 The court further points to a range of other (informal and non-binding) regulations and guidelines, from international organisations and private initiatives, which take as their starting point that companies have a responsibility on climate.

a. The 'United Nations Global Compact' is an initiative of non-state actors dating from the year 2000, inviting companies worldwide to work towards 'corporate sustainability' and 'corporate social responsibility'. Shell is one of the founding members of Global Compact. To achieve the goal, a number of 'Sustainable Development Goals' (SDGs) have been drawn up, which address global issues such as poverty, hunger, clean water and inequality. SDG 13 addresses 'Climate action: Take urgent action to combat climate change and its impacts'.

The 'International Organisation for Standardization' (ISO) published its 'Net Zero Guidelines' in 2022. The report contains recommendations for organisations to achieve net zero greenhouse gas emissions as soon as possible. The Guidelines define, for example:

"Organizations set long-term targets to meet net zero by or before 2050, and interim targets to achieve substantial emissions 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 towards and beyond 2050."

The Exponential Roadmap Initiative's '1.5oC Business Playbook' has been developed for the benefit of companies wishing to commit to the 1.5oC target.

To this end, the Playbook contains a "strategic framework for business planning, development, and target setting." The Playbook describes and elaborates on the four pillars for climate action: "1) Reduce your own emissions; 2) Reduce your value chain emissions; 3) Provide and scale solutions; 4) Accelerate climate action in society".

The Race to Zero initiative – endorsed by the United Nations – is a campaign calling on non-state actors, including companies, to take 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."

It lists as an interim target towards net-zero emissions by 2050:

"[to] set an interim target to achieve in the next decade, which reflects maximum effort toward or beyond a fair share of the 50% global reduction in CO2 by 2030."

A similar call is also made in a report by the United Nations' 'High-level expert group on the net zero emissions commitments of non-state entities'. The 2022 report 'Integrity matters: net zero commitments by business, financial institutions, cities and regions' ((hereinafter: the UN expert report) contains recommendations for (inter alia) companies committing to the Paris Agreement targets. The commentary on the first recommendation ("Announcing a Net Zero Pledge") includes the following:

"While governments must take the lead in reducing emissions, action by non-state actors is critical to achieving global net zero.

In the years since this call, many corporations, cities, states and regions have made voluntary commitments to reach net zero. This is commendable, but in the absence of regulation, too many of these pledges are not aligned with the science, do not contain enough detail to be credible, and use the terms "net zero" or "net zero aligned" (as well as many other similar terms) inconsistently. Deceptive or misleading net zero claims by non-state actors not only erode confidence in net zero pledges overall, they undermine sovereign state

commitments and understate the work required to achieve global net zero. Ultimately, to ensure consistency, rigour and enforceability, regulation will be needed (...)."

This observation leads to the following recommendation:

"A net zero pledge should be made publicly by the leadership of the non-state actor and represent a fair share of the needed global climate mitigation effort. The pledge should contain interim targets (including targets for 2025, 2030 and 2035) and plans to reach net zero in line with IPCC or IEA net zero greenhouse gas emissions modelled pathways that limit warming to 1.5°C with no or limited overshoot, and with global emissions declining by at least 50% by 2030, reaching net zero by 2050 or sooner. Net zero must be sustained thereafter."

This recommendation is elaborated on as follows:

"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."

The 2015 'Oslo Principles on Global Climate Change' – drafted by a group of experts in international law, environmental law and human rights – set out the obligations of states and companies to combat climate change, as well as how these obligations should be met. The starting point here is that greenhouse gases cause dangerous climate change and that their emissions should be limited to avoid dangerous climate change. The Principles (in summarised terms) also expect companies to make "assessments" of the impact of their business activities on CO<sub>2</sub> emissions.

The Principles on Climate Obligations of Enterprises (PCOE) build on the aforementioned Oslo Principles. The PCOE take as their starting point that companies have a responsibility to reduce greenhouse gas emissions. The PCOE are based on the assumption that multinationals are subject to a more stringent reduction obligation than other companies.

The 2020 report by the University of Oxford, entitled 'Mapping of current practices around net zero targets' contains an analysis of the various proposed climate measures by organisations that aim to reduce greenhouse gases to zero. Among other things, the report finds that there is consensus on the need to reduce CO<sub>2</sub> emissions to zero by 2050 and that everyone (governments, companies, etc.) has a responsibility to contribute to achieving this goal. Based partly on this report, the district court found that Shell (too) has its own responsibility to reduce greenhouse gases and that this responsibility extends to scope 3 emissions. The University of Oxford annually analyses data relating to climate targets of governments and companies. The most recent report ('Net Zero Stocktake 2023') was published in 2023.

## 5. Conclusion

- 7.24 Although (treaty) provisions regarding human rights are primarily directed at the government, this does not alter the fact that they can have an impact on private law relationships by giving substance to open standards, such as the social standard of care. When defining the social standard of care, it comes down to the question of what action is required of a person or company, especially when that action is not prescribed by specific rules (under public law or otherwise). Whether the social standard of care is breached depends on a variety of factors. 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.
- 7.25 For the court, there is no doubt that the climate problem is the greatest issue of our time. The threat posed by climate change is so great that it could be life-threatening in several places on earth and will start to have a profound and negative impact on human and animal existence in many other places. Climate change damages the rights protected by Articles 2 and 8 ECHR, both in the Netherlands and abroad, and will damage them even further. Those rights are also decisive for the interpretation of the social standard of care and for answering the question of what can be required of Shell, as a large and international company, under that standard.
- 7.26 It is an established fact that fossil fuel consumption is largely responsible for creating the climate problem and that addressing climate change is something that cannot wait. To combat the danger posed by climate change, everyone has a responsibility. To fulfil that responsibility, the focus does not lie exclusively on states. Especially

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. This follows from the instruments discussed above, including the OECD guidelines and the UNGP, to which Shell has subscribed. 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.

- 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.

### Climate legislation of the European Union

#### 1. General

- 7.28 This chapter will discuss the extent to which a reduction obligation, as described by Milieudefensie et al., is in line with the European Union's climate legislation.

The European Green Deal and Fit for 55 (see above under 3.16 and 3.18) have resulted in the creation of a considerable amount of new climate legislation within the European Union in recent years and the tightening up of existing legislation. Much of this legislation dates from after the district court judgment. The legislation has been transposed – to the extent necessary – into Dutch climate legislation. Given the volume of (Union law) climate legislation, the question arises what this means for the admissibility of the claims of Milieudefensie et al. More specifically, the question arises whether the obligations of companies to combat dangerous climate change are exhaustively regulated in the existing climate legislation in the sense that there is no room left for the civil court to rule that, on the basis of the social standard of care, there is an (additional) obligation for Shell to (further) reduce its CO2 emissions. Sections 2 to 5 below will discuss four directives that – once transposed into national law – create direct obligations for Shell: the EU-ETS, the EU-ETS-2, the CSRD and the CSDDD. Section 6 will look at other directives and regulations that are part of the European Union's package of climate legislation. Section 7 contains the conclusion. That section will also address Shell's defence that an obligation on individual companies to reduce their CO2 emissions is not in line with the system of the law.

#### 2. The EU ETS Directive

- 7.29 A scheme for greenhouse gas emissions trading within the European Community, known as the EU ETS system, was established in 2003.<sup>29</sup> It has subsequently been amended a number of times. The EU ETS system broadly entails the following. Installations falling within the scope of the directive must have a permit for emissions of (among other things) CO2. The directive covers heat and power production installations, large energy-intensive industries and European aviation, which account for about 40% of total emissions within the European Union. The operators of these installations – including Shell – are granted (tradable) emission allowances. An installation is allowed to emit CO2 against the surrender of emission allowances. Previously, the allocation of emission allowances was largely free of charge, but this system is now being phased out and replaced by an auction system. As the emissions cap (the amount of emission allowances) is continuously reduced by a linear reduction factor, CO2 emissions from installations within the scope of the directive have already fallen significantly: a decrease of over 37% of emissions covered by EU ETS has been achieved. This makes the EU ETS system a cornerstone of the European Union's climate policy.<sup>30</sup>

- 7.30 In the context of Fit for 55 and with a view to meet the European greenhouse gas emission reduction targets, the EU ETS system was adjusted further in 2023.<sup>31</sup> The target is to achieve a 62% reduction in greenhouse gas emissions within the EU ETS system by 2030 relative to 2005. In comparison: the previously existing target was to achieve a 43% reduction by 2030 compared to 2005. To achieve this target, the conditions for the free allocation of emission allowances were tightened considerably. The phasing out of free allocation is accelerated for certain sectors and the linear reduction factor by which the emission ceilings decrease annually is increased. The latter applies, for example, to oil refineries, such as Shell's Pernis refinery, for which the annual reduction factor will be increased from 2.2% to 4.4% from 2028. The scope of the EU ETS system has been further extended to include (for example) maritime shipping within the EU.

