[Unofficial English translation from Dutch original]

The Hague Court of Appeal
Case number: 200.302.332
Filing date: 22 March 2022

STATEMENT OF APPEAL

in the matter of:

SHELL PLC,

A company organised under foreign law and domiciled and having its registered office in London, United Kingdom,

Appellant,

Attorneys: D.F. Lunsingh Scheurleer and T. Drenth

vs

1. **VERENIGING MILIEUDEFENSIE,**
2. **STICHTING GREENPEACE NEDERLAND,**
3. **LANDELIJKE VERENIGING TOT BEHOUD VAN DE WADDENZEE,**
4. **STICHTING TER BEVORDERING VAN DE FOSSIELVRIJBEWEGING,**
5. **STICHTING BOTH ENDS,**
6. **JONGEREN MILIEU ACTIEF,**

Respondents,

Attorney: R.H.J. Cox

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1. INTRODUCTION

1.1 What this case is about

1.1.1 This Statement of Appeal contains the grounds for the appeal of Shell plc ("**Shell**"[1]) against the Judgment of the District Court of The Hague of 26 May 2021 (the "**Judgment**"[2] and "**District Court**" respectively). Before setting out those grounds, it is important to note where the parties are not divided. Shell agrees on the existence of climate change and that greenhouse gas ("**GHG**") emissions, which include carbon dioxide ("**CO_2**"), are contributing to climate change. Shell also agrees that urgent action is required to address climate change. This case is not about those matters since they are common ground. Indeed, the Shell Group[3] is transforming its business to help to drive forward the energy transition; it wants to be part of the solution.[4]

1.1.2 What does divide the parties, however, is whether, as a matter of *law*, Shell has a legally binding and enforceable obligation under Dutch civil law to reduce the emissions as reported by Shell by 45% by 2030, relative to 2019. This alleged obligation relates to the direct emissions of the Shell Group (Scope 1), emissions associated with electricity, steam, heat or cooling purchased by Shell Group companies (Scope 2), and the emissions of the Shell Group's customers, business relations and other end-users who emit CO_2 by combusting products acquired from the Shell Group (Scope 3). That question is at the heart of this case. For the reasons developed in this Statement of Appeal, Shell submits that it does not have the alleged obligation.

1.1.3 The adjudication of the claims of the Claimants (hereafter referred to as "**Milieudefensie et al.**") requires this Court to investigate (a) whether the claim for emissions reduction sought by Milieudefensie et al. can be enforced by means of a tort law action; and (b) if so, whether Shell is under a binding and

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1 Shell's name changed from Royal Dutch Shell plc to Shell plc in January 2022.

2 **Exhibit S-1**: Rb. The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337, (with docket number: C/09/571932 / HA ZA 19-379). See Rb. The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 for an English translation of the Judgment.

3 The "**Shell Group**" comprises Shell itself, together with the more than 1,000 subsidiaries ("**Group companies**") worldwide included in its consolidated financial statements. The companies in which Shell plc directly and indirectly owns investments are separate entities. In this Statement of Appeal, the expression "Shell" or "Shell Group" is sometimes used for convenience where references are made to those entities individually or collectively.

4 Shell announced the details of its own pathway to net zero by 2050 in its Powering Progress strategy in February 2021 (**Exhibit S-2**: Shell plc, 11 February 2021, *Shell accelerates drive for net-zero emissions with customer-first strategy*). In October 2021, it announced its own interim targets along that pathway, for an absolute emissions reduction for Scope 1 and 2 of 50% by 2030, compared to 2016 levels and on a net basis, covering all Scope 1 and 2 emissions under Shell's operational control (**Exhibit S-3**: Shell plc, October 2021, *Powering Progress*). At the time of filing of this Statement of Appeal, Shell's Annual Report and Accounts for the year ended December 31, 2021 (the "**2021 Annual Report**", **Exhibit S-4**: Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*), p. 12-15; 75-98) as published on 10 March 2022, contains the most recent description of Shell's Powering Progress strategy.

enforceable legal obligation to reduce emissions in terms of both scopes and percentages as sought by Milieudefensie et al.

1.1.4 Emissions reductions cannot be considered in isolation from the broader energy security and sustainable economic development considerations that are critical in, and inextricably linked to, the energy transition. Accordingly, in order to fully consider the *legal* issues in this case, the court must take account of the unique *factual* characteristics of the energy transition and the many challenges it poses, globally, to a wide range of actors, operating across a vast spectrum of sectors and countries. To achieve the objectives of the Paris Agreement, the energy transition requires an unprecedented displacement of existing energy sources and infrastructure to occur at a rapid pace, whilst at the same time meeting the needs of energy security and sustainable economic development.[5] This calls for a just and orderly transition – one that balances social, environmental, and economic considerations – to help achieve that outcome.[6] The Court thus needs to take into account ongoing policy developments at national, regional and international levels which seek to address these multi-faceted challenges. It is for these reasons that Shell addresses those factual matters in this Statement of Appeal: they are the axis on which so much of the legal submissions turn.

1.1.5 In the Judgment, the District Court ordered Shell (for both itself and the more than 1,000 Group companies that together form the "**Shell Group**") to reduce its aggregate CO_2 emissions (arising from both its own emissions and those of the products it sells to customers) by net 45% relative to 2019 by the end of 2030 (the "**Reduction Obligation**"). The District Court included in its reasoning, but not in the order itself, that Shell had an *obligation of result* with respect to the Shell Group's own emissions and was to use its *significant best efforts* to reduce the emissions outside its direct control, including the emissions of the Shell Group's suppliers, partners, customers and end-users across the globe.

1.2 The Reduction Obligation does not satisfy the requirements of a rule of unwritten law as a matter of Dutch law

1.2.1 The District Court based its Reduction Obligation on the finding that there exists an unwritten legal norm, more specifically an unwritten standard of care under Article 6:162(2) of the Dutch Civil Code ("**DCC**"). An unwritten standard of care within the meaning of Article 6:162 DCC is one that is so obvious, widely known, socially self-evident and capable of being understood that it must be and

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5 Exhibit RK-1, Paris Agreement (NL), 2015 (the "**Paris Agreement**"), see Article 4.1.

6 On the imperative of a just transition, see, for example, **Exhibit S-5**: ILO, 2015, *Guidelines for a just transition*, para 4: "*A just transition for all towards an environmentally sustainable economy, as described in this document, needs to be well managed and contribute to the goals of decent work for all, social inclusion and the eradication of poverty*"; Exhibit RK-1, the Paris Agreement (referring in the Preamble to "*the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities*"); and **Exhibit S-6**: COP26, 4 November 2021, *Supporting the Conditions for a Just Transition Internationally*.

is being observed broadly as a matter of *law* rather than conscience or even preference. Moreover, it must fit within the system of existing law and be consistent with the cases that are regulated by law.

1.2.2 Given the scale and urgency of the climate challenge, it is understandable that the Court felt prompted to find a way to assist in global efforts to reduce emissions. The imperative to take urgent action on climate change is well understood, but the District Court's decision will not help to accelerate the energy transition. This is partly because the decision is – necessarily – functionally limited since: (a) it is a judicial determination (which by its nature cannot fully account for the broader social and economic trade-offs and technical challenges, involved in addressing climate change and bringing about the energy transition); and (b) it is static in nature and therefore cannot evolve to adapt to changing circumstances. In addition, the District Court's reasoning and conclusions are unsustainable as a matter of law. The District Court did not correctly apply the legal framework in finding the existence of an unwritten law, and the Reduction Obligation does not satisfy the requirements of that framework. Neither the existence of such a rule, nor its content, is evident from any objective sources.

1.2.3 This conclusion is apparent from four key points:

(a) the individualised Reduction Obligation does not reflect the full factual context in which the energy transition occurs and is occurring;

(b) the international consensus on the need for a *general* global net 45% emissions reduction target for 2030 cannot be translated into a *specific* individual legal obligation on Shell (or any individual actor) to achieve that precise reduction across its, and its customers, emissions globally;

(c) the Reduction Obligation is not supported by (and at times conflicts with) international human rights principles and the multilateral climate change regime, as well as the law of the European Union ("**EU**"); and

(d) the imposition of a Reduction Obligation on Shell (and Shell alone) is an ineffective mechanism for reducing global emissions, thereby undermining the rationale of the Judgment. Shell turns now to explain each of these four points.

1.3 The factual characteristics of the energy transition do not support the imposition of a Reduction Obligation under Dutch law

1.3.1 First, the Reduction Obligation does not reflect the factual context in which emissions reductions, and the energy transition, occur and are occurring. To meet the goals of the Paris Agreement, the world needs rapid and deep decarbonisation in each of the sectors that contribute to global emissions. Parallel to action at the national government level, ambitious international action will be needed to drive sectoral decarbonisation, particularly for those sectors that operate across national boundaries.

1.3.2 The challenge is very different from sector to sector and country to country. Where there are clear, commercially and technically viable pathways to decarbonisation – such as renewables in the power sector or (in certain countries such as the Netherlands) e-mobility for passenger cars – markets and investments are urgently needed to deliver scale and speed. Indeed, in certain parts of the world, including Europe, mandates introduced in 2009 [7] for renewable energy use in the power sector have driven down costs to a point of parity with fossil fuels. Where commercially or technically viable pathways do not yet exist – such as key aspects of road freight transport, aviation, shipping, and heavy industry – viable technology solutions, infrastructure and markets need to be created. In other words, it is not simply about *supply* – it is vital to reform energy *demand* at the same time.

1.3.3 The IPCC's *Special Report Global Warming of 1.5°C* ("**IPCC SR1.5**") finds that it is necessary to achieve a global balance between emissions and removals by 2050 to cap the rise in global temperatures below 1.5°C (i.e. reaching "net zero").[8] Reaching the objective of net zero by 2050 will require a significant and time intensive scaling up of investment, innovation and infrastructure in the 2020s and beyond in order to mature these technologies, bring them to market and change demand behaviour in time.[9]

1.3.4 At all levels – international, regional and national – there are complex policy judgements, prioritisations and trade-offs (which have been made, and which will continue to develop) about the roles and responsibilities of different countries, sectors and actors. Those trade-offs and policy judgements have to be made in the face of constantly evolving technology and science, a dynamic geopolitical landscape, and consideration of the impact of such changes on society and local populations. They are therefore often made by, or with the close input of, those with technical expertise in climate change and socio-economic matters. The District Court was not only aware of this context but accepted, as "*not-disputed*", the following facts:

"- *(…) the worldwide reduction of CO2 emissions requires complex, global changes in society and the economy;*

- *there is no worldwide uniform approach, with a standard goal and uniform time path for reducing CO2 emissions;*

- *the worldwide reduction of CO2 emissions requires activities across various jurisdictions, which are subject to different legislative and regulatory frameworks and long-term strategies; (…)*

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7 **Exhibit S-7**: European Parliament, 2021, *Factsheet on Renewable Energy.*

8 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, C.1.1, p. 12.

9 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C, C*.2.6; D.5, p. 21-22 and **Exhibit S-8**: IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 133 and 135.

- the energy transition is beset with uncertainties;

- the precise course of the energy transition that is required to reduce CO2 emissions cannot be predicted in detail and also depends on partly unknown factors;

- the course of the energy transition will be influenced by future technological developments in various areas and sectors, whose physical and economic feasibility is not always clear beforehand;

- it is not clear beforehand how demand and supply on the energy market will develop;

- the circumstance that the energy market is not a static system;

- the key role for states in achieving the goals of the Paris Agreement through government policy;

- states will have to make difficult choices to achieve the climate goals;

- the goals of the Paris Agreement require a worldwide change in consumption patterns.

These circumstances reveal that the energy transition is a complex, multi-faceted and inherently uncertain issue, for which other parties – states and consumers – also bear responsibility."[10]

As will be explained in this Statement of Appeal, however, the District Court did not reflect this factual context properly in its legal analysis.

1.3.5 It is clear from this common ground that any pathway to reducing carbon dioxide emissions – while at the same time maintaining energy security, energy access and economic development and growth – involves complex and multi-faceted policy issues. The remaining carbon budget that is required to limit the rise in temperature to 1.5°C is diminishing, which means that this scarce budget must be allocated. Governments are best placed to determine the optimal frameworks for allocating this scarce budget, and to respond to changing circumstances such as geopolitical changes or conflicts which affect the security or affordability of energy. Indeed, only governments have the status – usually as a result of democratic and constitutional legitimacy – to make these determinations. The energy transition also represents one of the biggest technological and societal challenges in the history of mankind, requiring immense innovation, collaboration and infrastructure development. Given the nature and scale of these issues, and the need to be able to adjust to changing circumstances, the trade-offs and policy judgments involved are, and are

[10] Judgment, para. 4.4.31.

properly mandated to be, led by governmental and inter-governmental institutions having due regard to the needs of society and local populations.

1.3.6 Given this evolving context, it follows that there is no rule with the status of a legal obligation requiring a *specific* percentage reduction in emissions, by a *specific* date, by a *specific* entity, i.e., Shell.[11] The Judgment fails to explain how, in the light of the *"not-disputed circumstances"*[12] described above, the District Court could conclude as a matter of law that there existed a Reduction Obligation, viz., a legal obligation that is sufficiently self-evident and capable of being understood in the detail as accepted by the District Court so as to be "*a rule of unwritten law relating to proper social conduct*" under Article 6:162(2) DCC.

1.3.7 In reality, the District Court did not recognise an existing rule of unwritten law but instead created a policy of its own. In so doing, the District Court has itself determined the role to be played by one single energy company in the Netherlands, and globally, through to 2030. It has tried to address one of the most fundamental and challenging societal questions of our time. By doing so, the District Court lost sight of the crucial rule of law requirements of equality under the law and legal certainty. In addition to the points made at paras. 1.2.1-1.2.3 above, the District Court also did not correctly apply the Dutch legal framework in relation to finding the existence of an unwritten law. This is because the approach cuts across the Dutch and EU legislative and policy framework regarding climate change and the Supreme Court's finding in *Urgenda* that "*in the Dutch constitutional system, decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament*". Indeed, the Dutch government is actively engaged in making these decisions, with the recent Dutch 2021-2025 Coalition Agreement (the "**Coalition Agreement**") setting out the most ambitious climate targets yet. That Coalition Agreement expressly takes into account the policy trade-offs between different emissions reduction pathways, with an Appendix setting out "*how the additional emission reductions for 2030 are to be divided among sectors.*"[13]

1.4 A general global average net 45% reduction target for 2030 cannot be translated into a specific legal obligation on Shell to achieve the same precise reduction

1.4.1 Second, the serious consequences of climate change and the imperative for society to act to address it do not yield the *legal* conclusion that Shell is subject to the Reduction Obligation. In having regard to the consequences of climate change it is understandable that the District Court referenced the impact of climate change on the Netherlands and the Wadden region.[14] The District Court was also correct to note that the Intergovernmental Panel on Climate Change

[11] This is developed in the second point, at Section 1.4 below.

[12] Judgment, para. 4.4.31.

[13] **Exhibit S-9**: 15 december 2021, *Coalitieakkoord 2021-2025*.

[14] Judgment, para. 4.4.6.

("**IPCC**") found that there is "*a widely endorsed consensus that in order to limit global warming to 1.5°C, reduction pathways that reduce CO2 emissions by net 45% in 2030, relative to 2010 levels, and by net 100% in 2050, should be chosen*."[15]

1.4.2 However, this *general* global average net 45% reduction target for 2030 cannot be translated into a *specific* legal obligation on Shell to achieve that precise reduction across its, and its suppliers' and customers', emissions globally. This leap from a *general* global target to a *specific* civil law obligation on an individual company is unprecedented not just in the Netherlands, but anywhere in the world. It is not supported by any national, regional or international policies, principles or consensus. In particular:

(a) None of the existing policies aimed at mitigating emissions (nationally or internationally) envisages the setting of *specific* percentage targets for the emissions reductions of any *individual* private actor. Nor does the Paris Agreement or any other international or soft law instrument.

(b) The District Court's leap from a *general* global emissions target to a *specific* legal obligation on one company has conceptual and practical deficiencies, which render the scope and content of the Reduction Obligation unclear. For example: who else does the rule apply to? Does it apply only to "*large emitters*"?[16] If so, how are these defined and by whom? Does the same reduction percentage, by the same date, apply to these entities? And to their global operations? These are questions which go to the core of establishing the existence of what is required to be a "self-evident" unwritten rule of conduct, yet the Judgment does not grapple with, let alone answer, these fundamental questions. It also does not consider the rule of law consequences, e.g., for certainty and equality before the law, of the Reduction Obligation.

(c) The leap from a *general* global target to a *specific* legal obligation on an individual company also fails to take account of the multiple pathways that governments are using (or may use) in order to achieve emissions reduction targets across the entire economy (and consequently society as a whole), any combination of which may affect the extent or pace of emissions reductions required in the use/consumption of oil and gas generally, and the Shell Group specifically. For example:

(i) The Dutch government has chosen a pathway that prioritises emissions reductions by prohibiting coal-firing in power plants after 2030 (*Wet verbod kolen bij elektriciteitsproductie*), while electing not to significantly decrease oil use until at least 2030. This is because, in the power sector, less carbon intensive alternatives such as gas and renewables exist whereas oil will

[15] Judgment, para. 4.4.29.

[16] **Exhibit S-10**: Milieudefensie, 13 January 2022, *Letter to CEOs: De wereld is veranderd. Nu u nog.*

continue to serve as the dominant fuel for harder to abate sectors such as transport and the chemicals industry, where the requisite technology and infrastructure is not yet in place.[17]

(ii) The EU's proposed "Fit for 55" package sets out an economy-wide pathway for achieving a 55% reduction in EU emissions by 2030, compared to 1990 levels ("**EU Fit for 55**"). To achieve this *average* 55% reduction, the EU's pathway specifically envisages different emissions reduction pathways for different sectors, with the European Commission's impact assessment envisaging a reduction in transport sector emissions (which account for a significant proportion of Scope 3 emissions reported by the Shell Group)[18] by 21 – 22% of 2015 levels by 2030 (compared with 64 – 67% for power generation).[19] This illustrates why the imposition of an *average* emissions reduction target on an *individual company* does not reflect the reality of an economy-wide transition pathway; as pathways necessarily differ depending on the energy mix of a company, and the sectors in which it operates.

(iii) The International Energy Agency's ("**IEA**") May 2021 Net Zero Emissions ("**NZE**") scenario envisages a global net 41% reduction in 2019 emissions across all sectors by 2030.[20] Achieving this 41% *average* reduction scenario envisages a ~35% reduction in emissions from oil combustion, and ~18% reduction in emissions from gas combustion, compared to a ~60% reduction in emissions from combustion of coal.[21]

1.4.3 As these examples illustrate, the energy transition will not occur at the same pace across all sectors in the economy, or for all energy sources. After all, some energy sources emit more CO_2 per unit of energy produced, than others (i.e. they are more carbon intensive).[22] Furthermore, the relative pace of sectoral change will vary depending on the particular circumstances of each country or region, and the technology solutions available for the sector. Moreover, the energy sector is not the only area in which change is required, with

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17 **Exhibit S-11**: Ministry of Economic Affairs and Climate Policy, November 2019, *Integral National Energy and Climate Plan 2021-2030.*

18 See para. 2.3.8.

19 **Exhibit S-12**: European Commission, 14 July 2021, *Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652,* SWD(2021) 621, Part 2, p. 115.

20 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, based on Annex A Data.

21 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, based on Annex A Data.

22 See para. 2.2.12(a) below.

approximately 27% of greenhouse gas emissions coming from sources other than energy use (such as agriculture, waste, industry (e.g., chemicals and cement), forestry and other land uses).[23]

1.4.4 It follows that the imposition of a specific Reduction Obligation on a single company at a level which is directly transposed from a global average emissions reduction target interferes with the ability of those countries to pursue the pathways they consider best for their population. For example, it interferes with the ability of the Shell Group to contribute to the choice made by certain countries to transition from coal to gas. Thus, the possibility for such countries to make their own choices is also (indirectly) undermined. After all, the Reduction Obligation effectively requires emissions from the Shell Group's main energy products (i.e., oil and gas), and the sectors in which those energy sources are most common, to reduce on the same *average* pathway which applies to all sectors and energy sources combined (i.e., including coal). This is not aligned with the EU Fit for 55 pathway or the IEA's NZE scenario. Nor is the Reduction Obligation necessarily aligned with the many other possible pathways which governments around the world may select having regard to their specific circumstances. This lack of alignment shows why the Reduction Obligation is not an effective or meaningful way to bring about an effective pathway to – eventually – net zero.

1.4.5 Given these different pathways, governments are able to balance interests across the entire society through policies such as cap and trade systems, mandates, targets, subsidies and taxes on the supply and demand side. Governments can also adapt their policies to new developments and changing circumstances. This dynamic balancing act cannot be implemented through absolute and inflexible targets on individual actors imposed by courts at the request of certain interest groups or private individuals.

1.4.6 To this end, Shell supports the EU's transition to climate neutrality by 2050 and the 2030 GHG emissions reduction target of at least 55% as set out in the European Climate Law. Alongside other industry partners Shell called on the European Commission to "*show more ambition and determination when it comes to making Europe's energy system fit, already for 2030*" in advance of the EU Fit for 55 announcement.[24] Shell Nederland was also the first large industrial party to sign the Dutch Climate Accord.[25]

1.4.7 In addition to its support of EU and Dutch initiatives, Shell actively supports Government led-policies to reduce emissions across society and transition the

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[23] **Exhibit S-13**: Our World in Data, 18 September 2020, *Sector by sector: where do global greenhouse gas emissions come from?*

[24] **Exhibit S-14**: CEOs and members of the European Parliament, 8 July 2021, *Open letter to Ms. Ursula von der Leyen, President, European Commission and Executive Vice President Commissioner Timmermans, Call for a massive acceleration of capacity build-up of renewable energy in Europe*.

[25] Exhibit RO-92, Marjan van Loon, 12 September 2019, *Letter on behalf of Shell Nederland to Ed Nijpels, chairman of the Climate Council*.

energy system.[26] For example, Shell supported the UK's ban on the sale of internal combustion engine vehicles from 2030, and called for the UK to bring this measure forward from its originally proposed 2040 timeframe.[27] Shell has also put in place global policy positions on climate and energy transition in line with its Powering Progress strategy, which serve as a global framework for its advocacy with governments, international organisations, industry associations, coalitions, and other stakeholders globally, regionally and within countries. These policy positions reflect a belief that the world needs to rapidly decarbonise each of the key sectors that contribute to global emissions (which will take ambitious action at all levels of government, and by industry and consumers around the world), and a need to ensure that the economic and social benefits of the energy transition are inclusive and distributed in a fair way.[28]

1.5 International and EU law, and other international instruments relied on by the District Court, do not support the existence of the Reduction Obligation

1.5.1 Third, in addition to being contrary to the Dutch legal framework regarding unwritten rules of law (as set out at Sections 1.2 and 1.3 above), the Reduction Obligation is not supported by, and at times interferes or conflicts with, international and EU law. The District Court's reliance on non-legally binding international instruments is also incorrect. Specifically:

(a) International human rights law and related comparative law materials do not support the existence of a Reduction Obligation, including because:

(i) The Judgment did not explain the basis on which the European Convention on Human Rights ("**ECHR**"), a treaty entered into by and binding on States, was factored into the Court's analysis of Article 6:162(2) DCC. The human rights obligations articulated in the ECHR apply to States and cannot be directly applied to private actors. Nor did the Judgment explain how the ECHR could be "factored in" in deciding whether the Reduction Obligation exists as an unwritten rule.

(ii) In any case, the substantive, general content of the rights reflected in Articles 2 and 8 of the ECHR (the right to life and the right to respect for private and family life respectively) do not support the existence of the specific and individualised Reduction Obligation on Shell.

(iii) Articles 2 and 8 of the ECHR do not lend themselves to be "factored in" in Article 6:162(2) DCC. The European Court of

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[26] For Shell's own transformation to become a net-zero emissions company as part of its global Powering Progress strategy, see Exhibit S-2, Shell plc, 11 February 2021, *Shell accelerates drive for net-zero emissions with customer-first strategy.*

[27] **Exhibit S-15**: Shell plc, *Cleaner Transport*. **Exhibit S-16**: A. Vaughan, 5 July 2018, 'Shell would support UK bringing forward petrol ban from 2040', *The Guardian*.

[28] **Exhibit S-17**: Shell plc, 28 October 2021, *Shell's Global Climate and Energy Transition Policy Positions*.

Human Rights has observed that cases involving environmental issues are likely to give rise to difficult social and technical issues and, therefore, the European Court of Human Rights often refers to the need to give the State a wide margin of appreciation in assessing the best policy in such instances. Hence, applying that margin of appreciation means that the courts should not attempt to define an unwritten civil law obligation between private parties based on Article 6:162(2) DCC by means of "factoring in" Articles 2 and 8 of the ECHR. The proper application of the ECHR does not, therefore, support the unwritten rule as accepted by the District Court.

(iv) The approach taken by courts in non-ECHR cases regarding climate change reflects a similar approach to the wide margin of appreciation given in ECHR cases.

(b) Business and human rights frameworks do not support the existence of a Reduction Obligation, including because:

(i) The District Court drew legal conclusions from the UN Guiding Principles on Business and Human Rights ("**UNGP**") that are neither warranted nor substantiated.

(ii) Shell's approach to human rights is informed by international instruments, including the UNGP.[29] However, the District Court treated the general normative policy framework reflected in the UNGP as containing specific legal obligations, which is contrary to the object and purpose of the UNGP and their express terms.

(iii) Further, the Judgment did not explain how the UNGP are said to lead to the identification of the Reduction Obligation.

(iv) In attempting to apply the *general* framework of corporate responsibility to respect human rights in the UNGP to the *specific* context of climate change, the District Court incorrectly held that Shell has a legal obligation to reduce emissions based on the UNGP.

(c) The multilateral climate change regime does not support the existence of a Reduction Obligation, including because:

(i) The framework of the Paris Agreement provides discretion to governments to determine their individual emissions reduction pathways, and the imposition of the Reduction Obligation on Shell interferes with the discretion accorded to the Dutch

[29] Shell publicly sets out its support for the UNGP and a number of voluntary codes on its website, and its approach is informed by the UNGP. See e.g., **Exhibit S-18**: Shell plc, 7 April 2021, *Shell's Sustainability Report*, p. 76.

government, and indeed other governments (in countries where the Shell Group operates), under this framework.

(ii) The global consensus relating to *general* global temperature targets that is embodied in the Paris Agreement does not mean there is similar global consensus relating to a *specific* emissions reduction obligation for a *specific* entity. There is not.[30]

(iii) The IPCC's scientific consensus on the *average* emissions reduction levels required to *limit global warming to 1.5°C* does not, and was not intended to, establish a consensus about the specific required contribution of any individual State, sector or company in the period to 2030. This was not within its remit, and there are a range of global emissions reduction pathways – developed by those with technical expertise in climate change – capable of limiting global warming in line with the IPCC's consensus.

(d) EU law does not support the existence of a Reduction Obligation, including because:

(i) The Reduction Obligation hinders the free movement of goods in a manner prohibited by Article 34 of the Treaty on the Functioning of the European Union ("**TFEU**"), and such restrictions cannot be justified according to the standards established under EU law.

(ii) The Reduction Obligation undermines EU law and policy in fundamental respects contrary to the obligation on Member States in Article 4(3) TEU, to "*facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*." This is because the Reduction Obligation: (a) restricts Shell's ability to compete with its rivals and does so in a manner that is inconsistent with the internal market principle of economic freedom; and (b) undermines the EU legal and policy framework concerned with climate change.

1.6 The Reduction Obligation is an ineffective mechanism for reducing global emissions

1.6.1 Fourth, the imposition of a Reduction Obligation on Shell (and Shell alone) is an ineffective mechanism for reducing global emissions, thereby undermining the underlying rationale of the Judgment. Although the purpose of the District Court's Reduction Obligation is to address climate change by contributing to the reduction of global emissions – and Shell understands, and shares, the District

[30] See Section 5.1.

Court's desire to make such a contribution – in practice the Reduction Obligation does not achieve that aim.

1.6.2 The energy transition requires changes on both the supply-side and demand-side, and both must move together in order to achieve the global emissions reductions required. Shell announced the details of its own pathway to net zero by 2050 in its Powering Progress strategy in February 2021.[31] Shell also announced in October 2021 its new targets for absolute emissions reduction for Scope 1 and 2 of 50% by 2030, compared to 2016 levels and on a net basis, covering all Scope 1 and 2 emissions under Shell Group companies' operational control.[32] Shell is actively working with customers to support changes to their energy profiles,[33] but changing demand-side infrastructure, and the energy choices made by the Shell Group's customers, requires a coordinated, society-wide, approach extending beyond the Shell Group. In particular, the District Court's approach is ineffective in reducing emissions because:

(a) Whilst reductions in the Shell Group's own sales or production that go further than the reduction in demand will lead to a decline in the Shell Group's reported emissions in the countries and sectors where it supplies customers, this is unlikely to lead to a reduction in global emissions. This is because basic market economics provides that a reduction in the Shell Group's sales will – because of the continuing demand – be replaced by other market participants on the supply-side who will meet the ongoing demand and thus maintain existing *global* emissions. This is particularly the case for those "harder to abate" sectors for which there is as yet no viable and scalable alternative source of fuel, for which significant infrastructure changes are required (particularly in the lead-up to 2030). The Reduction Obligation therefore potentially requires Shell to reduce its emissions by exiting markets or reducing the size of its business, rather than by helping customers to decarbonise and changing the overall mix of energy that it supplies.

(b) The ineffectiveness of the District Court's Reduction Obligation is most obvious in the context of Scope 3 emissions.[34] While the Shell Group has no obligation to do so, and indeed many companies do not, the Shell Group voluntarily reports on Scope 3 emissions. However, such voluntary reporting was not designed to provide a basis for a legally

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31 Exhibit S-3, Shell plc, October 2021, *Powering Progress*. The District Court did not take into account the Powering Progress strategy when ruling on this matter, because in the finding of fact, the court only used the developments up until 13 January 2021 (see Judgment, para. 2, first sentence). From this strategy and from what is stated in this Statement of Appeal about the activities of Shell and the Shell Group, it follows that the activities of the Shell Group are broader than those described by the District Court at para. 2.2.3. Insofar as the District Court meant to provide a full description of the activities of Shell and the Shell Group in that finding, the description is therefore incorrect.

32 **Exhibit S-19**: Shell plc, 28 October 2021, *Our Climate Target*, p. 2.

33 See Section 8 below, esp. 8.4.

34 A more detailed explanation of Scope 3 emissions is contained in Section 8.

binding Reduction Obligation, nor – for the reasons explained in Section 8 – is it an appropriate metric for this purpose. Indeed, as will be explained below, reductions in global CO_2 emissions may correspond with certain components of the Scope 3 emissions reported by the Shell Group remaining constant or even increasing in the short to medium term. In this sense, global CO_2 emissions are not directly tied to the Scope 3 emissions reported by Shell. This also explains why - as explained in further detail in Section 2 – an emissions intensity target[35] can provide a more meaningful metric than an absolute emissions reduction obligation (as imposed on Shell by the District Court) for measuring Shell's (or any other energy company's) contribution to the progress of the energy transition.[36]

(c) For example, to the extent that the Shell Group's customers purchase gas to displace a more carbon intensive fuel such as coal, which will lead to an overall decrease in global emissions, the Scope 3 emissions reported by the Shell Group may stay constant or even increase in the short to medium term. This may be a necessary part of overall emissions reduction pathways in sectors or countries where existing technology or resources do not allow short to medium term substitution of hydrocarbons. For example, the use of gas is likely to be necessary[37] in the short to medium term for power production in major developing countries such as China (which is Shell's largest single market for Liquid Natural Gas ("**LNG**") sales, as it seeks to support China's transition away from coal), but also in Germany and Belgium where both nuclear power production and coal fired power production are to be phased down in parallel.

1.6.3 In light of these deficiencies in the Judgment and the District Court's Reduction Obligation, Shell presents the case for full review to the Court of Appeal, with the sole exception of the District Court's findings in paras. 5.1 and 5.2 of the Judgment regarding admissibility and the parts of para. 4.2 of the Judgment which form the underlying grounds for those findings. This means that Shell maintains its defences as raised against Milieudefensie et al.'s claims as those were raised in the first instance in full and respectfully requests a re-evaluation of those defences.

1.6.4 The remainder of this Statement of Appeal is structured as follows:

(a) Section 2 describes the factual context of this case, in which the legal analysis is rooted and which is central to an assessment of Milieudefensie et al.'s claims and Shell's defences.

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35 Carbon intensity expresses the amount of emissions per unit of energy produced by a given source and is expressed in grams of CO_2 equivalent per megajoule (gCO_2e/MJ).

36 See paras. 2.3.12 - 2.3.16.

37 **Exhibit S-20**: IEA, July 2019, *The Role of Gas in Today's Energy Transitions*, p. 13-14.

(b) Section 3 explains the Dutch legal framework regarding Article 6:162 DCC, why the Judgment does not properly apply that framework and why, therefore, the Reduction Obligation is not an unwritten law.

(c) Section 4 explains that international human rights law, related comparative law and international materials regarding business and human rights do not support the existence of the Reduction Obligation.

(d) Section 5 explains that international climate law, related international materials and comparative law do not support the existence of the Reduction Obligation.

(e) Section 6 explains that EU law does not support the existence of the Reduction Obligation.

(f) Section 7 brings together the points from Sections 2 - 6 to show that there is no rule of unwritten law under Article 6:162 DCC in the form of a Reduction Obligation with respect to the Scope 1, 2 and 3 emissions reported by Shell.

(g) Section 8 contains additional reasons why the Reduction Obligation does not exist with respect to the Scope 3 emissions reported by Shell.

(h) Section 9 provides further reasons why the court order sought by Milieudefensie et al. cannot be awarded.

(i) Section 10 lists Shell's grievances against specific findings in the Judgment, and substantiates each grievance, referring back to the arguments and grievances already raised in Sections 1 - 9 where necessary.

(j) Section 11 contains an offer to furnish proof and some remarks on the duty to adduce facts and the allocation of the burden of proof.

2. THE IMPOSITION OF THE REDUCTION OBLIGATION DOES NOT SUPPORT THE GLOBAL ENERGY TRANSITION

2.1 The practicalities of the energy transition and the many challenges it poses should be taken into account by the Court

2.1.1 As outlined at Sections 1.1 and 1.3 above, in order for the Court to consider the relevant *legal* issues in this case the Court needs to take account of the unique *factual* characteristics of the energy transition and the many challenges it poses, globally, to a wide range of actors, operating across a vast spectrum of sectors and countries. This Section therefore outlines key factual elements of the energy transition in order to inform the Court's assessment of the legal issues involved in this case.

2.2 The energy transition requires transformation of the global energy system

2.2.1 The need for energy is deeply enmeshed with all aspects of human activity across society. Energy powers economies and the everyday lives of ordinary people. Without energy, our way of life would be unrecognisable. Yet worldwide, predominantly in the global south, 2.6 billion people still lack access to the modern energy[38] many of us take for granted.

2.2.2 Global society is faced with two immense energy-related challenges.

2.2.3 First, ongoing global energy use needs to be accompanied by net-zero emissions of GHG within the next three decades.[39] There is a diminishing global "carbon budget" (i.e. the quantity of emissions possible over a specified time period while remaining within a specified level of global warming).[40] The Paris Agreement sets a collective objective that States act to "*keep the rise in global average temperature to well below 2°C [...] and to pursue efforts to limit the temperature rise to 1.5°C.*"[41]

2.2.4 Second, global energy supply needs to satisfy the energy security and sustainable development requirements of the world's growing population. The world's population has more than doubled in the last half century and is set to continue rising for decades.[42] Access to energy is inseparable from the livelihoods and development of a global population that is set to grow by 2

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38 **Exhibit S-21**: IEA, 2020, SDG7: *Data and Projections.*

39 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, Summary for Policymakers, C.1.1. p. 12 found it is necessary to achieve a global balance between emissions reductions and carbon dioxide removals by 2050 to cap the rise in global temperatures below 1.5°C.

40 **Exhibit S-22**: A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, Appendix 1, Glossary. As the author notes, his statement is his own independent expert opinion and does not represent the views of Imperial College London, Imperial Consultants or of any other organisation he is associated with (see at para. 1.6 of Exhibit S-22).

41 Exhibit RK-1, *Paris Agreement*, Article 2.1(a).

42 See **Exhibit S-23**: United Nations, *Global Issues: Population*; and **Exhibit S-24**: IEA, 2021, *World Energy Outlook 2021*, p. 328.

billion people by 2050, with "*rising incomes pushing up demand for energy services, and many developing economies navigating what has historically been an energy- and emissions-intensive period of urbanisation and industrialisation*".[43] Although populations around the world consume energy at vastly different levels and in different ways, more people will naturally aspire to achieve at least a decent material quality of life.[44]

2.2.5 These multi-faceted challenges require a co-ordinated approach; and governments need to ensure energy security, access to affordable energy, and facilitate economic development.[45]

2.2.6 At the same time, the carbon budget is scarce and needs to be rationed and allocated by governments to balance immediate energy needs with urgent climate goals.

2.2.7 The World Economic Forum ("**WEF**"), in its Fostering Effective Energy Transition Report, uses the concept of the "energy triangle" to frame the three objectives central to energy architecture: the ability to provide a (i) *secure* and (ii) *environmentally sustainable* energy supply that is able to (iii) *support economic development and growth*.[46]

2.2.8 The WEF Report emphasises the important balancing act within the energy triangle by defining an effective energy transition as "*a timely transition towards a more inclusive, sustainable, affordable and secure energy system that provides solutions to global-energy-related challenges, while creating value for business and society, without compromising the balance of the energy triangle*."[47]

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43 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, p. 15.

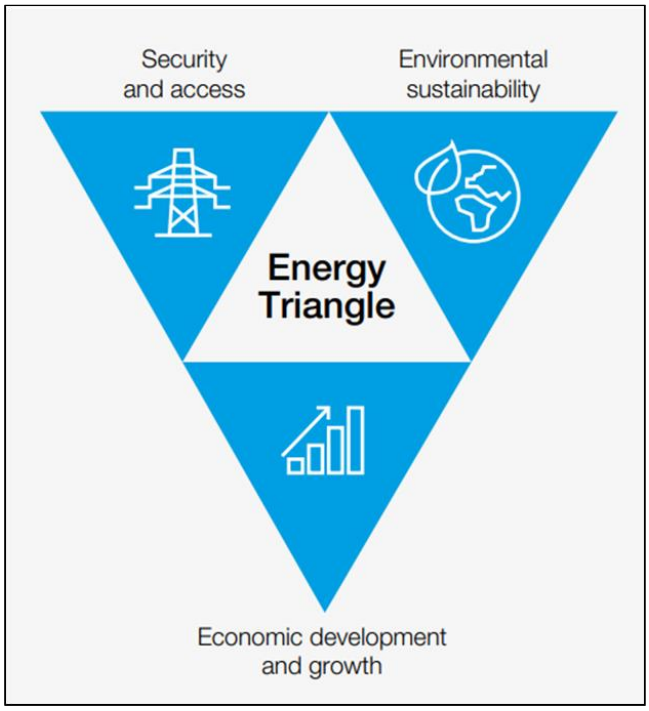
44 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, see e.g., para. 6.1.2.