- 7.31 The phasing out of the free allocation of emission allowances is made possible by the fact that the European Union has now taken measures to limit 'carbon leakage' (moving production to countries with less ambitious climate policies). In short, under a regulation created in 2023 (CBAM)<sup>32</sup>, importers of carbon-intensive products from countries outside the European Union must pay a levy for the embedded emissions of their

products. CBAM applies to sectors with high emission intensity, such as cement, aluminium, electricity, fertiliser, hydrogen, iron and steel sectors, and with a high risk of relocation of activities outside the EU. Shell has argued that many of its customers belong to these sectors. Shell has further stated that the scope of CBAM is expected to expand over time to include all EU ETS sectors.

- 7.32 Since the district court issued its judgment, the EU ETS system's relevance has increased. In the contested judgment, the district court considered that Shell was entitled to consider that the interests to be taken into account had been fully and properly weighed when the emission allowances were granted. At issue was the reduction goal pursued by the EU ETS system. The district court considered that, to this extent, the EU ETS has indemnifying effects. According to the district court, this means that – as far as the reduction goal of the EU ETS system is concerned – Shell has no additional obligation with regard to the scope 1 and 2 emissions covered by that system. However, the EU ETS system only covers a small part of the Shell group's total emissions. Only for those emissions, Shell does not need to adjust its policy, the district court stated.
- 7.33 On appeal, Shell explained that its European scope 1 and 2 emissions are largely covered by the EU ETS system: 75-100% of its scope 1 emissions and 100% of its scope 2 emissions. Moreover, Shell explained that there are currently 36 ETS systems in place worldwide and that these systems cover just over 40% of Shell's global scope 1 and 2 emissions.
- 7.34 Milieudefensie et al. have argued that Shell (in 2019) generated only 16.6% of its turnover in the EU and that just 5% of Shell's emissions fall under scope 1 or 2. On this basis, Milieudefensie et al. estimate that only a small percentage (7.6%) of Shell's global scope 1, 2 and 3 emissions fall under the EU ETS system. Furthermore, according to Milieudefensie et al., only 17% of global emissions are covered by any form of an emissions trading scheme, so the impact of emissions trading schemes on Shell's emissions is not particularly large.
- 7.35 Based on Shell's figures and the contested judgment, the court of appeal understands that Shell's European CO<sub>2</sub> emissions in scope 1 and 2 allegedly fall (almost) completely outside the scope of the district court's order. It is worth noting here that the EU ETS system cannot easily be reconciled with the claims of Milieudefensie et al. It does not fit well with the EU ETS system that Shell would have to reduce its 'European emissions', for which it obtains and then surrenders emission allowances, by 45%. The EU ETS system does not achieve the reduction of CO<sub>2</sub> emissions by forcing companies to reduce their emissions by a certain percentage. The goal is achieved through an emissions cap combined with freely tradable emission allowances.

### 3. The EU ETS2 Directive

- 7.36 A second emissions trading system (EU ETS2) was introduced in 2023.<sup>33</sup> EU ETS2 will apply to fuels supplied to the built environment, road transport and some other sectors, such as small industries. The system will be introduced gradually over the next few years. EU ETS2 has a greenhouse gas reduction goal of 42% by 2030 compared to 2005. Within the EU ETS2 system, not the ultimate emitters (building users, vehicle drivers) but the suppliers of fuels have an obligation to buy emission allowances. The suppliers will pass on the price to their customers, so that the actual emitters do end up paying for their emissions. There are no free allowances; allowances can be bought at auctions. The European Union has taken measures to avoid immediate high costs for end-users when the system is introduced. These include a cap on the CO<sub>2</sub> price and stricter vehicle emission standards that could result in end-users spending less money on petrol.
- 7.37 Shell has clarified that, as a fuel supplier, it will be subject to EU ETS2. Since half of Shell's reported scope 3 emissions are from the 'transport' sector and a quarter from the 'buildings' sector, a large part of Shell's activities within the EU will fall under EU ETS2, Shell has stated.
- 7.38 In short, if Shell's expectations about the functioning of EU ETS2 come true, a significant part of its European scope 3 emissions will fall under the scope of EU ETS2.

### 4. The CSRD

- 7.39 The Corporate Sustainability Reporting Directive (CSRD)<sup>34</sup> ensues from the European Green Deal. Under the CSRD, larger companies will have to prepare a sustainability report as part of their annual report from fiscal year 2024. Companies must include in their annual report information needed to understand the company's impact on sustainability issues, as well as information needed to understand how sustainability issues affect the company's development, performance and position.
- 7.40 The information to be provided should include a brief description of the company's business model and strategy, including, inter alia, the company's plans to ensure that the business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5°C and the

European Union's goal of achieving climate neutrality by 2050. The information should also include a description of the company's time-bound targets, including (where appropriate) the absolute reductions in CO<sub>2</sub> emissions for at least 2030 and 2050, as well as whether the sustainability targets to be achieved by the company are based on scientific evidence.

- 7.41 The reporting requirements under the CSRD are specified in the (comprehensive) European Sustainability Reporting Standards (ESRS).<sup>35</sup> Under the ESRS, companies must report on their scope 1, scope 2 and scope 3 emissions and companies with a climate transition plan must, among other things, provide information on the targets they have set for the reduction of their greenhouse gas emissions in scope 1, scope 2 and (where applicable) scope 3. Shell will have to comply with the reporting requirements in the CSRD. No (direct) reduction obligations for Shell arise from this directive.

## 5. The CSDDD

- 7.42 The Corporate Sustainability Due Diligence Directive of 13 June 2024 (CSDDD)<sup>36</sup> also ensues from the European Green Deal. During the oral hearing on appeal, the (then) most recent draft text, which had been approved by the 'COREPER' (the Committee of Permanent Representatives of the Member States) on 15 March 2024, was discussed with the parties. As far as relevant, this draft text is (largely) in line with the final text. Article 1(1) CSDDD defines the subject matter of the directive:

"1. This Directive lays down rules on:

- a) obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies;
- b) liability for violations of the obligations as referred to in point (a); and
- c) the obligation for companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, compatibility of the business model and of the strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1.5oC in line with the Paris Agreement."

- 7.43 Companies falling within the scope of the CSDDD must adopt and implement a climate transition plan that ensures the company's business model and strategy are compatible with the goal of limiting global warming to 1.5oC, in line with the Paris Agreement. In addition, business model and strategy should be compatible with the European Union's goal of achieving climate neutrality by 2050. Article 22(1), paragraph one, CSDDD determines that Member States shall ensure that companies falling within the scope of the directive:

"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 1.5oC 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.

Clause 73 of the preamble states the following on this:

"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 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."

- 7.44 Article 22(1) CSDDD further specifies that the climate transition plan includes time-bound targets in five-year increments from 2030 to 2050 based on compelling scientific evidence. The provision states that the plan includes absolute emission reduction targets for greenhouse gases for scope 1, 2 and 3 for each significant category "where appropriate". 'Scientific evidence' means evidence with independent scientific validation consistent with limiting global warming to 1.5oC as established by the IPCC and considering the recommendations of the European Scientific Advisory Board on Climate Change. Under Art 22(2) CSDDD, companies that report a climate change mitigation transition plan in accordance with the CSRD are also deemed to have fulfilled the CSDDD obligation to adopt a climate change mitigation transition plan. The CSDDD provides for administrative enforcement by national regulators. Furthermore, member states must ensure that

companies can be held civilly liable for damages resulting from non-compliance with obligations under certain circumstances (Article. 29).

- 7.45 Shell also falls within the scope of the directive. The court assumes that Shell will have to draw up a climate transition plan from 26 July 2027 that meets the requirements of this directive. Shell has argued that (also) under the CSDDD there is no obligation to introduce an absolute reduction goal. Companies may include such a goal in their climate transition plan, "where appropriate", but it is not binding or static, as changes in circumstances may cause the company to adjust the goal. Shell points out in this regard that while it was proposed during the drafting process that companies be required to impose an absolute reduction goal on themselves, this proposal was not adopted. Shell also points out the interconnection with the CSRD: under the CSRD, companies can set intensity targets, which Shell has done for scope 3; a transition plan with such a target is sufficient for the CSDDD, Shell argues.
- 7.46 In short, based on the CSDDD, Shell will be subject to an obligation to prepare a climate transition plan consistent with the Paris Agreement and the goals the European Union sets for itself. However, the plan need not necessarily include an absolute reduction commitment (of, for example, 45%) for scope 1, 2 and 3. The text of the preamble to the directive suggests some flexibility for companies to periodically adjust their own targets to market conditions.

## 6. Other Union law

- 7.47 The directives discussed above do not exist in a vacuum. Fit for 55 comprises a package of measures designed to ensure a coherent and balanced framework that guarantees a fair and socially equitable transition, strengthens the EU industry's innovation and competitiveness, assures a level playing field vis-à-vis third-country operators and reinforces the European Union's leadership in the global fight against climate change. The package is intended to ensure that the legal obligation under the European Climate Law to reduce net greenhouse gas emissions by at least 55% between now and 2030 and make the EU climate neutral by 2050 is met. A number of recent directives and regulations by which the European Union is further shaping its climate target will be discussed below.
- 7.48 The EU introduced a number of emission reduction measures for the transport sector in 2023. These include a regulation setting stricter CO<sub>2</sub> performance standards for cars and vans<sup>37</sup>, a regulation on sustainable aviation fuels (ReFuelEU)<sup>38</sup>, a regulation on cleaner shipping fuels (FuelEU), as well as a regulation on a new alternative fuels infrastructure, including improving the public charging network for electric cars.<sup>39</sup> All these regulations help to ensure that Shell's customers will be able to reduce their greenhouse gas emissions as more low-carbon options become available. In addition, the European Union promotes the use of energy from renewable sources, with the aim of increasing the overall share of renewable energy in the European Union to 42.5%.<sup>40</sup> Lastly, in 2023, the minimum annual contributions applicable to Member States were tightened in order to meet the European Union's greenhouse gas emissions target in certain sectors not covered by the EU ETS system (road transport, domestic maritime transport, buildings, waste and small industry).<sup>41</sup> The goal is to reduce greenhouse gas emissions in these sectors by 40% by 2030 compared to 2005.
- 7.49 According to the European Commission's Impact Assessment Report of 9 February 2024<sup>42</sup>, Fit for 55 helps the European Union achieve its 2030 climate targets compared to 2019 in a fair, cost-effective and competitive manner. This report discusses what reduction target should be set for 2040 and how this reduction target can be achieved.

## 7. Conclusion

- 7.50 Since the district court's judgment, many new regulations have been created in the European Union to combat dangerous climate change and achieve a 55% reduction in greenhouse gases by 2030. It concerns a package of coherent measures that (for the time being) particularly target large companies with high CO<sub>2</sub> emissions, thus including Shell. The EU ETS and EU ETS2 are relevant to the present dispute because, by means of an emission cap and an auction system, these directives give Shell a price incentive to contribute to the reduction of greenhouse gases. Under the CSRD and the CSDDD, Shell has reporting obligations pertaining to its (European) greenhouse gas emissions. These directives also stipulate that Shell must prepare a climate transition plan that is consistent with the European Union's climate objectives and includes absolute reduction targets "where appropriate". The European rules also envisage that customers of Shell will start contributing to the European Union's emission reduction targets by having additional measures in place to reduce CO<sub>2</sub> emissions and promote low-carbon energy products.
- 7.51 The climate legislation discussed above is not based on the starting point that each individual company is subject to an absolute reduction rate set by the European Union. This raises the question of how Milieudefensie

et al.'s claim, which does have precisely this purpose, relates to this legislation.

- 7.52 Shell argues that an obligation on individual companies to reduce their CO<sub>2</sub> emissions is not in keeping with the system of the law. According to Shell, decisions on reducing CO<sub>2</sub> emissions belong to the domain of the legislator and not the domain of the civil court. Climate change and energy transition require a balancing of interests that only the legislator can make. The legislator has chosen not to impose obligations on individual companies to reduce their CO<sub>2</sub> emissions by a certain percentage. M&M also sees only room for a (what it calls:) a democracy-based climate policy, in which the State can (if desired) set certain reduction percentages for certain companies. Within that government policy, the needs of ordinary citizens can be taken into account, more specifically energy security and affordability. The court should only assess whether the legislator has remained within the limits of the law in doing so, M&M holds.
- 7.53 The court of appeal does not concur with Shell and M&M in this principled position. The measures taken by the legislator to reduce CO<sub>2</sub> emissions are not exhaustive in and of themselves. Neither the European nor the Dutch legislator has stipulated that companies that comply with existing schemes to combat climate change no longer have obligations to further reduce their CO<sub>2</sub> emissions. Nor has Shell cited any examples of other countries where legislators have taken such exhaustive measures. Instead, governments have stressed that companies also have their own duty to reduce their emissions. Thus, obligations arising from existing regulations do not preclude a duty of care based on the social standard of care on the part of individual companies to reduce their CO<sub>2</sub> emissions.
- 7.54 That said, this existing legislation does affect Shell's obligations under the unwritten social standard of care. For instance, it must be assumed that the fulfilment of the said duty of care takes into account obligations that companies have under that existing legislation. The district court sought to do so in respect of the EU ETS. The EU ETS2 should also be taken into account in the interpretation of a social standard of care.

#### E. Interim review

- 7.55 The previous chapters have established that protection from dangerous climate change is a human right and that it is globally recognised that a state has an obligation to do its part to protect its citizens from the adverse effects of dangerous climate change. In private law relationships, human rights – including protection from dangerous climate change – can have an effect through open standards, such as the social standard of care. The social standard of care in relation to climate can be further defined through soft law such as the UNGP and the OECD guidelines. The content and scope may vary from one company to another, depending on a company's contribution to climate change and its capacity to counter climate change. It follows from the instruments discussed that the social duty of care implies that companies also have an obligation to contribute to the mitigation of dangerous climate change. More can be expected of Shell than of most other companies, as Shell has been a major player in the fossil fuel market for over 100 years and as it continues to occupy a prominent position in that market today.
- 7.56 It has also been established that European companies are subject to Union law measures. The EU legislator aims to reduce CO<sub>2</sub> emissions within Europe by 55% by 2030 through a set of measures. These measures are aimed not only at Member States, but also at companies. For instance, under the EU ETS system, companies such as Shell will gradually have to buy more and more emission allowances to emit greenhouse gases. They will have to align their business model and strategy with the transition to a sustainable economy and limiting global warming to 1.5°C under EU directives such as the CSRD and CSDDD. However, these measures do not impose absolute reduction obligations on individual companies or particular industries. Shell therefore does not have an absolute reduction obligation of 45% (or any other percentage) under EU law and will not have such an obligation for the foreseeable future. The European Union incentivises large companies such as Shell to reduce emissions through price incentives. Beyond that, the companies are free to choose their own approach to reducing their emissions in the – mandatory – climate transition plan as long as it is consistent with the Paris Agreement's climate targets.
- 7.57 On the other hand, these regulations and instruments are also not exhaustive, in the sense that, in order to comply with the social standard of care, it is enough for companies to comply with the obligations contained in these regulations and instruments. In addition to complying with these measures, companies have a social duty of care to reduce their emissions. However, it does not automatically follow from such a 'general' obligation that the claim of Milieudefensie et al. to reduce emissions by 45% is admissible. The court of appeal will discuss this in the following. In chapter F, the court of appeal discusses whether Shell, as Milieudefensie et al. argue, is acting in violation of that social standard of care by making new investments in oil and gas. In chapter G, the court of appeal examines the claim regarding Shell's scope 1 and 2 emissions in more detail. Lastly, chapter H

deals with the question of which obligations for Shell may ensue from this social standard of care with regard to its scope 3 emissions.