45 Exhibit RO-5, United Nations, 2015, *UN Sustainable Development Goals*.

46 **Exhibit S-25**: World Economic Forum, April 2021, *Fostering Effective Energy Transition*, p. 11.

47 *Ibid*. at p. 11.

Figure 1: The Energy Triangle[48]



2.2.9 Achieving this balancing act requires the effort and participation of States, non-State entities (including businesses), and individuals in the coming decades.

2.2.10 As Figures 2 and 3 below demonstrate, previous energy transitions – from a global economy fuelled by traditional biomass (wood, peat, dung) to modern industrial economies powered by fossil fuels across much of the world – involved new sources of energy building on top of previous forms of energy, transitioning over generations.

[48] *Ibid.* at p. 11.

Figure 2: Total Primary Energy Use[49]

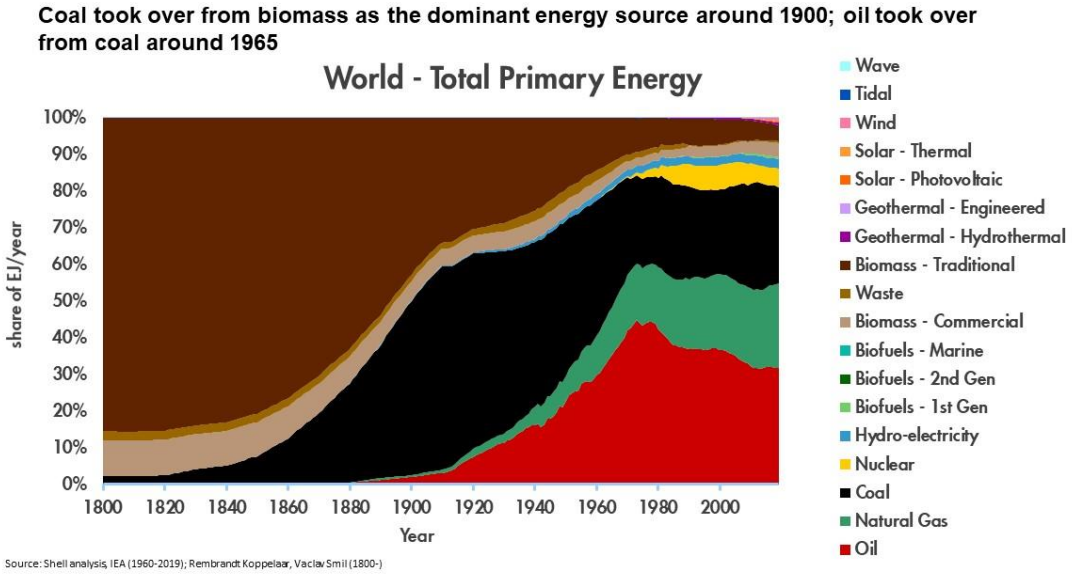
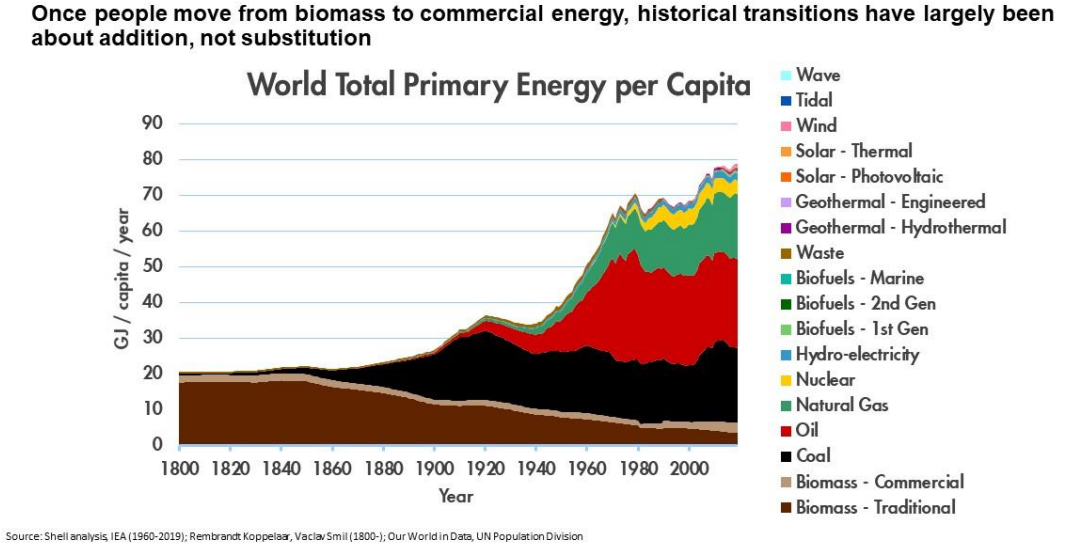


Figure 3: Per Capita Energy Use[50]



2.2.11 The current energy system has evolved around the combustion of fossil fuels. In 2020, oil accounted for 30% of the world's total energy supply, while coal

[49] **Exhibit S-26:** Based on data from IEA, *UN Population Division and Our World in Data*.

[50] Exhibit S-26, Based on data from IEA, *UN Population Division and Our World in Data*.

supplied 26% and natural gas 23%.[51] Since oil, coal and gas fulfil almost 80% of the world's energy needs, our economies and societies rely heavily on the use of fossil fuels. With rising populations and increased standards of living, demand for oil, gas and refined products is growing in the developing world. There is no readily available alternative energy source or infrastructure to immediately replace them. Indeed, these fuels are still intimately intertwined in national, regional and international development strategies, global politics, energy security and access, and the operation of national economies. This means that one-dimensional measures (such as only reducing supply of hydrocarbons without corresponding demand-side changes) can lead to undesirable results such as higher prices, which can prove regressive, thus undermining the principle of a just transition.[52]

2.2.12 It is widely accepted that oil and gas will inevitably continue to play a significant role in modern society until well beyond 2030[53] – both in the energy system itself, as well as in a range of other industries from pharmaceuticals to consumer goods where petroleum-derived products are "*deeply embedded throughout modern life*".[54] This is due to, amongst other things:

(a) **the short to medium term goal to end the use of coal, which is a more carbon-intensive energy source than oil or gas**[55]

Not all hydrocarbons have the same emissions profile, and so the metric of 'carbon intensity' can be used to compare the emissions caused by different energy sources (such as coal, gas and oil).[56] Carbon intensity expresses the amount of emissions per unit of energy produced by a given source and is expressed in grams of CO_2 equivalent per megajoule (gCO_2e/MJ). [57] For example, natural gas emits 50% fewer GHG emissions than coal when used to generate electricity, according to IEA data.[58]

This means that, in the short to medium term, transitioning power production from coal to gas can substantially reduce the carbon intensity

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51 Exhibit S-8, IEA, October 2021, *Net Zero by 2050, 4th Revision,* p. 57.

52 For the concept of a "just transition" see footnote 6 above.

53 See for example, Exhibit S-8, IEA, October 2021 *Net Zero by 2050*, 4th Revision, p. 101. See also Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.1.

54 Similarly, pending technological developments as part of the energy transition, other petroleum-derived products that are "*deeply embedded throughout modern life*" will continue to rely on oil and gas - including fertilizers, plastics (such as cell phone cases and glasses frames), medical equipment (including PPE) and pharmaceuticals (such as the lipids in the Pfizer and Moderna vaccines) – See **Exhibit S-27**: D. Yergin, 27 November 2021, 'Why the Energy Transition Will Be So Complicated', *The Atlantic*.

55 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, Section 1.7 starting at p. 57.

56 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.4.

57 Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report 2020*, p. 35.

58 Exhibit S-20, IEA, July 2019, *The Role of Gas in Today's Energy Transitions*, p. 4.

of a sector (and as described below, this is a key element of recognised emissions reduction scenarios such as the IEA NZE scenario and EU Fit for 55).[59]

(b) **the role which gas play in certain developing economies**

Gas can play a particularly important role in the energy transition in some developing countries, where carbon intensive energy sources such as coal remain a major part of primary energy demand. In India for example, coal comprised 44% of primary energy demand in 2019, with gas comprising just 6% – among the lowest in the world.[60] India has a stated ambition to increase the share of natural gas in its primary energy mix to 15% by 2030,[61] with the IEA noting that while "*the role for gas varies by sector, by scenario and over time*" natural gas "*can find multiple uses in India's energy system, including to help meet air quality and near term emissions goals if supply chains are managed responsibly*."[62]

(c) **the interdependence between gas and electricity security will continue for some time**

Gas is expected to retain a major role as a source of flexibility and back-up for many years to come, especially in economies – such as Europe – that have large seasonal variations in demand.[63] Given its transportable nature, LNG can be a particularly useful fuel for providing this flexibility for the energy system.

In addition, natural gas can play an important role in supporting an increased share of renewables in electricity supply.[64] This is because renewable electricity – such as wind and solar – is dependent on weather conditions, resulting in some intermittency of supply. Natural gas can therefore provide a "system balancing" function by ensuring security of supply at times when renewable generation is insufficient to satisfy system demand.[65] Gas has been used in this role in the UK for example, where gas-fired power generation has been used to fill shortfalls in

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59 See Section 2.3 below.

60 **Exhibit S-28**: IEA, 2021, *India Energy Outlook 2021*.

61 *Ibid*. at p. 37.

62 *Ibid*, at p. 15.

63 **Exhibit S-29**: F. Birol (IEA), 13 January 2022, *Europe and the world need to draw the right lessons from today's natural gas crisis*.

64 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, paras. 8.7-8.9.

65 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.8.

supply when low wind levels result in insufficient supply from wind generation.[66]

2.3 There are multiple reduction pathways to a net-zero society

2.3.1 Following its introduction at the 1992 Earth Summit in Rio, the UN Framework Convention on Climate Change ("**UNFCCC**") entered into force in 1994. Within the framework of the UNFCCC, contracting States meet regularly at the Conference of the Parties ("**COP**") to discuss climate change. These COPs have resulted in subsequent international instruments including the Kyoto Protocol in 1997 and the Paris Agreement in 2015 (COP21).

2.3.2 In the Paris Agreement, States agreed to "*keep the rise in global average temperature to well below 2°C* [...] *and to pursue efforts to limit the temperature rise to 1.5°C*".[67] In order to meet this important objective, the focus of the Paris Agreement is on the mitigation of GHG emissions, adaptation measures to address the adverse effects of climate change that cannot be avoided through mitigation, and the provision of support – in terms of finance, technology and capacity building – to enable developing States to meet their commitments. The international commitment to the objectives of the Paris Agreement, and the collective role of society in reaching those goals, was confirmed in 2021 in the Glasgow Climate Pact.[68] The Paris Agreement provides a coordinated system of GHG reduction targets for individual States in the form of so-called Nationally Determined Contributions ("**NDCs**" or "**NDC**").[69] In their NDCs, States communicate actions they will take to reduce their GHG emissions in furtherance of the goals of the Paris Agreement. Such climate policies are intended to be revisited regularly (and, since the Glasgow Climate Pact, annually) and in line with the latest science available (in contrast to the Reduction Obligation which is fixed).[70]

2.3.3 The Paris Agreement and the Glasgow Climate Pact recognise the need for a "*just*" transition and the provision of support to developing countries;[71] they also both recognize that the energy transition will involve different reduction paths, as reflected in the requirement on States to set, and review periodically, their individual NDCs.[72]

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66 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.8; and **Exhibit S-30**: I. Staffell et al., Q1 2021, *Electric Insights Quarterly*, p. 10-11.

67 Exhibit RK-1, the Paris Agreement, Article 2.1(a).

68 **Exhibit S-31**: United Nations Framework Convention on Climate Change, 13 November 2021, *the Glasgow Climate Pact*, 26th Conference of the Parties Decision -/CP.26 (the "**Glasgow Climate Pact**"), Part VIII.

69 Exhibit RK-1, the Paris Agreement, Article 4(2).

70 Exhibit S-31, the Glasgow Climate Pact, Article 1; and Exhibit RK-1, the Paris Agreement, Article 4(1).

71 Exhibit RK-1, the Paris Agreement, preamble; and Exhibit S-31, the Glasgow Climate Pact, Articles 20 and 52.

72 Exhibit RK-1, the Paris Agreement, Articles 3 and 4(2); and Exhibit S-31, the Glasgow Climate Pact, Article 20.

2.3.4 Following the adoption of the Paris Agreement, intergovernmental organisations such as the IPCC and IEA have developed various reduction scenarios, based on scientific research and analysis. These scenarios translate the goals of the Paris Agreement into what is required, practically, to meet these goals and to aid government climate policy. Notably, the IPCC published (i) IPCC SR1.5 in October 2018, (ii) the Sixth Assessment Report (Working Group I contribution) in August 2021,[73] and (iii) the Sixth Assessment Report (Working Group II contribution) in February 2022.[74] In October 2021, the IEA published its *World Energy Outlook 2021,* which analyses global energy supply and demand in different scenarios, including the IEA NZE scenario.

2.3.5 IPCC SR1.5 explains that the goals of the Paris Agreement can be achieved in a "*variety of ways*", through "*multiple options and choices*".[75] These different pathways to achieving the 1.5°C Paris Agreement climate goal (including those contained in the IEA's NZE scenario) indicate a range of global reductions in energy-related emissions achieved by 2030.

2.3.6 Governments have a collective objective under the Paris Agreement to choose pathways consistent with the carbon budget,[76] and they (and only they) have the status (e.g. democratic legitimacy) to make the difficult choices in determining how to divide this narrow budget between sectors/energy sources whilst ensuring a secure, reliable and affordable supply of energy and economic development for everyone. The various reduction pathways show that there is no single pathway that can be applied to States, businesses and other actors across the board. These are considered in detail below.

2.3.7 The carbon budget ties each of these pathways together; each pathway acknowledges that the carbon budget is limited,[77] and the world needs rapid and deep emissions reductions in each of the sectors that contribute to global GHG

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73 IPCC, 7 August 2021, *Climate Change 2021: The Physical Science Basis*, Cambridge University Press.

74 IPCC, 27 February 2022, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Cambridge University Press.

75 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 276 and p. 112-113.

76 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 33: "*Staying within a remaining carbon budget of 580 GtCO2 [medium confidence of limiting warming to 1.5°C] implies that CO2 emissions reach carbon neutrality in about 30 years*".

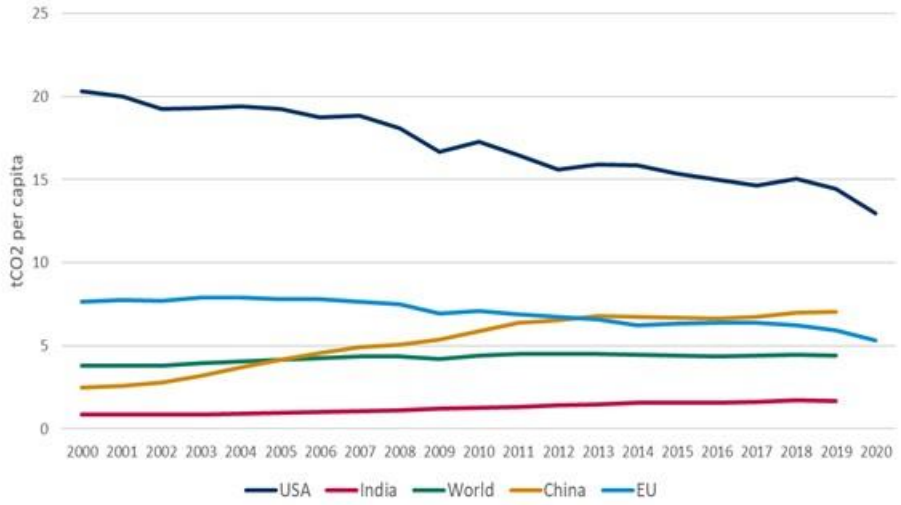
See also Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 62-3, "*The IPCC SR1.5 includes 90 individual scenarios that have at least a 50% chance of limiting warming in 2100 to 1.5 ° C (IPCC, 2018). Only 18 of these scenarios have net – zero CO2 energy sector and industrial process emissions in 2050. In other words, only one – in five of the 1.5 ° C scenarios assessed by the IPCC have the same level of emissions reduction ambition for the energy and industrial process sectors to 2050 as the NZE.*"

77 The IPCC acknowledges that the carbon budget may be overshot in the medium term in pathways consistent with 1.5°C per Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 122: "*Because of the tighter remaining 1.5°C carbon budget, and because many pathways in the literature do not restrict exceeding this budget prior to 2100, the relative weight of the net negative emissions component of CDR increases compared to 2°C-consistent pathways*".

emissions. In all cases, the reduction will not be uniform across countries and economic sectors, including because:

(a) Many emerging market and developing economies are entering what has historically been an energy and emissions-intensive process of urban expansion, infrastructure development and industrialisation.[78] Advanced economies must reach net zero before emerging markets and developing economies, and assist others in getting there.[79] As Figure 4 illustrates, there are also substantial variations in current per capita CO_2 emissions between countries, further reinforcing the fact that the pace and scale of CO_2 emissions reductions will necessarily vary between countries.

Figure 4: CO2 emissions per capita in selected countries and regions (IEA), 2000-2020[80]



(b) In economic sectors, the fastest and largest reductions in global emissions in the IEA NZE scenario are initially seen in the electricity sector (60% between 2020 and 2030), mainly due to major reductions from coal-fired power plants. Emissions from industry and transport both fall by around 20% between 2020 and 2030. Their pace of emissions reductions accelerates during the 2030s as the roll-out of low-emissions fuels and other emissions reduction options is scaled up.[81] Within the transport sector itself, transport modes do not decarbonise at the same rate because technology maturity varies markedly between them. Many of the technologies needed to reduce CO_2 emissions in long

78 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, p. 15.

79 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 53 and Exhibit RK-1, the Paris Agreement, Article 9.

80 IEA, 28 October 2021, *CO_2 emissions per capita in selected countries and regions, 2000-2020*.

81 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 54.

distance transport are currently under development and do not start to make substantial inroads into the market until after 2030.[82]

(c) Similarly, the EU Fit for 55 core scenarios envisage that, in order to achieve an *average* 55% reduction target by 2030 (compared to 1990 levels), sectors will reduce emissions at different rates; with the European Commission's impact assessment envisaging a reduction in transport sector emissions (which account for a significant proportion of Scope 3 emissions reported by the Shell Group) by 21 – 22% of 2015 levels by 2030, compared with 64 – 67% for power generation.[83] A key reason for these differences is that, compared to other sectors, the power generation sector has a relatively greater reliance on coal (a particularly emissions intensive energy source), and also that alternative technologies in the power sector are already readily available (wind, solar, nuclear etc.).[84] By contrast, in the transport sector – especially the harder-to-abate aviation, shipping and commercial road transport sub-sectors – new infrastructure and technologies need to be developed and deployed first.[85] Similarly, new infrastructure – such as the improvement of electricity grids – is required to handle the scaling up of electricity use beyond existing applications.

2.3.8 These differences between sectors and energy sources have important implications for understanding the contribution to emissions reductions to be made by any business, such as the Shell Group, until 2030. Figures 5 and 6 below illustrates the changes in the energy mix of different sectors under the IEA NZE scenario between 2019 and 2030 across *society as a whole*.[86] It illustrates several crucial elements of the energy transition up to 2030 based on the ambitious IEA NZE scenario, including that:

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82 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 132.

83 Exhibit S-12, European Commission, 14 July 2021, *Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*, SWD(2021) 621, Part 2, Table 46, p. 115.

84 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, Part 1.7, p. 57: "*All scenarios that meet climate goals feature a rapid decline in coal use. It is the most carbon intensive fuel, predominantly used in a sector – electricity generation – where renewable energy options are the most cost-effective new sources in most markets.*"

85 For example, the European Commission foresees that by 2050, 85% of transport fuels will be renewable and low carbon fuels, but that in 2030 the large majority of transport fuels (86%) will still be fossil fuel-based. See: **Exhibit S-32**: European Commission, 17 September 2020, *Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, Impact Assessment*, SWD(2020) 176, Part 1, p. 13, para. 2.2.3 and Part 2, p. 75.

86 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, Table A1.d, A2.d & A3.d, p. 309-312.

(a) The most substantial relative sectoral changes to the energy mix occur in the electricity and heat sectors, where coal reduces from 44% of the energy mix in 2019 to only 14% in 2030 (see Figure 5).

(b) In contrast to coal, oil continues to make up 74% of the transport sector energy mix; reducing from 91% in 2019 (see Figure 6). A further 11% of the transport sector energy mix is contributed by bioenergy (such as biofuels) in 2030, up from 3% in 2019. This reflects in part the fact that lower emission alternatives are not as readily available in various parts of the transport sector, including in the aviation, shipping and commercial road transport sub-sectors, as they are in the electricity and heat sectors. This is important, because transport sector emissions make up a significant portion of the Scope 3 emissions reported by the Shell Group. In 2019, 57% of Shell's products on an energy basis were oil products, gas-to-liquids and biofuels.[87] Based on the IEA 2019 World Energy Balances global sector splits, 79% of the Shell Group's oil products are used in transport sectors.[88] This would represent at least 44% of total Shell Group sales and a greater proportion of energy products sold into transport than the global average of 32%, as per the IEA World Energy Balances.[89]

(c) In all sectors, the contribution of gas to the energy mix remains relatively constant, reducing slightly from 24% to 21% in the electricity and heat sectors, while remaining constant at 4% in the transport sector.

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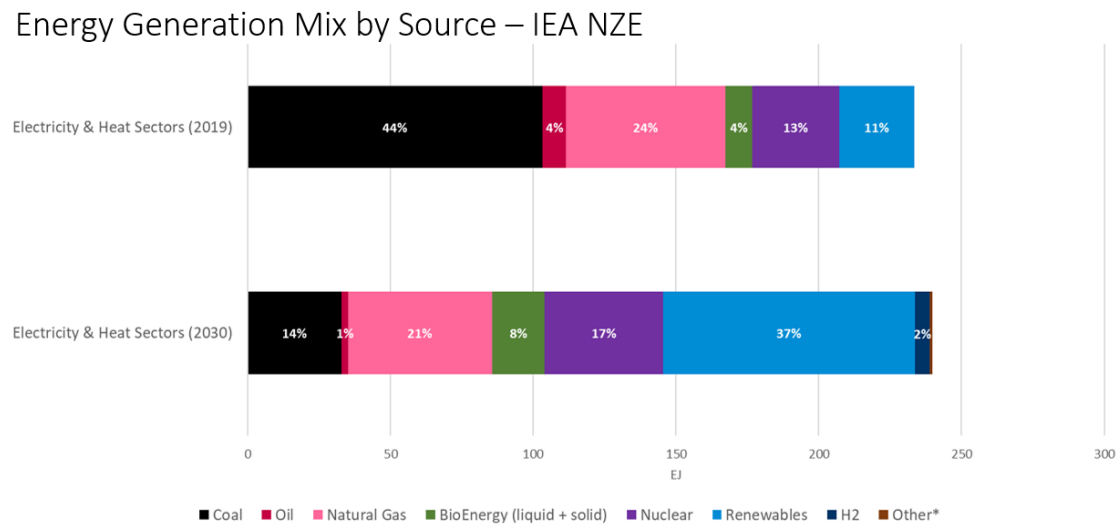
87 Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020, p. 90 (comprised of 56% oil products and gas to liquids (gas to liquids is miniscule on an energetic basis), and 1% biofuels).

88 Figures for 57% and 79% are rounded up; 44% is mathematically correct. Calculated based on *IEA World Energy Balances 2019.* Data is used for comparison with most recent full year IEA data.

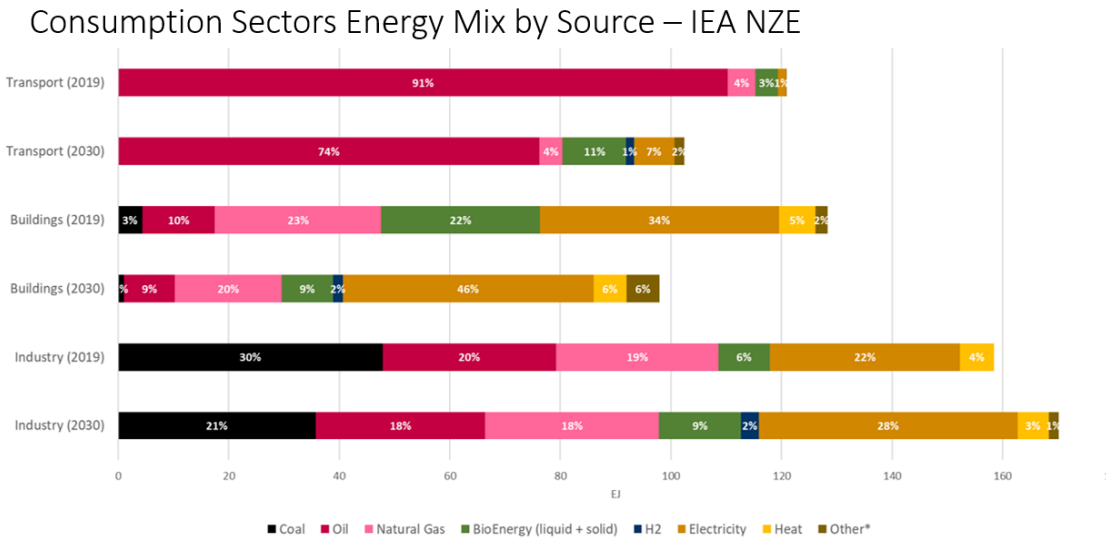
89 Calculated based on *IEA World Energy Balances 2019*. Data is used for comparison with most recent full year IEA data.

Figure 5: Energy Generation Mix by Source in the IEA NZE Scenario[90]



*Others (0.4%) includes gaseous fuels sources such as biomethane, waste, and liquid hydrogen-based fuels (such as ammonia and methanol). Renewables includes wind, solar and hydro power. Figures may not sum to exactly 100 percent due to rounding

Figure 6: Consumption Sectors Energy Mix by Source in the IEA NZE Scenario[91]



*Other includes gaseous fuels sources such as biomethane, waste, and liquid hydrogen-based fuels (such as ammonia and methanol). Electricity & Heat includes primary energy input from coal, oil, gas, bioenergy, nuclear, and renewables such as wind, solar and hydro. Figures may not sum to exactly 100 percent due to rounding

2.3.9 These substantial differences in the contribution made by different energy sources (and sectors) to emissions reductions until 2030 illustrates why it is incorrect to apply an *average economy-wide* emissions reduction percentage to a *specific private actor* such as Shell—which supplies a mix of energy products

that is quite different from the mix of energy products in the global energy system as a whole. In particular:

(a) Shell does not supply coal. The phase down of coal, however, is an important driver of emissions reductions between 2019 and 2030 under the IEA NZE scenario, with emissions from coal reducing by 60% over this period.[92] Thus, while reductions in coal need to make a disproportionately large contribution to 2030 emissions reductions, such reductions across society as a whole will not contribute to a reduction in the emissions reported by the Shell Group for the products it supplies to customers.

(b) By contrast, the majority of Shell's energy product sales, approximately 90% in 2019, are comprised of oil products and gas.[93] However, emissions reductions from oil and gas combustion are modelled to reduce by significantly less than the 41% average emissions reductions from energy under the IEA NZE scenario between 2019 and 2030 (with a ~35% reduction in emissions from oil combustion, and ~18% reduction in emissions from gas combustion).[94] Accordingly, basing the Reduction Obligation on average emissions reductions across society as a whole (as the District Court did) would – as a result of the mix of energy supplied by the Shell Group relative to the energy mix used by society as a whole – require the Shell Group's reported emissions from these sources to reduce by substantially more than that which is envisaged even by the ambitious IEA NZE scenario.

2.3.10 These differences have implications for the contribution to overall emissions reductions made by any individual company in absolute terms, as any business inherently reflects only a subset of emissions across society as a whole (and is unlikely to be exactly proportional to the emissions reduction pathway applied across the world economy).

2.3.11 For this reason, while the world's finite carbon budget is necessarily expressed in absolute terms (based on scientific evidence regarding the impact of emissions on global temperature rise),[95] the existence of variations in the speed of emissions reductions between sectors and regions, and multiple different options for the world to remain on pathways consistent with this budget – all of which envisage the continued use of hydrocarbons during the energy transition

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90 Based on data in Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, Table A1.d, A2.d & A3.d, p. 309-312.

91 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, Table A1.d, A2.d & A3.d.

92 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, based on Annex A Data.

93 Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 92. 2019 data is used for comparison with most recent full year IEA data. In 2021, approximately 88% of Shell's energy product sales were oil products or gas.

94 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, based on Annex A Data.

95 Depending on the envisaged maximum rise in global temperature.

– mean that an absolute global target cannot be automatically transposed to any individual sector or company.

2.3.12 Instead, at the sectoral or company level, carbon intensity[96] can be a more meaningful metric, as it allows comparisons between the progress that different companies make in transitioning to net zero. For example: in year 1, Company A and Company B both produce 100 MJ of energy by using the same energy source with a carbon intensity of 100 gCO_2/MJ. Hence, both emit 10 kg of CO_2 equivalent. Both companies seek to reduce their emissions by 40% in ten years, but they use different methods. Company A does so by shrinking its business by 40% through the sale of its assets to Company C, whereas company B does so by transitioning to an energy source which is 40% less carbon intensive. This leads to Company A emitting 6 kg of CO_2 equivalent (i.e. 40% less – though those emissions are likely to be emitted by Company C), but also producing 40% less energy, whereas Company B still produces the same amount of energy, but now emits 6 kg of CO_2 equivalent rather than the 10 kg it previously emitted. Company B is therefore more successful bringing about the energy transition than Company A.

2.3.13 Hence, intensity targets can enable more accurate measurements and comparisons regarding GHG performance during the energy transition to be made; both between companies in a similar sector, but also for the same company across time. This is because intensity-based emissions targets enable a company to change and develop, in line with the changing environmental and business environment. Moreover, it enables an energy company to grow its business to serve sectors that transition quicker whilst maintaining the necessary energy supply in harder-to-abate sectors.

2.3.14 This is particularly relevant in the context of the energy transition, where the shift in both demand and supply that is required in order for low carbon intensity products to substitute higher carbon intensity products will take time. An intensity metric in such circumstances accounts for the pace of change needed to accommodate this shift. This is in contrast to an absolute target, which accounts solely for the emissions reduction itself, and does not incentivise companies to invest in and produce the lower carbon products required to drive the energy transition and bring about systemic change (with a possible outcome being that an existing business may simply contract to meet the absolute target).

2.3.15 A further limitation of imposing an absolute target on a single company in the energy sector is the matter of product substitution by competitors (see para. 3.2.19 below). This arises because, without demand change, any reduction in the supply of hydrocarbons from one company will readily be met by others. As a result, instead of driving a transition toward lower carbon fuels (through an intensity measure), an absolute target may instead lead to third parties investing

[96] See description at para. 2.2.12 above.

in hydrocarbon production to meet demand (and therefore not achieve the systemic change that is required).

2.3.16 In sum, using only an absolute reduction target tells only part of the story and may lead to unintended outcomes, whereas an intensity-based metric can drive better outcomes in the context of the energy transition. Both metrics have their place and uses, and this is also why Shell uses both metrics in its reporting.[97]

2.4 Actions by States determine energy transition pathways across sectors and society as a whole

2.4.1 Governments often take a sector-by-sector approach in developing climate policies, each of which has its own infrastructure, technology and substitution challenges for achieving decarbonisation. Building new energy infrastructure is heavily dependent on government policies in terms of a country's total energy mix (for example, whether to use nuclear energy or not), as well as on a country's mix of natural resources (e.g., whether hydro or geothermal power is available). It is also dependent on planning and zoning laws, investment in utilities and the electricity grid, and policies to encourage investment.

2.4.2 This means that government climate policy provides for different measures and plans for different sectors, based on the specific circumstances and balancing of interests for each of these sectors with a range of national interests. This sectoral approach gives governments flexibility in dividing the carbon budget between the various sectors. For instance, if a certain sector exceeds its emission budget, set-offs with other, better performing, sectors may take place or additional measures can be taken in the sector that is lagging behind. In addition, more stringent goals for the next year may be set for a specific sector. For example, the legislative history of the Climate Act states that it is in the discretion of the Dutch Government to make such choices, as long as the overall goals of the Climate Act and Climate Plan are met.

2.4.3 Parallel to action at the national government level, ambitious international action will be needed to drive sectoral decarbonisation, particularly for those sectors that work across national boundaries.[98] For example, the international nature of the aviation sector means that a coordinated multi-jurisdictional approach is needed. The EU envisages that sustainable aviation fuels ("**SAF**") should account for 5% of aviation fuels by 2030[99] and that SAF production can

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97 See Figure 8 in para. 2.7.5 below; Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 89.

98 **Exhibit S-33:** Declaration by 25 States, December 2021, *International Aviation Climate Ambition Coalition COP 26 Declaration* ("*[…] international action on tackling aviation emissions is essential given the global nature of the sector and that co-operation by states and aviation stakeholders is critical for reducing the aviation sector's contribution to climate change, including its risks and impacts*").

99 **Exhibit S-34**: European Commission, 14 July 2021, *Proposal for a regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport*, (COM(2021) 561 final), p. 2.

feasibly ramp up to 10% of total European jet fuel consumption by 2030.[100] This would translate to SAF demand of 200,000 barrels of oil equivalent per day. This is a significant challenge because today the world produces about 300 barrels of oil equivalent per day (or 0.2% of this target) and SAF is currently 2-5 times more expensive than jet fuel.[101] In 2021, Shell announced its aim to produce around 2 million tonnes of SAF a year by 2025 (approximately 43,000 barrels of oil equivalent per day). By 2030, it aims to have at least 10% of its global aviation fuel sales as SAF.[102]

2.4.4 One example of sectoral policies in action is provided by the climate goals set at the EU level, which do not entail a uniform reduction target for all sectors. Instead, the European Commission has modelled policy scenarios which set out different reduction targets for various sectors.[103] The EU emissions trading system ("**ETS**") (which forms one element of the EU's climate response), for example, provides for differing coverage and ETS allowances between sectors,[104] while the Effort Sharing Regulation specifies different national emissions reduction targets for each of the Member States, collectively amounting to an overall 2030 emissions reduction target.[105] In recognition of the different circumstances of Member States, the EU Fit for 55 package includes a "Just Transition Fund" which has been a major negotiation driver to facilitate certain Member States in their transition away from coal, in particular Poland and Germany, which have more heavily coal-dominated economies.[106]

2.4.5 As we explain in more detail in para. 3.3.4 et seq. below, the Dutch Climate Act and Climate Plan also take a sector-by-sector approach.

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100 **Exhibit S-35**: World Economic Forum, July 2021, *Guidelines for a Sustainable Aviation Fuel Blending Mandate in Europe, Insight Report.*

101 **Exhibit S-36**: C. Brooks, 7 July 2021, 'Sustainable aviation fuel still in short supply due to cost: IHS Markit'.

102 **Exhibit S-37**: R. Bousso, 20 September 2021, 'Oil giant Shell sets sights on sustainable aviation fuel take-off', *Reuters*.

103 Exhibit S-12, European Commission, 14 July 2021, *Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652,* SWD(2021) 621, Part 2/2, Table 46, p. 115.

104 **Exhibit S-38**: European Commission, 2015, *EU ETS Handbook*, p. 12-14; 18-19; 26.

105 **Exhibit S-39**: European Commission, 16 December 2020, *Commission Implementing Decision (EU) 2020/2126 of 16 December 2020 on setting out the annual emission allocations of the Member States for the period from 2021 to 2030 pursuant to Regulation (EU) 2018/842 of the European Parliament and of the Council*, (L 426/58).

106 **Exhibit S-40**: European Commission, *Just Transition Fund*; and **Exhibit S-41**: World Bank, 27 January 2021, *World Bank and the European Commission to Support Poland to Transition Out of Coal*, Press Release No: 2021/ECA/62.

2.5 The scaling up of innovation and infrastructure is required for the energy transition

2.5.1 Transitioning to a system that is based on lower carbon energy sources and renewables also requires significant investment in new technologies and new energy infrastructure over several decades. According to the IEA's NZE scenario, most of the global reductions in CO_2 emissions through to 2030 will come from technologies available today, whereas in 2050, almost half the reductions come from technologies that are still in development.[107]

2.5.2 McKinsey & Co. estimates that the investment in new infrastructure and systems that is needed to meet international climate goals could be $9.2 trillion annually through 2050. This is an increase of approximately 60% in investment as compared with the status quo.[108]

2.5.3 The challenges associated with the energy transition are very different from sector to sector. In some sectors, lower emission technological alternatives are now becoming available and affordable. For example, electricity production from coal plants can be replaced by solar, wind or nuclear technologies. Passenger vehicles fuelled by gasoline or diesel can be substituted by vehicles using batteries powered by electricity delivered from low-emissions or renewable sources. Passenger vehicles and electricity production are examples of the so-called "easier-to-abate" sectors of the economy.

2.5.4 However, there are other sectors of the economy where viable, cost-competitive technological alternatives do not yet exist at scale – the "harder-to-abate" sectors. As noted earlier, these harder-to-abate sectors include shipping, road freight, aviation as well as chemicals, iron steel and cement.

2.5.5 These harder-to-abate sectors are the building-blocks for productive economies: they provide steel, cement and synthetics for constructing and maintaining buildings, water systems, waste systems, electricity distribution, roads and bridges and renewable energy infrastructure, such as wind turbines.

2.5.6 In sectors where there are increasingly commercially and technically viable pathways to decarbonisation– such as renewables in the power sector, or (in certain countries such as the Netherlands) e-mobility for passenger cars – markets and investments are still urgently needed to deliver them at scale and speed. For the harder-to-abate sectors, technical and business model innovation needs to take place, infrastructure needs to be developed, and rules and regulations need to be designed, so that a viable market can develop and investment in both the supply and demand side of the energy system can be made. In some instances, transitional technologies may be required.

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[107] Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, Part 4.5.4, p. 184.

[108] **Exhibit S-42**: McKinsey & Co., 25 January 2022, *The economic transformation: What would change in the net-zero transition*.