F. New investments in oil and gas and scope 3 emissions

7.58 Milieudefensie et al. have argued that Shell's current policy is not contributing to the Paris Agreement goals, in part because as a result of Shell's planned investments in new oil and gas fields, the Shell Group's overall emissions will not decrease. Milieudefensie et al. have used several UNEP and IEA reports (see above under 3.10 and 3.11) to substantiate that climate scientists agree that large-scale investments in new oil and gas fields are neither desirable nor necessary to meet the demand for oil and gas in a scenario where warming is limited to well below 2°C, as agreed in the Paris Agreement. The 2022 report of the UN expert group (see above under 7.23 under e) also expresses that new investments are not desirable:

"As the IPCC has highlighted, existing planned and approved fossil fuel infrastructure will exhaust the remaining carbon budget. Therefore, there is no room for new investment in fossil fuel supply and a need to decommission existing assets. Additionally, the IEA states that new fossil fuel supply is incompatible with the required emissions trajectory to achieve net zero, and that includes new supplies of natural gas and LNG exports, which must peak and decline by the end of this decade."

7.59 Milieudefensie et al. have further argued that too many investments in new oil and gas fields could lead to a 'carbon lock-in'. While Shell argues that investments in oil and gas will remain necessary for some time to come, it has not disputed that this effect may occur. 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.

7.60 Shell is aware of this carbon lock-in effect. This is evidenced by, among other things, the open letter it wrote to its investors on 16 May 2014, in which Shell noted that it does not expect its investments to become redundant, as the energy transition will continue for decades due to the "long-lived nature of the infrastructure and many assets in the energy system" (see above under 3.37). Nevertheless, after first reducing its supply of oil and gas, Shell has opted for a policy of maintaining its supply (oil) or significantly increasing it (gas). Between 2019 and 2023, Shell's oil production fell by 20%, and gas production by 28%. However, for the period up to 2030, Shell is committed to maintaining the same oil production and expanding LNG sales by 20-30%, of which an (unknown) part will come from its own production. This will be accompanied by significant (expected) investments in upstream oil and gas activities: around \$40 billion between 2023 and 2025, and another \$60 billion between 2025 and 2030. More than half of these investments will go to fields not currently producing oil and gas (see above under 3.47, 3.48 and 3.49).

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%.

7.62 In short, although oil and gas companies are expected to take into account the negative consequences for the energy transition when investing in new oil and gas fields as these investments will expand the supply of fossil fuels, this in itself cannot lead to granting any part of the claim.

G. Shell's obligations as regards its scope 1 and 2 emissions



- 7.63 Shell has argued that the claims of Milieudéfensie et al. regarding scope 1 and 2 cannot succeed because there is no threat that Shell will not comply with the (alleged) reduction obligation. In this regard, Shell has put forward, inter alia, that it has set specific reduction targets of 50% for scope 1 and 2 in 2030 relative to 2016.
- 7.64 The court of appeal considers as follows on this matter. The granting of an order aimed at preventing a future violation of standards requires the existence of a threatening violation of a legal obligation. Milieudéfensie et al. argue that there is such a threat because Shell will not reduce its emissions by at least 45% by the end of 2030 compared to 2019. With regard to the scope 1 and 2 emissions, Shell counters, as said, that it has set itself the goal of reducing these emissions by 50% by the end of 2030 compared to 2016. It is not in dispute between the parties that this target goes beyond the 45% reduction relative to 2019, as claimed by Milieudéfensie et al. (In their written pleadings, Milieudéfensie et al. acknowledge in paragraph 111 that a 50% reduction of scope 1 and 2 emissions by the end of 2030 compared to 2016 corresponds to a 48% reduction of scope 1 and 2 emissions by the end of 2030 relative to 2019.) According to Milieudéfensie et al., there is nevertheless an impending violation of a legal obligation because Shell has adjusted its policy before, and this target offers no guarantee of further or permanent emission reductions.
- 7.65 The court of appeal does not concur with Milieudéfensie et al. in this respect. Shell has committed to this target in its business plan, in documents filed with the Securities and Exchange Commission (SEC) and on Capital Markets Day in June 2023. Shell has outlined in its Energy Transition Progress Report 2024, among other publications, how it will achieve this target. Moreover, 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. To assume the impending violation of a legal obligation alleged by Milieudéfensie et al., the court would have to find that it is likely that Shell will not have reduced its scope 1 and 2 emissions by 45% by 2030, despite Shell's concrete plans and the measures Shell has already taken to implement those plans. Milieudéfensie et al. have not provided sufficient arguments in support of that. The mere fact that Shell has previously watered down targets cannot in any event justify that finding.
- 7.66 With regard to scope 1 and 2, an impending violation of a legal obligation has therefore not been established. To that extent, the claim of Milieudéfensie et al. cannot be granted.

### Shell's obligations as regards its scope 3 emissions

#### 1. General

- 7.67 In this chapter, the court will address the claims in respect of scope 3. It has previously been concluded that, in order to comply with the social standard of care, Shell must make an appropriate contribution to the climate goals of the Paris Agreement, but that existing climate legislation does not provide for a concrete reduction rate for individual companies or industries. However, it is conceivable that there is consensus in climate science on specific reduction standards that should apply to a company such as Shell in order to meet the aforementioned responsibility. The court will discuss this issue in this chapter. Section 2 will address whether Shell can be held to the consensus existing within climate science on a 45% reduction standard (or any other percentage). In section 3, the court will discuss whether a sectoral standard for oil and gas can be established on the basis of scientific consensus. Lastly, the court will examine Shell's defence that a scope 3 reduction order will not have the effect desired by Milieudéfensie et al.

#### 2. Can a reduction obligation for Shell be based on the general standard of 45% in 2030?

- 7.68 Milieudéfensie et al.'s claim is principally to order Shell to reduce its CO<sub>2</sub> emissions to such an extent that by the end of 2030 they will have been reduced by 45%, or at least by a net 45%, relative to 2019. In the alternative and further in the alternative, Milieudéfensie et al. claim that Shell's CO<sub>2</sub> emissions will have been reduced by 35% and 25% by the end of 2030.
- 7.69 The principal claim, with the reduction rate of 45%, is primarily based on the IPCC reports (see above under 3.9) and the IEA reports (see above under 3.11). These reports assume an average global reduction in all sectors, with a range (interquartile range) of 40-60% compared to the base year 2010. It follows from the IPCC reports that a global emission reduction of 45% by the end of 2030 is necessary to maintain a 50% chance of limiting global warming to 1.5°C. This puts a 45% emission reduction in line with the Paris Agreement.

7.70 Milieudefensie et al. conclude also on this basis that it is best practice for companies to reduce their scope 3 emissions in absolute terms by 45% by the end of 2030. In that context, they have referred, among other things, to the report 'Best practices in scope 3 greenhouse gas management' of the 'Science Based Targets initiative' (hereinafter also: the SBTi report). That report states, among other things:

"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."

Furthermore, Milieudefensie et al. refer in this context to the Race to Zero initiative in which companies are encouraged to set concrete emission reduction targets, with an interim target of 50%, so that the goals of the Paris Agreement can be met (see above paragraph 7.23 under d) and to the UN expert report recommending companies to reduce CO2 emissions by at least 50% by 2030 (paragraph 7.23 under e).

7.71 The alternative claim of Milieudefensie et al. takes as a starting point an emission reduction of 35%. That percentage is – as the court of appeal understands – based, among other things, on the Beyond 2oC Scenario described by the IEA in a 2017 report. The 25% emission reduction claimed in the further alternative is based on the IEA's Sustainable Development Scenario. The claims in the alternative both start from scenarios where global warming remains at least below 2°C. In the Beyond 2oC Scenario, the level of zero emissions is reached in 2060. This requires a 35% emission reduction in 2030 compared to 2019 in the energy sector. In the Sustainable Development Scenario, the level of zero emissions is reached in 2070. To reach that target, a 25% emission reduction from 2019 levels must be achieved in 2030 in the energy sector.

7.72 Milieudefensie et al. deduce from the figures and reports mentioned that the percentage of 45 by 2030 should also be applied to the energy sector and (in line with the SBTi report and the principle of "maximum ambition" as described in the Race to Zero initiative) subsequently also to individual companies. Since there are no agreements on how the reduction commitment is to be divided among companies, Milieudefensie et al. believe the obvious approach is to apply the percentage of 45 to all companies. This is the only way to ensure that every company makes its proportionate contribution so that the 45% reduction target can be achieved. As the energy sector accounts for 4/5 of global CO2 emissions, individual companies in the energy sector will have to adhere to at least the general standard of 45%, Milieudefensie et al. argue. This is all the more true since there are no agreements within the global energy sector as to which company or which part of the energy sector will make what contribution to meeting the global target. In line with the common but differentiated responsibilities principle (CBDR principle), Shell could even be required to make a higher contribution to the global reduction target. In this context, Milieudefensie et al. have further referred to a report from the 'Tyndall Centre for Climate Change Research' from 2022, from which it follows that the richest oil and gas producing countries must reduce their oil and gas production to zero by 2034.

7.73 In assessing these contentions, the court of appeal, like the district court (4.4.29 of the judgment), takes as its point of departure that there is a broad consensus that, in order to limit global warming to 1.5°C, reduction pathways must be chosen in which CO2 emissions are reduced by a net 45% by the end of 2030 relative to at least 2019 and by 100% by 2050. However, these reduction pathways involve a global reduction, which amounts to a net 45%. This means that there are sectors and companies in countries that need to reduce more and there are sectors and companies in countries that are required to reduce less. Unlike Milieudefensie et al. argue in these proceedings, the court cannot determine what specific reduction obligation applies to Shell. This judgement is based on the following.

7.74 It is not in dispute between the parties that a 45% reduction by the end of 2030 is an average for all sectors and for all places in the world. Moreover, that average percentage relates to the emissions of all greenhouse gases, including CO2. CO2 is created by burning different fossil fuels, namely oil, gas and coal. The various fossil fuels have different carbon intensities. It is also not in dispute between the parties that the burning of gas is less onerous on the climate than the burning of oil and that the burning of oil in turn is less onerous than the burning of coal. Shell neither extracts nor supplies coal to its customers. Although the share of oil and gas in global emissions is higher than that of coal, in the shorter term, the greatest gains can be made by ending coal combustion. Leaving aside the equity argument (see below under paragraph 7.79), this means that although a shift from coal to gas will lead to an increase in emissions from the combustion of gas, on balance it will be less damaging to the climate because the (higher) emissions from the combustion of coal will decrease.

7.75 Applied to Shell, this means that if Shell starts supplying gas to a company that previously obtained its energy from coal (which necessarily comes from a supplier other than Shell), this will lead to an increase in Shell's scope 3 emissions, but on balance may lead to lower global CO2 emissions. It follows from that example alone that applying the general standard to Shell of a 45% reduction by the end of 2030 (or 35% or 25% in the

alternative and further alternative claims) is not sufficiently case-specific. Nor is the standard designed for that purpose. On the contrary, there are indications that different reduction pathways are appropriate per sector, and they may also differ per country.

7.76 For example, the IEA Net Zero Emissions report 2023 states in this regard (p. 62-63):

"On a sector basis, electricity sees CO<sub>2</sub> 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."

7.77 The European Commission's Impact Assessment Report of 6 February 2024<sup>43</sup> also distinguishes between different sectors. The same applies in the national context to the Climate Act.

7.78 Shell's scope 3 emissions are spread across several sectors. The 'transport' and 'buildings' sectors, where alternatives to fossil fuels are more difficult to realise and where that process takes longer, account for a significant proportion of Shell's scope 3 emissions. Applying a general percentage for the reduction of Shell's scope 3 emissions therefore ignores the different reduction pathways for the individual sectors that belong to Shell's customer base.

7.79 The court recognises that, as a major oil company, Shell has a special responsibility. The court has ruled above that companies, and thus Shell too, must make an appropriate contribution to preventing dangerous climate change. However, that alone does not justify ignoring the specifics of Shell's supply portfolio and ignoring the possibility, described above, that an increase in Shell's scope 3 emissions in the shorter term could, on balance, lead to globally lower emissions. Therefore, if the general average standard of 45% emissions reduction is to be applied to Shell, it would have to be plausible that Shell's product range and its customer base reflect the global product range and global customer base (the purchasers of those products). However, as Shell has argued, uncontested and reasoned, this is not the case.

7.80 The fact that the Race to Zero initiative includes an "interim target" of a 50% reduction by 2030 does not change this. Even that "target" must in fact reflect a company's "fair share" and therefore does not automatically imply that the general standard of – in that case – 50% can be applied to every company as a hard and enforceable standard. The same applies to the recommendations in the UN expert report. The fact that that expert report, as well as other documents, states that companies should make maximum efforts to reduce their emissions as soon as possible is not sufficient to turn an average global reduction standard into a general, binding standard for Shell.

7.81 Milieudefensie et al. have pointed out that Shell is a major player in the oil and gas market and can therefore be expected to make a special effort. The court has included the fact that Shell is a major player in its decision that there is a legal obligation for Shell to reduce its emissions. However, given that there are different reduction pathways for different sectors in different countries, this fact does not mean that Shell can be held to the average global reduction rate. Nor can such an obligation be derived from the so-called 'equity'. In this context, that concept means taking into account social aspects, among other things, when sharing the burdens (and revenues) of the energy transition. Such aspects could include the fact that climate change is largely caused by industrialised countries, and that they have reaped the benefits, so that industrialised countries are expected to make a greater effort in combating climate change. However, also that standard is too general to infer that Shell has a 45% reduction obligation.

### *3. Can a sectoral standard for oil and gas be established?*

7.82 The parties have also discussed whether there could be reason to order Shell to make a reduction linked to its specific supply portfolio, i.e. a reduction specifically related to the supplied oil and gas products. Several reports have addressed the question of what reductions in oil and gas are necessary to meet the goals of the Paris Agreement. For example, the 2021 IEA report 'Net Zero by 2050, A roadmap for the Global Energy Sector' projected reductions of around 60% for coal, 35% for oil and 18% for gas in the period up to 2030, with 2019 as the base year. And the 2023 update mentions a 28% reduction for oil and 23% for gas by 2030 (see above under 3.11). In the following, the court will discuss these and other reports in more detail. In doing so, the court takes into account that (some of) these reports are based on models, so-called integrated assessment models (IAMs). The parties and their experts have each commented on the value of these IAMs for establishing a sectoral reduction obligation.

7.83 Milieudefensie et al. have invoked the UNEP's Production Gap Report 2021 (see above under 3.10), which states that, in order to keep a 1.5°C global warming within reach, production in the period between 2020 and 2030 must decrease annually by (as a median) 11% for coal, 4% for oil and 3% for gas. According to a calculations by Milieudefensie et al., this means a total reduction of 36% for oil, 28% for gas and 72% for coal in the period up to 2030. The Production Gap Report 2023 assumes unabated reductions in coal, oil and gas production, but those reductions follow a slightly different pattern than in the 2021 report. Milieudefensie et al. are of the opinion that from the 'Low Demand Scenario' in the IPCC AR6 report, it can be deduced that a 47% reduction for oil and gas must take place by 2030 (see above under 3.9). Lastly, Milieudefensie et al. have invoked the International Institute for Sustainable Development's June 2022 report 'Lighting the path: what IPCC energy pathways tell us about Paris-aligned policies and investments', which includes (p. 4):

"The feasible 1.5°C pathways analyzed in this report show that oil and gas production needs to decrease by 30% by 2030 and by 65% by 2050. This is equivalent to an annual reduction of 3% on average for both oil and gas between 2020 and 2030."

7.84 Shell has pointed out that the EU Fit for 55 package will lead to a reduction in 2030 of 62% for coal, 12% for oil and 18% for gas.

7.85 The parties further each called in experts who wrote reports on the reduction pathways and the percentages associated with them. In the following, the court sets out the conclusions of these reports, to the extent relevant to the question of whether a sectoral reduction pathway can be established.