2.5.7 Therefore, reaching net zero by 2050 will require a massive scaling up of innovation and infrastructure in this decade in order to mature these technologies and bring them to market in time. That means the necessary *infrastructure* must be put in place in this decade in order to achieve deep decarbonisation in the 2030s and beyond. For example, synchronized investments in hydrogen trucking infrastructure during the 2020s will create the conditions for the mass market roll-out of hydrogen fuelled heavy duty transportation after 2030, which is required to meet the European ambition of net zero emissions by 2050.[109] Shell is working with Daimler AG, IVECO, OMV and Volvo Group in H2Accelerate, a mobility consortium designed to create the conditions for a large-scale rollout of hydrogen trucking infrastructure across Europe in the next decade.

2.5.8 Without a significant shift in demand-side infrastructure, the withdrawal of individual energy companies from certain markets would not result in a reduction in emissions. This is because there would continue to be the same level of demand from customers for fossil fuel products, and therefore customers would simply seek out alternative providers. Consumers would continue to make choices based on cost, availability and security of supply. Thus, in China and India, energy derived from coal is dominant because they are respectively the first and second largest producers of coal in the world. Similarly, oil is the dominant source of energy in the Middle East because of its vast oil resources.

2.5.9 In order to reduce emissions while ensuring energy security "supply-side actions" (which pertain to measures that facilitate increased availability of lower-emission energy sources), and "demand-side actions" (which pertain to measures that facilitate increased demand for lower-emissions energy sources), are fundamental in order to achieve a meaningful shift in consumption and corresponding reduction in overall emissions. Supply-side and demand-side measures are "*not an either – or question*" and both must move in tandem to achieve an effective energy transition.[110]

2.5.10 One example of supply and demand moving in tandem is as follows: energy suppliers can assist in decarbonising the transport sector by increasing the availability of electric vehicle charging infrastructure, thereby increasing the availability of lower-emissions energy sources for vehicle users. To be effective in reducing global emissions, however, simultaneous demand side changes are also required to accelerate the substitution of combustion engine vehicles with electric vehicle alternatives. The pace of these demand side changes, will be influenced by a range of decisions made by governments, individuals and companies. To produce a fleet of electric vehicles, batteries need to be manufactured, which in turn requires sufficient battery manufacturing

[109] **Exhibit S-43**: Shell plc, *Hydrogen.*

[110] Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 161.

infrastructure, and the mining of raw materials – with supply chains feeding production on a global scale.

2.5.11 Similarly, in the Netherlands, electricity transmission and distribution lines need to substantially expand to support increased demand (for example from electric vehicle infrastructure) and to absorb additional supply from renewables into the grid.[111]

2.5.12 On all levels – international, regional and national – policy discussions, plans and developments are underway to develop and implement pathways for the energy transition. The Theme Report on Energy Transition of the United Nations states: "*The challenges of balancing energy security, economic development, and climate concerns must be accepted and the paths must be sought that promote each of these simultaneously*"; "*such paths exist and it is the task of policymakers to find them (…)*", and "*A holistic assessment must inform energy system planning, economic policymaking, and other policies necessary to ensure a just and inclusive energy transition at the global, regional, national, and local levels.*" [112] Recent examples of such discussions and developments include COP26 at the international level; EU Fit for 55 at the regional level and the Dutch Climate Act and Climate Accord at the national level.

2.5.13 The pace and direction of the energy transition is also directly affected by the broader political and societal context, and is heavily influenced by real-time developments (which, as noted at Section 2.3 above, is one of the reasons why the Reduction Obligation is practically ineffective). For example, the trajectory of the global energy system can be changed significantly by:

(a) political redirection following elections (such as the US withdrawal from – and re-entry to – the Paris Agreement);

(b) unforeseen disasters (such as Fukushima, causing an urgent need for LNG in Japan, to replace the loss of nuclear power generation);

(c) global events creating sudden changes in supply or demand (e.g. the demand drop caused by the COVID-19 lockdowns. After an initial surplus of oil and gas caused steep decreases in price, steep price increases and energy affordability challenges were experienced in winter 2021/22 including in Western Europe);[113] and

(d) instability and fragility of the geopolitical order, as illustrated by the global events of 2022. The consequent risks to energy security arising

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111 **Exhibit S-44**: Netbeheer Nederland, April 2021, *Summary: The Energy System of the Future 2030-2050 Integral Infrastructure Survey*, p. 39-40.

112 **Exhibit S-45**: United Nations, September 2021, *Theme Report on Energy Transition; Towards the Achievement of SDG 7 and Net-Zero Emissions*, p. 24 and 20.

113 **Exhibit S-46**: IEA, Q4 2021, *Gas Market Report Q4 2021 including Global Gas Security Review 2021*.

from unpredictable events of this nature can be felt across the globe, reducing the availability of affordable energy in a large part of the world.

2.5.14 Such crises and volatility mean that a just and smooth transition cannot be taken for granted. The challenges of achieving affordable access to energy and a just and orderly transition are universal challenges, affecting people across the world – not only those in developing countries but also those in the developed world. Government policies are needed to put the goals of the Paris Agreement in practice at a regional or national level; and to ensure the supply of *secure* and *affordable* energy.[114] Balancing these different concerns so as to yield coordinated policy choices requires cross-departmental input, responsibility and expertise.[115] Governments have the status and the power to create policies and enact legislation (e.g. because of their democratic legitimacy), and can align their climate policies on an international or regional level. They also have advisory bodies, access to technical expertise, and consultation mechanisms in place to assist them in making choices and trade-offs and in crafting policies and laws.

2.5.15 Deciding which mitigation strategies to employ, for example, requires certain choices and trade-offs, which are often country or sector specific. These decisions need to take into account a range of economic and social issues and competing interests, such as energy security and economic growth and development.[116]

2.5.16 For example, as part of EU Fit for 55, the European Commission issued policy guidance on the need for a fair and just transition with the aim of "*putting people at the heart of the green transition*" towards net zero emissions by 2050.[117] As part of this objective, it adopted the Social Climate Fund, which aims to mobilise €72.2 billion through emissions trading and as a result reduce costs for micro-enterprises, transport users and vulnerable households (and to finance income support for the latter).

2.5.17 In the Netherlands, the dedicated Minister for Climate and Energy recently acknowledged that hard choices must be made: "*To me, the motto is: The Netherlands go for green and everybody must be able to be part of that. We commit to a maximum increase of temperature of 1.5 C. This means that we significantly increase the ambitions. This is a very critical challenge which may also hurt at times. I want to focus more on financial support of people and*

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114 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 7.1.

115 Including the Ministry of Finance, Ministry of Social Affairs and Employment, Ministry of Economic Affairs and Climate Policy and the Ministry of Infrastructure and Water Management and the Ministry of Agriculture, Nature and Food Quality departments.

116 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 386-387.

117 **Exhibit S-47**: European Commission, 14 December 2021, *Commission presents guide for a fair transition towards climate neutrality*. IP/21/6795; and **Exhibit S-48**: European Commission, *Proposal for a Council Recommendation on ensuring a fair transition towards climate neutrality*, COM/2021/801.

companies who cannot afford making the required the investments by themselves."[118]

2.5.18 We describe in more detail measures being taken in the Netherlands at Section 3.3 below, including the prohibition of coal-firing in power plants post 2030. Other EU Member States have also chosen to reduce the use of coal first, with more limited reductions of oil and gas until 2030.

2.5.19 In reality, however, whilst States are implementing an array of new policies, no government in the world has made a policy choice to comply with the Paris Agreement in the way identified by the District Court, viz., by imposing an absolute reduction obligation on a single company that operates amongst international competitors which are readily able to replace the supply of that single company's products.[119] International and domestic policies need to take into account all actors involved in the production, transportation and use of energy, and balance the societal need for energy with the need to have lower emissions. States also require the flexibility to respond to geopolitical changes or conflicts which affect the security or affordability of energy, and may therefore influence long-term emissions reduction pathways in unpredictable ways. The need for such flexibilities cannot be accommodated within the stringent boundaries of a court imposed absolute Reduction Obligation.

2.6 States are deploying a combination of economy-wide emissions reduction policies and market-based solutions

2.6.1 Governments, as well as other policymakers, are using legislation and market-based and non-market-based solutions to tackle the two challenges posed by the energy transition.

2.6.2 There is a trend to increasingly use *sector-specific policies* like renewables targets (biofuels), bans (plastic bags, coal power stations), financial incentives for investing in specific electricity generation types (capacity markets, contracts for difference, auctions), and efficiency ratings (ratcheting A* ratings for energy labels, energy performance certificates for houses and rental & mortgage conditions). Moreover, sector-specific policies need to be part of a system and cannot be "one-offs". A policy to phase out coal, for example, must be implemented in parallel with a system to offer an alternative, less carbon intensive, source of energy.

2.6.3 While market mechanisms vary by country, examples include cap and trade systems, subsidies and taxes.

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[118] **Exhibit S-49**: M. Stellinga & E van der Walle, 12 February 2022, 'Interview Rob Jetten Minister voor Klimaat en Energie, 'Haalbaar en betaalbaar' wil hij niet meer horen', *NRC*.

[119] If the Reduction Obligation had been imposed on Shell by a government decision, it would not have passed the test of the general principles of sound administration because, among other things, it infringed the principles of legality, equality and proportionality.

2.6.4 In *a cap and trade system*, a "cap" refers to a maximum total amount of GHG that can be emitted by emitters covered by the system. One example is the EU ETS, which is the cornerstone of European climate policy and which we consider in Section 6.4 below. The cap is reduced over time so that total emissions will decrease. Within the cap, emitters buy or receive emissions allowances, which they can trade with one another as needed. After each year, an emitter must surrender enough allowances to fully cover its emissions, otherwise heavy fines are imposed. If an emitter reduces its emissions, it can keep the spare allowances to cover its future needs, or sell them to another emitter that is short of allowances.[120]

2.6.5 Cap and trade systems are able, simultaneously, to serve multiple aspects of the energy triangle (i.e. energy security and access, environmental sustainability and economic development and growth). Trading brings flexibility that ensures emissions are cut where it costs least to do so and allows for competition within sectors.

2.6.6 China's ETS (launched in July 2021) and the EU's ETS are respectively the first and second largest carbon markets in the world. Besides these two systems, national or regional systems are operating or under development in Canada, Japan, New Zealand, South Korea, Switzerland, the United States and the United Kingdom. The number of emissions trading systems around the world is increasing.[121] At the global level, Article 6 of the Paris Agreement provides a mechanism for States to collaborate on emissions trading initiatives. During COP26 in Glasgow, significant progress was made on developing the rules for implementing this mechanism.[122]

2.6.7 *Subsidies* are deployed to make the use of alternatives for fossil fuels more attractive, essentially by ensuring that the costs of using alternative fuels are lowered and the use of such alternatives is more competitive and hence attractive.

2.6.8 For example, the EU's Renewable Energy Directive II[123] ("**RED II**") includes renewable energy support schemes whereby Member States grant allowances to incentivise measures that reduce emissions, often following auctions or tenders. Such measures may be bolstered by tools such as the EU Taxonomy for Sustainable Activities,[124] which assists in developing a consistent approach for

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120 **Exhibit S-50**: European Commission, 2021, *EU Emissions Trading System (EU ETS)*.

121 **Exhibit S-51**: European Commission, *International carbon market*.

122 **Exhibit S-52**: United Nations, 13 November 2021, *COP26 Reaches Consensus on Key Actions to Address Climate Change*, United Nations Climate Press Release.

123 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

124 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

identifying sustainable activities, and thereby enables investments in these activities to be scaled up faster at a lower cost.[125]

2.6.9 For the application of subsidies in the Netherlands, see Section 3.3 below.

2.6.10 *Taxes* essentially serve the same purpose as subsidies, but in the opposite way: by imposing taxes the use of fossil fuels becomes more expensive. This incentivises customers to use alternative fuels and makes them more competitive. Such policies incentivise demand-side changes as part of the overall energy transition.

2.7 Overview of Shell's integrated business model

2.7.1 Shell is well placed to play an active, leading role in the energy transition in a way that drives the reduction of carbon emissions, whilst continuing to reliably deliver the energy that society needs. Shell advocates for the policies, incentives, and regulatory environment that can guide system wide change in the energy transition. Where there are clear, commercial pathways to decarbonisation, Shell is calling for policies that drive urgent investment by the public and private sectors (for example, government policies that accelerate renewable power generation, and end unabated coal-fired power generation by 2040 where feasible).[126] In sectors that are harder to decarbonise, such as aviation, shipping, heavy industry and commercial road transport, governments need to help drive the transition to low- and zero-carbon energy. In these sectors, Shell is calling for policies that create commercial markets for new energy sources, such as sustainable aviation fuel, hydrogen and advanced biofuels.[127]

2.7.2 As noted above, Shell supports the EU's transition to climate neutrality by 2050 and the 2030 GHG emissions reduction target of at least 55% as set out in the European Climate Law, as well as the Dutch Climate Accord. As set out in its climate policy positions, Shell has called on Governments and policymakers to:

(a) Set binding targets to reach economy-wide net-zero emissions by 2050 or sooner (including interim targets for 2030 and 2040);

(b) Agree on a definition of Paris alignment and agree globally consistent Paris-aligned frameworks for each sector;

(c) Put a direct price on carbon emissions as part of a broader policy framework to achieve net-zero emissions;

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[125] **Exhibit S-53**: European Commission, 26 October 2021, *Annex to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2021 report on the State of the Energy Union - Contribution to the European Green Deal and the Union's recovery*, COM(2021) 950.

[126] Exhibit S-17, Shell plc, 28 October 2021, *Shell's Global Climate and Energy Transition Policy Positions*, p. 3.

[127] *Ibid*. at p. 3.

(d) Promote greater international cooperation through systems that transfer carbon credits between countries;

(e) Ensure the economic and social benefits of moving towards a net-zero emissions society are inclusive and distributed in a fair way, including through national plans for a just transition that support workers, communities and economies affected by the energy transition;

(f) Expand access to low-carbon energy and mitigate the impact of any increase in energy costs on vulnerable communities, for example through financial support for energy bills and improvements in home efficiency;

(g) Improve energy efficiency through standards and regulatory instruments covering key sectors of the economy;

(h) Set policies that enable different ways to produce decarbonised hydrogen and adopt binding mandates for the use of clean energy such as renewable hydrogen or advanced biofuels in the industrial and transport sectors;

(i) Promote capital investment in low-carbon projects, working in collaboration with banks to better assess the value of the risks and opportunities of the energy transition;

(j) Support common standards and benchmarks to allow comparison of environmental social and governance (ESG) reporting metrics and to improve transparency; and

(k) Encourage public and private investment to protect and expand natural ecosystems that store carbon.[128]

2.7.3 The Shell Group is a fully integrated end-to-end energy business with operations including energy exploration, extraction, manufacturing, transport, trading and sales and marketing. This means that the Shell Group can – through its vast network, infrastructure, expertise and trading and supply capabilities – work together with its customers, sector by sector, to offer decarbonised energy solutions where they exist today and co-creating decarbonised energy pathways where both demand and supply actions and investments are needed. An overview of the Shell Group's business is set out in the Figure 7 below.

[128] *Ibid*. at p. 3.

Figure 7: Overview of Shell's business[129]

2.7.4 Shell seeks to meet the world's need for energy solutions in ways that are economically, environmentally and socially responsible. It works with its customers and across sectors to accelerate the energy transition, assisting customers to find their own pathways to net-zero emissions, and to helping grow demand for low-carbon products. This requires partnering with customers, businesses, investors, and others to reduce emissions, including in the harder-to-abate sectors such as aviation, shipping and road freight. To this end, Shell is working from one end of the spectrum – the customer (and strengthening customer-facing organisations within its businesses) – back to the other end of the spectrum, by helping accelerate each sector's journey to net zero.[130]

2.7.5 Further, Shell's strategy is to accelerate the transition to net zero emissions and to become a net-zero emissions business by 2050, in step with society's[131] progress towards achieving the goal of the Paris Agreement. A summary of the Shell Group's short, medium and long term targets for achieving this goal are outlined below in Figure 8.[132] Shell is committed to continuing to build on its

[129] Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 8-9.

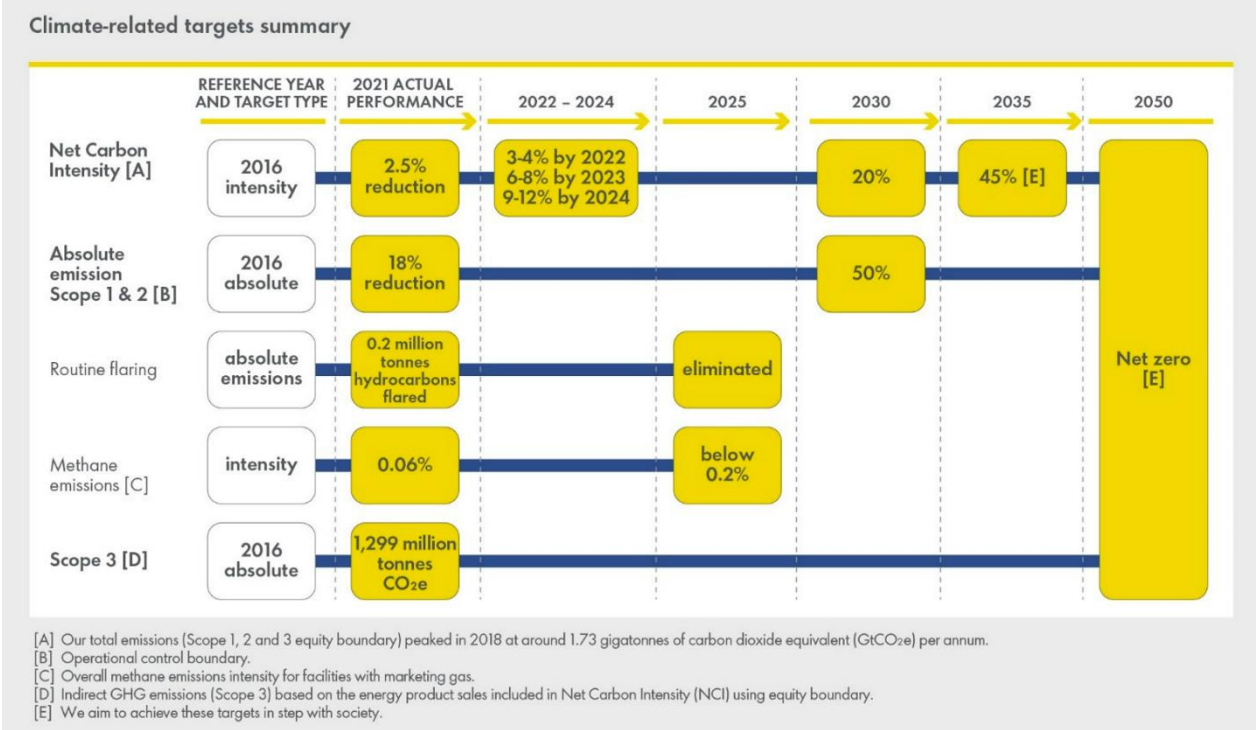
[130] See Section 8.5 for details of how Shell works with end-users to reduce Scope 3 emissions.

[131] Achieving Shell's target depends on society making progress to meet the Paris Agreement. If society changes its energy demands more quickly, Shell intends to aid that acceleration. If it changes more slowly, Shell will not be able to move as quickly as it would like. Both energy demand and energy supply must evolve together. This is because no business can survive unless it sells things that people need and buy.

[132] Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 89.

strengths, global scale and deep knowledge of energy markets to improve its own energy production activities to decrease carbon emissions (as reflected in its updated Scope 1 and Scope 2 reductions targets), as well as to grow demand for low-carbon energy and develop technological solutions to facilitate the energy transition. This includes increasingly offering low-carbon products and solutions (such as biofuels, charging for electric vehicles, hydrogen and renewable power, as well as carbon capture and storage and nature-based solutions), through which Shell expects to build low-carbon businesses of significant scale over the coming decade.

Figure 8: Summary of Shell's climate-related targets[133]



2.8 Conclusion

2.8.1 The parties to this appeal agree that urgent action is required to reduce emissions. Whilst the District Court's Reduction Obligation sought to make a contribution to the reduction of global emissions, a freestanding binding Reduction Obligation on an individual company will not be effective in reducing emissions, and so in practice the Reduction Obligation will not achieve its aim. The multiple competing elements, such as CO_2 reduction, energy security, access to affordable energy, and the facilitation of economic development, together with the need to decarbonise the energy system by transitioning both the demand and supply sides of this system, can only be considered and achieved through a

133 Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 89. It follows from this figure that the qualification in footnote 131 in relation to the 2035 and the 2050 targets does not apply to the 2030 targets.

collective, coordinated effort. This effort needs to be driven by technical expertise and must be adaptable to ongoing change (criteria that the Reduction Obligation does not satisfy). Furthermore, as we explain in the next Section, the Reduction Obligation is unfounded as a matter of law.

3. DUTCH LAW IS NOT PROPERLY APPLIED AND THE REDUCTION OBLIGATION AS AN UNWRITTEN RULE OF LAW DOES NOT FIT IN THE DUTCH LAW SYSTEM

3.1 As a matter of law, the Reduction Obligation imposed on Shell does not exist

3.1.1 As set out in the previous Sections 1 and 2, the reduction of GHG emissions involves issues that are complex and difficult to resolve in an orderly and just manner. These issues require the careful balancing of numerous interests. Important political decisions need to be made, as acknowledged by the Dutch Supreme Court in *Urgenda*. It is in this context that the question arises: can, and should, the court order a private party to reduce its GHG emissions by a certain percentage and by a certain date, far exceeding the ground-breaking decision in *Urgenda*. For the reasons developed in this Statement of Appeal, Shell submits that the answer is no.

3.1.2 This Section sets out the applicable Dutch law framework.

(a) Section 3.2 sets out the relevant legal principles under Dutch law, concluding that the Dutch law framework for an unwritten rule of law does not support the existence of the Reduction Obligation, and that the District Court did not apply the correct legal framework in its Judgment.

(b) Section 3.3 explains that, moreover, the Dutch legislative framework already contains regulations for combatting climate change through market and non-market mechanisms and sector-based approaches. The approach chosen by the legislature takes a sector-by-sector approach not aimed at individual actors, which means that any such unwritten rule of law would not fit within the existing system of Dutch law. Furthermore, there are even more far-reaching legislative priorities outlined in the Coalition Agreement.

(c) Section 3.4 explains that the Dutch legislative and policy approach accords with what the Supreme Court held in *Urgenda*, namely that in the Dutch constitutional system, "*decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament*."[134] This also reflects the practical limitations on courts in this area, as recognized in the advisory opinion in *Urgenda*. That opinion explained that restraint is required where, in effect, a whole regulatory system needs to be designed and implemented, correctly noting that "*[o]nly the legislator can do that*".[135] That is what needs to happen: as is apparent from what has been described in Section 2.

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[134] Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 8.3.2.

[135] Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para 5.25.

3.2 Legal principles

The Dutch law framework for a rule of unwritten law does not support the existence of the Reduction Obligation

3.2.1 The order claimed by Milieudefensie et al. requires findings that (a) Shell has a legal duty towards Milieudefensie et al. and that (b) Milieudefensie et al. have a sufficient interest in preventing an imminent breach of that duty.[136] For the reasons set out below, neither finding can properly be made on the facts of this case. In particular, this case concerns a potential *future* violation of the alleged duty, i.e. consideration of whether Shell's future policy for the Shell Group is in line with the alleged Reduction Obligation on Shell. In such cases – which concern a potential future violation of an alleged duty – Dutch law requires that there should be a threat of an infringement of interests as a result of the feared unlawful act.[137]

3.2.2 Since the alleged legal duty in question cannot be found in statute, the only potential source is the unwritten standard of care of Article 6:162(2) DCC.[138] For such a "*rule of unwritten law relating to proper social conduct*" to exist, there must be a standard of morality that has attained the status of a rule that is legally binding and enforceable in court.[139]

3.2.3 A court must *find* rules of unwritten law based on existing and objective points of reference, and not *create* them; rules of unwritten law "*should not become*

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136 Articles 3:296 DCC and 3:303 DCC respectively.

137 Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 2.10. See also Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217 (*Kernwapens*), with commentary from T. Koopmans, para. 3.3 (D): " *D. With respect to the claimed injunctions against future acts, the admissibility of the claims furthermore requires the existence of a concrete interest, in the sense that there is a real threat that the acts which VJV et al. want to see prohibited will be performed. In the absence of a concrete and real threat, the debate in civil proceedings could only concern permissibility in the abstract.*"

138 Whether there is an infringement of an unwritten standard of care is to be assessed in the context of the specific circumstances of the case at hand and thus by a weighing of interests. Such a weighing of interests also occurs when assessing an unwritten duty of care in a case of, for example, endangerment. See Dutch Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079, *NJ* 1966/136 (*Kelderluik*). See also Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 2.18. C.H. Sieburgh, *Mr. C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel IV. De verbintenis uit de wet.*, Deventer: Kluwer 2019/75.

139 As is confirmed in the legislative history, rules of unwritten law are "*standards which must be observed not only according to conscience but also according to the law*". See C.J. van Zeben en J.W. du Pon (red.) m.m.v. M.M. Olthof, *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek.* Boek 6. Algemeen gedeelte van het verbintenissenrecht, Deventer: Kluwer 1981, p. 616. Also see K.J.O. Jansen, commentaar op art. 6:162 BW, in: C.J.J.M. Stolker (red.), *Groene Serie Onrechtmatige daad*, Deventer: Kluwer, para. 6.1.1. See also C.H. Sieburgh, *Mr. C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel IV. De verbintenis uit de wet.*, Deventer: Kluwer 2019/55. Also see C.H. Sieburgh, *Mr. C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht.*, Deventer: Kluwer 2014/330 *et seq.*

apparent from the judicial decision only after the harm has been done".[140] In determining whether there are rules of unwritten law, courts must not elevate their own views to rules of unwritten law.[141] Thus, they must not "*elevate [their] subjective opinion[s] about what 'should be' to the status of law*".[142]

3.2.4 These principles are confirmed by well-established case law of the Supreme Court. In the 1959 case of *Quint/Te Poel*, the Supreme Court decided that a rule of unwritten law must "*fit within the system of the law*" and must be "*in line with the cases that are regulated by the law*".[143] This has been confirmed by the Supreme Court in later cases. For example, the Supreme Court has held that the fact that the statutory system for a particular issue does not meet a social need, does not mean that the courts may develop law on the same issue, by using Article 6:162 (2) DCC.[144] It therefore declined to create a general rule that would allow for wider compensation than the specific statutory rule in question.[145] Furthermore, as the Supreme Court has repeatedly emphasised, an important guiding principle in relation to Article 6:162(2) DCC is the principle of legal certainty. [146] The extant statutory framework is therefore significant in this

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[140] T. Hartlief, 'Kennen wij het ongeschreven recht?', *NJB* 2021/1711 (issue 24), p. 1941. Also see the last sentence of p. 1941: "*Nieuwenhuis' wise words are not only a reassurance for us as participants in legal transactions – **we know the unwritten law** – but also an assignment to the judge who writes out the unwritten law.*" (emphasis added).

[141] H.J. Rossel, 'De verkeersopvatting', in T: Hartlief et al (*ed.)*, *CJHB* (C.J.H. Brunner-Bundel), Deventer: Kluwer 1994, p. 341-342, B.G.P. Rogmans, *Verkeersopvattingen* (Monografieën. BW, deel A20), Deventer: Kluwer 2007, para. 16 and 18, K.J.O. Jansen, 'Verkeersopvattingen en particuliere regelgeving', *NTBR* 2020/5, para. 2.1 with reference to B.G.P. Rogmans, *Verkeersopvattingen* (Monografieën BW, deel A20), Deventer: Kluwer 2007, para. 16 and H.J. Rossel, 'De verkeersopvatting', in T: Hartlief et al (*ed.*), *CJHB* (C.J.H. Brunner-Bundel), Deventer: Kluwer 1994, p. 342, J.L. Smeehuijzen, Hoe beoordeelt de feitenrechter over strijd met de maatschappelijke betamelijkheid in de zin van art. 6:162 lid 2 BW?', *VR* 2017/125 (vol. 10), p. 351, P.M. Memelink, *De verkeersopvatting* (diss. Leiden), The Hague: Boom Juridische Uitgevers, p. 7.

[142] Opinion A-G W.L. Valk, ECLI:NL:PHR:2020:412, for Dutch Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, *NJ* 2020/293 (*IS-expatriates*), para. 6.1.

[143] Dutch Supreme Court 30 January 1959, ECLI:NL:HR:1959:AI1600, *NJ* 1959/548 (*Quint/Te Poel*). The same notion is confirmed by deputy P-G F.F. Langemeijer and A-G M.H. Wissink in their opinion on the *Urgenda* judgment. As they explain, Dutch courts tend to look for a solution "*that fits within the system of the law and is in line with the cases that are regulated by law*", because "*the risk of clashes within the trias politica is then minimal*" (Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 5.22). See also Dutch Supreme Court 28 June 2019, ECLI:NL:HR:2019:1046, *NJ 2020/257*, para. 3.6.8 in which the Dutch Supreme Court held: "*It fits within the system of the law and is in line with the cases regulated by the law to limit the consequences of a reliance on error in the manner described above. […]*".

[144] See e.g. Dutch Supreme Court 22 February 2002, ECLI:NL:HR:2002:AD5356, *NJ* 2002/240 (*Taxibus*).

[145] Dutch Supreme Court 22 February 2002, ECLI:NL:HR:2002:AD5356, *NJ* 2002/240 (*Taxibus*), para. 4.2.

[146] See Dutch Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, *NJ* 2011/2107 (*De Rooyse Wissel*), para. 5.4: "*Moreover, this would create a large degree of legal uncertainty, because no clear line can be drawn with (other) accidents at work for which no insurance obligation of the employer would apply.*" See also HR 11 November 2011, ECLI:NL:HR:2011:BR5215, *NJ* 2011/597 (*TNT postal delivery company*), para. 3.5: "*the required legal certainty and the practicability of the law, the employer's obligation to take out insurance, which is accepted in case law and which stems from good employment practice, should be limited to the specific, defined category of cases as described above*."

respect, since it provides the parameters for the assessment of whether the alleged rule of unwritten law exists.

3.2.5 The exercise of considering whether an unwritten law exists therefore requires careful consideration of the alleged unwritten law and an assessment of whether existing and objective points of reference support the existence of that alleged rule, including, critically, the existing statutory framework (see Section 3.3 where the relevant statutory framework in this case is considered).

3.2.6 The *Kelderluik* ruling, which applied an unwritten norm, forms the centrepiece of Milieudefensie et al.'s argument regarding the criteria for endangerment (*'gevaarzetting'*).[147] However, *Kelderluik* does not apply to this situation. In *Kelderluik*, as in similar cases dealing with endangerment, there was a very specific and concrete risk to one other person (or a very limited number of other persons) caused by one defendant alone. Furthermore, the defendant in that case could have mitigated the entire risk created by his actions by taking very simple precautions, in circumstances where those precautions would have no further impact on either the potential victims or on himself.

3.2.7 Such a bilateral situation is clearly not present in this case. As set out in Sections 1 and 2, CO_2 emissions are a global issue, caused by and affecting countless persons and entities. They can only be reduced by complex trade-offs and choices across society as a whole, which must also include balancing energy supply needs against emissions reductions. It is only governments that have the status and power to make such decisions (e.g. because of their democratic legitimacy). Put differently, in a case such as this, where every person in the world is – to varying degrees – both contributing to a risk and the potential victim of that same risk, a system change is required. It is impossible for an individual alleged tortfeasor to bring about that system change single-handedly (just as it is impossible for the civil courts to do so in a dispute between private parties by way of its ruling).

3.2.8 This multilateral systemic context completely distinguishes this case from *Kelderluik* as well as other Dutch case law in relation to the unwritten standard of care relating to endangerment, which seems to have been the basis for the District Court's decision. This is a fundamentally different type of case and this is even more true for Scope 3 emissions, as explained below in Section 8. The District Court therefore unjustifiably and incorrectly applied Article 6:162(2) DCC in this case.

The District Court did not apply the correct legal framework in its Judgment

3.2.9 The District Court did not properly consider and apply the principles described above in its Judgment. In particular, the District Court did not properly consider whether the alleged rule of unwritten law is socially self-evident or not, nor whether it fits within the existing system of the law.

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147 Judgment, para. 3.2.

3.2.10 A key shortcoming in the Judgment is the failure to focus on the specific alleged rule of law. This is apparent from the following:

(a) Significant parts of the Judgment address the questions of whether there is a *general* need to reduce global emissions and by what percentage global emissions need to be reduced: see, e.g., Judgment, para. 4.4.27.

(b) But the answers to these questions are *not* in dispute between Milieudefensie et al. and Shell. It is common ground in these proceedings that there is an urgent need to reduce global emissions. It is also common ground that the IPCC's SR1.5 report concludes that *general* global net emissions should be reduced by 45% by the end of 2030 when compared to 2010 to limit global warming to 1.5°C in line with the Paris Agreement's goals.[148] These facts are not disputed in these proceedings.

(c) Instead, the question in this case is whether there is the *specific* alleged legal Reduction Obligation on Shell. The District Court used the *general* global net 45% reduction target for the end of 2030 to find a *specific* unwritten legal obligation on Shell and Shell alone to achieve the exact same reduction. But the Judgment does not substantiate this conclusion with any, or adequate, evidence or analysis. For example, in para. 4.4.37 of the Judgment, the Court first emphasizes in general that Shell has its own responsibility regarding emissions reductions, and in para. 4.4.38 the District Court simply takes as a given that this means there is a 45% Reduction Obligation as per the end of 2030. However, as is developed below, there is no justification for this leap, and it is unsustainable.

3.2.11 First, applying the above legal framework to this case, there are two essential questions which need to be answered when considering whether the alleged Reduction Obligation is a rule of unwritten law. As is developed further below, consideration of both of these questions shows that there is no consensus on them, and no unwritten law as alleged by Milieudefensie et al. The District Court incorrectly held that there was. Shell summarises its key arguments here. The two questions are as follows:

(a) First, whether an *individual company* has any "*socially self-evident"* obligation to reduce its own emissions (Scope 1) and of others (Scope 2 and 3) by a *specific percentage* by a *specific* date, i.e. 2030 and whether this standard - even if it has not been codified in the written law – is so obvious, generally known, socially self-evident and can also be understood by anyone, that this standard should be respected in a broad sense and also in law.

[148] Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C,* Summary for Policymakers, Section C.1, p.12.

(b) Second, whether the specific *percentage* imposed by this unwritten standard of care (if it exists) is the *same* as the target for the general global reduction.

3.2.12 *In relation to the first question*: the absence of a specific legal Reduction Obligation on individual companies by 2030 is apparent from the detailed discussions on the international, regional and national levels (e.g. at COP26, and in the legislative process of the EU Fit for 55 legislative package, and the Dutch Climate Act and Climate Accord). These discussions involve consideration of how and at what pace emissions should be reduced by different countries, in different sectors and which fossil fuels are to be phased down first.

3.2.13 The status quo is that different targets for emissions reductions are set for, and by, different entities. At the level of *States*, the Paris Agreement recognizes that they have "*common but differentiated responsibilities*".[149] At a *sector* level, governments set different targets for different sectors and direct their policies towards specific sectoral reduction pathways. At the level of *corporate entities*, they set widely different targets, if any at all. Finally, citizens' plans to reduce their emissions also differ significantly. In relation to the more specific, temporal, level of reductions by the *end of 2030*, the absence of a common approach to targets by countries, sectors, corporate entities and individuals is even more self-evident.

3.2.14 The landscape is constantly changing and the approach at different levels of society also differs from country to country and from sector to sector. These ongoing developments and the divergent practices, at different levels of society, show that there is no '*socially self-evident*' obligation for *companies* to reduce their own emissions and those of others by any *specific percentage* by 2030.

3.2.15 *In relation to the second question*: it follows, from the lack of consensus on the first question, that there is also a lack of consensus on whether that *percentage* is the same as the general global reduction target. As noted above at 3.2.10(c), the District Court conflated (a) its finding of a widespread acceptance that *general* global net emissions should be reduced by 45% by the end of 2030 when compared to 2010 with (b) Milieudefensie et al.'s claim that there is a socially self-evident consensus in the Netherlands on what this means for a *specific* company in terms of the *specific* alleged Reduction Obligation. Whilst there is consensus on (a) there is no consensus on (b).

3.2.16 There may be consensus in Dutch society that companies must take steps to reduce their emissions. Judged by that standard and, by reference to any reasonable metric (including in comparison to what similarly situated companies are doing): Shell clearly does so.[150] This is apparent from its goal of

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[149] Exhibit RK-1, Paris Agreement, third consideration.

[150] In this respect, The Hague District Court specifically held in *Greenpeace/The Netherlands* that the Dutch State could not be obliged to impose specific targets on KLM to reduce its CO_2 emissions, as KLM would then be brought into a worse position than its international competitors for which such requirements would not apply: "*Imposing such a requirement on KLM only would lead to KLM being brought into a worse position*

becoming a net-zero emissions energy business by 2050, and from its other climate targets, which at the time of filing this Statement of Appeal remain sector leading.[151] Put differently, there is certainly no '*socially self-evident*' obligation on companies that are demonstrably taking the energy transition very seriously, and certainly do not lag behind when one considers comparable companies, to do even more than they are already doing; such behaviour cannot, under Dutch law, be considered a breach of any rule of unwritten law. Such a rule does not exist.

3.2.17 Therefore, the answer to both of the questions identified above is that the alleged Reduction Obligation is not socially self-evident; it does not exist as an unwritten rule of law.[152] Furthermore, the alleged Reduction Obligation does not fit within Dutch law (see Section 3.3 below) and is not supported by either international materials (on human rights; businesses and human rights; international climate law; comparative law) or EU law, as is explained in more detail at Sections 4 - 6 below.

3.2.18 Second, the Reduction Obligation accepted by the District Court does not exist as a rule of unwritten law because it is, and will be, ineffective in achieving the aim of reducing global emissions. This is developed at Sections 8 and 9 below. A summary of Shell's submissions on this point is as follows.

3.2.19 The purpose of the alleged Reduction Obligation is to reduce the total emissions around the world and thereby limit global warming.[153] However, this purpose will not be achieved and, indeed, *cannot* be achieved by the Reduction Obligation for the following reasons:

(a) As explained in Section 2, any emissions reductions can only be achieved if supply-side and demand-side actions move in tandem.

(b) It is uncontroversial that there will be a continued need for oil and gas in order to meet the global energy demand until 2030 and beyond. This is particularly true in the transport sector, where the Shell Group does a significant amount of its business. Emissions from oil and gas in the period up to 2030 will be reduced much less than the average 45% emissions reduction target – but this does not mean that the overall global reduction target would not be met. The focus in this period is on reducing emissions from coal, which emits more CO_2 per unit of energy

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than its international competitors for which such requirements would not apply. This is precisely an effect which must be avoided by means of seeking agreement on binding obligations in an international context." District Court of The Hague, 9 December 2020, ECLI:NL:RBDHA:2020:12440.

151 **Exhibit S-54**: Wood Mackenzie, February 2022, *Carbon offsets II: The strategies driving the net zero of tomorrow*, p. 3.

152 T. Hartlief, 'Kennen wij het ongeschreven recht?', *NJB* 2021/1711 (issue 24), p. 1941. Also see the last sentence of p. 1941: "*Nieuwenhuis' wise words are not only a reassurance for us as participants in legal transactions – **we know the unwritten law** – but also an assignment to the judge who writes out the unwritten law.*" (emphasis added).

153 Judgment, para. 4.4.49.

(i.e. is more carbon intensive)[154] and which in many cases is easier to displace, and on scaling up the infrastructure for electrification and renewables to facilitate greater decarbonisation in the coming decades.

(c) The continued demand for oil and gas will need to be met. If the Shell Group does not do so, then others will step in. For example: as long as gasoline cars are on the road, a reduction of supply of gasoline by the Shell Group will mean that other companies will supply the gasoline to keep these cars running. Similarly, the closure of the Groningen gas fields does not by itself lead to a reduction of CO_2 emissions in the Netherlands. Gas from Groningen is replaced by gas imported from abroad, which could in fact lead to an extra CO_2 footprint in the Netherlands of 10-20%.[155]

(d) Imposing an obligation on Shell to reduce supply much faster than demand decreases will thus lead to substitution by others. This is a particular limitation of imposing an absolute reduction target on a single company in the energy transition. Importantly, the Reduction Obligation will not reduce global emissions proportionally and could potentially increase emissions. Shell presented in-depth evidence on this risk of substitution in first instance.[156] In the Judgment, the District Court questions how significant this risk is and refers to a comment from one report stating that a barrel of oil not produced in one region would in the long term not be replaced by 100%, but by 40% to 80%.[157] It is unclear what the substantiation is behind these numbers. It seems that they do not relate at all to lower production (let alone sales) by one *company*, but to oil production that is not developed at all in one *region* as a result of government restrictions, rendering these numbers irrelevant for the current case.

3.2.20 It follows that imposing a reduction obligation on an individual company is not an effective way to reduce global emissions. The Reduction Obligation also has functional limitations which contribute to its ineffectiveness: it is a judicial determination, whereas these types of decisions not only require technical expertise and political decision-making, but also a weighing of societal interests, and as a fixed finding, it lacks the necessary adaptability to changing circumstances. This further supports the conclusion that there is no such rule of unwritten law. It also undermines the basis for the Reduction Obligation, as any order must, under Dutch law, protect against an imminent breach. This Reduction Obligation fails to do so, even assuming there was an imminent breach (which is not accepted: see Section 9.2 below). Furthermore, imposing the Reduction Obligation on an individual company cuts across the existing

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154 See para. 2.2.12(a).

155 See Exhibit RO-28, GEO ExPro, The Groningen Gas Field, April 2009 and Exhibit RO-29, Van de Graaff et al., The termination of Groningen gas production - background and next steps, July 2018.

156 See Exhibit RK-35, Mulder Report and Exhibit RK-37, Note from Prof. Dr. M. Mulder.

157 Judgment, para. 4.4.50.

policy frameworks, including the Dutch legislative framework. Those policy frameworks are much more likely to succeed at reducing global emissions, as Shell will explain below.

3.3 The Dutch legislative framework contains an economy-wide mechanism for combatting climate change

3.3.1 The Dutch legislative package – the Climate Act and accompanying documents such as the Climate Plan – aims to reduce emissions on Dutch territory, in line, or to be brought in line, with the European Green Deal (which is described at para. 6.4.7 below).

3.3.2 There are two notable features of the Dutch legislative approach to date:

3.3.3 First, the Dutch legislative package, like the European Green Deal, aims to achieve an overall reduction of emissions through *market mechanisms such as subsidies and taxes*. Neither of these packages contain specific, time-sensitive reduction obligations for individual corporate entities.

(a) In relation to *subsidies*: there is a subsidy in the electricity sector through which the Dutch Government compensates the difference between the cost price and the market price of renewable energy.[158] Other subsidies exist in the Netherlands for projects that contribute to the cost efficiency of CO_2 reductions, carbon storage and innovative pilot and demonstration projects aimed at cost efficient CO_2 reductions.[159] Subsidies also apply for CO_2 emissions reduction measures taken by the private sector.[160]

(b) In relation to *taxes*: in the Netherlands, there are several taxes designed to encourage efficient use of electricity, natural gas, taxes on the purchase of new passenger cars and motorcycles as well as car fuels.[161] Other examples aimed at reducing CO_2 emissions in the transport sector include a tax on flying and a levy for freight traffic.[162] For heavy industry,

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158 Directive (EU) 2018/2001 of the European parliament and of the Council on the promotion of the use of energy from renewable sources (recast).

159 Directive (EU) 2018/2001 of the European parliament and of the Council on the promotion of the use of energy from renewable sources (recast).

160 Directive (EU) 2018/2001 of the European parliament and of the Council on the promotion of the use of energy from renewable sources (recast). Exhibit RO-266: Climate Plan 2021-2030, p. 31. An overview of Shell's commitments towards the energy transition in the Netherlands is included in Shell's letter to the Dutch government of 10 December 2021 submitted as **Exhibit S-55**: Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy.* Similar projects are being conducted in other countries where the Shell Group operates.

161 These include a general energy tax *(Energiebelasting*) and Storage Sustainable Energy taxes (*Opslag Duurzame Energiebelastingen*), the tax on passenger cars and motorcycles (*Belasting van Personenauto's en Motorrijwielen*), which is dependent on the CO_2-emissions of the vehicle and excise duties on gasoline and diesel.

162 Exhibit RO-266: Climate Plan 2021-2030, p. 29 and 30.

a national CO_2 levy applies, on top of the EU ETS system.[163] In 2018/19, Shell was one of the few industrial companies to publicly support a national CO_2 tax, after which the European Green Deal levelled the playing field via a higher European CO_2 price.[164]

3.3.4 Second, the Dutch Climate Act and Climate Plan take a sector-by-sector approach and are not aimed at individual actors. Based on sector-specific factors, the Climate Plan sets out bespoke measures and plans for each of the following sectors: electricity, mobility, industry, built environment, agriculture and land use.[165] This sector-by-sector approach reflects a deliberate choice by the Government in determining the optimal allocation of the Dutch carbon budget over the various sectors and accompanying departments. This approach also allows it the flexibility and dynamic decision-making to adapt that allocation if and when appropriate (cf. the fixed Reduction Obligation). As explained in Sections 2.3 and 2.4 above, if one sector exceeds its emissions budget then set-offs with other, better performing, sectors may take place, or additional measures or more stringent goals can be imposed on the sector that is lagging behind. Government has the power to make such discretionary political choices, as long as the overall goals of the Climate Act and Climate Plan are met, as the legislative history of the Climate Act explains.[166] This Dutch sectoral approach reflects the approach taken by others, such as the EU Fit for 55 and IEA NZE scenarios (see para. 2.3.7 above and Section 5.3 below). These scenarios do not contain targets for individual actors but describe different reduction routes for different sectors.[167] According to these scenarios, certain (harder-to-abate) sectors, such as the transport sector, will need to make use of fossil fuels for a

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163 Exhibit RO-266: Climate Plan 2021-2030, p. 31.

164 Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*.

165 Exhibit RO-266, Climate Plan 2021-2030, para. 2.2. 84. Just like the Climate Act and the Climate Plan, also the Climate Accord takes a sectoral approach: "*The main goal of the National Climate Agreement is to achieve a 49% reduction in national greenhouse gas emissions by 2030 compared to 1990 levels. The consultations on how to achieve this target took place within five sector platforms. In order to facilitate the debate on measures and specific instruments and to provide clear direction, each sector platform was assigned a sector-specific target regarding the reduction in Mt (megatonnes) which would have to be realised by 2030, in respect of established and previously proposed policies, in order to collectively achieve the 49% reduction. The sector-specific targets were indicative, having been formulated by the government based on calculations by the Netherlands Environmental Assessment Agency (PBL) on the national cost effectiveness of various carbon emissions reduction measures.*" Climate Accord, p. 7 Parliamentary Papers *II* 2018/19, 32 813, no. 342, p. 7. The Climate Accord contains the agreements made in several sectors and discusses what measures can be taken on a cross-sectoral level.

166 Revised Explanatory Memorandum Climate Act on the advice of the Council of State, Parliamentary Papers II 2016/17, 34 534, no. 7, p. 15 (EM) and Explanatory Memorandum Climate Act, Parliamentary Papers *II* 2015/16, 34 534, no. 3, p. 10-11 (EM).

167 Exhibit RO-186, IPCC 2019, *Special Report on Climate Change and Land*, p. 98, 112-113, 149. Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p.100.

longer period, and in any event until 2030 when the infrastructure for electrification and renewables is expected to be further developed.[168]

3.3.5 It is clear, as acknowledged in the legislative history of the Climate Act, that "*[c]limate policy requires political choices*".[169] Deciding which mitigation strategies to employ, for example, requires certain choices and trade-offs. These choices and trade-offs are often country or sector specific, and, as has been noted above, must be made holistically, i.e. taking into account and balancing competing interests, such as energy security as well as economic growth and development.[170]

3.3.6 Concrete examples of relevant political choices include the following. The Dutch Government decided to reduce emissions by prohibiting coal-firing in power plants after 2030 (*Wet verbod kolen bij elektriciteitsproductie*). The operators of these coal-fired plants are compensated from public funds.[171] The Government has also chosen not to significantly decrease oil use until at least 2030, as until then oil will continue to remain critical for harder-to-abate sectors such as transport and the chemical industry.[172] In adding renewable capacity such as solar panels and wind turbines, the Government makes political choices in awarding permits and designating locations, in which environmental impact on wildlife such as birds (in the case of wind turbines) is balanced with climate goals.

3.3.7 Building on the legislative package described above, the Coalition Agreement sets out the most ambitious climate targets yet.[173] Among other things, the coalition parties (which have a majority within the lower house of parliament) have agreed the following:

(a) The emissions reduction goal in the Climate Act will be tightened to achieve a reduction in carbon emissions of at least 55% by 2030. The appendix to the Coalition Agreement sets out "*how the additional emission reductions for 2030 are to be divided among sectors*". As the coalition notes:

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168 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 3, 57, 73, 137, 181; Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, p. 18; Exhibit RO-186, IPCC 2019, *Special Report on Climate Change and Land*, p. 132.

169 Revised Explanatory Memorandum Climate Act on the advice of the Council of State, Parliamentary Papers *II* 2016/17, 34 534 no. 7, p. 8 (EM).

170 Exhibit RO-186, IPCC, 2019, *Special Report on Climate Change and Land*, p. 400.

171 Exhibit RO-266, Climate Plan 2021-2030, p. 27; Exhibit S-11, Ministry of Economic Affairs and Climate Policy, November 2019, *Integral National Energy and Climate Plan 2021-2030*, p. 10.

172 Exhibit S-11, Ministry of Economic Affairs and Climate Policy, November 2019, *Integral National Energy and Climate Plan 2021-2030*, p. 10.

173 Exhibit S-9, 15 December 2021, *The Dutch Coalition Agreement 2021-2025*. **Exhibit S-56**: M. Stellinga, 24 februari 2022, 'Klimaatdebatten klinken anders', *NRC*.

"*It gives only an indication of the distribution, costs and benefits, and it will be up to the government to put in place a comprehensive package that reduces emissions sufficiently, with adequate consideration of leakage effects, practicability, cost effectiveness and the Netherlands' earning capacity. We will ask the policy research agencies and other bodies to assist in producing up-to-date calculations of the impact.*"[174]

(b) The Dutch Government will revise its climate policy in line with the projected impact of the EU Fit for 55 package on carbon emissions, and with a view to affordability for households and small and medium-sized enterprises.

(c) There is a specific focus on new legislation relating to industry and business. In this respect, the Coalition Agreement states:

"*We will **raise the level of ambition** in industry. To achieve our higher national ambitions, we will in principle look first to the sectors in the European Emissions Trading System (ETS), alongside our 'Fit for 55' commitments.*

*We will make **binding, customised agreements with the 10 to 20 biggest emitters** of greenhouse gases, taking account of the connections between companies in industrial clusters. These customised agreements will be based on reciprocity, with the government facilitating the new energy infrastructure and entering into agreements stipulating ambitious sustainability goals. We will also make agreements with these companies on long-term investments in the Netherlands, on co-investment in training, on good employment practices and on the quality of the living environment.*

*We will provide an extra incentive for companies to make their operations more sustainable by **increasing the marginal levy charged in addition to the price stipulated in the Emissions Trading System (ETS)**. To create certainty, a gradually increasing price floor will be introduced for the ETS price, preferably in agreement with neighbouring countries. Any additional income from the marginal levy and the increasing price floor will be ploughed back into the Climate Fund to help make business more sustainable.*" (emphasis added)

(d) For the first time in history, the Coalition Agreement provides for a newly created Minister for Climate and Energy Policy (Mr. Jetten) to oversee climate policy and the climate fund: see a quote from an interview with Mr. Jetten at para. 2.5.17 above.[175]

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[174] Exhibit S-9, 15 December 2021, *The Dutch Coalition Agreement 2021-2025,* p. 10.

[175] Exhibit S-49, M. Stellinga & E van der Walle, 12 February 2022, 'Interview Rob Jetten Minister voor Klimaat en Energie, 'Haalbaar en betaalbaar' wil hij niet meer horen', *NRC.*

3.3.8 These points from the Coalition Agreement show that the new coalition seeks to expand and build on the existing legal framework. Critically, there is a clearly expressed policy to propose further legislation on *exactly* the subject of these proceedings.

3.3.9 The anticipated further legislation will be enacted in 2022/2023. It will also have the two features noted at paras. 3.3.3 and 3.3.4 above. Since the extant and anticipated Dutch legal and policy framework seeks to achieve an overall reduction and takes a sector-by-sector approach, it is much more likely to be effective in combating climate change. That is in sharp contrast to the District Court's finding of the Reduction Obligation which is, as noted above, ineffective.

3.3.10 In short, the Dutch legislative and policy framework takes a fundamentally different approach from the Judgment to reducing CO_2 emissions. Not only is there a difference in approach, the legislature has not imposed a specific reduction norm on any corporate entity; it is nevertheless clearly considering how to regulate "*the 10 to 20 biggest emitters*" (see para. 3.3.7(c) above). The unwritten rule of law as formulated in the Judgment is therefore not supported by the existing approach of the Dutch legislature to climate change; it is contrary to, and inconsistent with, the legislative approach and purports to address an issue that the Coalition Agreement has expressly identified for Government action.

Shell actively supports the legislative initiatives of the Dutch Government and the EU to combat climate change and is committed to delivering against its new Scope 1 and 2 emissions targets

3.3.11 Before leaving the legislative framework, Shell notes that it fully supports the legislative initiatives of both the Dutch Government and the EU. For example:

(a) In 2018/19, Shell was one of the few industrial companies to publicly support a national CO_2 tax, after which the European Green Deal levelled the playing field via a higher European CO_2 price.[176]

(b) As a major participant in the Dutch energy market, Shell has an ambition, both through its own investments and through cooperation with others, to be one of the largest drivers of the energy transition in the Netherlands. Indeed, Shell has set specific targets in the Netherlands, which are aligned with its global 'Powering Progress' strategy and go beyond what is required by the Climate Agreement, namely to: (a) supply 100% carbon-neutral energy for all types of road transport by 2040, (b) be a leader in investments and innovations in cleaner energy solutions such as wind energy, hydrogen and low-carbon fuels, and (c) play a leading role in developing sustainable and circular chemicals and by 2050 be a net-zero emissions producer of high-quality fuels and chemicals. In 2020 and 2021 alone, Shell took investment decisions worth almost

[176] Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*, Appendix.

EUR 4 billion for energy transition projects in the Netherlands. More information is contained in Shell's letter to the Dutch Prime Minister and the then-Minister of Economic Affairs and Climate Policy of 10 December 2021.[177]

(c) Shell has announced that the amount it will spend to facilitate the energy transition will increase significantly. The Shell Group expects that by 2025, approximately 50% of its total expenditure will be on low- and zero-carbon products and services.[178]

3.3.12 As noted at para. 1.6.2 above in relation to Scope 1 and 2, in October 2021 Shell announced new targets for an absolute emissions reduction for Scope 1 and 2 of 50% by 2030, compared to 2016 levels and on a net basis, covering all Scope 1 and 2 emissions under the Shell Group's operational control. Shell is committed to delivering these targets regardless of whether it wins or loses this appeal.[179]

3.3.13 This case concerns a potential future violation of an alleged rule of unwritten law. Given Shell's own emissions reduction targets described above at para. 2.7.5 and in Figure 8, it cannot be sustained that it would be likely that Shell, insofar as it concerns its Scopes 1 and 2, will not meet its targets or will not comply with its future (legal) obligations in this matter. Therefore, there is no longer a basis in Dutch law for an order regarding Scopes 1 and 2 – even if there were an unwritten rule of law as found by the District Court (which is denied).[180]

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177 Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*, Appendix.

178 As noted in **Exhibit S-57**: Shell plc, 3 February 2022, *Fourth Quarter 2021 Results*: Expenditure on low- and zero-carbon products and services includes "[u]*nderlying opex and cash capex, excluding spend in JV and associates, that support the decarbonisation of our customers, including electric vehicle charging, low carbon fuels (see* [https://www.shell.com/energy-and-innovation/new-energies/low-carbon-fuels.html]*), nature and environmental solutions, renewable electricity generation, decarbonised hydrogen, marketing and trading of power & natural gas, and developing CCS hubs. It also includes spend to provide non-energy products including chemicals, lubricants, convenience retail and road materials, that have no scope 3 emissions. It excludes all refining, upstream, LNG and gas to liquid related spend although there will be spend on mitigating/improving energy efficiency in these segments.*"

179 All of Shell's targets are on an operational basis. This is fully aligned with the GHG Protocol, the world-wide standard for emission reporting. Shell uses this method for all its reporting in order to make its reporting transparent and simple.

180 Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 2.10. See also Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217 (*Kernwapens*), with commentary from T. Koopmans, para. 3.3 sub D: "D. With respect to the claimed injunctions against future acts, the admissibility of the claims furthermore requires the existence of a concrete interest, in the sense that there is a real threat that the acts which VJV et al. want to see prohibited will be performed. In the absence of a concrete and real threat, the debate in civil proceedings could only concern permissibility in the abstract."

There are fundamental legal and conceptual issues with including Scope 3 emissions within the Reduction Obligation

3.3.14 Scope 3 emissions are mainly emissions resulting from the use of products sold by the Shell Group, of which more than half are from "third-party products", i.e. products not produced by the Shell Group but sold by it.[181]

3.3.15 As is explained in Section 8, there are fundamental difficulties with extending the Reduction Obligation to Scope 3 emissions. This is because:

(a) First, although Shell is partnering with its customers to address the energy transition and reduce emissions sector by sector, the extent to which the Shell Group can influence the reduction of Scope 3 emissions is heavily influenced by factors not within its control, such as demand-side changes driven by government policy (see Section 2 above).

(b) Second, there is no allegation in this case that the use of fossil fuels by end-users is unlawful in general, or in relation to products of the Shell Group specifically. And rightly so: there is nothing unlawful about the purchase and use of fossil fuels by Shell Group's customers. Consumers still need fossil fuels to heat their homes and travel, and companies in various sectors still need fossil fuels for their production processes, which are lawful activities in the many markets in which the Shell Group sells products. As explained in Section 8.3, under Dutch law, liability for the actions of others (if those actions are not unlawful) is only possible in very limited circumstances, which do not arise in this case.

(c) Third, whilst, as noted, the Shell Group is actively working with end-users to reduce emissions (as will be set out in more detail in Section 8.5 below): the end-users are primarily responsible for their own emissions. It would be unprincipled to place the entire responsibility for the emissions of this extremely large and diverse group of end-users solely on Shell. After all, it is to a decisive extent the behaviour of the end-users themselves that give rise to the Scope 3 emissions reported by the Shell Group.[182] This also means that there can be no legal duty that is enforceable by Milieudefensie et al. against Shell in this respect.[183]

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[181] Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020, p. 91-94. See also Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 89 et seq. Shell reports GHG emissions for the entire Shell Group.

[182] Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*).

[183] Dutch Supreme Court 23 February 2007, ECLI:NL:HR:2007:AZ6219, *NJ* 2008/492 (*De Groot/Io Vivat*). Cf. the doctrine of *in pari delicto* (see, *inter alia*, Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*); Dutch Supreme Court 2 December 2005, ECLI:NL:HR:2005:AU2397, *NJ* 2007/5 (*WE/Henselmans*); Joint Court of Justice 11 February 2014, ECLI:NL:OGHACMB:2014:22, *NJF* 2014/345; Dutch Supreme Court 16 February 1973, ECLI:NL:HR:1973:AD7415, *NJ* 1973/463 (*Maas/Willems*)).

(d) Fourth and finally, the alleged unwritten rule is focused on a reduction of net emissions in absolute terms. While the world's finite carbon budget is necessarily expressed in absolute terms, there are multiple different pathways available for remaining within this budget.[184] All of these pathways envisage the continued use of oil and gas during the energy transition. This means that an absolute obligation cannot be directly transposed as an individual target for (the customers of) a company such as Shell.[185] This certainly holds true for a (net) reduction in Scope 3 emissions reported by Shell, since the parameters of such a reduction are not easy to determine, which is discussed in Section 8.

3.4 The Supreme Court's decision in *Urgenda* does not support the existence of the Reduction Obligation

3.4.1 *Urgenda* is about the obligation of the Netherlands to take measures to prevent climate change and to reduce its GHG emissions by at least 25% compared to 1990 by the end of 2020.

3.4.2 In *Urgenda*, the Supreme Court analysed Articles 2 and 8 of the ECHR. It found that these provisions oblige the State to do its part, despite the global dimension of the problem.[186] The Supreme Court held that, although in the Dutch constitutional system "*decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament*",[187] courts "*can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change*"[188] albeit they must "*observe restraint.*"[189] It noted that government and parliament "*have a large degree of freedom when making their political assessment*".[190]

3.4.3 In their advisory opinion to the Supreme Court, Deputy Procurator General Langemeijer and Advocate General Wissink identified a practical limitation on the role of courts, namely that the legislator is better placed to oversee the consequences of certain legislative choices because a court hears only the wishes and interests of the parties involved in the litigation. A court cannot "*organise a public policy debate in society on the advantages and*

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184 See Section 2.3 and 5.

185 As outlined in paras. 2.3.12 - 2.3.16, an emissions intensity target can in some circumstances provide a preferable metric than an absolute emissions reduction target (as imposed by the Reduction Obligation) for measuring Shell's contribution to the energy transition.

186 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), paras. 5.2.1-5.8.

187 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 8.3.2.

188 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 6.3.

189 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 6.6.

190 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 8.3.2.

disadvantages of a certain solution".[191] A court cannot create a consultation process or "*retain advice on the best way to design the regulation*".[192] Restraint is especially required if a whole regulatory system needs to be designed and implemented: "*only the legislator can do that*".[193]

3.4.4 This is true, and on the facts of this case, it is critically important to note that the legislature has already done so – and the new Dutch Government is in the process of doing more: see, e.g., the Coalition Agreement at para. 3.3.7 above.

3.4.5 As Deputy Procurator General Langemeijer and Advocate General Wissink point out, it is very difficult for a court to make decisions where multiple policy considerations are involved, as this requires technical expertise; assessment of the social, economic and distributional implications of regulatory design choices, and the political question of how to best distribute the remaining carbon budget within society. As outlined in Sections 2.3 and 5, there are different pathways that exist for reducing emissions, including EU Fit for 55 and the IEA NZE scenarios (and the Reduction Obligation significantly exceeds both of them). The alleged new rule of unwritten law in the Judgment ignores the practical limitations on the courts. It interferes with a number of policies and ignores a number of fundamental questions, including what costs society can bear, whether this is compatible with energy security, and whether government should forego fossil fuel revenue.

3.4.6 The limitations on courts, especially in the context of climate change, have been acknowledged by courts themselves. For example, in *Smith v Fonterra Co-op & Smith v Attorney-General*[194], the Court of Appeal of New Zealand concluded that climate change "*is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.*"[195] In a similar vein to the Dutch Supreme Court in *Urgenda*, the Court of Appeal held that courts "*do not have the expertise to address the social, economic and distributional implications of different regulatory design*

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191 Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*) para 5.24, referring to M. Scheltema, 'Wie stelt de wet: de wetgever of de rechter?', in: P. van Dijk (red.), *De relatie tussen de wetgever en rechter in een tijd van rechterlijk activisme*, Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 1989, p. 16.

192 Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para 5.24, referring to M. Scheltema, 'Wie stelt de wet: de wetgever of de rechter?', in: P. van Dijk (red.), *De relatie tussen de wetgever en rechter in een tijd van rechterlijk activisme*, Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen 1989, p. 16.

193 Opinion deputy P-G F.F. Langemeijer and A-G M.H. Wissink, ECLI:NL:PHR:2019:887, for Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para 5.25.

194 **Exhibit S-58**: *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552; **Exhibit S-59**: *Smith v Fonterra Co-Operative Group Limited* [2020] NZHC 419. Smith has submitted a leave to bring an appeal to the Supreme Court of New Zealand on 12 November 2021.

195 Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 16.

choices"[196] and that it "*is not the role of the courts to develop a parallel […] regulatory regime that is ineffective and inefficient, and likely to be socially unjust.*" [197]

3.4.7 As such, given the Dutch legislative and policy framework, there is simply no room for the new rule of unwritten law adopted by the District Court – especially not a rule that is ineffective for the reasons set out at Sections 8 and 9.[198] This remains the case, even if one takes into consideration international law frameworks on human rights which are discussed in the next Section. A reduction obligation as alleged by Milieudefensie et al. and adopted by the District Court, for all the reasons set out in this Section cannot be based on the unwritten law but requires a specific provision of law. Such specific provision of law does not exist.

[196] Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 26.

[197] Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 35.

[198] See also in this regard Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 16.

4. INTERNATIONAL HUMAN RIGHTS LAW AND BUSINESS AND HUMAN RIGHTS PRINCIPLES DO NOT SUPPORT THE EXISTENCE OF A BINDING REDUCTION OBLIGATION

4.1 The human rights which the District Court factored in when interpreting the alleged unwritten standard of care

4.1.1 The Judgment refers to Articles 2 and 8 of the ECHR and Articles 6 and 17 of the International Protocol on Civil and Political Rights ("ICCPR") in relation to its finding that climate change poses a threat to the human rights of Dutch residents and the inhabitants of the Wadden region.[199] These rights articulate the right to life and the right to respect for private and family life, respectively. The Judgment states: *"[d]ue to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between Milieudefensie et al. and RDS. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care".*[200] The Judgment also refers to the international framework for business and human rights provided for, in particular, by the UNGP.[201]

4.1.2 Respect for human rights is ingrained into Shell's core values of honesty, integrity and respect for people. Shell's approach to human rights is informed by international instruments, including the UNGP. Shell's website articulates its support for the UNGP and a number of other voluntary initiatives.[202]

4.1.3 For the reasons developed below, international human rights law does not support the existence of the Reduction Obligation.

4.2 Human rights law and the European Convention on Human Rights

4.2.1 As the Judgment notes: the relevant ECHR rights of Articles 2 and 8 apply to the relationship between States and citizens (and, as follows from *Urgenda*, those obligations of the State are clearly engaged in relation to climate change).[203] Articles 2 and 8 ECHR do not impose direct obligations on Shell; they impose obligations on the Dutch State. Accordingly, the Judgment states that Milieudefensie et al. cannot directly invoke these human rights with respect to Shell.

4.2.2 There are, however, two key flaws in the District Court's approach to the ECHR and the manner in which it sought to "factor in" international human rights in its interpretation of the unwritten standard of care.

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199 Judgment, para. 4.4.10.

200 Judgment, para. 4.4.9.

201 Judgment, para. 4.4.11.

202 See Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020.

203 Judgment, para. 4.4.49.

4.2.3 First, the Judgment does not properly explain how the relevant human rights were "*factored in*" to the Court's analysis of Article 6:162(2) DCC.

4.2.4 The District Court appears to have used the ECHR rights to underline the gravity of the consequences of climate change.[204] In this regard, reference is made to climate-related health problems and water-related climate impacts that Dutch residents may face.[205]

4.2.5 But *if* this is the extent of the invocation of the ECHR, then it is unnecessary because there is no dispute that the consequences of climate change threatens to have an impact on peoples' lives, also in the Netherlands. However, Shell says "if", because the Judgment ought to have particularised the basis on which the ECHR, given its application to States, has any role to play in the interpretation of an unwritten standard of care owed by a non-State actor such as Shell. The articulation of that basis is, however, lacking.

4.2.6 Second, in any event, neither Article 2 nor Article 8 of the ECHR, support the Reduction Obligation. Before turning to the three reasons why this is so (see para. 4.2.17-4.2.19 below), we describe the relevant ECHR framework.

4.2.7 Article 2(1) of the ECHR – *"Everyone's right to life shall be protected by law"* – contains two separate obligations. First, the State has a negative obligation not to take life, whether intentionally or unintentionally. Secondly, Article 2 imposes a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. The positive obligation placed on States applies in the context of any activity in which the right to life may be at stake and involves *"a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life"*.[206] In the context of dangerous activities, the Grand Chamber has placed *"special emphasis"* on "*regulations geared to the special features of the activity in question… They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."*[207]

4.2.8 The positive obligation under Article 2 of the ECHR is not absolute. It must be interpreted in a way that does not impose an impossible or disproportionate burden on the State.[208] It must also be considered in light of the State's margin of appreciation. Both of these points are illustrated by the Grand Chamber judgment in *Oneryildiz v Turkey* which (as is generally true of environmental

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[204] Judgment, para. 4.4.10.

[205] Judgment, para. 2.3.9.

[206] **Exhibit S-60**: *Oneryildiz v Turkey* (2005) 41 EHRR 20, para. 89.

[207] Exhibit S-60, *Oneryildiz v Turkey* (2005) 41 EHRR 20, para. 90.

[208] Exhibit S-60, *Oneryildiz v Turkey* (2005) 41 EHRR 20, para. 107.

cases resolved by the European Court of Human Rights) turned on the consideration of a *specific* site/issue (cf. an issue like *global* climate change).

4.2.9 *Oneryildiz* concerned certain authorities' supervision and monitoring of a municipal rubbish dump in Turkey where there had been an explosion, causing the death of the applicant's relatives. The Grand Chamber held that the authorities knew or ought to have known of the real and immediate risk to those living in the vicinity of the rubbish dump. The failure to take the necessary measures to protect those particular individuals was a breach of the substantive aspect of Article 2.[209] The Grand Chamber acknowledged that it was not its task to substitute for the views of the local authorities its own view of the best policy to adopt in dealing with the social, economic and urban problems in the relevant part of Istanbul; accepted that an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make and "*this results from the **wide margin of appreciation States enjoy**, as the Court has previously held, **in difficult social and technical spheres** such as the one in issue in the instant case.*"[210] (emphasis added)

4.2.10 Article 8(1) of the ECHR provides, *"Everyone has the right to respect for his private and family life, his home and his correspondence."* Article 8(2) of the ECHR states that there shall be no interference by a public authority with the exercise of this right *"except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

4.2.11 States have also been afforded a margin of appreciation in relation to Article 8. Cases involving environmental issues are likely to give rise to difficult social and technical issues and, therefore, the European Court of Human Rights often refers to the need to give the State a wide margin of appreciation in assessing the best policy in such instances. Two illustrations of these principles are the Grand Chamber judgments in *Hatton v UK* and *Fadeyeva v Russian Federation*. As with *Oneryildiz* these environmental cases turned on the consideration of a specific site/issue (cf. global climate change).

4.2.12 *Hatton*[211] involved a claim by individuals regarding noise disturbances caused by private operators of flights at Heathrow airport. The Grand Chamber identified the question as being whether, in the implementation of the relevant policy on night flights at Heathrow airport, a fair balance was struck between the competing interests of the individuals affected by the night noise on the one hand and the community as a whole on the other hand. It then analysed the

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209 Exhibit S-60, *Oneryildiz v Turkey* (2005) 41 EHRR 20, para. 110; the Grand Chamber also found that there had been a breach of the procedural aspect of Article 2, see para. 118).

210 *Ibid.*, para. 107.

211 **Exhibit S-61:** *Hatton and others v United Kingdom*, (2003) 37 EHRR 28.

relevant facts observing, *"Environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin."*[212] It concluded that it did not find, in substance, that the authorities "*overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals … and the conflicting interests of others and of the community as a whole*". There was no violation of Article 8.[213]

4.2.13 *Fadeyeva* involved a claim by an individual in relation to the operation of a steel plant close to her home in Russia. The Grand Chamber recited the principle that States have a wide margin of appreciation in the sphere of environmental protection, where States have adopted various measures to reduce the adverse effects of industrial activities.[214] It also stated: "*[i]t remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary on*e."[215]

4.2.14 The approach of the European Court of Human Rights in environmental cases, which are likely to give rise to "*difficult social and technical issues*", is therefore to tread with great care, noting that it is not the task of the Court to substitute its views in place of those of the national authorities because those authorities have a margin of appreciation: they are better placed to undertake the policy assessments in question. The approach of the European Court of Human Rights is reflected in national judgments in environmental cases on Articles 2 and 8 of the ECHR, which note that courts should give a margin of appreciation to the government. A recent example of the dangers where a court fails to do so is *Richards,* from the UK.

4.2.15 In *Richards*[216] the claimant submitted that his rights under Articles 2 and 8 of the ECHR had been infringed by injuries suffered as a result of hydrogen sulphide emission from a quarry landfill site proximate to his home. The case concerned the proper approach to be taken by a court to allegations that an environmental regulator (the "**EA**") was acting in a way which was incompatible with Articles 2 and 8 of the ECHR. The first instance judge did not grant any remedy in relation to the claim that the EA was acting in breach of its Article 2 and 8 of the ECHR obligations but he did grant a declaration, based on his reading of certain evidence, as to what the EA needed to do in order to comply with its legal obligations. He ordered the EA to design and apply measures to achieve the reduction of daily concentrations of hydrogen sulphide

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212 Exhibit S-61, *Hatton and others v United Kingdom*, (2003) 37 EHRR 28, para. 122.

213 Exhibit S-61, *Hatton and others v United Kingdom*, (2003) 37 EHRR 28, para. 129.

214 **Exhibit S-62**: *Fadeyeva v Russian Federation*, (2007) 45 EHRR 10, para. 103.

215 Exhibit S-62, *Fadeyeva v Russian Federation*, (2007) 45 EHRR 10, para. 105.

216 **Exhibit S-63**: *R (Richards) v Environment Agency* [2022] EWCA Civ 26.

emissions and related odours in the local area to a certain level. The English Court of Appeal held that the judge had gone beyond the proper limits of adjudicating on the dispute between the parties. In particular, the judge had erred since he had "*sought to prescribe the precise outcomes that the appellant had to achieve, and the timescale within which it had to achieve those outcomes.*"[217] This relief "*ran counte*r" to ECHR principles regarding the State's activities *"in a difficult area of technical and social policy*."[218] The "*greatest care*" needs to be taken where no unlawful act has been identified by the court, and where, nevertheless relief had been granted, and in terms that were both "*mandatory and prescriptive*".[219] These remarks resonate with what happened in this case: the District Court made a number of the same errors as the first instance judge in *Richards*.

4.2.16 Against the backdrop of this framework: there are three reasons why neither Article 2 nor 8 of the ECHR supports the finding by a court in a civil action between private parties of an unwritten rule such as the one on which the District Court based the Reduction Obligation.

4.2.17 First, the substantive, general content of these rights does not support the existence of the highly specific and individualised Reduction Obligation.

4.2.18 Second, each of the cases above involved scrutiny of State policies and processes in relation to *specific* allegations of environmentally-related human rights issues. The analysis took account of the margin of appreciation because of the involvement of "*difficult social and technical spheres*". It is hard to think of an issue that involves more difficult social and technical spheres than *global* climate change. Where climate change related claims against States have involved human rights, the margin of appreciation has been given wide application.

(a) This was the case in *Plan B Earth*,[220] where the court was asked to evaluate the adequacy of the UK Government's overarching policy framework on climate change and declined to do so. The claimants relied on Articles 2 and 8 of the ECHR to argue that the UK Government's existing framework is not effective. The judge rejected the claim noting that the *"insuperable problem"* with the Article 2 claim (and with any Article 8 claim based on the physical or psychological effects of climate change on the claimants) is that UK legislation regulates climate change and the policies/measures and framework adopted under it. [221] The judge observed that the framework is

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217 Exhibit S-63, *R (Richards) v Environment Agency* [2022] EWCA Civ 26, para. 64.

218 Exhibit S-63, *R (Richards) v Environment Agency* [2022] EWCA Civ 26, para. 95, per Lewis LJ.

219 Exhibit S-63, *R (Richards) v Environment Agency* [2022] EWCA Civ 26, paras. 98-100, Sir Keith Lindblom.

220 **Exhibit S-64**: *R (Plan B Earth and others) v Prime Minister and others* [2021] EWHC 3469 (Admin).

221 Exhibit S-64, *R (Plan B Earth and others) v Prime Minister and others* [2021] EWHC 3469 (Admin) *Plan B Earth*, para. 48.

"constantly evolving"[222] and *"consists of high level economic and social measures involving complex and difficult judgments"*[223] He went on to state that *"these claims invite the Court to venture beyond its sphere of competence… [The framework] contains provision for debate, and that debate occurs in a political context with democratic, rather than litigious, consequences."*[224]. Again, these comments resonate in this case because – as noted in Section 3.3 above – the Dutch State has also put in place legislative and policy frameworks that are *"constantly evolving"* (cf. the fixed Reduction Obligation) and involve *"complex and difficult judgments"* that occur *"in a political context"*.

(b) In *Urgenda* the Supreme Court found that the Netherlands is "*obliged to do 'its part'*"[225] under Articles 2 and 8 of the ECHR but held that the court for its part must observe restraint if it is reviewing whether measures taken by the State to meet its obligations are sufficient.[226]

(c) The following cases illustrate the same approach to the "margin of appreciation" in cases which concerned the ECHR:

(i) In Germany, the Administrative Court of Berlin in *Family Farmers and Greenpeace Germany v Germany*[227] cited the wide margin of appreciation that should be afforded in relation to the application of Article 2 of the ECHR. The court recognised that the government must undertake measures to provide adequate protection against climate change, but refused to order the government to make specific changes to the national Climate Protection Program, citing the government's wide discretion in selecting what measures to use to achieve emissions goals and observing:

"[d]iese weite Gestaltungsfreiheit kann von	*"[t]his wide freedom of Scope can only be examined*

[222] Exhibit S-64, R (Plan B Earth and others) v Prime Minister and others [2021] EWHC 3469 (Admin) *Plan B Earth*, para. 49.