7.86 The report 'Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets' by the 'Tyndall Centre for Climate Change Research' was prepared in 2022 by D. Calverley and K. Anderson (hereinafter: the Tyndall report). The report explains that under a 1.5°C scenario, coal production should end in developed countries by the end of 2030 and in developing countries by the end of 2040. For oil and gas, production has to decrease at least everywhere and there is no room for growth. With regard to oil and gas, the following conclusion was drawn (p. 6):

"The IPCC's headline carbon budget for a 50% chance of 1.5°C places very tight constraints on the production of oil and gas. For the wealthiest group of 'producer nations', with the highest capacity to achieve a 'just transition', output of oil and gas needs to be cut by 74% by 2030, with complete phase out by 2034. For the middle-income group with medium capacity for a just transition, the timeframe extends a little, with a 28% cut by 2030, and a zero-production year of 2043. For the poorest group with lowest capacity, a 14% cut is required by 2030, with all production ended by 2050."

7.87 A letter dated 14 December 2023 from K. Anderson, one of the authors of the Tyndall report, includes the following table, which presents what he believes to be the necessary reduction rates under a 1.5°C scenario:

	All FFs	Oil & Gas	Coal
2025	9%	10%	7%
2030	45%	45%	46%
2035	78%	77%	81%
2040	94%	92%	97%
2045	98%	97%	100%
2050	100%	99%	100%

7.88 A report by J. Rogelj dated 4 March 2024 includes the following table:

Scenarios that limit warming to 1.5°C with no or low overshoot this century (starting from IPCC C1 scenarios)	Verified calculations of: Range of percent change 2020 – 2030, by fuel type		
	Coal	Oil	Gas
Global	-78%	-13% to -26%	-28% to -31%
Developed countries	-78% to -83%	-30% to -31%	-42%

7.89 A report dated 15 December 2023 by A. Hawkes explains that different reduction pathways should be followed for different sectors. Regarding the differences for coal, oil and gas, Hawkes included the following table:

7. The result of the analysis described at paragraphs 5 and 6 is shown in Table A.1. The information contained in this table is summarised at paragraph 4.3 in this report.

Study	Fuel	Scenario category subset	Bioenergy limit in 2050 (EJ/year)	Median percent change 2020 – 2030
Achakuwisut et al. (2023) <sup>53</sup>	Coal	C1	n.a.	-73
		C1 with CDR limits		-84
	Oil	C1		-9
		C1 with CDR limits		-5
	Gas	C1		-11
		C1 with CDR limits		-25
Scenario subset based on Schleussner et al. (2022) <sup>50</sup>	Coal	Subset of C1a and C2	n.a.	-69
		Subset of C1a and C2	135	-76
	Oil	Subset of C1a and C2	n.a.	-3
		Subset of C1a and C2	135	-2
	Gas	Subset of C1a and C2	n.a.	-8
		Subset of C1a and C2	135	-5
Own filters, with scenario subset based on either IPCC C1a or all of C1.	Coal	C1a	100	-75
		C1a	135	-75
		C1	100	-76
		C1	135	-76
	Oil	C1a	100	-8
		C1a	135	-3
		C1	100	-4
		C1	135	-3
	Gas	C1a	100	-20
		C1a	135	-11
		C1	100	-26
		C1	135	-15

Table A.1: Median values of coal, oil and gas reduction between 2020 and 2030 when different filters are used on the IPCC AR6 scenario set. Where "own filters" is stated, it refers to bioenergy limits, afforestation CDR limits and CCS limits set out in paragraphs 5 and 6.

7.90 In "pleading notes part 4", Milieudéfensie et al. have calculated the different reduction rates back to the base year 2019. This produces the following picture (which expressly does not yet take into account Shell's challenge of these figures, which include a recalculation of the figures of expert A. Hawkes, hired by Shell):

Reductiepercentages in 2030 ten opzichte van het referentiejaar 2019 <sup>57</sup>			
Bron	Brandstof	Jaarlijkse % verandering	Reductie in 2030 t.o.v. 2019
Tyndall-report	Olie en gas	-6,4%	-51,7%
IMP Low Demand scenario <sup>58</sup>	Olie	-6,2%	-50,5%
	Gas	-6,2%	-50,5%
Herberekende C1 scenario's prof. Hawkes <sup>59</sup>	Olie	-3%	-28,5%
	Gas	-3,6%	-33,2%
C1-scenario's prof. Hawkes Ontwikkelde landen <sup>60</sup>	Olie	-3,6%	-33,2%
	Gas	-5,3%	-45,1%
C1-scenario's IISD	Olie	-3,5%	-32,4%
	Gas	-3,5%	-32,4%
IEA NZE 2023 <sup>61</sup>	Olie	-4%	-36,2%
	Gas	-3,2%	-30,1%

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

is that the various reduction figures are quite divergent. Hawkes arrives at the lowest figures for oil and gas, while the Tyndall report arrives at the highest figures. The experts hired by the parties have mutually criticised and questioned each other's conclusions. Even in the figures recalculated by Milieudefensie et al., the scope of reduction ranges from 28.5% to 51.7% for oil and 30.1% to 50.5% for gas. Moreover, the figures are not stable. The IEA's NZE scenario shows in the 2023 update that the reduction pathway for oil and gas is different from the one from 2021. Apparently, there are ample differences of opinion among experts on the percentages to be used and the methodology to be applied for the various calculations.

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. But by doing so, the court of appeal would not only disregard the doubts that Milieudefensie et al. themselves have raised about the creation of the IEA's prognosis, but, more importantly, by doing so, the court of appeal would elevate that prognosis to a legally binding standard for a specific company. That was never its intended purpose and, moreover, that standard is, as noted, subject to change. An order for Shell to achieve a fixed reduction percentage in the period up to 2030 would be incompatible with that fluctuating nature.

7.93 The court of appeal takes into account that both parties have also questioned the value of the IAMs on which the figures are (partly) based. According to Milieudefensie et al., those models are even only 'of limited use'. That too calls for far-reaching restraint in elevating the figures based on those reports to a legal standard. Milieudefensie et al. have argued that if the figures based on those models do not sufficiently take into account a fair distribution of the burden between countries (equity) and thus the CBDR principle, a more far-reaching standard to be determined by the court of appeal may conversely result from that. The court of appeal does not concur with Milieudefensie et al. in this respect. The court of appeal recognises that on the basis of the CBDR principle, which is also laid down in the Paris Agreement, especially the rich developed countries must follow a faster reduction pathway than the developing countries. While that fact may call into question reduction pathways that prioritise the phasing out of coal, no standard for Shell's reduction obligation to be applied in the present case follows from that. In other words, even if the court of appeal accepts Milieudefensie et al.'s contention that the IAMs take too little account of coal dependency of developing countries, and that therefore emissions from coal should fall less quickly than the models prescribe, this does not establish a standard applicable to Shell (in developed countries) for oil and gas which the court of appeal could use in these proceedings.

7.94 That Shell, in the case of a 45% reduction in its CO<sub>2</sub> emissions in 2030, would still be able to sell 55% of the amount of fossil fuels sold in 2019, thus meeting the needs of sectors that are harder to make sustainable, as Milieudefensie et al. argue, is also not a fact that can contribute to establishing a legal standard.

7.95 The precautionary principle does not justify a different conclusion. This principle implies that also in the event of (scientific) uncertainty regarding the occurrence of certain consequences, it may be appropriate to intervene in a certain activity. The precautionary principle also precludes non-intervention because of scientific uncertainty regarding the consequences of a given action. However, this case does not concern uncertainty about the consequences of a particular action (CO<sub>2</sub> emissions), but about uncertainty about a standard to be applied. The precautionary principle does not justify ignoring that uncertainty at the expense of a private party and setting a legal standard for that private party.

7.96 Therefore, however much Shell may be required to do its part in combating dangerous climate change, the available figures do not provide the court with sufficient support to oblige Shell to reduce its CO<sub>2</sub> emissions by a certain percentage in 2030, as claimed by Milieudefensie et al. This applies to both the principal and alternative claims. This therefore leads to the conclusion that the claims of Milieudefensie et al. regarding scope 3 must be dismissed.