[223] Exhibit S-64, R (Plan B Earth and others) v Prime Minister and others [2021] EWHC 3469 (Admin) *Plan B Earth*, para. 50.

[224] Exhibit S-64, *R (Plan B Earth and others) v Prime Minister and others* [2021] EWHC 3469 (Admin)*Plan B Earth*, para. 54.

[225] Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 *(Urgenda)*, para. 8.3.2.

[226] Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 *(Urgenda)*, para. 6.6. See also **Exhibit S-65**: Tribunal administratif de Paris 14 October 2021, no. 1904967-1904968-1904972-1904976/4-1 (*Notre Affaire à Tous and others v France*), para. 13. In this case the Administrative Court of Paris ruled that the French State failed to implement public policies that would enable the State to meet the emissions reduction target it had set itself. However, as in *Urgenda* the court emphasised that "*the concrete measures to compensate for the damage suffered may take various forms and therefore express choices which are within the free discretion of the Government*" (unofficial translation).

[227] **Exhibit S-66**: Verwaltungsgericht Berlin 31 October 2019, no. VG 10 K 412.18 (*Family Farmers and Greenpeace Germany v Germany*).

den Gerichten je nach Eigenart des in Rede stehenden Sachbereichs, den Möglichkeiten, sich ein hinreichend sicheres Urteil zu bilden und der Bedeutung der auf dem Spiel stehenden Rechtsgüter nur in begrenztem Umfang überprüft werden".[228]	*by the courts to a limited extent, depending on the specific nature of the area in question, the possibilities of forming a sufficiently certain judgement and the significance of the legal interests at stake". (unofficial English translation)*

(ii) In another judgment in Germany, the German Constitutional Court heard four constitutional complaints challenging selected provisions of the German Federal Climate Change Act of 12 December 2019 and alleging that Germany failed to take sufficient measures to reduce greenhouse gas emissions. The court ruled that parts of the Climate Change Act lacked sufficient requirements in relation to emissions reductions from 2031.[229] The court made clear that the legislature:

"*grundsätzlich auch dann ein Einschätzungs-, Wertungs- und Gestaltungsspielraum zukommt, wenn er dem Grunde nach verpflichtet ist, Maßnahmen zum Schutz eines Rechtsguts zu ergreife*".	"*retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design, even where the legislator is under an obligation to take measures to protect a legal interest*". (unofficial English translation)

and that

"*Weiten Spielraum hat der Gesetzgeber insbesondere dabei, wie er die Belange der durch den Klimawandel gefährdeten Eigentümer und die einem strengeren Klimaschutz entgegenstehenden Belange zu*	"*In particular, the legislator has considerable leeway in deciding how to strike an appropriate balance between the interests of property owners exposed to risks from climate change and the interests opposing more stringent climate action*".

[228] Exhibit S-66, Verwaltungsgericht Berlin 31 October 2019, no. VG 10 K 412.18 (*Family Farmers and Greenpeace Germany v Germany*), p. 22-23.

[229] **Exhibit S-67**: Bundesverfassungsgericht 24 March 2021, no. 1 BvR 2656/18-1 BvR 78/20-1 BvR 96/20-1 BvR 288/20 (*Individuals v Germany*), para. 166.

einem angemessenen Ausgleich bringt".[230]	(unofficial English translation)

(iii) In Belgium, the Brussels Court of First Instance in *VZW Klimaatzaak v Belgium*[231] refused to impose an order setting specific emissions targets for the Belgian federal government and three regional governments, because this would infringe on the principle of separation of powers, in accordance with which a judge

"*doit exercer un contrôle nécessairement marginal.*"[232]	"*must exercise a necessarily marginal control.*" (unofficial English translation)

It decided that

"*la manière dont la Belgique va participer à l'objectif mondial de réduction des émissions de GES relève actuellement du pouvoir d'appréciation de schuldeisers organes législatif et exécutif […] et seront le résultat d'un arbitrage politique dans lequel le pouvoir judiciaire ne peut s'immiscer*".[233]	"*the way in which Belgium will participate in the global GHG emissions reduction target is currently a matter for its legislative and executive bodies to decide […] and will be the result of political [discussion] in which the judiciary cannot interfere*". (unofficial English translation)

(d) The approach taken by courts in non-ECHR cases regarding climate change, reflects a similar approach to the similarly wide "margin of appreciation" given in ECHR cases. See *Smith v Fonterra* at para. 3.4.6 above and the following examples from the United States:

(i) The Court of Appeals for the Ninth Circuit held that federal courts lack the power to issue "*[…] an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2,*'" in *Juliana v. United*

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230 Exhibit S-67, Bundesverfassungsgericht 24 March 2021, no. 1 BvR 2656/18-1 BvR 78/20-1 BvR 96/20-1 BvR 288/20 (*Individuals v Germany*), para. 152.

231 **Exhibit S-68**: Tribunal de première instance francophone de Bruxelles, Section Civile 17 June 2021, no. 2015/4585/A (*VZW Klimaatzaak v Belgium*). VZW Klimaatzaak has lodged an appeal against the judgment with the Brussels Court of Appeal on 17 November 2021.

232 Exhibit S-68, Tribunal de première instance francophone de Bruxelles, Section Civile 17 June 2021, no. 2015/4585/A (*VZW Klimaatzaak v Belgium*), p. 59.

233 Exhibit S-68, Tribunal de première instance francophone de Bruxelles, Section Civile 17 June 2021, no. 2015/4585/A (*VZW Klimaatzaak v Belgium*), p. 82.

States.[234] The court reasoned that although "[t]*here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change […]*" "*[…] any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches*."[235]

(ii) The Court of Appeals for the Second Circuit affirmed the dismissal of New York City's claims against five multinational oil companies for harms allegedly caused by global warming, in *City of New York v. Chevron Corp*.[236] The court reasoned that because "*the political process*" in the United States and abroad has produced "*numerous federal statutory regimes and international treaties*" regulating GHG emissions, it could not "*condone*" the City's attempt to "*sidestep*" the political process by seeking to recover in a lawsuit.[237]

4.2.19 Third: As has been explained above (see para. 4.2.1), Articles 2 and 8 apply to the State in the context of climate change and not to a private entity. It also follows from the case law of the European Court of Human Rights as described above (para. 4.2.7 et seq.) that the State should be afforded a wide margin of appreciation in the "*constantly evolving*" area of climate change (see Plan B at para. 4.2.18(a) above). As has been explained in Section 3 the Dutch legislative and policy framework demonstrates significant activity in respect of climate change. In this case, if it is assumed for the sake of argument that Articles 2 and 8 ECHR have some role to play in relation to Shell (as well as the State) then applying the margin of appreciation means that the Court should recognise that the Dutch executive and legislative branch – and not a civil court – is best placed to consider the issue of emissions reductions vis-à-vis Shell. Therefore, the Court should not attempt to define an unwritten civil law obligation between private parties based on Article 6:162(2) DCC by means of "factoring in" Articles 2 and 8 ECHR. They do not lend themselves to such an exercise. The proper application of the ECHR does not, therefore, support the unwritten rule as accepted by the District Court.

4.3 Business and human rights principles

4.3.1 The District Court said that its analysis on the existence of an unwritten standard of care "*follows*" the UNGP[238] and it purported to use the UNGP to identify the

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234 **Exhibit S-69:** *Juliana v. United States* 947 F.3d 1159, para. 1164 (9th Cir. 2020).

235 *Ibid.* at para. 1171.

236 **Exhibit S-70**: *City of New York v. Chevron Corp* 993 F.3d 81, paras. 85-86 (2d Cir. 2021).

237 *Ibid.* at para. 86.

238 Judgment, para. 4.4.11.

existence of the Reduction Obligation. In doing so, the District Court's analysis is incorrect in three critical respects:

(a) First, it treated the general normative policy framework reflected in the UNGP as containing specific legal obligations, contrary to the object and purpose of the UNGP and the express text of the UNGP.

(b) Second, the Judgment did not explain how the UNGP are said to lead to the identification of the Reduction Obligation.

(c) Third, in attempting to apply the *general* framework of corporate responsibility to respect human rights embodied in the UNGP to the *specific* context of climate change – which gives rise to novel difficulties and challenges, the District Court made several critical errors as follows: (1) The District Court conflated the concepts of 'control' and 'influence' with "responsibility" and, in effect, applied the 'sphere of influence' concept that the UNGP had expressly sought to avoid, (2) the District Court wrongly relied on a survey, which it referred to in the judgment as the "Oxford Report", for the proposition "*it is internationally endorsed that companies bear responsibilities for Scope 3 emissions*",[239] and (3) the District Court wrongly attempted to extrapolate a highly specific legal obligation on Shell from the UNGP which contain a general normative framework for *all* business enterprises in connection with *all* business-related human rights impacts.

4.3.2 Properly understood, the UNGP do not support or justify the imposition of a legal obligation on Shell to reduce/procure the reduction of CO_2 emissions, as reflected in the Reduction Obligation. This submission does not diminish in any way Shell's policy commitment to the UNGP as noted at para. 1.5.1(b)(ii) above. Before developing the points noted above, we provide some context regarding the UNGP.

Context: the responsibility to respect is part of a normative framework and high-level guidance

4.3.3 This part addresses point (a) of para. 4.3.1 above.

4.3.4 The UNGP were developed as part of the mandate of the then Special Representative of the UN Secretary-General, the late Professor John Ruggie, on the issue of human rights and transnational corporations and other business enterprises.[240] The UNGP were endorsed by the Human Rights Council in its resolution 17/4 on 16 June 2011. [241] Professor Ruggie has explained that in

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[239] Judgment para. 4.4.18.

[240] **Exhibit S-71**: Office of the High Commissioner for Human Rights, 20 April 2005, H*uman rights and transnational corporates and other business enterprises, Resolution 2005/69*, E/CN.4/RES/2005/69.

[241] **Exhibit S-72**: United Nations General Assembly, 6 July 2011, *Human rights and transnational corporations and other business enterprises, Resolution 17/4*, A/HRC/RES/17/4.

developing the UNGP, he "*aimed for a formula that was politically authoritative, not a legally binding instrument*."[242]

4.3.5 Professor Ruggie's appointment should be understood by reference to the prior context, namely that his appointment came after a prior UN initiative, "The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (the "**Draft Norms**").[243] This had "*triggered a deeply divisive debate between human rights advocacy organizations and the business community*".[244] The Draft Norms proposed that corporate entities, within their 'sphere of influence', were subject to the same human rights duties, as *legal obligations*, that States have accepted for themselves under treaties. [245] The UNGP take a fundamentally different approach to business' responsibilities. This is critical to understanding how the Judgment misapplied the UNGP (essentially by misinterpreting the UNGP as being akin to the Draft Norms) in the context of the unwritten norm, as clarified further below.

4.3.6 The UNGP implement the UN "Protect, Respect and Remedy Framework" (the "Framework") which was approved unanimously by the UN Human Rights Council in 2008. The Framework rests on the differentiated but complementary roles of States and businesses with respect to human rights. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.[246]

4.3.7 The UNGP elaborate on and seek to 'operationalise' the Framework.[247] In doing so, they confirm that, under the *first* principle, States have international human rights law *obligations* which require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. In the context of business-related human rights harms, the duty to protect includes protection against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.[248]

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242 **Exhibit S-73**: J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, W.W. Norton, 2013 (hereafter "**Ruggie 2013**"), Introduction, p. xlvi (emphasis added). See generally Chapter Two.

243 **Exhibit S-74**: United Nations Economic and Social Council, 26 August 2003, *Economic, Social and Cultural Rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/12/Rev.2.

244 Exhibit S-73, Ruggie 2013, p. xvii.

245 *Ibid*. at p. xvii.

246 **Exhibit S-75**: United Nations Human Rights Council, 7 April 2008, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5, hereafter the "**Framework Report**", para. 9.

247 **Exhibit S-76**: Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction*, p. 1.

248 Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction*, Commentary to Guiding Principle 1.

4.3.8 By contrast to the State's duty to protect, under the *second* principle, the UNGP state that businesses have a responsibility to respect human rights. The responsibility to respect reflects social expectations,[249] not law. It does not create new international legal obligations. The responsibility is "*distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions*."[250] A number of corporate entities now expressly acknowledge the corporate responsibility to respect human rights as reflected in the UNGP. As the Judgment notes, Shell is one of these companies.[251]

4.3.9 The corporate 'responsibility to respect' human rights means that companies should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are 'involved'.[252]

4.3.10 The concept of the responsibility to respect was already recognised in a number of soft law instruments such as the UN Global Compact and the OECD Guidelines on Multinational Enterprises at the time the Framework was established.[253] The new element elucidated in the UNGP was the concept of 'human rights due diligence' at UN Guiding Principle 17 – the *process* by which business enterprises can, in practice, meet the responsibility to respect human rights. When Professor Ruggie considered how to define the parameters of the responsibility to respect and its due diligence component, he identified that alternative approaches, in particular the concept of the 'sphere of influence' in the Draft Norms, were inappropriate; a more 'rigorous' approach was required for defining the parameters of the responsibility to respect and its due diligence component.[254] He identified the concept of 'influence' as imprecise and ambiguous – it could, for example, mean both 'impact' and 'leverage'. He also observed that "*anchoring corporate responsibility in influence defined as leverage is problematic*" as its application might result in a corporate responsibility that was potentially too broad and far reaching.[255] Moreover, he wrote: *"attributing responsibility for human rights to companies based on their influence requires the assumption, in moral philosophy terms, that "can implies ought". But companies should not be held responsible for the human rights impacts of every entity in society over which they may have influence because this would include sources of harm to which they are entirely unrelated. At the*

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249 Exhibit S-75, Framework Report, para. 54.

250 Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction*, Commentary to Guiding Principle 12.

251 Judgment, para. 4.4.11.

252 Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction*, Guiding Principle 11; and Exhibit S-75, Framework Report, para. 56.

253 Exhibit S-75, The Framework Report, para. 23.

254 Exhibit S-75, The Framework Report, para. 67-68.

255 **Exhibit S-77**: United Nations Human Rights Council, 15 May 2008, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, A/HRC/8/16, para. 13.

same time, such an attribution could absolve companies from responsibility for adverse impacts when they could show they lacked influence even if they were connected to the harm."[256]

4.3.11 Given the failure of the Draft Norms, it was clear that a consensus could not be reached in the international arena that businesses should have international legal obligations in relation to human rights. That explains the approach Professor Ruggie took to the UNGP and remains the case today. Thus, discussions regarding the elaboration of an internationally binding treaty which would require States to regulate business' activities in relation to human rights began in 2014 but still are ongoing.[257] Consensus amongst States of the desirability, content and scope of such a legally binding instrument is not likely to be achieved in the near future.[258] Equally, whilst some governments are considering if and how to incorporate elements of the UNGP into legislative requirements, there is no consistent approach taken by governments with regards to the nature and extent of such obligations. To date, none of those initiatives contemplate or envisage an obligation akin to the Reduction Obligation, nor indicate a societal expectation that business should be required to cut emissions in the manner prescribed by the Reduction Obligation.[259] None of the legislative initiatives to date seek to incorporate the UNGP or its components wholesale. As Professor Ruggie acknowledged, the UNGP are not a tool kit with components that can be "*simply … taken off the shelf and plugged in*".[260]

4.3.12 The District Court acknowledges that the UNGP are not, and were never intended to be, a legal framework.[261] Yet at the same time, the District Court said that it is "*universally endorsed that companies must respect human rights*".[262] The use of "*must*" connotes a hard-edged legal obligation: in light of

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256 Exhibit S-75, The Framework Report, para. 69.

257 **Exhibit S-78**: United Nations Human Rights Council, 25 June 2014, *UN Human Rights Council Resolution, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1.

258 In August 2021 a third draft of the proposed text for a treaty was released and discussed at the 7th session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. The draft report of the meeting notes that textual amendments to the draft will be published "no later than the end of July 2022", per **Exhibit S-79**: United Nations Human Rights Council, 29 December 2021, *Report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights A/HRC/49/65*, para. 20(c).

259 See for example **Exhibit S-80**: the French law, titled *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

260 **Exhibit S-81**: United Nations Human Rights Council, 21 March 2011, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/17/31, para. 15.

261 Judgment, para. 4.4.11.

262 Judgment, para. 4.4.14.

the points above it is clear that the UNGP do not contain such a hard-edged legal obligation for businesses.

The Judgment did not explain its reliance on the UNGP

4.3.13 This part addresses point (b) of para. 4.3.1 above.

4.3.14 Whilst the District Court states that it took account of the UNGP as a "*suitable…guideline*" in the identification of the unwritten norm,[263] it did not explain how the UNGP are said to lead to the identification of the Reduction Obligation.

4.3.15 Instead, the Judgment simply includes sections of the UNGP and concludes that the Reduction Obligation applies to Shell, adopting a high-level assessment of the operation of the Shell Group, the relationships within it and the structure and content of the Shell Group's value chains.[264] The court has attempted to use the UNGP as a toolkit – exactly what Professor Ruggie cautioned *against* (see para. 4.3.11 above).

The District Court interpreted the UNGP incorrectly

4.3.16 This part addresses point (c) of para. 4.3.1 above, i.e. that the Judgment makes a number of further errors in attempting to apply the *general* framework of corporate responsibility to respect in the UNGP to the *specific* context of climate change.

4.3.17 The District Court referred to the UNGP in the context of its conclusion that the responsibility to respect encompasses the Shell Group's entire value chain.[265] It held that the responsibility includes not only "*the closely affiliated companies of the Shell group*" but also "*the end-users of the products produced and traded by the Shell group*".[266] The District Court appears to have regarded this as providing a sufficient basis for stating that Shell has responsibility for its Scope 1, 2 and 3 emissions, applying "*an obligation of result*" in relation to the activities of the Shell Group and a "*significant best-efforts obligation*" in relation to "*the business relations of the Shell group, including the end users*".[267]

4.3.18 There are several critical errors in the approach taken in the Judgment, which are identified at para. 4.3.22 et seq. below but first we provide some relevant background.

4.3.19 Under the UNGP, businesses are expected to use due diligence processes to identify actual or potential human rights impacts with which they are 'involved'.

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263 Judgment, para. 4.4.11.

264 Judgment, para. 4.4.16.

265 Judgment, para. 4.4.17.

266 Judgment, para. 4.4.18.

267 Judgment, paras. 4.4.23 - 4.4.24.

'Involvement' under the UNGP can take three forms: a business can either 'cause', 'contribute to', or 'be directly linked to' an actual or potential negative human rights impact ("Human Rights Impact").[268] These terms are not grounded in domestic or international legal concepts and are not intended to, and do not, have legal effect.[269]

4.3.20 The UNGP stipulate the action expected of a business if it finds that it is 'involved' in a Human Rights Impact, depending on the nature of its involvement.[270]

(a) Accordingly, businesses should take steps to avoid causing or contributing to a Human Rights Impact through their own activities and should seek – through the exercise of 'leverage' – to prevent or mitigate impacts that are directly linked to their operations, products, or services by their business relationships, even if they do not contribute to those impacts.

(b) A 'cause' or 'contribute' type of involvement comes with an expectation to stop or prevent harms and to provide or cooperate in remediation through legitimate processes where harms occur.

(c) By contrast, where a business is 'directly linked' to a Human Rights Impact through a business relationship, it is expected to exercise any leverage it has to prevent or mitigate the Human Rights Impact.

(d) Under the UNGP, 'leverage' refers to a business' ability to effect change in the practices of the party that is causing or contributing to the Human Rights Impact.[271]

4.3.21 The District Court sought to use the UNGP to justify an obligation on Shell to reduce emissions across Scopes 1, 2 and 3 emissions, on the basis that:

(a) "*The level of responsibility is related to the extent to which companies have control and influence over…emissions*,"[272] and

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[268] Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction,* Guiding Principle 17.

[269] See generally, **Exhibit S-82**: J.E. Ruggie and J.F. Sherman III, 2017, 'The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale', *EJIL*, 28/3.

[270] Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction,* Guiding Principle 19.

[271] Exhibit S-76, Office of the High Commissioner for Human Rights, 2011, *The UN Guiding Principles on Business and Human Rights, An Introduction,* Guiding Principle 19.

[272] Judgment, para. 4.4.18.

(b) "*RDS' responsibility is defined by the influence and control it can exercise over the Scope 1 through to 3 emissions of the Shell group*".[273]

4.3.22 The conclusions drawn by the District Court stem from an incorrect understanding of the UNGP, as explained further below.

4.3.23 First, control and influence do not establish responsibility under the UNGP. The UNGP clarify that all businesses have a responsibility to respect human rights. As set out above, how a business is expected to act in relation to adverse human rights impacts that it identifies depends on its level of involvement with the negative human rights impacts – whether it caused, contributed to or is directly linked to an adverse impact. The District Court conflated the concepts of 'control' and 'influence' with responsibility and, in effect, applied the 'sphere of influence' concept that the UNGP had expressly sought to avoid (see para. 4.3.5 above).

4.3.24 Second, the District Court wrongly stated that it follows from the Oxford Report that "*it is internationally endorsed that companies bear responsibilities for Scope 3 emissions*".[274] This document says nothing about responsibilities or requirements to reduce Scope 3 emissions. See further, paras. 8.3.24-8.3.27 below.

4.3.25 Third, and in any event, the UNGP are a general normative framework for all business enterprises in connection with *all* business-related human rights impacts. The District Court wrongly attempted to extrapolate a highly specific legal obligation on Shell from this general framework. The UNGP are not sector or industry specific, nor do they assist when assessing how business should address or reduce carbon emissions. To the extent that the District Court found that Shell has a legal obligation to reduce emissions based on the UNGP, it is incorrect.

[273] Judgment, para. 4.4.21 and para. 4.4.25.

[274] Judgment para. 4.4.18.

5. THE INTERNATIONAL CLIMATE FRAMEWORK DOES NOT SUPPORT THE REDUCTION OBLIGATION

5.1 The multilateral framework of climate change rules obliges States to determine their individual emissions reduction pathway

5.1.1 As Section 2 explains, States have established a multilateral international law framework to combat climate change in the form of the UNFCCC[275] and the Paris Agreement.[276] The Netherlands is a party to both treaties.

5.1.2 The Paris Agreement contains both a *collective objective* to be pursued by all States, and *individual obligations* by which each State is obliged to contribute to that collective objective. Thus, the Paris Agreement:

(a) establishes a collective objective that States act to hold "*the increase in global average temperature to well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature rise to 1.5°C*";[277] and

(b) establishes an individual obligation on each State to, among other things, submit a pathway for their own emissions reductions in the form of NDCs.[278] It is through their NDCs that States communicate the pathway they will take to reduce their GHG emissions in pursuit of the collective objectives of the Paris Agreement.

5.1.3 This combination of collective objectives and individual obligations reflects the reality that there is no single pathway for the world, or any individual State, to achieve the emissions reductions necessary to limit global temperature rise. Indeed, the Paris Agreement explicitly recognises both the different capacities of States to contribute to the collective objective, and also the sovereign right of States to make different choices about how they design their own emissions reduction pathway. It does so by providing that the Paris Agreement "*will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*."[279]

5.1.4 The Paris Agreement does not support the recognition of a freestanding binding Reduction Obligation on an individual company. Indeed, the recognition of such

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275 The UNFCCC entered into force on 21 March 1994 and has 197 Parties, all of which are States (except the European Union), and for all of which it is legally binding.

276 The Paris Agreement entered into force on 4 November 2016. It has 195 signatories and 193 Parties. The Agreement is binding on the 193 Parties that have ratified it, all of which are States (except the European Union).

277 Exhibit RK-1, the Paris Agreement, Article 2.1(a).

278 Exhibit RK-1, the Paris Agreement, Articles 3 and 4(2).

279 Exhibit RK-1, the Paris Agreement, Article 2(2); Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, paras. 7.10 - 7.13.

a Reduction Obligation is inconsistent with the structure of the Paris Agreement. This is so for two key reasons.

5.1.5 First, the Reduction Obligation undermines the primacy of State responsibility under the Paris Agreement for setting and implementing economy-wide emissions reductions. The Paris Agreement places an obligation on each State party to communicate their individual emissions reduction pathway (in the form of an NDC). The corollary of States assuming this individual *obligation* is that States also have the *right* to determine their own emissions reduction pathway having regard to their own national circumstances, taking into account a wide range of trade-offs and value judgements. That right includes the power to determine the obligations to be imposed on the citizens and businesses subject to that State's jurisdiction.

5.1.6 By imposing a binding Reduction Obligation on Shell, the Judgment addresses a matter which (a) is within the discretion accorded to the Dutch Government to determine its own emissions reduction pathway and (b) is also within the similar discretion of the more than 70 States in which Group companies operate across the world.

5.1.7 Leaving aside other points about whether there is such a binding Reduction Obligation (which are summarised in Section 7): any such finding could only properly be made (if at all) after careful and detailed consideration has been given to whether such a finding would be consistent with the legal and policy framework in all of the relevant jurisdictions. The District Court did not do so; in particular, it did not assess the national circumstances of any other States in which the Shell Group operates (including developing States).[280]

5.1.8 Second, the District Court describes the objectives of the Paris Agreement as representing a "*universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change*" and stated that it followed this reasoning in its interpretation of the unwritten standard of care.[281] It went on to state that, in following this reasoning, it does not formulate a legally binding standard for the prevention of dangerous climate change in the Netherlands but rather that it includes this "*broad consensus*" in its answer to the question whether Shell is obliged to reduce the Shell Group's CO_2 emissions via its corporate policy.[282] This analysis is misplaced for the reasons noted in Sections 3.1 and 3.2. In particular, the Reduction Obligation found by the District Court is not aligned with the consensus embodied in the Paris

[280] Exhibit RK-1, Article 4(4) recognises that while developed country Parties should set absolute emissions *reduction* targets, developing country Parties are only required to move to this ambition over time and may take the principle of common but differentiated responsibilities into account when determining its strategies: "*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances*."

[281] Judgment, para. 4.4.27.

[282] Judgment, para. 4.4.27.

Agreement. The Paris Agreement consensus itself relates to global average temperature targets and contains no specific, time-sensitive overall GHG reduction target. It therefore does not support the finding that single non-State actors are subject to such individual binding targets.

5.2 The Intergovernmental Panel on Climate Change Reports do not support the existence of a Reduction Obligation on an individual non-State actor

5.2.1 The IPCC is a UN intergovernmental organisation which reports on what is known about the drivers of climate change, its impacts and future risks, and how adaptation and mitigation can reduce those risks. The Judgment uses the IPCC SR1.5 as the basis for its conclusion that there is "*a widely endorsed consensus that in order to limit global warming to 1.5°C, reduction pathways that reduce CO2 emissions by net 45% in 2030, relative to 2010 levels, and by net 100% in 2050, should be chosen.*"[283] While the District Court emphasises that it "*does not formulate a legally binding standard for–in this case–a reduction pathway to be chosen,*" it nevertheless goes on to use the "*broad consensus*" from the IPCC's SR1.5 report in its interpretation of the unwritten standard of care.[284]

5.2.2 The IPCC's reports state that – as a matter of scientific consensus – the world must achieve certain emissions reductions in order to limit global warming.[285] But they do not support the finding of the District Court that there is a binding legal obligation on Shell as an individual company. The District Court expressly acknowledges this earlier in the same paragraph, when it states that "*RDS rightfully points out that the IPCC does not prescribes [sic] a particular reduction pathway and that the scenarios reported by the IPCC are potential pathways, which have many variables and alternatives. RDS … is right when pointing out that the IPCC does not comment on the question whether and how its scenarios can be translated into contributions of various actors and sectors, let alone contributions of individual parties.*"[286] There is therefore no way to transpose the IPCC's consensus onto Shell without considering the range of global emissions reduction pathways capable of limiting global warming in line with that consensus. The Judgment incorrectly made that transposition.

5.2.3 The reliance on the Paris Agreement and the IPCC is brought together in the District Court's conclusion that Shell "*should take as a guideline that the Shell group's CO2 emissions (Scope 1, 2 and 3) in 2030 must be net 45% lower relative to 2019 levels*".[287] The Judgment explains that this conclusion is reached

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283 Judgment, para. 4.4.29.

284 Judgment, para. 4.4.29.

285 See e.g. Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 6.

286 Judgment, para. 4.4.29.

287 Judgment, para. 4.4.32.

through the reasoning in para. 4.4.33 through to para. 4.4.38 of the Judgment,[288] which, in summary, state:

(a) "*dangerous climate change is a worldwide problem, which RDS cannot solve on its own*" so Shell has a "*significant individual best-efforts obligation, which requires cooperation with other parties*";[289]

(b) there is a "*broad international consensus that each company must independently work towards the goal of net zero emissions by 2050*",[290] though:

(i) the "*concrete implementation of this responsibility for companies is still unclear*";[291] and

(ii) there is "*no well-defined and concrete specification for the method according to which the timing of the various companies must be applied in working towards the goal of net zero emissions in 2050*";[292]

(c) still, Shell "*may be expected to do its part*";[293]

(d) every emission of CO_2 and other greenhouse gases contributes to the environmental damage in the Netherlands;[294] and

(e) it is more appropriate to take 2019 as the base year, rather than 2010 because this "*sufficiently corresponds*" to the consensus described in the IPCC's SR1.5 report.[295]

5.2.4 Again, it is striking that there is nothing in these paragraphs that explains the District Court's leap in reasoning from the principles set out in the Paris Agreement and the IPCC's SR1.5 report to the specific content of the Reduction Obligation on Shell. Indeed, the District Court acknowledges the lack of any applicable method that might justify its imposition of a Reduction Obligation, at para. 4.4.36, but simply falls back on the general proposition that "*each company must independently work towards achieving net zero emissions by 2050*".[296]

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288 Judgment, para. 4.4.32.

289 Judgment, para. 4.4.33.

290 Judgment, para. 4.4.34.

291 Judgment, para. 4.4.35.

292 Judgment, para. 4.4.36.

293 Judgment, para. 4.4.36.

294 Judgment, para. 4.4.37.

295 Judgment, para. 4.4.38.

296 Judgment, para. 4.4.36.

5.3 The District Court's selection of "45%" as the Reduction Obligation for Shell is not supported by international reports

5.3.1 The District Court's choice of 45% as the appropriate Reduction Obligation to apply to Shell is not supported by international reports. The District Court found that the 45% average global emissions reduction from the IPCC SR1.5 could be directly translated into a 45% net emissions Reduction Obligation for the Scope 1, 2 and 3 emissions reported by the Shell Group, requiring that the Shell Group should satisfy this reduction percentage by 2030.[297] This direct transposition of the IPCC's *average global emissions reduction* recommendation into an *individual emissions reduction obligation for a company* is inappropriate. It ignores the multi-faceted considerations involved in determining how a macro global emissions reduction objective translates into an individual emissions reduction pathway for an individual economic actor.[298]

5.3.2 Indeed, it is widely accepted that there are a broad range of potential emissions reductions pathways available – each of which States may choose from (consistent with the framework of the Paris Agreement), and all of which may entail different emissions reductions for the Shell Group and every other economic actor (and individual) in society.[299] Given these multiple pathways and the differing implications that each of them entails for all aspects of the economy and society, it is Governments that must ultimately implement economy-wide policies to collectively balance these interests in a manner consistent with the world's finite emissions budget.

5.3.3 To demonstrate this variation, intergovernmental organisations such as the IPCC and the IEA have developed various potential reduction scenarios, based on scientific research and analyses, to translate the macro-objectives of the Paris Agreement into more granular emissions reduction scenarios for individual sectors. In October 2018, the IPCC published IPCC SR1.5 and in May 2021, the IEA published its NZE scenario, which provides a scenario for reaching net zero emissions by 2050.[300]

5.3.4 As IPCC SR1.5 outlines, the emissions reductions required to achieve the goals of the Paris Agreement can be pursued in a "*variety of ways*" and involve

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297 Judgment, para. 4.4.29.

298 This also implies that the District Court's finding at para. 4.4.40 et seq. of the Judgment (that the importance of access to reliable and affordable energy, and the Shell Group's role in it, has no bearing on Shell's Reduction Obligation, because the interests that are served within the context of climate targets) does not do justice to the broader context of the energy transition and the role of an individual economic actor. After all, within a chosen reduction pathway, also with a view of considerations of access to reliable and affordable energy, it is possible to choose to reduce the use of coal for electricity generation in favour of using less carbon intensive gas. Such a choice will, by its nature, lead to significantly different outcomes for a company that supplies coal and for a company that supplies gas, even though this still fits within the climate goals in the Paris Agreement. The District Court did not take this into account.

299 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 14.

300 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 3.

"*multiple options and choices*".[301] For example, IPCC SR1.5 draws upon 222 different scenarios in total, of which 90 scenarios are consistent with maintaining a temperature rise of 1.5°C compared to pre-industrial levels (see below).[302]

5.3.5 These different pathways to achieving the 1.5°C Paris Agreement climate objective indicate a range of global reductions in energy-related emissions achieved by 2030. The reduction will not be uniform across countries, energy sources and economic sectors. Increasing demand for energy services in developing economies, many of which are "*navigating what has historically been an energy- and emissions-intensive period of urbanisation and industrialisation*",[303] will also influence the design of these emissions reduction pathways. All reduction pathways anticipate a continued need for fossil fuels until 2030 and beyond.[304]

5.3.6 The pathways referred to in the IPCC SR1.5 report envisage a substantially greater decline in coal use (relative to oil and gas) until 2030 to achieve the objectives of the Paris Agreement (with an increasing reduction in oil and gas supply post-2030).[305] Professor Adam Hawkes' analysis of a subset of 21 scenarios used in IPCC SR1.5 shows a reduction in coal supply of 69% compared to between 2020 and 2030 compared with a 32% reduction in oil supply and 18% reduction in natural gas supply.[306] Due to the higher carbon intensity of coal relative to oil and gas, based on these reduction scenarios, the reduction in coal use would deliver 62% of the total CO_2 emissions reductions from the energy sector between 2020 and 2030, compared with 30% for oil and just 8% for gas.[307] These are consistent with the IEA NZE scenario, which envisages a reduction in coal use of 53% between 2020 and 2030, compared with a 21% reduction in oil use and 6% reduction in gas use over the same period.[308] These significant differences between the contribution of different energy sources to Paris Agreement-compliant emissions reduction pathways illustrates the inappropriateness of applying an average global emissions reduction norm, including coal, to an individual company which supplies predominantly oil and gas (and does not supply coal).[309]

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301 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, p. 276; 112-113.

302 Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, Table 2.1.

303 Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, p. 15.

304 See para. 2.2.12.

305 Based on a study of 85 available primary energy supply pathways, summarised in Milieudefensie c.s., Exhibit 136, IPCC 2018 *Global Warming of 1.5°C*, Table 2.6 on p. 132.

306 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, paras. 8.2 - 8.5, Table 1.

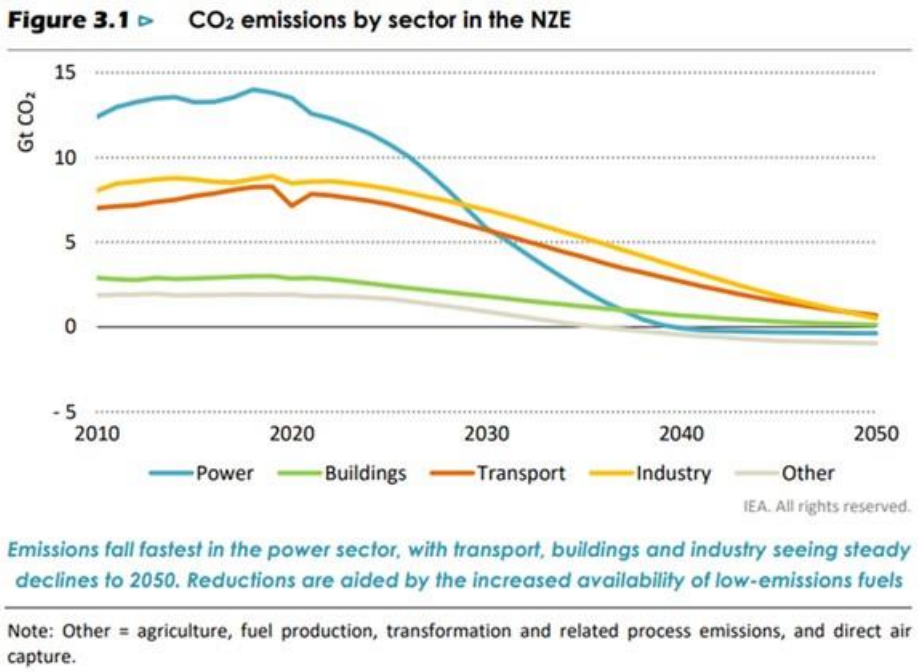
307 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.5.

308 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 8.6.

309 The products supplied by Shell are weighted towards oil and gas, with oil products and gas comprising approximately 90% of Shell's energy product sales in 2019. Exhibit S-4, Shell plc, 10 March 2022, *Annual*

5.3.7 Like the IPCC in SR1.5, the IEA also recognises that "*[t]here are many possible paths to achieve net-zero CO2 emissions globally by 2050*".[310] Indeed, even the IEA NZE scenario, which assumes that major developments in increasing energy efficiency will reduce demand despite a strongly growing world economy,[311] anticipates a ~60% reduction in emissions from combustion of coal, a ~35% reduction in emissions from oil combustion and an ~18% reduction in emissions from gas combustion between 2019 and 2030.[312] As outlined in Figures 9 and 10, most of the emissions reductions up to 2030 will come from the easier-to-abate power sector and to a much lesser extent from harder-to-abate sectors such as transport:

Figure 9: CO2 emissions by sector in the IEA NZE Scenario[313]



Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119)), p. 92. 2019 data is used for comparison with most recent full year IEA data. In 2021, approximately 88% of Shell's energy product sales were oil products or gas.

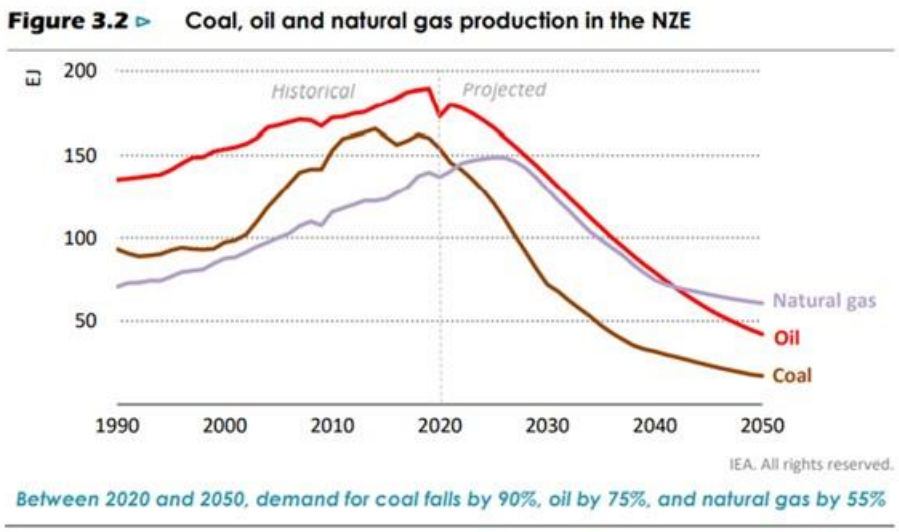
310 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 49, 13 and 83.

311 Although the IEA NZE scenario expects that the world economy will be 40% larger in 2030 when compared to 2020, it assumes that the world will use 7% less energy as a result of increasing energy efficiency. Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 14.

312 Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, p. 100-101.

313 *Ibid*. at p. 100-101.

Figure 10: CO2 emissions by sector in the IEA NZE Scenario[314]



5.3.8 These various reduction scenarios show that there is no single pathway that can be applied to States, businesses and other actors across the board. The target of a carbon emissions reduction of net 45% by 2030 as mentioned in IPCC SR1.5 is an *average* reduction norm that cannot be applied equally to each specific energy source, to each sector of the economy, to each country or to each individual actor in society such as Shell.

5.4 The selection of "45%" as the Reduction Obligation for Shell fails to account for the differences between States in which the Shell Group operates

5.4.1 A company's emissions reduction pathway will be particularly influenced by (a) the relevant sector in which it operates, and (b) the State(s) in which it operates. Point (a) has been considered at Section 2.3. As for point (b): as also noted above in Section 2.3, the Paris Agreement recognises and accommodates the right of States to make decisions about how to implement their contribution to global emissions reductions. The fact that States have different NDCs shows that a variety of State-specific reduction objectives and pathways are dependent on, amongst other things, the State's own domestic challenges, economic situation and current energy mix. In this respect, there are significant differences between existing energy systems and requirements in the Netherlands as compared with other countries in which the Shell Group operates. But these differences were not accounted for by the District Court in its Judgment. For example, in states such as China and India (which in 2018 accounted for 30.3% and 7.2% of worldwide CO_2 emissions, respectively),[315] a key challenge is to transition from coal to less carbon intensive energy sources, while dealing with

[314] *Ibid*. at p. 100-101.

[315] The World Bank, 2018 CO_2 emissions data, *CO_2 emissions data (kt) – World, India, China*.

the needs of a growing population and increased urbanization.[316] As Daniel Yergin, a leading authority on energy, international politics and economics, explains:

"For India, it's a question of "energy transitions"—plural—which reflects the fact that its per capita income is only one-tenth that of the United States. Prime Minister Narendra Modi's government has announced very ambitious goals for wind, solar, and hydrogen, and has set a net-zero target for 2070. Yet at the same time, it has said it will continue to use hydrocarbons to achieve its immediate priorities. As the government put it in an official report, "Energy is the mainstay of the development process of any country"."[317]

5.4.2 Consequently, it may be the case that in some States, the use of gas (which cause fewer emissions per unit of energy than coal, i.e. it is less carbon intensive) increases until 2030.[318] As noted in Section 2 above, many States are also prioritising the phase-down of coal until 2030, accepting that more limited reductions in the use of oil and gas can be achieved in this decade.[319] Shell can play an important role in supporting this rapid transition away from coal, but its ability to do so would be affected by the Reduction Obligation.

5.4.3 It is also important to bear in mind the need for equity and fairness between States and across regions. As noted by Nigeria's Vice President, Yemi Osinbajo to Daniel Yergin: "'*The term energy transition itself is a curious one… We sometimes tend to focus on one element of the transition. But in fact, that energy transition itself is multidimensional' and must take 'into account the different realities of various economies and accommodat[e] various pathways to net zero*"'.[320] In the case of gas, for example, Osinbajo notes that limiting the development of such projects poses big challenges for African nations, whilst making an insignificant dent in global emissions. This is because natural gas and natural gas liquids are already replacing the "*huge amounts of charcoal and kerosene cookstoves that are most widely used for cooking, and thus saving millions of lives otherwise lost to indoor air pollution annually*."[321]

5.4.4 The international consensus, as reflected in the Paris Agreement, therefore recognises that the average 45% emissions reduction called for by the IPCC is just that – an average. It does not reflect the particular circumstances of any

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316 See: Exhibit S-28, IEA, 2021, *India Energy Outlook 2021*, p. 12-15; see: Exhibit S-24, IEA, 2021, *World Energy Outlook 2021*, p. 44.

317 Exhibit S-27, Daniel Yergin, 27 November 2021, 'Why the Energy Transition Will Be So Complicated', *The Atlantic*.

318 Exhibit S-28, IEA, 2021, *India Energy Outlook 2021*, p. 12-15.

319 See Section 2.5. Exhibit S-31, the Glasgow Climate Pact, para. 20 called on States to accelerate efforts towards the phasedown of unabated coal power.

320 Exhibit S-27, D. Yergin, 27 November 2021, 'Why the Energy Transition Will Be So Complicated', *The Atlantic*, p. 7.

321 Exhibit S-27, D. Yergin, 27 November 2021, 'Why the Energy Transition Will Be So Complicated', *The Atlantic*.

individual State or sector and does not provide a proper legal basis for imposing an emissions Reduction Obligation on Shell and through it on the Shell Group, which operates in over 70 States.

5.5 Case law from around the world emphasises the pre-eminent role of Government in relation to emissions reduction pathways

5.5.1 As noted in Sections 3.1 and 3.4 above, the conclusion of the Supreme Court in *Urgenda,* that "*decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament*",[322] is consistent with the approach taken by courts around the world in the context of climate change.

5.5.2 Case law from other jurisdictions, including Germany, Belgium, France, the UK, New Zealand and the USA,[323] shows that courts have recognised that the determination of emissions reduction pathways involves inherently political questions and requires allocative decisions for which different, at times opposing interests need to be taken into account. Accordingly, courts have consistently regarded such decisions as being appropriate for resolution by the legislative and executive branches of government. See further the discussion on these cases at Section 4.2 above as well as Section 10.9 below.

[322] Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), para. 8.3.2.

[323] See paras. 3.4.6 and 4.2.18 above.

6. THE JUDGMENT IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF EU LAW AND POLICY

6.1 The alleged rule of unwritten law jeopardises EU policy objectives

6.1.1 The effect of the Judgment is to hinder the free movement of goods which is prohibited by Article 34 TFEU. The restrictions imposed by the Judgment must be shown to be suitable for securing the relevant objective and must not go further than is reasonably necessary in doing so. The Judgment does not justify those restrictions according to the standards established under EU law.

6.1.2 In any event, the Judgment undermines EU law and policy in fundamental respects contrary to Article 4(3) TEU.

6.1.3 First, the internal market is based on the principle of economic freedom, unhindered by any national barriers to competition. Restrictions on such freedom must be proportionate and take account of other EU policy objectives such as energy fairness and security.

6.1.4 The Judgment restricts Shell's ability to compete, since its rivals are subject to no such restrictions. Even if applying the unwritten law broadly, the standard formulated in the Judgment does not apply to undertakings outside the jurisdiction of the Dutch courts. It therefore operates as a national barrier to competition in the internal market.

6.1.5 Secondly, the Judgment undermines the EU legal and policy framework concerned with climate change. The EU has, following detailed study, adopted a coherent scheme of policy choices it considers are best suited to securing the most ambitious realistic GHG reductions in the world. That policy framework is designed not only to incentivise the investment and technology developments needed to secure the relevant reductions, but also to reduce the risk that emissions simply move beyond the reach of the EU framework and to ensure energy fairness and security within the EU.

6.1.6 The District Court did not recognise the fact that the Judgment would jeopardise these EU policy objectives. The District Court, unlike a legislator, was not equipped to undertake the necessary balancing exercise.

6.2 EU law is supreme in the Netherlands and must be applied when assessing the alleged existence of a rule of unwritten law

6.2.1 EU law is supreme in the Netherlands. This requires the disapplication of rules of Dutch tort law (for example) where they conflict with EU law. The disapplication required by EU law is far-reaching. It requires the national court "*to do everything necessary at the moment of* [the] *application* [of EU law] *to*

set aside national provisions which might prevent Community rules from having full force and effect".[324]

6.2.2 The primacy of EU law applies not only to legislative provisions, but also to "*any legislative, administrative or judicial practice which might impair the effectiveness of Community law*".[325] The primacy of EU law also requires national authorities to "*interpret [domestic law] ... as far as possible, in the light of the wording and the purpose of*" the relevant EU law provision.[326]

6.3 The alleged rule of unwritten law is an unjustified restriction of the free movement of goods

6.3.1 The prohibition in Article 34 TFEU is construed broadly.[327] All measures which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are prohibited by Article 34 TFEU.[328] An unwritten law of the type identified in the Judgment, and a binding judgment of a national court, are both "*measures*" within the meaning of Article 34 TFEU.[329]

6.3.2 Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-EU trade. Unless justified in the given circumstances, a national measure that has an effect on imports from other Member States and domestic goods alike is prohibited under Article 34 TFEU if that measure operates so as to hinder the imports.[330]

6.3.3 The goods that fall within the ambit of Article 34 TFEU have been defined very broadly by the ECJ. Essentially, anything that is the subject of a commercial transaction and is not services or capital falls within its definition. This extends to all goods which have lawfully entered the internal market (for example, oil products imported from outside the EU).[331] The nationality of the trader of the goods in question and/or the person whose trade has been hindered is irrelevant. Only the status of the goods is relevant for the application of Article 34 TFEU.[332]

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[324] ECJ 9 March 1978, C-106/77, ECLI:EU:C:1978:49 (*Simmenthal*), para. 22.

[325] ECJ 9 March 1978, C-106/77, ECLI:EU:C:1978:49 (*Simmenthal*), para. 22.

[326] ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing SA v La Comercial Internacional de Alimentacion SA*), para. 8.

[327] ECJ 18 June 2019, C-591/17, ECLI:EU:C:2019:504 (*Austria v Germany*), paras. 125-134.

[328] ECJ 11 July 1974, C-8/74, ECLI:EU:C:1974:82 (*Dassonville*), para. 5.

[329] ECJ 3 March 1988, C-434/85, ECLI:EU:C:1988:109 (*Allen and Hanburys Ltd v Generics (UK) Ltd)*, para. 25.

[330] ECJ 20 February 1979, C-120/78, ECLI:EU:C:1979:42 (*Rewe-Zentral ('Cassis de Dijon'))*, para. 15; ECJ 15 September 1994, C-293/93, ECLI:EU:C:1994:330 (*Houtwipper*), para. 11; ECJ 16 January 2014, C-481/12, ECLI:EU:C:2014:11 (*Juvelta*), para. 17.

[331] ECJ 15 December 1976, C-41/76, ECLI:EU:C:1976:182 (*Donckerwolcke)*, para. 18.

[332] ECJ 1 July 1969, C-2/69 and C-3/69, ECLI:EU:C:1969:30 (*Sociaal Fonds voor de Diamantarbeiders)*, para. 24/26.

6.3.4 The Judgment relates to intra-EU trade in goods that are within the ambit of Article 34 TFEU:

(a) For the purposes of the Scope 1 emissions, Shell and its subsidiaries use products imported across EU frontiers. These products are imported exclusively and directly as inputs into processes that produce Scope 1 emissions.

(b) For the purposes of the Scope 2 emissions, the supply of "*electricity, steam and heating*" and other emissions-generating goods from other Member States to Shell Group companies in the Netherlands and to Shell Group companies in other Member States will be hindered by the Judgment. The "*electricity, steam and heating*" which Shell Group companies acquire from third party sources are also "*goods*" within the meaning of Article 34 TFEU.[333]

(c) For the purposes of the Scope 3 emissions, the products that result from the *activities* of the Shell Group are "*goods*" within the meaning of Article 34 TFEU and they cross EU Member State frontiers to a very significant extent.

6.3.5 As a multinational business whose supply chain encompasses both upstream (e.g. exploration fields, liquefying gas, generating wind power) and downstream (e.g. refineries, trading, B2B and retail sales) flows, Shell is active in around 15 countries in the EU alone.[334] The Shell Group's activities across the whole energy value chain are illustrated in Section 2.7.

6.3.6 Oil and gas produced or refined by the Shell Group in the Netherlands is exported or sold to individuals and businesses across the EU on a daily basis, and across a range of sectors including road transport and aviation. Similarly, Shell's Group companies in Germany, the Netherlands, Italy or Spain are actively serving hundreds of business customers and are also selling oil and gas commodities on trade markets across national and continental borders.[335]

6.3.7 Shell cannot comply with the Judgment without affecting intra-EU trade directly or indirectly, as the Reduction Obligation necessarily constrains the ability of the Shell Group to sell certain products; including within the EU. The supply chains described above mean that intra-EU trade will inevitably be affected by Shell's attempts to comply with the Reduction Obligation. The Reduction Obligation will therefore discourage and hinder, directly and indirectly, the supply of goods traded by the Shell Group between Member States.

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333 Exhibit RK-18, World Resources Institute, 2015, *GHG Protocol Scope 2 Guidance*, p. 5-6, para. 1.2. See also Judgment para. 2.5.4.

334 **Exhibit S-83**: Shell plc, 2019, *Shell Energy Europe Brochure, A Better Way to Power Your Business*, p. 15.

335 Exhibit S-83, Shell plc, 2019, *Shell Energy Europe Brochure, A Better Way to Power Your Business*, p. 8-9.

6.3.8 In any event, there is no attempt in the Judgment to assess the extent (if any) to which Shell could comply with the Reduction Obligation in a way that would not discourage or restrict intra-EU trade. This is a legally necessary question which this Court must ask.

6.3.9 A national measure restricting intra-Union trade may be justified by overriding requirements relating to – for example – the protection of the environment.[336] The ECJ has recognised on several occasions, including in the *Essent Belgium* case, that national measures which go further than the EU regime in the same area may be justified where those national measures seek to address climate change. However, any such measure must satisfy the principle of proportionality. This requires that the measure is confined to: (a) what is actually suitable to secure the legitimate objective; and (b) no more than is necessary (when compared with any less onerous alternatives) to secure that legitimate objective.[337]

6.3.10 In showing that the measure is justified, the burden lies on the relevant national authority, which may include a national court. Where a Member State's authority wishes to justify a measure, it must show that the measure is well-founded by providing relevant evidence, data (technical, scientific, statistical) and all other relevant information.[338] The justification provided by the Member State authority must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure and precise evidence enabling its arguments to be substantiated.[339] This is not included in the Judgment.

6.3.11 By way of example, in adopting the Dutch Climate Accord, the Dutch Ministry of Economic Affairs commissioned PwC to undertake a report on the potential effects of a national tax on GHG emissions for the Dutch industry and to assess the risks of carbon leakage.[340] This report was based on extensive research. Conversely, a mere statement that the measure is justified on one of the accepted grounds or in the absence of a comprehensive analysis of possible alternatives would have been unsatisfactory.[341]

6.3.12 In assessing whether the alleged rule of unwritten law as found by the Judgment was proportionate, the Court must have regard to the fact that the EU has already legislated extensively in the area. Any national measure must be assessed in the

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336 Article 36 TFEU; ECJ 11 September 2014, C-204/12 to C-208/12, ECLI:EU:C:2014:2192 (*Essent Belgium*), paras. 90-91.

337 ECJ 15 November 2005, C-320/03, ECLI:EU:C:2005:684 (*Commission v Austria*), para. 85; ECJ 15 November 2007, C-319/05, ECLI:EU:C:2007:678 (*Commission v Germany (Garlic)),* para. 87.

338 ECJ 15 November 2007, C-319/05, ECLI:EU:C:2007:678 (*Commission v Germany (Garlic)),* para. 88.

339 ECJ 7 June 2007, C-254/05, ECLI:EU:C:2007:319 (*Commission v Belgium*), para. 36.

340 **Exhibit S-84**: PwC, 14 June 2019, *De effecten van de overwogen vormgeving van de nationale heffing op broeikasgas emissies in de industrie. Rapport in opdracht van het Ministerie van Economische Zaken en Klimaat.*

341 ECJ 10 April 2008, C-265/06, ECLI:EU:C:2008:210 (*Commission v Portugal*), paras. 40-47.

light of the harmonising provisions.[342] It will have to be acknowledged, therefore, that when the EU assessed how best to secure the same climate change objectives in a balanced, effective and sustainable manner, it never proposed obligations such as those in the Judgment. Instead, the EU chose to implement a wide range of measures including non-market and market mechanisms (see Sections 2.4 and 3.3 above).

6.3.13 The restrictions imposed by the Judgment have not been justified in this case.

6.3.14 First, the District Court did not assess the *extent* of the restrictions:

(a) Any proportionality analysis must first assess the extent of the restriction that will be imposed by the measure. It is impossible to undertake the necessary balancing exercise without at least estimating the potential restrictive effects of the measure, i.e. the harm which must be balanced against the alleged positive effects of the measure. There is no examination in the Judgment of how or to what extent the Reduction Obligation will hinder intra-EU trade or the EU policy framework more generally.

(b) The restrictive effects of the Reduction Obligation are potentially very extensive. The District Court found that where an undertaking takes decisions in the Netherlands which even indirectly lead to emissions anywhere in the world, the District Court will assume jurisdiction over that undertaking (Article 7(2) of the Rome II Regulation 1215/2012) and apply Dutch law (including the unwritten standard of care) to it. Accordingly, this means that the unwritten law must be applied to other undertakings operating in the Netherlands in a manner similar to Shell. In reliance on the Judgment, Milieudefensie announced on 13 January 2022 that it was threatening similar proceedings against 29 other entities based in the Netherlands subject to their agreement to publish concrete plans within three months as to how they will reduce emissions by 45% by 2030.[343]

6.3.15 Second, the Reduction Obligation is *not suitable* to secure the objectives set out in the Judgment:

(a) As regards the question of whether the Reduction Obligation is suitable to secure the objectives set out by the Judgment, the analysis of the District Court falls short of the rigorous analysis required by EU law.

(b) As ECJ case law makes clear, it is not sufficient simply to assert or assume that the measure is suitable to secure the objectives. The question under EU law is whether the Court has demonstrated (since the burden lies on the Member State authority for these purposes) that

[342] ECJ 14 December 2004, C-309/02, ECLI:EU:C:2004:799 (*Radlberger Spitz*), para. 53.

[343] Exhibit S-10, Milieudefensie, 13 January 2022, *Letter to CEOs: Betreft: De wereld is veranderd. Nu u nog*.

imposing reductions on Shell alone is "*guaranteed*" to solve the problem.[344]

(c) Since the standard is applied strictly, EU law requires the Member State authority (here the District Court) to have detailed, specific and compelling evidence demonstrating that the particular reductions imposed on Shell will lead to the overall global effects which the District Court recognised are necessary to secure the climate change objectives set out in the various instruments cited above.

(d) The Judgment explicitly acknowledges that the Reduction Obligation will not secure those objectives and that Shell *"cannot solve this global problem on its own*".[345] In particular, the Judgment recognises that much broader and additional action is required and that the District Court has no power to secure this additional action or even an awareness of what additional action is actually required.[346]

(e) The Judgment imposed the Reduction Obligation on Shell in the hope that other unspecified action would be taken and without any evidence as to what that action would need to be or the likelihood of it occurring. The Judgment was thus adopted in the implicit knowledge that if further, broader international action was not taken, the Reduction Obligation imposed on Shell would be ineffective. It necessarily follows that the threshold for a justification under Article 36 TFEU is not met.

(f) Moreover, EU law requires that the Member State authority demonstrates that the measure will secure its objective in a "*consistent and systematic manner*".[347] It is difficult to see how the Reduction Obligation could conceivably operate in a consistent and systematic manner when it operates against one undertaking only and in circumstances where the Judgment recognises that the objective can only in fact be secured when thousands, if not millions, of other undertakings are subject to similar restrictions globally. This is all the more problematic since the Dutch civil court does not have the jurisdiction to effect these.

(g) Even in respect of those undertakings over which the Dutch courts have jurisdiction, it cannot be said that the measure operates in a consistent and systematic manner. Whether and to what extent the alleged unwritten law will affect other such undertakings depends entirely on the actions of plaintiffs who may or may not commence proceedings against them at a time which cannot be predicted and with an unknown

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344 ECJ 25 July 1991, C-353/89, ECLI:EU:C:1991:325 (*Commission v Netherlands*), para. 19.

345 Judgment, para. 4.4.49.

346 Judgment, paras. 4.4.49-4.4.50.

347 ECJ 23 December 2016, C-333/14, ECLI:EU:C:2015:845 (*The Scotch Whisky Association*), para. 37; ECJ 10 March 2009, C-169/07, ECLI:EU:C:2009:141 (*Hartlauer*), para. 55.

outcome. The case law of other national courts discussed above in Section 5.5 and para. 4.2.18 does not support the assumption that the outcome of such proceedings would be similar to the one on the proceedings in the first instance of this case.

6.3.16 The reasoning of the District Court thus falls far short of what EU law requires of a Member State in demonstrating that a measure restricting the free movement of goods is suitable for securing the objective in question.

6.3.17 In fact, the Judgment will be ineffective and potentially harmful. Legal certainty is key to enabling the investments needed for the energy transition. It is served by coordinated policies undertaken by the Dutch government and other governments around the world. The Judgment created legal uncertainty instead.

6.3.18 Third, the District Court did not ask if the Reduction Obligation is *more onerous than is reasonably necessary* to secure the objectives set out in the Judgment. The District Court was required to assess whether there were any other means which would have a less restrictive effect on intra-Union trade, but which nevertheless reach the same result.[348] The District Court never attempted this exercise, not even when considering whether to include Scope 3 emissions as part of the Reduction Obligation.

6.4 The alleged rule of unwritten law undermines the EU policy framework

6.4.1 Article 4(3) TEU provides that "[t]*he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*". This duty also applies to the judicial branch of a Member State.[349]

6.4.2 The aim of the EU is to "*establish an internal market*" based on "*a highly competitive social market economy*" (Article 3(3) TEU). The EU therefore seeks to ensure "*an open market economy with free competition*" (Articles 119, 120, 127, 170, 173 TFEU). Protocol No 27, annexed to the EU Treaties, states that "*the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted*".[350] These principles are fundamental to the EU.

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348 ECJ 20 May 1976, C-104/75, ECLI:EU:C:1976:67 (*De Peijper)*, para. 17; ECJ 15 March 2007, C-54/05, ECLI:EU:C:2007:168 (*Commission v Finland*), para. 46; ECJ 20 September 2007, C-297/05, ECLI:EU:C:2007:531 (*Commission v Netherlands*), para. 79. See also *Commission Guide on Articles 34-36 TFEU* (2021/c 100/3, p. 75), 23 March 2021.

349 ECJ 14 December 2000, C-300/98 and C-392/98, ECLI:EU:C:2000:688 (*Dior*), paras. 36-38. Loyalty applies to the Member States even when they act within their own competences, or when they operate outside of the Treaty entirely: ECJ 14 November 1978, ECLI:EU:C:1978:202 (*Ruling 1/78, IAEA*), paras. 34-36; ECJ 19 March 1993, ECLI:EU:C:1993:106 (*Opinion 2/91, ILO*), para. 36; ECJ 15 November 1994, ECLI:EU:C:1994:384 (*Opinion 1/94, WTO*), para. 108 and ECJ 6 December 2001, ECLI:EU:C:2001:664 (*Opinion 2/00, Cartagena*), para. 18.

350 The notion of the internal market is built on the principle that market participants should operate with the greatest possible degree of economic freedom, unhindered by any national barriers to competition.

6.4.3 The Judgment imposes a significant competitive disadvantage on Shell, as the Reduction Obligation applies only to the Shell Group (not to competitors of the Shell Group in the EU or internationally). Accordingly, the measure distorts competition between the Shell Group and other players in the market and thereby undermines the level playing field established by the EU internal market. This competitive distortion is not assessed in the Judgment at all. The proportionality assessment required by EU law could not be done without weighing this distortion in the balance.

6.4.4 The Judgment distorts the ability of Shell to compete, since its commercial peers are currently subject to no such restrictions. Even if the Reduction Obligation was to be applied more broadly to other entities, it does not apply to undertakings outside the jurisdiction of the Dutch courts. There is no indication that measures equivalent to the Reduction Obligation will be declared by the courts or legislatures of the other Member States of the EU (and the District Court never examined that likelihood). It therefore operates as a national barrier to competition in the internal market.

6.4.5 The Judgment also jeopardises the EU energy policy objectives of ensuring energy security and energy fairness, as laid down Article 194(1) TFEU.[351] In line with this article, the EU Energy Union Strategy (2015) discusses in its first paragraph that "*[t]he goal of a resilient Energy Union with an ambitious climate policy at its core is to give EU consumers – households and businesses – secure, sustainable, competitive and affordable energy*"[352]. Affordability, security, and competition are therefore key underlying goals of the strategy alongside sustainability.[353]

6.4.6 Moreover, the Judgment does not take account of these EU energy policy goals, still less the risk that such goals and broader EU energy policy may be undermined by the Reduction Obligation. In fact, for the reasons set out below, there is a real likelihood that they will be undermined by the Reduction Obligation. In addition to the EU energy policy goals, there is a detailed and

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[351] Article 194(1) TFEU provides: "*In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks*".

[352] **Exhibit S-85**: European Commission, 2015, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, The Committee of the Regions and the European Investment Bank, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015) 80, p. 2.

[353] Exhibit S-53, European Commission, 26 October 2021, *Annex to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2021 report on the State of the Energy Union - Contribution to the European Green Deal and the Union's recovery*, COM(2021) 950, p. 2, which states that: "[i]*n the medium term, the suggested policy response should focus on making the EU more efficient in the use of energy, less dependent on fossil fuels and more resilient to energy price spikes, while providing affordable and clean energy to end-users*". This once again demonstrates that in 2021, the core ambition is for energy to be affordable and secure, and to ensure competition in the energy market, in addition to the policy goal of sustainability.

carefully calibrated EU legal and policy regime in place for addressing climate change that aims to secure the very same objectives.

6.4.7 The EU has recently increased its reduction targets for 2030 and 2050 via (a) the European Green Deal, which is a set of policy initiatives of the European Commission with the overarching aim of making the EU climate neutral by 2050, and (b) EU Fit for 55, which aims to reduce GHG emissions in the EU by 55% by 2030 compared to 1990 levels. These were translated into legally binding targets when the EU Parliament passed the European Climate Law in June 2021.[354]

6.4.8 EU Fit for 55 is underpinned by the so-called "core scenarios".[355] The "core scenarios" represent an update of the scenarios in the Climate Target Plan, to reflect COVID impacts and to capture Member States' most recent climate and energy plans.

6.4.9 The EU examined the range of GHG reductions per sector needed to achieve the 2030 target of at least 55% GHG reductions.[356] As noted at para. 2.3.7 - 2.3.9 above, the largest share of these reductions will be delivered through the power-sector. The analysis shows that for the harder-to-abate industrial and transport sectors, representing a very significant share of the Scope 3 emissions reported by the Shell Group, the GHG reduction potential to 2030 is more limited.[357] The EU found that new climate neutral technologies at commercial scale are critical for decarbonisation in those latter sectors:

"For the industrial and transport sectors lower emission reductions are projected for the next decade but much higher reduction rates after 2030. This actually underlines how crucial the next 10 years will be to develop and deploy new climate neutral technologies at scale, and decrease learning costs, just as was done for renewable electricity in the last decade."[358]

6.4.10 The state of constant expansion and development of the EU legislative framework reflects the need for a fair and just transition towards net zero

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354 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 Regulations (EC) No 401/2009 and (EU) 2018/1999 (**"European Climate Law**").

355 See para. 2.3.7 above.

356 **Exhibit S-86**: European Commission, 14 July 2021, *Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*, Part 2/2, SWD (2021) 621, Annex 4, p. 115-117.

357 *Ibid*. at p. 116-117. The GHG reduction range for the industrial sector, intra-EU transport sector and road transport sector are, in order, 23%, 21-22% and 24-26%.

358 **Exhibit S-87**: European Commission, 2020, *Impact Assessment Report on Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people*, Part 1/2, SWD (2020) 176, p. 51 et seq.

emissions by 2050. EU legislative history shows how the EU institutions have the necessary resources, expertise and oversight to develop carefully crafted policies, such as the EU ETS cap-and-trade scheme[359] which are guided by extensive consultation.[360]

6.4.11 The Judgment cuts across at least two important elements of these EU policies.

6.4.12 First, the EU legal and policy framework recognises that its objectives are best secured in a coordinated way, and that Member States acting unilaterally and without carefully balancing interests and considering the effect of their decision, risks undermining such coordinated policy. The Commission stated that: *"[a]ction at EU level is therefore indispensable and has a much bigger chance of leading to the necessary transformation, acting as a strong driver for cost-efficient change and upward convergence. Implementing a similar measure nationally would result in smaller, fragmented carbon markets, risking distortions of competition and likely lead to higher overall abatement costs"*.[361]

6.4.13 The District Court's sole attempt to ensure consistency with the EU policy framework was to suggest that emissions specifically covered by the EU ETS have a partially "*indemnifying effect*" for Shell up to the extent of the "*reduction percentage they aim to achieve*." [362] However, by only recognising the indemnifying effect of such mechanisms to the extent the emissions reported by the Shell Group are covered by the ETS, the District Court incorrectly did not take account of the fact that an ETS is used by the EU (and other governments) as part of a policy framework to achieve emissions reductions, not just to reduce the specific emissions that are required to obtain permits under an ETS. The District Court also did not examine if its action would result in smaller, fragmented carbon markets, risking distortions of competition and higher overall abatement costs. The District Court did not examine if, in taking a radically different approach from that of the EU, it might be undermining the careful balance which the EU's policy framework struck.

6.4.14 Second, the EU is concerned to avoid the risk of so-called carbon leakage. Carbon leakage is defined in EU law as any "*increase in greenhouse gas emissions in third countries where industry would not be subject to comparable carbon constraints*".[363] In substance, this covers any relocation of emissions

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359 **Exhibit S-88**: European Commission, Climate Action, *Development of EU ETS (2005-2020)*.

360 **Exhibit S-89**: European Commission, 14 July 2021, *'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, Com(2021) 550.

361 **Exhibit S-90**: European Commission, Q2 2021, *Inception Impact Assessment on Amendment of the EU Emissions Trading System* (*Directive 2003/87/EC*) (2021), p. 2.

362 Judgment, para. 4.4.44 - 4.4.48.

363 Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (recital 24).

(whether wholly or partially) that neutralises the effect of emissions reduction in one region through increases in emissions in other regions.

6.4.15 The key risk which the EU and the OECD have identified in relation to carbon leakage is that, as the EU adopts a more aggressive approach to reducing emissions, the incentives to move the emissions production out of the EU increase – as does the cost of energy in the EU.[364]

6.4.16 In order to ensure that its measures in this area are effective, the EU invariably seeks to build-in protections against such carbon leakage. The District Court did not do so and did not examine whether its own attempt to force emissions reductions would generate the very kind of carbon leakage which the EU was seeking to prevent.

6.4.17 The Reduction Obligation will not lead to a reduction of global CO_2 emissions since – if the Shell Group stops certain activities to meet the Reduction Obligation – the Shell Group's activities will be continued by the parties to whom it transfers those activities, or to whom the relevant authorities give the right to continue those activities. But even if another party does not take over the Shell Group's previous activities, then the oil and gas production will be increased at another well to satisfy global demand. The consequence of this is that global emissions will not be reduced but will only be relocated and potentially increased (see, similarly, the substitution point made above at para. 3.2.19(d)).

6.4.18 The Judgment refers to page 50 of the Production Gap Report at para. 2.4.6 and para. 4.4.50, which estimated that, for oil, for "*each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term*". The study was misapplied by the District Court given that the example cited is a hypothetical scenario in which the United States – a country with significant oil and gas production and reserves – no longer issued new extraction permits. This would mean that these reserves of an entire region would no longer be produced and sold. This is a completely different situation from that in which an individual company, in this case Shell, is limited in its production

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364 **Exhibit S-91**: OECD, 25 February 2020, Round table on sustainable development background paper, *The Climate Challenge and Trade: Would border carbon adjustments accelerate or hinder climate action?*, p. 4: "*The net-zero GHG emissions targets adopted by some countries imply deep emissions reductions across all sectors of the economy. This includes energy-intensive industries such as steel, cement and chemicals, where cost-competitive decarbonisation options are less available. If stringent emissions regulation is not matched in other countries, the risk of future carbon leakage increases* (emphasis added); and **Exhibit S-92**: European Commission, 14 July 2021, *Impact Assessment Report accompanying the document Directive of the European Parliament and the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757*, SWD(2021)601, Part 1/4, p. 17, para. 2.3, said as follows: "[i]*ncreased ambition requires lowering the ETS cap, which leads to a reduced overall amount of allowances. This in turn raises important questions as to the continued suitability of the carbon leakage protection framework currently included in the ETS Directive. A lower cap indeed means that fewer allowances may be available for free allocation. Moreover, the carbon price is expected to rise as a result of a reduced cap. Both developments could lead to higher compliance costs and an increased risk of carbon leakag*e." (emphasis added).

and its permits and production most likely will be taken over by others.[365] But even if this quote was correct and could be applied to this case, 80% to 40% of emissions relating to a barrel that the Shell Group is prevented from producing will be emitted elsewhere in the globe by another undertaking unaffected by the Judgment. It is therefore highly likely that carbon leakage will be caused by the Reduction Obligation imposed on Shell.

6.4.19 In addition, the District Court did not investigate the question with the rigour required by EU law in the context of justification under Article 36 TFEU. It did not secure the necessary evidence and technical, scientific and statistical data to undertake the proportionality assessment.

6.4.20 By ordering Shell to rapidly cut its direct and indirect emissions in a way that is not coordinated with global, EU, and national policies, the Judgment creates the risk of carbon leakage, without any of the mitigating steps that global, EU, and national policy makers have at their disposal. At the very least, contrary to what could have been expected from it, the District Court did not examine the issue at all.

6.4.21 For the reasons set out above, the Judgment and the Reduction Obligation it identified amount to an unjustified restriction on the free movement of goods contrary to Article 34 TFEU. Even if the Judgment does not breach Article 34 TFEU, it breaches the duty of sincere cooperation under Article 4(3) TEU.

[365] See Exhibit RK-35, Mulder Report, para. 4.5, p. 75 and 77. From a global standpoint, Shell's share in global crude oil production is about 2%, while Shell's share in the globally proven and extractable crude oil reserves is approximately 0.25%. In the case of natural gas, Shell's share in global production is 3% and in the global reserves 0.5%.

7. SUMMARY OF SECTIONS 2-6: THERE IS NO RULE OF UNWRITTEN LAW IMPOSING A REDUCTION OBLIGATION ON SHELL

7.1 Overview

7.1.1 The overwhelming conclusion from the factual context and legal frameworks (domestic, international and EU) set out in Sections 2 - 6 above is that there is not, and cannot be, an unwritten law obligation on Shell with the content described in the Judgment. This Section contains a summary of the points made in those Sections and brings together the reasons why there is no unwritten law imposing a Reduction Obligation on Shell.

7.2 There is and can be no rule of unwritten law as alleged in Dutch law

7.2.1 For the reasons set out in Section 3, there is not and cannot be, a rule of unwritten law under Article 6:162(2) DCC.

7.2.2 The District Court did not properly consider and apply the relevant legal framework in its Judgment. In particular, the District Court did not properly consider whether the alleged rule of unwritten law is socially self-evident or not, nor whether it fits within the existing system of the law. Furthermore, the District Court did not explain its own leap in logic from a *general* global net 45% reduction target for 2030 to a *specific* unwritten legal obligation on Shell and Shell alone to achieve the exact same reduction. This leap is unsustainable.

7.2.3 A rule of unwritten law must be self-evident: so obvious, widely known, socially self-evident and capable of being understood that it must be and is being observed broadly *as a matter of law*. It must also fit within the system of existing law. The alleged Reduction Obligation does neither.

(a) The alleged Reduction Obligation is not socially self-evident:

(i) It is not self-evident from international, regional and government policy approaches. None of the discussions on the international, regional and national levels (e.g., at COP26, and in the legislative process of EU Fit for 55, the Dutch Climate Act and Climate Accord) contemplate a Reduction Obligation on individual companies, nor do they fix a percentage to that obligation and impose a temporal target.

(ii) It is not self-evident from the role companies like Shell are expected to play in supporting the energy transition. A *specific* Reduction Obligation on Shell to match the target for the *general* global reduction in emissions by 2030 does not take account of the fact that the emissions reported by the Shell Group are not representative of the mix of energy products in the global energy system as a whole. Accordingly – based on scenarios such as EU Fit for 55 and IEA NZE – there can be no expectation that

economy-wide emissions will reduce on the same pathway as those of an individual company such as Shell and its customers.

(iii) It is not self-evident from social expectations on businesses to act responsibly. There may be consensus that inaction by companies is unacceptable and they must take steps to reduce their emissions but judged by that standard and, by reference to any reasonable metric, Shell clearly does so (see for example para. 3.2.7 and Section 8.5).

(iv) It is not self-evident because the Reduction Obligation will not be effective in achieving its objective of a reduction in global emissions. In the absence of economy-wide policies to reduce demand as well as supply, customers previously supplied by the Shell Group will simply seek to meet their demands by substituting Shell Group products with products from other suppliers.

(b) The alleged Reduction Obligation does not fit within existing Dutch law and policy.

(i) There is a clear legislative package in place in the Netherlands and the new coalition Government has announced that it will set targets even beyond what Milieudefensie et al. are claiming in this case.

(ii) The Government has said it will enter into bilateral binding customized agreements with large emitters, based on reciprocity, with the Government facilitating new energy infrastructure in line with ambitious sustainability goals.[366] Shell has already made substantial commitments to the Government regarding its investment in the energy transition in the Netherlands[367] and has committed to the Dutch Climate Accord.[368]

(iii) The Dutch legislative and policy framework takes a fundamentally different approach from the District Court to reducing CO_2 emissions because it aims to achieve an overall reduction of emissions through market mechanisms and a sectoral approach that is not aimed at individual actors.

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366 Exhibit S-9, 15 December 2021, *The Dutch Coalition Agreement 2021-2025*, p. 11.

367 Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*.

368 Exhibit RO-92, Marjan van Loon, 12 September 2019, *Letter on behalf of Shell Nederland to Ed Nijpels, chairman of the Climate Council*.

(iv) The legislature and Government have not singled out one specific entity and imposed a specific reduction norm or timeframe on it.

(v) The rule of unwritten law formulated by the District Court is therefore not only unsupported by the existing approach of the Dutch legislative and policy framework to climate change; it is contrary to, and inconsistent with, this framework and approach. Indeed, it purports to address an issue that the Coalition Agreement has expressly identified for Government action.