#### *4. Is a scope 3 reduction obligation effective?*

7.97 Shell furthermore argues that a scope 3 reduction obligation will not make an effective contribution to reducing global emissions. Although the claims of Milieudefensie et al. with respect to scope 3 can be denied on the basis of the foregoing considerations, the court of appeal will also address this defence, as it may constitute an additional reason why the claims of Milieudefensie et al. with respect to scope 3 cannot succeed. In support of this effectiveness defence, Shell argues, on the one hand, that it has only a limited influence on the factors on the demand side. On the other hand, on the supply side, a reduction in Shell's fossil fuel sales will result in those fossil fuels being sold by another supplier, according to Shell. M&M has also made this point.

7.98 As for the demand side, Shell points out that its scope 3 emissions are the scope 1 emissions from end-users of its products. It has no control over those emissions. End-users decide which energy sources they use, in what quantities and from which suppliers. The scope 1 emissions of end-users will only change when end-user demand changes. The legislator has been trying to influence that demand by, among other things, encouraging

the use of low-carbon and renewable energy. Shell maintains that it is not acting unlawfully as long as its supply responds to the demand for fossil fuels, and it adopts its climate policy "in step with society". Shell further argues that assuming a responsibility for Shell with regard to scope 3, effectively means that it is liable for (lawful) acts of third parties (its customers).

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 1.5oC 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 en 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) acts of third parties. Shell's responsibility with regard to scope 3 emissions applies to its own actions.

7.100 As for the supply side, the following applies. Shell has countered by arguing that it would make no difference for CO2 emissions if Shell were to reduce its sales of fossil fuels from third parties and in this way complied with the district court-imposed obligation to reduce its scope 3 emissions. In this regard, Shell has pointed out, *inter alia*, that about one-third of Shell's reported scope 3 emissions comes from its own production and the remaining two-thirds from oil and gas produced by third parties, which Shell resells. Shell could meet the obligation to reduce its scope 3 emissions by a certain percentage by (partially) ceasing to trade in third-party fossil fuels. In that case, fossil fuel producers would continue to supply those fuels, and customers would continue to use those products. The only difference would be that Shell would no longer be part of the value chain. This would not lead to a reduction in total CO2 emissions. Therefore, Milieudefensie et al. have no interest in a reduction obligation with regard to scope 3 emissions, Shell argues, supported in this by M&M.

7.101 In assessing this defence, the court of appeal states the following first and foremost. Importantly, it follows from the district court's judgment that Shell is free to determine for itself the manner in which it fulfils the obligation imposed by the district court. Milieudefensie et al. have not submitted a ground for appeal against this element of the judgment. The court of appeal must therefore assume that Shell could choose to comply with the obligation imposed by the district court by restricting third-party fossil fuel sales to end users. This raises the question whether this would serve the interest defended by Milieudefensie et al. in these proceedings.

7.102 It follows from Article 3:303 DCC that there must be a sufficient interest in a legal action. Whether there is a sufficient interest can be assessed by comparing the situation with and without granting the claim. If there is no relevant difference between the two situations, in the sense that allowing the claim does not actually bring the claimant any benefit, the required interest in the claim is lacking. Focused on the claims of Milieudefensie et al. this means that Milieudefensie et al. have no interest in an order for Shell to reduce its scope 3 emissions by 45% (or 35% or 25%) by the end of 2030, if such an order can be complied with in a manner that cannot contribute to the interest being defended by Milieudefensie et al.: the protection of the residents of the Netherlands and the residents of the Wadden Sea region against dangerous climate change due to CO2 emissions.

7.103 In support of this argument, Shell relies on reports submitted by an economic expert, Richard Druce of the National Economic Research Associates, Inc. (NERA). Druce exemplifies his argument *inter alia* with a case study of the impact of the bankruptcy of Enron, a major trader in commodities, including oil and gas, on the oil market in 2001. According to this case study, Enron's bankruptcy had an effect on the spot oil market for only a few months, indicating that the trading activities had been taken over by other traders within a few months. The same would happen, according to Druce, if Shell were to reduce its resale activities.

7.104 Milieudefensie et al. dispute Druce's conclusions. They allege that Druce does not take into account the added value of Shell Trading, Shell's trading house. Shell Trading does more than just buy and sell oil and gas products. It also arranges the transport of oil and gas, with its own fleet of oil tankers, LNG carriers and other types of vessels. In addition, Shell has its own refineries and storage terminals worldwide. Shell uses this storage capacity, among other things, to speculate on price fluctuations. Furthermore, Shell Trading provides financing for independent producers of oil and gas, and hedges risks for its customers through derivatives trading. If Shell Trading were to wind down its trading activities, these activities could not be taken over by



another party overnight. Therefore, a downsizing of Shell Trading's trading activities would indeed have an impact on the oil and gas market. Because of these activities, Shell Trading is not comparable to Enron. Enron was mainly a middleman, adding little market value to what was traded. Part of the difference between Shell Trading and Enron is reflected in the margin per barrel earned by Enron and Shell Trading. In Enron's case, this margin was about \$1 per barrel of oil and gas traded, while Shell earned about \$86 per barrel of oil and gas traded in 2022, according to Milieudefensie et al.

7.105 Milieudefensie et al. support their argument with reports by climate scientists Erickson and Green (hereinafter: Erickson et al.). According to Erickson et al., Enron and Shell are incomparable entities. Unlike Enron, Shell cannot be easily replaced. Erickson et al. assert: "Constraints or increases in costs anywhere along the extensive process of producing and selling oil and gas could increase the price to final consumers". Erickson et al. refer to research showing that if the US stopped issuing new fossil fuel extraction licences, it would lead to a reduction in global fossil fuel consumption by an amount equalling 0.2 to 0.6 times the US production limitation. Lastly, Milieudefensie et al. point to the message sent by the reduction order. Companies in the oil and gas sector should factor this message into their investment decisions, and therefore be more cautious with fossil investments compared to the situation without the reduction order.

7.106 The district court rejected Shell's contention that an obligation to reduce its scope 3 emissions by a certain percentage is not effective on the basis that any reduction in greenhouse gas emissions has a positive effect on combating climate change (paragraph 4.4.49 of the district court's judgment). This consideration is correct in itself and is also in line with what the Supreme Court considered in the Urgenda judgment (legal ground 5.7.7 and 5.7.8). However, this does not mean that a reduction obligation imposed on a specific company will have such a positive effect, especially if this reduction obligation can also be realised by selling less fossil fuels. After all, in that scenario, the specific company would only disappear from the value chain and the (already produced) fossil fuels would still reach the end consumer via another intermediary. There may be a causal relationship between a production limitation and emission reduction, as assumed by the district court (cf. section 4.4.50 of the district court's judgment), but Milieudefensie et al. have failed to put forward sufficient grounds to assume that in this case a causal relationship (also) exists between a sales limitation and emission reduction.

7.107 Erickson et al. do not explain in their report how a fossil fuel sales restriction imposed on a specific company could lead to price increases for end consumers, which in turn could lead to a decrease in demand for fossil fuels. The study cited by Erickson et al. fails to demonstrate this because it concerns the effects on fossil fuel consumption of a production restriction in a specific region (the US territory). A restriction extending to an entire region (certainly a region as large as the US) is of a substantially different order than a sales restriction applying to a specific company. Moreover, a production restriction is less easily absorbed by other market participants than a sales restriction.

7.108 Milieudefensie et al.'s argument about the added value of Shell Trading fails because the district court's reduction order does not oblige Shell to wind down Shell Trading's operations. Shell could reduce its fossil fuel sales while Shell Trading continues to offer its services to the market. A party that would sell fossil fuels in Shell's place would not need to have the logistical and financial capabilities of Shell Trading. If necessary, this party could purchase these services from Shell Trading or other service providers. Therefore, the example of Enron also cannot be brushed aside by pointing out the differences between Enron and Shell Trading. Incidentally, the comparison between Enron and Shell Trading in terms of earnings per barrel of oil traded is not valid, because the amount of \$86 mentioned for Shell Trading does not only cover Shell Trading's costs but also Shell's total exploration and production costs.

7.109 A potential signalling effect of a reduction order on other fossil investors is too speculative, and too far removed from Shell's alleged unlawful conduct to serve as an interest in the reduction order.