7.2.4 Finally, the approach by the District Court is at odds with the Supreme Court's finding in *Urgenda* that "*in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament*"[369], not the civil courts in a tort case.

7.3 There is no support in international human rights law or business and human rights principles for an unwritten standard of care

7.3.1 For the reasons set out in Section 4.2, international human rights law and related comparative law materials do not support the existence of a Reduction Obligation, including for the following reasons:

(a) The District Court did not explain the basis on which the ECHR were "factored in" to the Court's analysis of Article 6:162(2) DCC.

(b) In any event, the substantive, general content of the rights reflected in Articles 2 and 8 of the ECHR (the right to life and the right to respect for private and family life respectively) do not support the existence of the highly specific and individualised Reduction Obligation on Shell.

(c) Articles 2 and 8 of the ECHR do not lend themselves to be "factored in" into Article 6:162(2) DCC. The European Court of Human Rights has observed that cases involving environmental issues are likely to give rise to difficult social and technical issues and, therefore, the European Court of Human Rights often refers to the need to give the State a wide margin of appreciation in assessing the best policy in such instances. Hence, applying that margin of appreciation means that the courts should not attempt to define an unwritten civil law obligation between private parties based on Article 6:162(2) DCC by means of "factoring in" Articles 2 and 8 of the ECHR. The proper application of the ECHR does

[369] Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*), par. 8.3.2.

not, therefore, support the unwritten rule as accepted by the District Court.

(d) The approach taken by courts in non-ECHR cases regarding climate change reflects a similar approach to the wide margin of appreciation given in ECHR cases.

7.3.2 For the reasons set out in Section 4.3, international business and human rights principles do not support the existence of a Reduction Obligation, including for the following reasons:

(a) Although the social expectations of corporations to respect human rights are reflected in the UNGP, the UNGP contain a general normative policy framework and do not contain specific legal obligations and do not support or justify the imposition of the Reduction Obligation.

(b) The Judgment did not explain how the UNGP are said to lead to the identification of the Reduction Obligation.

(c) In wrongly attempting to apply the *general* framework of corporate responsibility to respect in the UNGP to the *specific* context of climate change, the District Court made a number of errors: (1) The District Court conflated the concepts of 'control' and 'influence' with responsibility and, in effect, applied the 'sphere of influence' concept that the UNGP had expressly sought to avoid, (2) the District Court wrongly relied on the "Oxford Report" for the proposition "*it is internationally endorsed that companies bear responsibilities for Scope 3 emissions*",[370] and (3) the District Court wrongly attempted to extrapolate a highly specific legal obligation on Shell from the UNGP which contain a general normative framework for *all* business enterprises in connection with *all* business-related human rights impacts.

7.4 The multilateral climate change framework and related comparative law do not support the imposition of a Reduction Obligation on an individual non-State actor

7.4.1 For the reasons set out in Section 5, the multilateral climate change regime and related comparative law approaches do not support the existence of a Reduction Obligation, including for the following reasons:

(a) States have chosen to act through the multilateral international law framework reflected in the UNFCCC and the Paris Agreement. The Paris Agreement framework is specifically designed to provide States with discretion to determine, consistent with their own unique national circumstances, their own emissions reduction pathway. This structure reflects the reality that there is no single pathway for the world, or for

[370] Judgment para. 4.4.18.

any individual State, to achieve the emissions reductions necessary to limit global temperature rise.

(b) By imposing a specific binding Reduction Obligation on Shell, the Judgment interferes with the discretion accorded to the Dutch Government, and other Governments (in jurisdictions where the Shell Group operates), to determine their individual emissions reduction pathway within the multilateral framework of the Paris Agreement.

(c) The global consensus relating to global average temperature targets that is embodied in the Paris Agreement does not translate to an individual Reduction Obligation for a non-State actor.

(d) The IPCC's consensus on the *average* emissions reduction levels required to *limit global warming to 1.5°C* does not establish a consensus about the required contribution of any individual State, sector or company in the period to 2030, as there are a range of global emissions reduction pathways capable of limiting global warming in line with the IPCC's consensus.

(e) As reflected in the structure of the Paris Agreement, climate change requires international co-ordination combined with supportive regulatory mechanisms by governments at the national level. The imposition of a Reduction Obligation is akin to the court establishing its own parallel mechanism for emissions reductions, but, as the Court of Appeal of New Zealand has noted: courts "*do not have the expertise to address the social, economic and distributional implications of different regulatory design choices*"[371] embodied in the development and implementation of such a mechanism. This also applies to Dutch civil courts.

7.5 The Reduction Obligation is contrary to fundamental principles of EU law

7.5.1 For the reasons set out in Section 6, the Reduction Obligation is contrary to fundamental principles of EU law, including for the following reasons:

(a) The effect of the Judgment is to restrict the free movement of goods, contrary to Article 34 TFEU. It does so without justifying (as it must) the restrictions it imposes as being both (a) suitable for securing the relevant objective and (b) not going further than is reasonably necessary in doing so.

(b) The Judgment undermines EU law and policy in fundamental respects contrary to Article 4(3) TEU. This is because the Reduction Obligation:

(i) restricts Shell's ability to compete with its rivals and does so in a manner that is inconsistent with the internal market principle of

[371] Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 26.

economic freedom. The internal market is based on the principle of economic freedom, unhindered by any national barriers to competition. Restrictions on such freedom must be proportionate and take account of other EU policy objectives such as energy fairness and security. The Judgment restricts Shell's ability to compete because its rivals are not subject to any such restrictions. Even if applied more broadly, the unwritten law does not apply to undertakings outside the jurisdiction of the Dutch courts. It therefore operates as a national barrier to competition in the internal market;

(ii) undermines the EU legal and policy framework concerned with climate change. The EU has, following detailed study, adopted a coherent scheme of policy choices best suited to securing the most ambitious realistic GHG reductions in the world. That policy framework is designed not only to incentivise the investment and technology developments needed to secure the relevant reductions, but also to reduce the risk that emissions simply move beyond the reach of the EU framework and to ensure energy fairness and security within the EU. The District Court did not take into account that the Judgment would interfere with these EU policy objectives. The District Court, unlike a legislator, was ill-equipped to undertake the necessary balancing exercise and it did not do so.

7.5.2 For all these reasons, there is and can be no unwritten law imposing a Reduction Obligation on Shell.

8. THERE IS NO UNWRITTEN LAW THAT ESTABLISHES A REDUCTION OBLIGATION ON SHELL FOR SCOPE 3 EMISSIONS

8.1 There are additional specific reasons why there is no rule of unwritten law imposing a Reduction Obligation in relation to Scope 3 emissions

8.1.1 The arguments summarised in Section 7 apply to Scope 1-3 emissions. However, there are *additional* specific legal and practical reasons why there is no Reduction Obligation in respect of the *Scope 3 emissions* reported by Shell. Thus, even if the approach taken by the District Court is regarded as the appropriate legal framework for determining the specific obligations of companies in relation to the reduction of emissions (which is denied for the reasons in Sections 3 - 6): this could not extend to the Scope 3 emissions reported by the Shell Group. This is for the following reasons:

(a) As a matter of *law*, an unwritten law with this alleged content is inconsistent with fundamental legal principles because:

(i) it effectively imposes liability for actions of third persons (beyond a company's control) in circumstances where there is no statutory basis for such liability (see Section 8.3);

(ii) it has the effect of making Shell liable for, and requires Shell to prevent, the *lawful* activities of those third persons;

(iii) it is not self-evident since there is no uniform way of reporting such emissions by third persons (and so no way to prove or disprove compliance);

(iv) it is not self-evident and indeed would be arbitrary as it would necessarily result in double-counting of emissions;

(v) there is no consensus that suppliers should be legally responsible for end-use emissions; and

(vi) there is no rule of unwritten law enforceable by Milieudefensie et al. against Shell.

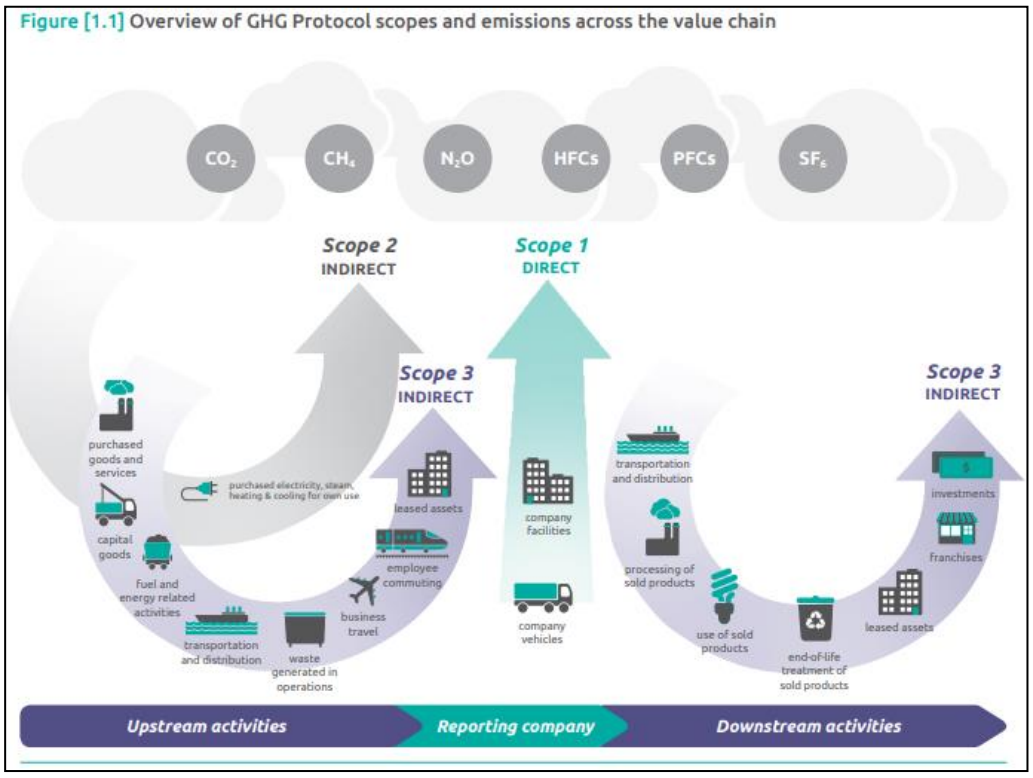
(b) As a matter of *practice*, since the Reduction Obligation has only been articulated and applied to Shell, it would not meaningfully, if at all, advance climate goals. One reason for this is because, as explained at Section 2 above, without government-led policies inducing societal-based demand-side and supply-side changes as part of a holistic reform to energy usage, Shell's products will simply be substituted by consumers with the same products from other suppliers. Indeed, this is a particular limitation of imposing an absolute reduction target on a single company in the energy transition (as was explained in Section 2.3.10 et seq. above).

8.1.2 However, while there is no *legal* norm in relation to Scope 3 emissions, Shell is nevertheless committed to encouraging changes in the behaviour of its customers and to mitigating the effects of their behaviour.[372]

8.2 Defining Scope 3: Scope 3 emissions include emissions from sources not owned or controlled by Shell

8.2.1 Figure 11 below shows the distinction between Scope 1, 2 and 3 emissions. This reflects the accounting framework established in the GHG Protocol, for reporting Scope 1, 2 and 3 emissions across an entity's value chain, which is commonly used to inform standards, methods and initiatives.[373]

Figure 11: Overview of GHG Protocol scopes and emissions across the value chain[374]



372 Examples of this are outlined in Section 8.5.

373 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard 2004*. The core document of the GHG Protocol is the Corporate Accounting and Reporting Standard (the "**GHGP Corporate Reporting Standard**") In addition, the World Business Council for Sustainable Development and the World Resources Institute has published Exhibit RK-19, World Business Council for Sustainable Development and the World Resources Institute, 2011, *The Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard GHGP Scope 3 Standard*, the related GHG Protocol Scope 3 Value Chain Standard ("**GHGP Scope 3 Standard**"), which provides further information specifically in relation to Scope 3 emissions.

374 Exhibit RK-19, Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* 2011, p. 5.

8.2.2 The GHG Protocol's Corporate Reporting Standard describes the three reporting sub-categories for emissions as follows:[375]

(a) *Scope 1 emissions* are "direct GHG emissions". These "occur from sources that are owned or controlled by the company, for example, emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment".

(b) *Scope 2 emissions* are "electricity indirect GHG emissions". These are "emissions from the generation of purchased electricity consumed by the company". Scope 2 also includes steam and heating/cooling.

(c) *Scope 3 emissions* are "other indirect GHG emissions". These emissions "are a consequence of the activities of the company, but occur from sources **not owned or controlled** by the company".[376] (emphasis added)

8.2.3 As the diagram at Figure 11 above shows, the GHGP Scope 3 Standard breaks down Scope 3 emissions into a total of 15 Categories, including "upstream" emissions from purchased goods and services, and "downstream" emissions related to waste streams, final use, recycling or disposal of sold products and investments.[377]

8.2.4 Figure 12 shows the emissions reported by Shell, as well as their relative weight in the total reported emissions by Shell:

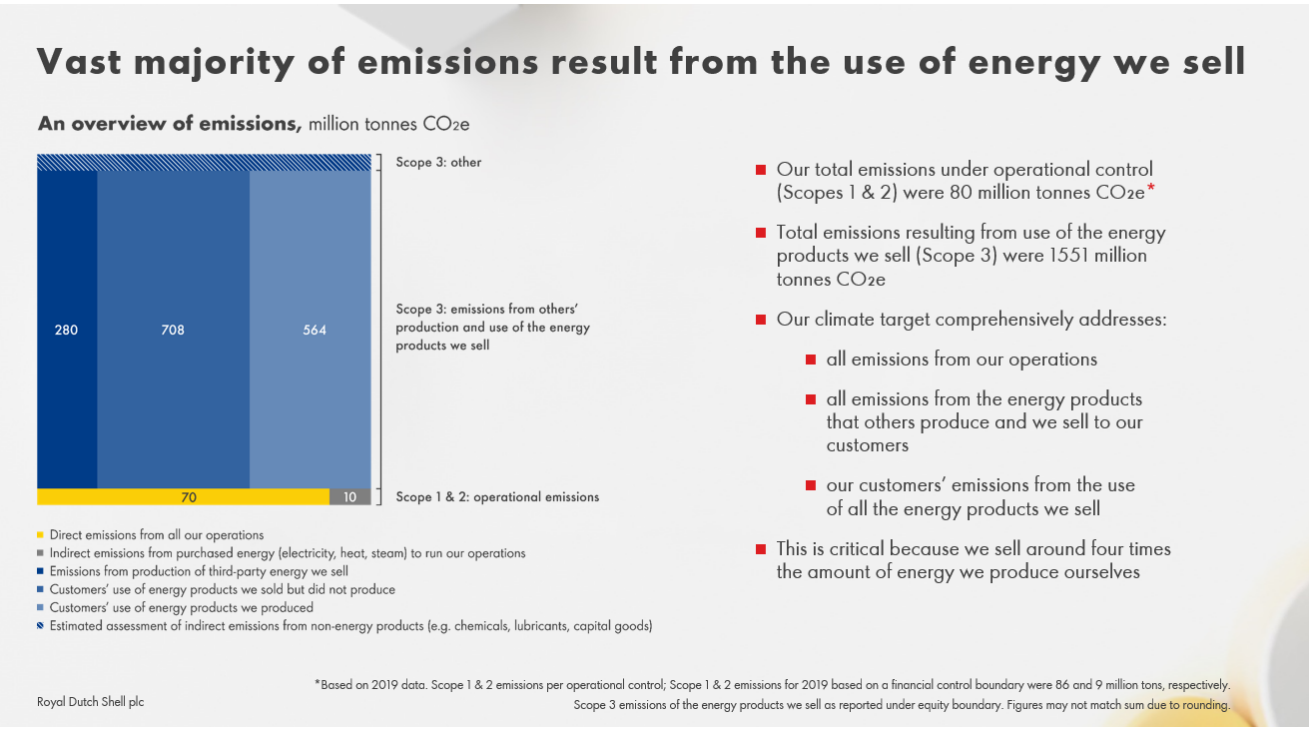
Figure 12: Shell 2019 reported emissions[378]

[375] Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 25, 33 (note 2). There are other sources that use somewhat different definitions. However, the definitions used in the GHGP Corporate Reporting Standard are the most commonly used.

[376] *Ibid*. at p. 25. See also Exhibit RK-19, Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* 2011, p. 34-37, Table 5.4.

[377] Exhibit RK-19, Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* 2011, p. 34-37, Table 5.4.

[378] **Exhibit S-93**: Shell plc, 20 July 2021, *Emissions Explainer: working together towards net zero emissions*, p. 6. In 2021, the Scope 3 emissions reported by Shell were 1,299 million tonnes of CO_2e. The Scope 1 and 2 emissions reported by Shell were 68 million tonnes of CO_2e collectively (See Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 91).



8.2.5 The Scope 3 emissions reported by Shell largely constitute emissions resulting from the use of products sold by the Shell Group.[379] More than half of the products sold by the Shell Group are "third-party products", i.e. from oil/gas not extracted by the Shell Group.[380] This can be shown in Figure 13[381]:

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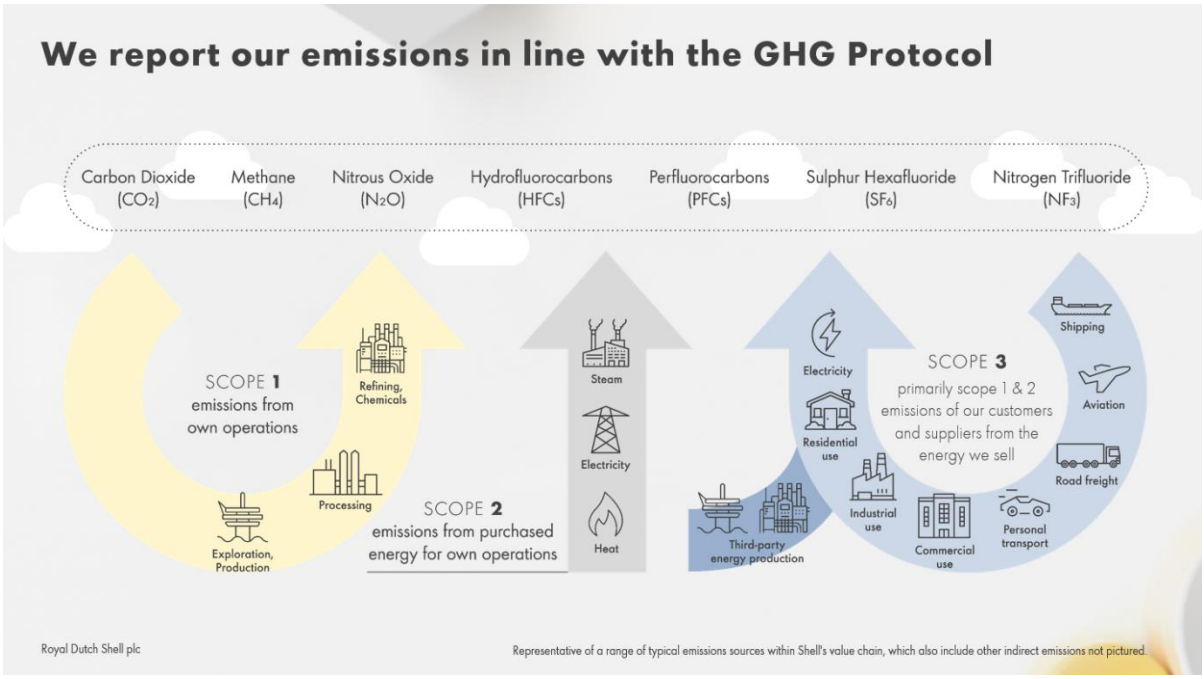
379 *Ibid*. at p. 34-37, Table 5.4, describes "sold products" as the "[e]*nd use of goods and services sold by the reporting company in the reporting year*."

380 Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020, p. 91-93. Shell reports GHG emissions for the entire Shell Group.

381 The finding that the emissions "*of the Shell group*" (Judgment, par. 4.4.5) exceed those of the Netherlands is therefore incorrect, or in any event incomplete. The global Scope 1 and 2 emissions of the Shell Group were 80 million tons CO_2e in 2019 and 68 million tons CO_2e in 2021 (see for these numbers Exhibit S-4: Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*). The emissions of the Netherlands were, according to the CBS, 180.7 million tons CO_2e in 2019 and 167.8 million tons CO_2e in 2021 (**Exhibit S-94**: Dutch Central Bureau for Statistics, 16 March 2022, *Emissions of greenhouse gases 2.1% higher in 2021*). This would be different if the reported Scope 3 emissions (i.e. the emissions of the customers, business relations and other end-users of the Shell Group) would be taken into account, but in that case, it is difficult to say that these are "emissions of the Shell group". But also if the Scope 3 emissions were to be included in the determination of the total emissions "by" Shell and the Shell Group and the comparison thereof to the total emissions in the Netherlands, such an approach would fail to appreciate the special characteristics of Scope 3 emissions as set out in this Section, including for example double counting, which lead to the fact that the reported Scope 3 emissions do not reflect the actual amount of CO_2 emitted into the atmosphere (see para. 8.3.10 et seq.). This also means that the determination by the District Court that the "*total CO2 emissions of the Shell group (Scope 1 through to 3) exceeds the CO2 emissions of many states, including the Netherlands*" (see Judgment, para. 4.4.5) is incorrect, or at least does not take into account to a sufficient extent the special characteristics noted above.

Figure 13: Types of emissions reported by Shell in line with the GHG Protocol[382]



8.3 The imposition of a Reduction Obligation with respect to Scope 3 emissions is inconsistent with fundamental legal principles

A rule that in effect imposes liability on a company for actions of a third person beyond that company's control requires a statutory basis

8.3.1 Shell partners with customers to facilitate decarbonisation by providing access to lower emission energy sources. This could include customers switching from combustion engine vehicles to electric vehicles. This is illustrated by the examples outlined in Section 8.5 below. But that does not mean Shell can or does as a matter of fact or Dutch law 'control' emissions from companies and other third persons that are, themselves, outside its ownership or control. The alleged rule of unwritten law would presuppose, for example, that the supplier of energy products is able to affect the behaviour of its customers to the extent that it can decide whether and how to reduce their emissions. As a factual and legal matter, Shell (as a supplier of energy) does not exercise control over the demand decisions (and related investments) of its customers – not least given that the product sold to customers is legally and readily substitutable by other suppliers offering a similar product.

8.3.2 All end-users are primarily responsible for their own emissions; those are the users' Scope 1 emissions. For Shell as an energy supplier, those *very same*

382 Exhibit S-93, Shell plc., 20 July 2021, *Emissions Explainer: working together towards net zero emissions, p. 5.*

emissions are reported as Scope 3, but that does not make them Shell's emissions. They remain the emissions of the end-user and are driven by the choices made by, and behaviours of, the end-user. It would go beyond well-established principles of causation and attribution for responsibility in Dutch law for the legal responsibility for the emissions of this extremely large group of end-users to be passed to Shell.[383]

8.3.3 Given the structure of this relationship between the Shell Group and its customers, to impose such a rule of unwritten law on Shell would in effect be to fix it with strict liability for the actions of end-users. But as a matter of Dutch law, the creation of an *actual* strict liability obligation can only be done by statute.[384] There is no statutory basis for this liability.

A defendant cannot be held liable for, or be obliged to prevent, lawful conduct by third persons

8.3.4 It is only where statute so provides that a defendant can be liable based on tort for an act performed by a third party, and only where the third party is also liable for the act in question (i.e. the act of the third party is itself unlawful).[385] This means that if the specific conduct of that third party is *not* unlawful, then a defendant cannot be held liable for that (lawful) conduct.[386] There is no basis in Dutch law for the conclusion that the seller of a product bears liability in tort for the buyer's use of the product where that use of the product is lawful.

8.3.5 Milieudefensie et al. – rightly – do not allege that the use of fossil fuels by end-users is unlawful in general, or in relation to products of Shell Group specifically. Consumers still need fossil fuels to heat their homes and travel, and companies in various sectors still need fossil fuels for their production processes.[387] These are clearly legal activities in the many markets in which the Shell Group sells products.

The alleged rule of unwritten law is not self-evident since there is no consensus regarding the measuring and reporting of Scope 3 emissions (and so no way to prove or disprove compliance)

8.3.6 There can be no unwritten law extending to Scope 3. The existence of such an unwritten law cannot be self-evident or apparent because there is no consensus

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383 Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*).

384 Dutch law provides that (legal) persons can only be held liable for acts and omissions of other (legal) persons in an exclusive list of cases that have an explicit statutory basis (*Asser/Sieburgh 6-IV* 2019/169.).

385 See, for example, liability of a supervising authority for a tort primarily committed by an entity under its supervision or liability for instigating a breach of contract by a third party. In those cases, the liability in tort of the third party can only exist if there is a significant link between the defendant and the unlawful acts of the third party for which the defendant should be held responsible.

386 See also further references in Section 10.6.

387 **Exhibit S-95**: Dutch Minister for Climate and Energy Policy, 14 March 2022, *Letter about security of gas supply next winter and beyond*.

on how to measure and report on Scope 3 emissions. This results in fundamental uncertainty regarding compliance, both regarding *how* to comply and as to how to *prove* one's compliance. Given these uncertainties, the alleged rule does not meet the standard of legal certainty required as the basis for a legal rule and is irreconcilable with the requirement that a rule of unwritten law can only be found to exist if it is "*socially self-evident*".[388]

8.3.7 The lack of legal certainty arises from:

(a) the lack of an objective standard for reporting Scope 3 emissions, including the fact that businesses may choose to report on Scope 3 emissions based on either 'financial control' or 'operational control', or based on 'equity share';[389]

(b) the issue of double counting, which is an issue acknowledged and prominently considered in the GHGP Scope 3 Standard (see further at paras. 8.3.10 et seq. below);

(c) the issue of reporting on third party products, which are on-sold by the Shell Group, but are not produced by the Shell Group (and therefore the emissions would arise regardless of the Shell Group's involvement); and

(d) the different methodologies for reporting of Scope 3 emissions (which have not kept pace with developments in this area), including the approach to the accounting of removed, prevented, compensated and avoided emissions (and carbon offsets more generally).

8.3.8 This lack of certainty is widely recognised. For example, as Professor Hawkes notes, existing accounting frameworks "*are not fit for imposing emissions targets on companies in an equitable, consistent, and constructive manner (particularly where scope 3, avoided and inset/offset emissions are included).*" [390] Moreover, the GHGP Corporate Reporting Standard itself

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388 See Section 3.2 above.

389 These variations in Scope 3 reporting methodology are evident in the different approaches taken by companies or groups to defining their relevant organisational boundaries for the purpose of reporting Scope 3 emissions. This can be shown by an example of a Shell operated joint-venture, in which Shell indirectly holds a 60% equity stake and the JV partner 40%. If Shell chooses to report on an operational control boundary, it will report Scope 3 emissions based on 100% of the JV's sales volume. If Shell chooses to report on an equity basis, it would report Scope 3 emissions based on 60% of the JV's sales volume. Similarly, the JV partner could choose to report its Scope 3 emissions: (a) on a control basis (in which case the JV partner would report no Scope 3 emissions associated with the JV's sales volume); or (b) an equity share basis (in which case the JV partner would only report Scope 3 emissions based on 40% of the JV's sales volume). The consequence is that Scope 3 emissions reporting (between Shell and the JV partner) could range from 60% of the Scope 3 emissions associated with the JV's sales volume (if Shell reports on an equity basis and the JV partner reports on an operational control basis) to 140% of the Scope 3 emissions associated with the JV's sales volume (if Shell reports on an operational control basis and the JV partner reports on an equity basis). Such lack of consensus on the organisation boundary is inconsistent with a rule of unwritten law requiring a 45% Scope 3 emissions reduction requirement.

390 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 10.

acknowledges that "*data accuracy may be lower*"[391] in respect of Scope 3 emissions reporting, which is optional under the GHGP Corporate Reporting Standard. Even where a company does choose to report Scope 3 emissions in accordance with the GHG Protocol guidance, in respect of Scope 3 emissions the GHGP Corporate Reporting Standard provides that "*companies have discretion over which [Scope 3] categories they choose to report*".[392] As a result, "*scope 3 may not lend itself well to comparisons across companies*".[393] This leads to material differences in how Scope 3 emissions are reported (even between companies in the same sector). Accordingly, as Professor Hawkes notes "*the GHG Protocol is not intended to provide a basis for comparative assertions between companies or products.*"[394]

8.3.9 These variations in reporting Scope 3 emissions under the GHG Protocol are not viewed as an inherent issue by those that developed the GHG Protocol. This is because the underlying purpose of the GHGP Corporate Reporting Standard is as an optional tool with respect to Scope 3 emissions and it is acknowledged that such Scope 3 emissions are not to be used for the purpose of comparing respective companies' emissions,[395] let alone imposing any legal obligation. However, it becomes a central issue of concern where Scope 3 emissions are said to form the basis for a legal norm that gives rise to liability of a supplier of energy that is used by customers.

A rule of unwritten law imposing a Reduction Obligation in respect of Scope 3 emissions cannot be self-evident and would be arbitrary as it would necessarily result in double-counting

8.3.10 A Reduction Obligation in respect of Scope 3 emissions cannot be self-evident; and would be arbitrary. Scope 3 emissions are subject to double counting, because Scope 3 emissions *overlap* with emissions reported in other sectors of the economy and by other companies and end-users. The reported quantity of Scope 3 emissions does not, therefore, reflect the quantity of CO_2 which is actually released into the atmosphere.

8.3.11 Figure 14 below illustrates this double counting across a fuel supply chain:

391 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 31.

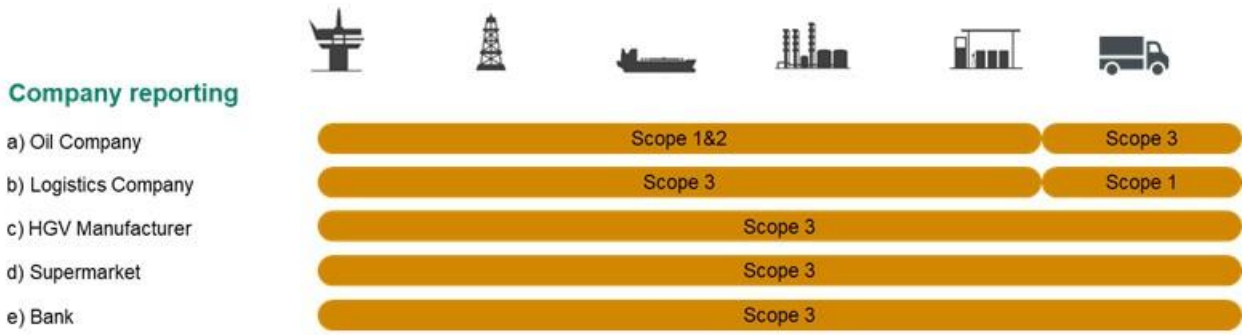
392 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 29.

393 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 29.

394 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 12.1.10.

395 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 29.

Figure 14: Double counting of scope 3 emissions leads to an overestimate of the emissions from the whole supply chain ("well to wheels")



8.3.12 This Figure shows "well to wheel" data for a fuel supply chain. The supply chain involves 5 companies:

(a) Oil Company produces and sells fuel.

(b) Logistics Company uses the fuel in its HGV fleet.

(c) HGV Manufacturer reports lifetime fuel use.

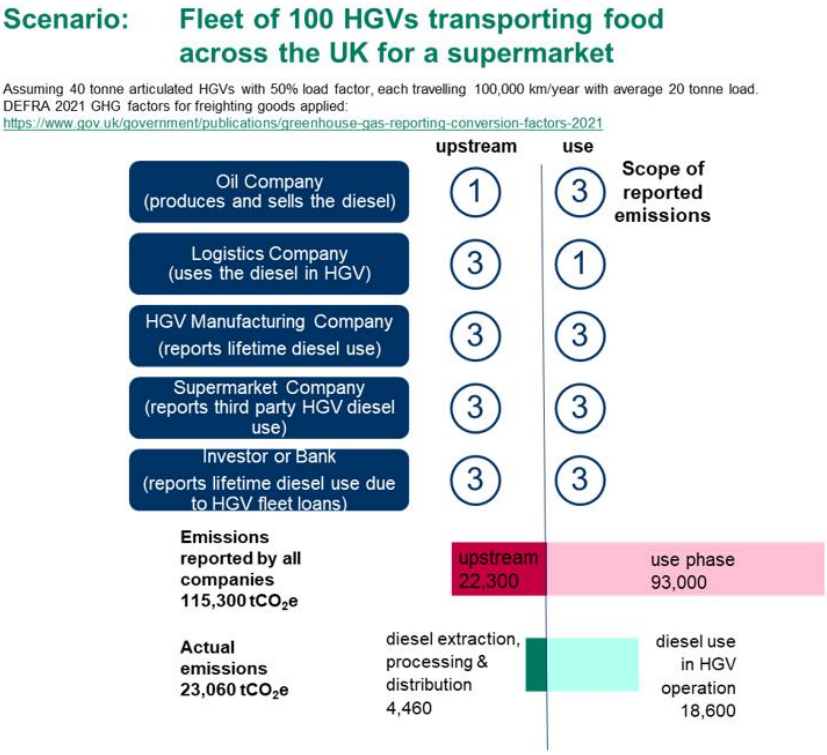
(d) Supermarket reports third party HGV fuel use.

(e) Bank reports lifetime fuel use due to HGV fleet loans.

8.3.13 In this theoretical diagram, each company reports Scope 1, 2 and 3 emissions. Each company reports the relevant 15 categories of Scope 3 in a consistent way and in accordance with the GHG Protocol. The last step, the combustion of fuel by the logistics company, creates the highest emissions. The logistics company has the smallest Scope 3 emissions since it reports fuel combustion as Scope 1; all other companies report combustion as Scope 3. Each company reports the Scope 3 emissions of the whole supply chain, so the sum of their reported emissions far exceeds the actual emissions.

8.3.14 A more detailed analysis of this theoretical example is described in Figure 15, which shows an example of a fleet of 100 Heavy Goods Vehicles ("**HGVs**") transporting food across the UK for a supermarket, where the reporting position would look as follows:

Figure 15: Example of double counting of scope 3 emissions



8.3.15 This highlights the double counting of Scope 3 emissions, as:

(a) The *actual emissions* released into the atmosphere are 23,500 tons of carbon dioxide (CO_2) equivalent (e) ("tCO_2e").

(b) But this results in a cumulative total of 115,300 tons (t) reported as emissions. This is a difference of 91,800 tCO_2e.

8.3.16 Further, the *same company* may in fact double count the same Scope 3 emissions. This may occur, for example, if an energy company (or any of its subsidiaries) such as Shell refines an energy product and trades the same energy product via a subsidiary. Alternatively, an energy company may double count the same Scope 3 emissions associated with jet fuel that it sells to a commercial airline on the one hand and the business travel of its employees that take a flight on the other.[396]

8.3.17 These examples show the complexities involved in analysing companies' emissions from Scopes 1-3, which are inherently interlinked.

[396] There would be no way of knowing whether the airline is using the energy company's jet fuel on the flight used by its employees.

8.3.18 As mentioned above, the GHGP Corporate Reporting Standard acknowledges the potential for double counting but concludes that (in contrast with Scopes 1 and 2),[397] it is not an issue with respect to Scope 3 emissions. This is because (i) Scope 3 emissions are an optional aspect of the GHGP Corporate Reporting Standard; and (ii) Scope 3 emissions are acknowledged as a metric that does not "*lend itself well to comparisons across companies*".[398]

8.3.19 The GHGP Corporate Reporting Standard also states that "*double counting of emissions needs to be avoided in […] certain mandatory government reporting programs*"[399] and "*[w]hether or not double counting matters, depends on how the reported information is used*".[400]

There is no consensus that supplier should be legally responsible for end-use emissions

8.3.20 The absence of an unwritten legal norm is further illustrated by how Scope 3 emissions are dealt with in CO_2 emissions reporting standards and practices.

8.3.21 Even aspirational international principles recognise that suppliers cannot and should not be held legally responsible for end-use emissions – see e.g., *Principles on Climate Obligations of Enterprises* (the "**Principles**")[401] where the absence of an unwritten norm with respect to Scope 3 emissions reduction is explicitly recognized.

8.3.22 The Principles considered the attribution of emissions resulting from fossil fuel consumption,[402] and concluded that the fairest and most workable solution was

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397 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 25, contrasts Scope 1 and 2 with Scope 3: "*Scopes 1 and 2 are carefully defined in this standard to ensure that two or more companies will not account for emissions in the same scope. This makes the scopes amenable for use in GHG programs where double counting matters*".

398 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 29.

399 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 20.

400 Exhibit RK-15, Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 2004, p. 32.

401 **Exhibit S-96**: J. Spier (ed.), Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises by the Expert Group on Climate Change*, (2nd ed.), Eleven International Publishing, 2020 (selection). As follows from these principles, they are not a binding set of rules. Rather, these purport to help corporate leaders to make informed decisions about the measures to be taken and allow other stakeholders to assess whether the required measures have been taken. The principles contribute to the development of the law and can therefore be considered as aspirational.