7.110 The conclusion based on the foregoing is that Shell can meet the obligation to reduce its scope 3 emissions by a certain percentage by limiting the resale of fossil fuels purchased by Shell from third parties. It has not been established in the present proceedings that downsizing the resale activities of Shell Trading will lead to a reduction in CO<sub>2</sub> emissions. Since the latter is precisely what Milieudefensie et al. seek to achieve with the reduction order they claimed, the conclusion is that such an order with regard to scope 3 emissions is not effective and Milieudefensie et al. therefore have no interest in their claim.

## 5. Conclusion

7.111 While it follows from the foregoing that Shell may have obligations to reduce its scope 3 emissions, this cannot lead to the award of Milieudefensie et al.'s claims on this point. The court of appeal has come to the conclusion that Shell cannot be bound by a 45% reduction standard (or any other percentage) agreed by



climate science because this percentage does not apply to every country and every business sector individually. The court has answered in the negative the question whether a sectoral standard for oil and gas can be established on the basis of scientific consensus. This entails that based on the available climate science, it cannot be said that a 45% reduction obligation (or any other percentage) applies to Shell in respect of scope 3. In addition, it could not be established that an obligation on Shell to reduce its scope 3 emissions by a certain percentage is effective, so that, at any rate, Milieudéfensie et al. have no interest in their scope 3 claim.

## 8 Conclusion and costs of the proceedings

8.1 In conclusion, Shell's appeal succeeds and the contested judgment will be quashed.

8.2 The court of appeal dismisses the claims of Milieudéfensie et al. As the unsuccessful party, Milieudéfensie et al. will be ordered to pay the costs of the appeal proceedings, both on the part of Shell and on the part of M&M.

## 9 Decision

The Court of Appeal:

- quashes the contested judgment;
- denies the claims of Milieudéfensie et al.;
- orders Milieudéfensie et al. to pay the costs of the proceedings in the first instance, determined on the part of Shell at €639 in court fees and €1,842 in lawyers' fees (3 points, rate II);
- orders Milieudéfensie et al. to pay the costs of the appeal proceedings, determined on the part of Shell at €891.21 in court fees and €3,642 in lawyers' fees (3 points, rate II) and €178 in subsequent costs;
- stipulates that if Milieudéfensie et al. have not complied with this judgment within fourteen days of Shell's notification and this judgment is subsequently served, Milieudéfensie et al. will have to pay the costs of service, plus additional subsequent costs of €92, to be increased by statutory interest on these costs;
- orders Milieudéfensie et al. to pay the costs of the appeal proceedings, determined on the part of M&M at €772 in court fees and €3,642 in lawyers' fees (3 points, rate II) and €178 in subsequent costs;
- stipulates that if Milieudéfensie et al. have not complied with this judgment within fourteen days of M&M's notification and this judgment is subsequently served, Milieudéfensie et al. will have to pay the costs of service, plus additional subsequent costs of €92, to be increased by statutory interest on these costs;
- declares this judgment provisionally enforceable.

This judgment was issued by judges C.A. Joustra, J.J. van der Helm and P. Glazener, and pronounced in open court on 12 November 2024 in the presence of court clerks M.J. Boon and J.A. Lukkes.

## LIST of ABBREVIATIONS

CBAM Carbon Border Adjustment Mechanism

CBDR principle Common but differentiated responsibilities principle

COP Conference of the Parties

CSDDD Corporate Sustainability Due Diligence Directive

CSRD Corporate Sustainability Reporting Directive

EJ Exajoule

ECtHR European Court of Human Rights

ETS Emission Trade System

EU ETS European Emission Trade System

ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms

GHG Greenhouse Gas

IAM integrated assessment model

ICCPR International Covenant on Civil and Political Rights

IEA International Energy Agency

IPCC Intergovernmental Panel on Climate Change

ISO International Organization for Standardization

Kbbl/d thousand barrels per day

Kboe/d thousand barrels of oil equivalent per day

KNMI Royal Netherlands Meteorological Institute

NZE scenario Net Zero Emissions scenario 2050

OECD Organization for Economic Cooperation and Development

ppm parts per million

SBTi Science Based Targets Initiative

SDG Sustainable Development Goal

UNEP United Nations Environment Programme

UNGP UN Guiding Principles on Business and Human Rights

UNFCCC United Nations Framework Convention on Climate Change

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1 *Tractatenblad* 1992, 189.

2 *Tractatenblad* 1998, 170.

3 *Tractatenblad* 2005, 1.

4 *Tractatenblad* 2016, 94; *Tractatenblad* 2017, 141.

5 COM(2019) 640 final.

6 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulation (EC) No 401/2009 and Regulation (EU) 2018/1999, OJ EU L 243/1.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 July 2021, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final.

8 Act of 2 July 2019, *Staatsblad* 2019, 253.

9 *Staatsblad* 2024, 16.

10 *Tractatenblad* 1951, 154.

11 *Tractatenblad* 1969, 99.

12 Section V of the Representative Actions for Consumers (Implementation) Act, *Staatsblad* 2022, 459.

13 For instance: Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, *Nederlandse Jurisprudentie* 2010/388 (SGP).

14 Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, *Nederlandse Jurisprudentie* 2011/473 (*Plazacasa*).

- 15 Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741, *Nederlandse Jurisprudentie* 1987/743 (*Nieuwe Meer*).
- 16 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *Nederlandse Jurisprudentie* 2020/41 (*Urgenda*).
- 17 Act of 26 June 2013 amending the Class Actions (Settling of Large-scale Losses or Damage) Act, *Staatsblad* 2013, 255. Parliamentary Papers II 2011-2012, 33126, no. 3, p. 5 and 12.
- 18 Named after the case at stake in Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079, *Nederlands Juristenblad* 1966/136.
- 19 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *Nederlands Juristenblad* 2020/41.
- 20 ECLI:CE:ECHR:2024:0409JUD005360020.
- 21 All available in: Climate Change Litigation Databases - Sabin Center for Climate Change Law ([climatecasechart.com](https://climatecasechart.com)).
- 22 Lahore High Court 4 September 2015, case no. W.P. No. 25501/2015, par. 7 (*Leghari/Federation of Pakistan*).
- 23 Supreme Court of Colombia 5 April 2018, no. STC4360-2018, p. 13 (*Future Generations/Ministry of the Environment*).
- 24 Federal Supreme Court of Brazil 7 April 2022 (*PSB et al v. Brazil*).
- 25 Montana First Judicial District Court 14 August 2023, case no. CDV-2020-307, p. 97-98 (*Held, et al./State of Montana, et al.*).
- 26 Supreme Court of India 21 March 2024, Civil Appeal no. 3570 of 2022, par. 20 (*Ranjitsinh and Others v Union of India and Others*).
- 27 Legal ground 410 of the judgment *Verein Klimaseniorinnen Schweiz v. Switzerland*.
- 28 Cf. CJEU 6 November 2018, ECLI:EU:C:2018:874 and CJEU 9 November 2023, ECLI:EU:C:2023:834.
- 29 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ EU L 275/32.
- 30 Commission report of 31 October 2023 on the functioning of the ETS system, p. 3. Exhibit S-217.
- 31 Directive (EU) 2023/959 of the European Parliament and of the Council 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 trading scheme, OJ EU L 130/134.
- 32 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ EU L 130/52.
- 33 See Directive (EU) 2023/959 in footnote 31.
- 34 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting OJ EU L 322/15.
- 35 Delegated Regulation (EU) 2023/2772 of 31 July 2023, OJ EU L of 22 December 2023.
- 36 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ EC L of 5 July 2024.
- 37 Regulation (EU) 2023/851 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition, OJ EU L 110/5.
- 38 Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation), OJ EU L of 31 October 2023.
- 39 Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport and amending Directive 2009/16/EC, OJ EU L 234/48.
- 40 Directive (EU) 2023/2413 of the European Parliament and of the Council 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 Council Directive (EU) 2015/652, OJ EU L of 31 October 2023.
- 41 Regulation (EU) 2023/857 of the European Parliament and of the Council 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 commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ EU L 111/1.

42 Impact Assessment Report, Accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Securing our future. Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society, SWD(2024) 63.

43 See above in footnote 42.

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