402 *Ibid*. at p. 59-61. It is stated that, "*the latter stance would make it too easy for others to argue: climate change is not our problem, it is 'theirs'. In addition, enforcement of such obligations would be fraught with difficulties in relation to quite a few major fossil fuel companies.*" It also noted that *"[t]he better strategy to achieve that imperative is to focus on buyers of fossil fuels (Principle 21) and to scrutinize the obligations concerning products (fossil fuels are products) and by elaborating on the meaning of 'excessive emissions' (Principles 11 and 12). For the remainder we have to leave solutions to politicians, investors and NGOs.*" This approach to fossil fuels in the Principles is consistent with the more general notion informing these Principles, that "*we attribute GHG emissions to the enterprise (be it a producer, supplier, service provider, or otherwise) which causes them. That follows from the formulation "An enterprise must reduce its GHG emissions" (emphasis added). Insofar as emissions are attributed to consumers or governmental agencies, they are covered under the Oslo Principles. This is justified because entities only have direct power over their activities: a car*

to attribute emissions from fossil fuel to the user of the product and not to a previous link in the production chain.[403] Thus, the Principles do not support the notion that Scope 3 emissions can be attributed to a producer of fossil fuels as a matter of policy, much less recognise the existence of an obligation on a producer to reduce such emissions as a rule of unwritten law. They are clear evidence of a lack of consensus on this issue. Indeed, as Professor Hawkes notes, "*[n]o widely accepted common practices have yet emerged that can support organisation-level emissions reduction targets (beyond scopes 1 and 2) that are demonstrably equitable between organisations*."[404]

8.3.23 One of the reasons informing the approach in the Principles is that attributing emissions to anyone other than the end-user would inappropriately circumvent important questions of policy inherent in the energy transition (as described in Section 2). The Principles explain this as follows: "*[a]ligning with the emerging view that 'big oil is the problem' would give rise to very serious difficulties. Who would have to decide who are allowed to buy the shrinking quantities to be put on the market? Would that be the infamous 'market-mechanism' (the market price)? Depending on the price of fossil fuels that could mean that fossil fuels will only be available to wealthy countries and enterprises. That, in turn, would be at odds with one of the pillars of the sustainability agenda: the eradication (end) of poverty. It would also create serious difficulties if and to the extent countries are unable or unwilling to provide a grid capable of accommodating increasing quantities of electricity based on renewable energy*".[405]

8.3.24 The District Court was also incorrect to conclude that what it described as the "Oxford Report" establishes that "*it is internationally endorsed that companies bear responsibilities for Scope 3 emissions*."[406] This incorrect conclusion by the District Court was material, as the District Court expressly used this "*widely endorsed starting point in its interpretation of the unwritten standard of care*".[407]

8.3.25 In fact, there is no such international consensus, and the "Oxford Report" does not provide authority for the proposition that there is. Rather, the "Oxford Report" is a 7-page document that it describes as being based "*principally on responses to a questionnaire completed by leading actors and organizations*

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producer chooses to produce cars, but a driver chooses how much and how efficiently to drive and whether to drive a car in the first place. If one would choose to attribute emissions differently, it would be very difficult to calculate how the emissions from an end-product would have to be attributed to, say, the supplier of a small part. […] In other words: we cannot attribute the emissions from the use of a product to a previous link in the chain".

403 *Ibid*. at p. 60.

404 Exhibit S-22, A. Hawkes, 17 March 2022, *Expert Report of Professor Adam Hawkes*, para. 10.1.

405 Exhibit S-96, J. Spier (ed.), Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises by the Expert Group on Climate Change*, (2nd ed.), Eleven International Publishing, 2020 (selection), p. 60.

406 Judgment para. 4.4.18.

407 Judgment para. 4.4.18.

setting net zero targets".[408] The document does not identify which participants participated in the questionnaire, nor has the document been peer-reviewed, or formally endorsed by any company, government or international organisation. It therefore provides no authoritative guidance on the responsibility of companies for Scope 3 emissions.

8.3.26 Even on its own terms, the Oxford Report does not endorse the proposition *"that companies bear responsibilities for Scope 3 emissions".* Rather, with respect to Scope 3 emissions, the document notes instead that "*[f]or companies, a few targets do not include scope 3 emissions, though the majority do*" and that it was a "*[p]oint[] of greater consensus or certainty*" that "*[i]n general, targets should aim to cover all gasses and all activities and scopes, as data allows*".[409] The Report does not explain the basis on which it concluded that the "majority" of companies include Scope 3 emissions in their targets, or how it concluded that there was greater consensus or certainty that targets should include Scope 3. The document also notes that it was a "*[p]oint[] of less consensus or [an] open question[]*" as to "*[h]ow to prioritize different activities across scopes (e.g. focus on total emissions, areas of direct control, etc.)"* and also that *"[d]ata limitations around, especially, scope 3 emissions, creates further uncertainties about coverage*".[410]

8.3.27 In any case, however, reporting on Scope 3 emissions (or including these in a company's emissions reduction targets) is fundamentally different from assuming responsibility for their reduction as matter of unwritten law. The Oxford Report did not purport to identify a consensus that a company is legally responsible for Scope 3 emissions, and indeed expressly noted that there are uncertainties about the coverage of Scope 3 emissions. The Court's reliance on this survey as a basis for establishing that a consensus that companies bear legal responsibility for Scope 3 emissions (in the form of the Reduction Obligation) was therefore misplaced.

There is no rule of unwritten law enforceable by Milieudefensie et al. against Shell

8.3.28 If demand for the Shell Group's products dropped by 45%, the Scope 3 emissions reported by Shell would – other things being equal – drop proportionately, independently of Shell's own efforts to reduce such emissions. However, demand is not affected by the imposition of a Reduction Obligation on Shell. If demand does not drop, there can be no legal duty that is enforceable

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408 Milieudefensie c.s., Exhibit 287, University of Oxford, *Mapping of current practices around net zero targets*, May 2020, p. 1.

409 Milieudefensie c.s., Exhibit 287, University of Oxford, *Mapping of current practices around net zero targets*, May 2020, p. 1 and 3.

410 Milieudefensie c.s., Exhibit 287, University of Oxford, *Mapping of current practices around net zero targets*, May 2020, p. 1 and 3.

by Milieudefensie et al. against Shell, as will be explained in paras. 9.2.19-9.2.23.

8.4 The Reduction Obligation would not be practically effective in reducing emissions, particularly in relation to Scope 3 emissions

8.4.1 In practice, the Reduction Obligation imposed by the District Court will not achieve the objectives that the Court intended, i.e. of reducing emissions. Shell's compliance with the Reduction Obligation will not reduce global emissions: it will simply displace the emissions from Shell's Scope 3 ledger to that of another supplier. This ineffectiveness is another reason why the Reduction Obligation is not and cannot be a self-evident norm.

8.4.2 There are two principal ways in which the Shell Group can reduce the Scope 3 emissions ensuing from the products it sells to customers. *First*, the Shell Group can supply its customers with lower emission energy sources, for example by supplying a vehicle owner with renewable electricity for their electric vehicle instead of fossil fuel for their vehicle ("**low-emission substitution**"). *Second*, the Shell Group can reduce its fossil fuel market share by divesting or otherwise withdrawing a proportion of fossil fuel or other higher-emission products from the market, although where demand remains constant, those products will be readily substitutable by other suppliers ("**supplier substitution**").

8.4.3 The extent to which the Shell Group may be able to influence the reduction of Scope 3 emissions through *low-emission substitution* is heavily influenced by factors outside its control. For example, many of the Shell Group's customers have assets that rely on existing energy system infrastructure, have a long expected useful life, are costly and complex to replace, and are heavily reliant on fossil fuels. For example, customers may have rail lines that rely on diesel trains, ships that rely on bunker fuel, pharmaceutical products that rely on petrochemicals, and older buildings that are energy inefficient. Without a significant shift in the available infrastructure, if Shell withdrew from these markets, there would be no reduction in emissions. That is because customers would continue to need the fossil fuel products – i.e. their level of demand would remain the same – and they would simply find an alternative supply and provider. Therefore, despite being a major global energy producer Shell *alone* cannot directly influence the energy choices made by its customers.

8.4.4 One illustration of this lesser influence is as follows: Shell can, and does, make it easier for users of electric vehicles to access energy through a large network of charging stations.[411] Shell has also advocated for the replacement of

[411] Shell's subsidiary, NewMotion, provides drivers with access to more than 275,000 public charging points across more than 33 European countries, which is critical to the rapid adoption of electric vehicles. Similarly, its acquisition of Greenlots in January 2019 ensures that Shell will also play a leading role in the transition to electric mobility in the USA. (Exhibit RO-48, Greenlots, 30 January 2019, G*reenlots announces acquisition by Shell, one of the world's leading energy providers*. See also, for example, **Exhibit S-97:** Shell plc, 25 January 2021, Shell agrees to buy Ubitricity, a leading provider of on-street charging for electric vehicles (EVS).

combustion vehicles with electric vehicles (such as calling for an earlier ban on the sale of new petrol and diesel cars in the UK by 2030) and has rolled out large numbers of electric vehicle charging points.[412] However, it cannot dictate the pace at which such replacement takes place. That will ultimately be determined by a range of other decisions made by governments, individuals and companies. Accordingly, while Shell can influence change through *supply-side* measures such as its roll-out of charging stations, and can and does work with its customers in a range of sectors to help them shift to new energy sources,[413] Shell has less influence over the pace at which *demand-side* changes in energy use occur. In the case of heavy-duty transport, Shell's influence is even more limited, because of the issues with achieving low energy replacements in this harder-to-abate sector.

8.4.5 Given the limited influence Shell, as an individual player in the market, has over demand-side decisions, Shell is significantly hampered in its ability to reduce its reported Scope 3 emissions (as required by the Judgment) through low-emission substitution. This means that Shell's only option for reducing the Scope 3 emissions that it reports is through shrinking the size of the business, which will result in *supplier substitution*. However, as noted above, this would have no impact on total global CO_2 emissions because customers will simply obtain supply from an alternative provider. Therefore, this is not an effective way of contributing to a reduction in global emissions.

8.4.6 Accordingly, the imposition of the Reduction Obligation on Shell does not – in practical terms – yield an effective contribution to the reduction of global emissions, because:

(a) Shell's ability to reduce emissions through *low-emission substitution* is substantially limited by demand-side factors outside its control, which means it cannot, by itself, dramatically and with reasonable certainty increase the pace of its customers' emissions reductions; and

(b) to the extent that Shell acts through the mechanism of *supplier substitution*, this will not reduce total global CO_2 emissions, as customers will satisfy their demand for fossil fuel products by obtaining a supply from an alternative provider.

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412 **Exhibit S-98**: LinkedIn, Sinead Lynch, 16 July 2020, VP Low Carbon Fuels at Shell, *Why we need a plan to achieve the ban*; and **Exhibit S-99**: Shell Global, *Electric Vehicle Charging*.

413 For example, **Exhibit S-100**: Shell, 2020, *Decarbonising Shipping: Setting Shell's Course*. Shell is working with customers and partners in the shipping industry to help accelerate decarbonisation towards a net-zero emissions future for shipping. It is also increasing its shipping decarbonisation research and development capability in order to develop the zero-emissions fuels of the future, and recently published a joint report with Deloitte outlining industry perspectives on how to accelerate such decarbonisation.

8.5 Shell works with its customers to reduce Scope 3 emissions, but there is no legal obligation to do so, because Shell does not control its customers

8.5.1 Shell does not control entities and individuals outside the Shell Group. The degree of influence that Shell has over those entities and individuals is constrained by contractual terms, legal obligations and the practical realities of the international marketplace. However, in its capacity as a supplier, Shell can, and does, work with end-users to encourage changes in customer demand in a manner that is consistent with reducing emissions. This includes the following:

(a) **Setting a framework policy for working with customers to reduce emissions**

Central to Shell's transformation to a net-zero emissions company is its global Powering Progress strategy, announced in February 2021. This is directed at working with customers and across sectors to accelerate the transition of Shell's business by providing more and cleaner energy solutions.[414]

As part of its strategy to reduce emissions associated with this sector, Shell is increasingly investing in renewable energy sources such as wind, solar and hydrogen. It is, for example, the second largest producer in offshore wind in the Netherlands[415] and its plants in Pernis (the largest refinery in Europe) and Moerdijk (one of the most energy efficient plants of its kind) will be transformed into energy and chemicals parks that will be net zero producers of high-quality fuels and chemicals by 2050. Shell is also converting its current refineries into five energy parks globally – apart from Pernis, in Singapore, Norco (US), Scotford (Canada), and Rheinland (Germany).[416]

(b) **Reporting on Scope 3 emissions**

While Shell has no legal obligation to do so, it voluntarily reports on the emissions of its customers (i.e., Scope 3 emissions). More than two-thirds of the Scope 3 emissions reported by the Shell Group consist of emissions resulting from use of sold products,[417] which essentially means the emissions of its customers.

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414 See Exhibit S-3, Shell, October 2021, *Powering Progress*.

415 Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*.

416 **Exhibit S-101**: Shell plc, 16 September 2021, *Shell to build one of Europe's biggest biofuels facilities*. As part of its Powering Progress strategy, Shell is transforming its refineries (which numbered 14 in October 2020) into five energy and chemicals parks. Shell aims to reduce the production of traditional fuels by 55% by 2030 and provide more low-carbon fuels such as biofuels for road transport and aviation, and hydrogen.

417 Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020, p. 93. Exhibit RK-19, Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* 2011, p. 34-37, Table

(c) Assisting its customers to decarbonise in harder-to-abate sectors

Again, although it is not legally obliged to do so, and while it cannot force change in the behaviour of its customers,[418] Shell is voluntarily trying to help its customers to reduce their emissions.[419] It is doing so independently of the Judgment. As part of its Powering Progress strategy, Shell's target is to supply 100% carbon-neutral energy for all types of road transport in the Netherlands by 2040.[420] The Shell Group expects that by 2025, approximately 50% of its total expenditure will be on low- and zero-carbon products and services.[421]

As part of its strategy to reduce Scope 3 emissions, Shell's efforts to decarbonise harder-to-abate sectors include the following four examples: Decarbonising Aviation, Decarbonising Shipping, Decarbonising Road Freight and Developing Hydrogen (which plays a role in decarbonising several harder-to-abate sectors). Shell's efforts in relation to each of those examples are summarised below.

(i) Decarbonising Aviation

Aviation has fewer low carbon options available than other industries. The growth of the sector as projected by the International Aviation Transport Association expects to see passenger numbers doubling by 2037.[422] SAF will play a key role in the sector's decarbonisation. A massive scaling up of supply is required to achieve significant reductions in emissions, and the high cost of SAF also poses challenges (it is currently at least 2 to 5 times more expensive than jet fuel).[423]

5.4 describes "*sold products*" as the "*End use of goods and services sold by the reporting company in the reporting year*."

418 As explained in Sections 8.3-8.4 above.

419 See Section 8.5.

420 Exhibit S-55, Shell plc, 10 December 2021, *Letter from Ben van Beurden and Marjan van Loon to the Prime Minister and the Minister of Economic Affairs and Climate Policy*.

421 As noted in Exhibit S-57, Shell plc, 3 February 2022, *Fourth Quarter 2021 Results*, p. 39: Expenditure on low- and zero-carbon products and services includes "[u]*nderlying opex and cash capex, excluding spend in JV and associates, that support the decarbonisation of our customers, including electric vehicle charging, low carbon fuels (see* [https://www.shell.com/energy-and-innovation/new-energies/low-carbon-fuels.html]*), nature and environmental solutions, renewable electricity generation, decarbonised hydrogen, marketing and trading of power & natural gas, and developing CCS hubs. It also includes spend to provide non-energy products including chemicals, lubricants, convenience retail and road materials, that have no scope 3 emissions. It excludes all refining, upstream, LNG and gas to liquid related spend although there will be spend on mitigating/improving energy efficiency in these segments.*"

422 **Exhibit S-102**: IATA, 24 October 2018, *IATA Forecast Predicts 8.2 billion Air Travelers in 2037*.

423 See **Exhibit S-103**: Shell plc, 2021, *Decarbonising Aviation: Shell's Flight Path*, p.13; **Exhibit S-104**: Deloitte and Shell Plc, 2021, *Decarbonising Aviation: Cleared for Take-off*; and **Exhibit S-105**: Shell Global, 2021, *Decarbonising Aviation*. See also Exhibit S-33, Declaration by 25 States, December 2021, *International Aviation Climate Ambition Coalition COP 26 Declaration*.

In 2021, Shell announced its market-leading ambition to produce around 2 million tonnes of SAF a year by 2025 (approximately 43,000 barrels of oil equivalent per day).[424] By 2030, it aims to have at least 10% of its global aviation fuel sales as SAF.[425] Shell will build one of Europe's largest biofuels facilities, the Shell Energy and Chemicals Park Rotterdam (formerly known as the Pernis refinery), which is expected to begin production in 2024 and will be able to produce 820,000 tonnes of low-carbon fuels per year.[426]

Further, Shell is helping its customers by partnering with World Energy, a biofuels company, to supply up to 6 million gallons[427] of SAF to Amazon Air.[428] Shell has also invested in sustainable fuels technology company LanzaJet, which uses catalytic conversion technology to convert alcohol into SAF. In February 2021, Shell, KLM and the Dutch Ministry for Infrastructure and Water Management also enabled the world's first passenger flight from Schiphol to Madrid partly flown on sustainably produced, certified synthetic kerosene.[429]

(ii) Decarbonising Shipping

Shipping is a capital-intensive industry characterised by large, long-life assets, thin margins and a high-dependence on a global supply of energy-dense fuels. Around 80% of the volume of world trade is transported by ships, with demand for shipping expected to grow in line with GDP, nearly doubling by 2050. For deep-sea shipping – which accounts for around 85% of shipping emissions – there is currently no viable alternative fuel that makes it possible to reach the International Maritime Organisation's 2050 ambition of a 70% reduction in the carbon intensity of emissions by 2050 (compared with 2008 levels).[430]

Against this backdrop, the industry is actively exploring several alternative fuels – including hydrogen, ammonia, methanol and biofuels – to facilitate decarbonisation. Shell is working with customers and partners in the shipping industry to help accelerate decarbonisation

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424 **Exhibit S-106**: Shell Global, 20 September 2021, *Shell calls for more action on aviation emissions and announces ambition to produce around 2 million tonnes of sustainable aviation fuel a year*.

425 Exhibit S-106, Shell Global, 20 September 2021, *Shell calls for more action on aviation emissions and announces ambition to produce around 2 million tonnes of sustainable aviation fuel a year*.

426 Equalling 43,000 barrels per day. Exhibit S-101, Shell Global, 16 September 2021, *Shell to build one of Europe's biggest biofuels facilities.*

427 Background information: 1 gallon = 3,78541178 litre, thus 6 million gallon equals ~22.7 million litre or approximately 142,857 barrels.

428 **Exhibit S-107**: Shell Global, 2020, *Amazon signs major deal for sustainable aviation fuel*.

429 **Exhibit S-108**: KLM, 8 February 2021, *World first in the Netherlands by KLM, Shell and Dutch ministry for Infrastructure and Water Management: first passenger flight performed with sustainable synthetic kerosene*.

430 **Exhibit S-109**: Deloitte and Shell plc, 2020, *Decarbonising Shipping: All Hands on Deck*, p. 6; and Exhibit S-100, Shell plc, 2020, *Decarbonising Shipping: Setting Shell's Course*, p. 5.

towards a net-zero emissions future for shipping. For example, Shell, with its partners Kawasaki Heavy Industries and Iwatani, has launched the Suiso Frontier, a Liquid Hydrogen ship carrier. The aim is to establish technology for safe and efficient transportation of mass volumes of hydrogen. [431] Shell is also increasing its shipping decarbonisation research and development capability in order to develop the zero-emissions fuels of the future, and recently published a joint report with Deloitte outlining industry perspectives on how to accelerate such decarbonisation.[432] In addition, Shell is establishing a consortium to develop a fuel cell trial[433] on a commercial deep-sea vessel (pulling in partners from across the value chain, such as owners, classification societies, fuel cell vendors, and ports), to demonstrate the maritime suitability of fuel cells and how these might shape future ship design.

(iii) Decarbonising Road Freight

Shell has identified a wide range of initiatives to accelerate road freight past the planning and design stage of the transition. The solutions include immediate action through the increased use of existing technology, such as battery-electric technology for the shorter-range, lighter vehicles used in cities. In the longer term, they include hydrogen as a fuel for heavier trucks that travel further with a greater load. Examples of Shell's specific initiatives include:

(A) In December 2020, Daimler Truck AG, IVECO, OMV, Volvo Group and Shell announced a new collaboration for zero emission hydrogen trucking at mass market scale through H2Accelerate. Under H2Accelerate, the participants expect to work together to seek funding for early pre-commercial projects during the first phase of the roll-out. In parallel, the participants will encourage a policy environment which will help support the subsequent scale up into volume manufacturing for hydrogen trucks and a Europe-wide refuelling network for zero carbon hydrogen fuel.[434]

(B) Shell's Group company, NewMotion (now called Shell Recharge Solutions) provides drivers with access to more than 250,000 public charging points across more than 35 European countries, which is critical to the rapid adoption of electric vehicles. Similarly, its acquisition of

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431 Shell is involved only in the vessel and the crewing of it. See **Exhibit S-110**: HySTRA, *Hydrogen Supply Chain*.

432 See Exhibit S-109, Deloitte and Shell plc, 2020, *Decarbonising Shipping: All Hands on Deck.*

433 In a fuel cell trial, a fuel cell is deployed in a marine environment to measure the technology performance and suitability for that service.

434 **Exhibit S-111**: H2Accelerate, 2021, *Whitepaper: Expectations for the fuel cell truck market*.

Greenlots in January 2019 ensures that Shell will also play a leading role in the transition to electric mobility in the USA.[435]

(C) Renewi, Nordsol and Shell opened in October 2021 the first Dutch bio-LNG installation in Amsterdam Westpoort. This new bio-LNG installation processes, among other things, waste products from supermarkets. The three partners each fulfil a unique role in this waste-to-energy value chain. Renewi collects and processes organic waste, and converts it into biogas. Nordsol will then process the biogas into bio-LNG, which is designed to produce 3.4 kilotons of bio-LNG per year. Finally, Shell sells this bio-LNG at its growing network of LNG refuelling stations.

(D) Shell has also proposed a gas liquefaction plant at its Rheinland refinery to supply Shell LNG filling stations and their customers in Germany with CO_2-neutral fuel in the future. Shell will use biomethane for this purpose. The planned liquefaction plant is expected to have an annual capacity of around 100,000 tonnes.

(iv) Developing Hydrogen

Hydrogen is a versatile low carbon fuel that can be used to power different types of transportation, making it a desirable low carbon fuel option for harder-to-decarbonise transport sectors. Hydrogen can also play a role as feedstock in industrial sectors, like steel and cement-making, which require a large energy input.

Green hydrogen, produced from electricity generated by renewable sources, will be a critical enabler in accelerating the transition to net zero. However one of the main obstacles to producing green hydrogen today is cost. Production of green hydrogen is Shell's ultimate goal, but in order to achieve net-zero emissions ambitions, both blue hydrogen (hydrogen produced using fossil fuel combined with carbon capture and storage) and green hydrogen will be required.

Shell began work on hydrogen in the 1990s, but there was ultimately an absence of demand to drive further growth. Prospects on the demand-side have improved since and Shell has increased hydrogen investments and initiatives, with examples including the following:

(A) Shell participates in several initiatives which encourage the adoption of hydrogen in transport, from a renewable

[435] Exhibit RO-48, Greenlots, 30 January 2019, *Greenlots announces acquisition by Shell, one of the world's leading energy providers*.

low carbon hydrogen refuelling network for passenger cars, trucks and trains in California to the H2Accelerate consortium which aims to foster the conditions for the mass market roll-out of hydrogen trucks in Europe.[436] Shell also set up the H2 Mobility Joint Venture in Germany, which today operates 90 hydrogen stations.[437]

(B) In the Port of Rotterdam, Shell is part of H-vision, a consortium of 10 companies looking to decarbonise energy by replacing natural gas and coal with blue hydrogen. Shell is working on large-scale electrolysis in the Port of Rotterdam for provision of hydrogen to its Pernis refinery. Fuel infrastructure linked to ports will be a critical enabler in the transition to zero-emissions fuels for the sector.

(C) Shell, together with its consortium partners RWE, Equinor, Gasunie and Groningen Seaports, is working on one of the largest green hydrogen projects in Europe, the NortH2 project. Located in the North of the Netherlands, the project envisages the construction of wind farms in the North Sea, up to a phased total capacity of about 10 gigawatts or 800,000 tonnes of green H2 by 2040. Subject to upcoming tenders for suitable offshore wind blocks, the first turbines could be ready before the turn of the decade and will be used for green hydrogen production feeding a hydrogen backbone to de-carbonise heavy industry in the Netherlands and beyond.[438]

(D) Shell, with its partner Zhangjiakou City Transport, built and commissioned a 20MW electrolyser that produces green hydrogen. It supplied more than half of the green hydrogen supply for fuel cell vehicles required for the Winter Olympic games in February and March 2022, which was used to refuel hundreds of buses.[439]

8.5.2 These are some examples of Shell's efforts to decarbonise harder-to-abate sectors and assist its customers to reduce their own direct emissions and therefore the Scope 3 emissions reported by the Shell Group. In these, and other, ways Shell can and does play a positive role to seek to reduce emissions by others. However, all of these are voluntary efforts and do not indicate that there

[436] **Exhibit S-112**: Shell US, 10 December 2020, *Shell to expand California hydrogen refuelling infrastructure*.

[437] **Exhibit S-113**: H2 Mobility, *We are building the filling station network of the future.*

[438] **Exhibit S-114**: Shell Nederland, 27 February 2020, *Grootste groene waterstofproject van Europa start in Groningen*.

[439] **Exhibit S-115**: Shell plc, 28 January 2022, *Shell starts up hydrogen electrolyser in China.*

is a legal obligation on Shell to reduce emissions of others under a specific Reduction Obligation.

9. RELIEF SOUGHT CANNOT BE AWARDED

9.1 The relief sought by Milieudefensie et al. is a court order within the meaning of Article 3:296 (1) DCC

9.1.1 Milieudefensie et al. *inter alia* seek an order that Shell:

> "*both directly and via 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 CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy 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 net 45% relative to 2019 levels;*
> >
> > *- in the alternative: will have reduced by at least 35% or net 35% relative to 2019 levels;*
> >
> > *- further in the alternative: will have reduced by at least 25% or net 25% relative to 2019 levels;*"[440]

9.1.2 This relief qualifies as a claim for condemnatory relief in the form of a court order against Shell within the meaning of Article 3:296(1) DCC. This relief can relate to a legal binding duty based in contract or tort. As explained in Section 3.2, the latter is the case here.

9.1.3 In order for this form of relief to be granted, the Court must be satisfied that the following conditions are met:

(a) an *imminent* violation of a *legal duty* by the defendant (see paras. 9.2.1 et seq. below);

(b) the claimant must have a *sufficient interest* within the meaning of Article 3:303 DCC (see paras. 9.2.4 et seq. below); and

(c) the order must be sought by a party *against whom* the defendant owes a legal duty to do or not do something (see paras. 9.2.19 et seq. on the relativity requirement below).[441]

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[440] Judgment, para. 3.1.

[441] J.J. van der Helm, *Het rechterlijk bevel en verbod* (*Burgerlijk Proces & Praktijk nr. 19)*, Deventer: Wolters Kluwer 2019, p. 19, para. 15.

9.2 Requirements for awarding relief sought are not met

No legal duty to reduce; no imminent violation

9.2.1 As has been set out in Section 3.2, the pre-conditions for the order claimed by Milieudefensie et al. are that: (a) Shell has a legal duty towards Milieudefensie et al.; and (b) Milieudefensie et al. have a sufficient interest in preventing an imminent breach of that duty.[442] As to the latter, this case concerns a potential *future* violation of the alleged duty, i.e. consideration of whether Shell's future policy for the Shell Group is in line with the alleged Reduction Obligation on Shell. In such cases – which concern a potential future violation of an alleged duty – Dutch law requires that there should be a threat of an infringement of interests as a result of the feared unlawful act. This is all the more important in view of the District Court's finding in para. 4.5.8 of the Judgment that the Shell Group's CO_2 emissions are currently not unlawful.

9.2.2 For the reasons stated in Sections 3 - 8 above, criterion (a) is not satisfied; the alleged legally binding duty does not exist. There is no rule of unwritten law that requires Shell to reduce the emissions at issue by net 45% or any other percentage by end 2030. And even if there were some rule of unwritten law requiring companies to take steps to reduce their emissions (which is denied), if Shell were assessed according to that standard or any other reasonable norm, it clearly would meet that standard, as has been explained in para. 3.2.16.[443] For these reasons alone, the relief sought must be denied.

9.2.3 Moreover, even if there were such a duty, there is no imminent violation of that duty by Shell. With regard to criterion (b) (as mentioned in para. 9.2.1 above), Shell notes the following:

(a) First, as the Supreme Court held in the *Kernwapens* judgment, it is not sufficient for there to be a *possibility* of a breach. Furthermore, a "*theoretical possibility* [of a breach] *is not sufficient*"[444] to impose an injunction either. The threat must truly be *imminent*. This is only the case if the threat that a legal obligation will be breached is concrete and real.[445] The claimant has the burden of proving that such an imminent

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442 Articles 3:296 DCC and 3:303 DCC respectively.

443 See also Section 8.5.

444 C.J.J.C. Van Nispen, *Het rechterlijk verbod en bevel*, Deventer: Kluwer 1978, para. 112.

445 Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217 (*Kernwapens*), para. 3.3 sub D: "*With respect to the claimed prohibition of future acts, admissibility of the claims furthermore requires the existence of a concrete interest, in the sense that there is a real threat that the acts that VJV et al. want to see prohibited will be performed. In the absence of a concrete and real threat, the debate in civil proceedings could only concern permissibility in the abstract.*" See also: J.J. van der Helm, *Het rechterlijk bevel en verbod* (*Burgerlijk Proces & Praktijk nr. 19*), Deventer: Wolters Kluwer 2019, paras. 15 and 24.

threat already exists at the time that the court rules on its claim.[446] Milieudefensie et al. have not discharged this burden.

(b) Second, the District Court's finding that it "must" grant relief, because "[t]here is no room for weighing interests"[447] is based on an error of the law. For example, in a case where relief was granted to remove a rooster because its sound unlawfully disturbed a neighbour's rest, the Court of Appeal, upheld by the Supreme Court, denied the order because the relief was too broad. The Court held that the defendant should have the opportunity to take other sufficient and lawful measures to avoid the sound disturbance. That decision illustrates the fact that the court plainly has discretion to deny the relief sought if the unlawful conduct can be ended in another way than by an order, for example because as a result of taking certain measures, the behaviour that at first constituted a tort, is now no longer tortious.[448] In that case, the Court of Appeal held that the requested order could not be granted as the defendant could not be denied his right to keep roosters in a lawful manner (i.e. by taking sufficient precautions). In this case, there are such other lawful means: viz., the existing Dutch and EU legislation, proposed future legislation and policy framework described in paras. 3.3 and 6.4, as well as Shell's own policy and intentions (as to which see Section 2.7 and para. 9.2.8).

(c) Third, the Supreme Court has made clear that an order aimed at future conduct can never be issued if the conduct that the requested order encompasses is not unlawful, or not unlawful in all circumstances.[449] This is the case here. The existing legislative framework in the Netherlands does not prohibit the production or supply of a certain amount of oil and gas by 2030. Furthermore, in relation to States that are currently in the process of considering more ambitious legislation: Milieudefensie et al. have not shown that those States have prohibited Scope 1, 2 or 3 emissions to the extent requested in the order. Hence, the order should not have been granted.

There is a lack of sufficient interest within the meaning of Article 3:303 DCC

9.2.4 Furthermore, the claim seeks to ensure a particular future outcome, namely the reduction by Shell of the emissions at issue by net 45% by the end of 2030. Importantly, the District Court established that there is "*no ground*" for any

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[446] See T.E. Deurvorst, *GS Onrechtmatige daad,* Article 6:162 DCC, under II, para. 2.1.2.3: "*It follows from the case law of the Supreme Court that the question of whether the requirements for the imposition of a prohibition or injunction have been met must be answered in accordance with the situation at the time of the judgment.*"

[447] Judgment, para. 4.5.3.

[448] Dutch Supreme Court 29 October 1993, ECLI:NL:HR:1993:ZC1116, *NJ* 1994/107 (*Kraaiende hanen*) and see J.J. van der Helm, *Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk nr. 19)*, Deventer: Wolters Kluwer 2019, para. 27.

[449] Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217, under 3.3(A). See in detail para. 6.4.2 Statement of Defence, with further references.

assertion that Shell is *currently* acting unlawfully.[450] The injunction that Milieudefensie et al. are seeking is therefore dependent on the emissions of Shell and its customers by the end of 2030. Milieudefensie et al. have the burden of proving that there is – at *this* moment in time – a real and concrete threat that Shell will act unlawfully by the end of 2030. For the reasons noted below, they have not done so.

9.2.5 *First*, the context of the burden of proof on Milieudefensie et al. is as follows:

(a) Shell is an energy company, and the world at large is grappling with the challenge of an overhaul of the entire energy system, as explained in Section 2.2 above.

(b) There is no one-size-fits-all approach to reducing emissions as explained in Section 2.3 - 2.6 and Section 5 above.

(c) Integrated and aligned climate policies are needed to guide the energy transition and are actively being made and implemented by governments as explained in Section 2.4 and 6.1 above, and

(d) Key policy issues pertaining to the relief sought by Milieudefensie et al. remain and have not crystallized in a norm of unwritten law (Sections 3 - 6).

9.2.6 It follows that energy companies like Shell are faced with a situation in which they – like others: States, businesses and individuals – will need to consider and adjust their policies and behaviours on an ongoing and rolling basis, as society transitions to a situation where the average global temperature rise is limited to internationally agreed limits.

9.2.7 *Second*, Milieudefensie et al. primarily sought to satisfy the burden of proof that there is a real and concrete threat by pointing to Shell's emissions reduction ambitions at the time the case was filed. Milieudefensie et al. merely argued that there is a *theoretical* possibility of a breach of the alleged Reduction Obligation because in their view Shell's goals were then not concrete enough and did not guarantee that Shell's CO_2 emissions will be reduced by net 45% by 2030. In light of the legal test explained at Section 3 above and set out below in paras. 9.2.1 et seq., that is insufficient.

9.2.8 *Third*, properly analysed, the evidence – which shows that Shell plays and will continue to play its part in meeting the challenges of the energy transition and the global need to reduce emissions – demonstrates that there is no concrete and real threat. In any event, before the Judgment was issued, Shell further revised its emissions reduction targets in the Powering Progress strategy launched in

[450] Judgment, para. 4.5.8.

February 2021,[451] which it is committed to achieving irrespective of the outcome of the current proceedings. Shell has taken, and continues to take, active steps to progress the energy transition. This includes the following:

(a) **Shell's Net-Zero Strategy**

(i) Central to Shell's transformation to a net-zero emissions business is its Powering Progress strategy. This was announced in February 2021. It is directed at working with customers and across sectors to accelerate the transition of Shell's business by providing more and cleaner energy solutions.

(ii) Shell is increasingly investing in renewable energy sources such as wind, solar and hydrogen. For example, in May 2021, Daimler Truck and Shell New Energies signed an agreement to jointly drive the adoption of hydrogen-based fuel-cell trucks in Europe by building out hydrogen-refuelling infrastructure and providing customers with fuel-cell trucks. Shell intends to initially roll out a hydrogen-refuelling network joining three green hydrogen production hubs at the Port of Rotterdam as well as Cologne and Hamburg. From 2024, Shell aims to launch heavy-duty refuelling stations between the three locations and Daimler Truck aims to hand over the first heavy-duty hydrogen trucks to customers subsequently in 2025. The plan aims to continuously expand the hydrogen powered freight corridor, which will cover 1200 kilometres by 2025, in order to deliver 150 hydrogen refuelling stations and around 5,000 Mercedes-Benz heavy-duty fuel cell trucks by 2030. Another example is the recent investment to build and operate two of the world's first large-scale floating offshore wind farms in UK waters.

(b) **Shell's reduction goals**

(i) Shell is fully committed to playing an industry leading role in the energy transition. In 2017, Shell was the first energy company to announce emissions reduction related goals that included Scopes 1, 2 and 3, well before the European Commission launched its recent proposal for large companies to set indicative emissions reduction targets.[452] Since then, Shell has

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451 See most recently Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 6 et seq. See p. 89 for an overview of all of these emissions reduction targets.

452 On 23 February 2022, the European Commission released its Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence. The legislative proposal includes requirements on large EU and non-EU companies to adopt a plan to ensure their business models and strategies are compatible with the transition to a sustainable economy and limiting of global warming to 1.5 °C in line with the Paris Agreement, and to include indicative emissions reduction objectives in the plan where climate change is identified as a principal risk.

progressively increased its reduction goals across all three Scopes, tied meeting those goals to executive compensation,[453] set short and medium term targets, and has the ultimate long term target of being a net zero emissions energy business by 2050 in step with society;[454]

(ii) Shell has set specific reduction targets for the Shell Group's own emissions (Scope 1) and the emissions from the electricity, steam and heating/cooling it buys to run its operations (Scope 2) under operational control of 50% by 2030 when compared to 2016;[455]

(iii) Shell publicly reports Scope 1 and 2 emissions.[456] And while it has no obligation to do so, and indeed many companies do not, Shell voluntarily reports on the emissions of its customers (i.e. Scope 3 emissions). Scope 3 emissions account for more than 90% of the emissions reported by the Shell Group. More than two-thirds of those Scope 3 emissions consist of emissions resulting from the use of sold products;

(iv) Shell is also taking steps to cut emissions from its existing oil and gas operations,[457] and to avoid generating more in the future;

(v) Shell also confirmed its expectations that total carbon emissions for the company peaked in 2018, that its annual oil production peaked in 2019, and that its total oil production will decline by 1-2% a year until 2030;[458]

(vi) By 2025, Shell will end routine flaring of gas, which generates carbon emissions, from the Upstream assets the Shell Group operates;

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453 Exhibit S-18, Shell plc, 7 April 2021, *Shell's Sustainability Report* 2020, p. 11 et seq. (under Executive Remuneration).

454 Achieving Shell's target depends on society making progress to meet the Paris Agreement. If society changes its energy demands more quickly, Shell intends to aid that acceleration. If it changes more slowly, Shell will not be able to move as quickly as it would like. Both energy demand and energy supply must evolve together. This is because no business can survive unless it sells things that people need and buy.

455 **Exhibit S-116**: Shell, 28 October 2021, *Press release Q3 2021 results*. See also Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 15 and p. 89.

456 See e.g. Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 91 et seq.

457 See for example **Exhibit S-117**: Shell Offshore Inc., 14 April 2021, *Letter to the US Department of Interior*.

458 Exhibit S-2, Shell plc, 11 February 2021, *Shell accelerates drive for net-zero emissions with customer-first strategy*.

(vii) By 2025, Shell expects to have kept the methane emissions intensity of the Shell Group-operated assets to below 0.2%;[459]

(viii) Shell seeks to have access to an additional 25 million tonnes a year of carbon capture and storage capacity by 2035 – or the equivalent of taking about 5.375 million cars off the road each year;[460]

(ix) Shell has linked the pay of more than 16,500 staff to its target to reduce the carbon intensity of its energy products by 6-8% by 2023, compared to 2016;[461]

(x) As a major player in the Dutch energy market, Shell has an ambition, both through its own investments and through cooperation with others, to be one of the largest drivers of the energy transition in the Netherlands. Indeed, Shell has set specific targets for Shell in the Netherlands, which are aligned with its global 'Powering Progress' strategy and go beyond what is required by the Climate Agreement, namely to: (a) supply 100% carbon-neutral energy for all types of road transport by 2040, (b) be a leader in investments and innovations in cleaner energy solutions such as wind energy, hydrogen and low-carbon fuels, and (c) play a leading role in developing sustainable and circular chemicals and by 2050 be a net-zero emissions producer of high-quality fuels and chemicals. As further evidence of its ambitions in the past years, Shell decided to invest almost EUR 4 billion in energy transition projects in the Netherlands alone;

(xi) Shell has announced that the amount it will spend to facilitate the energy transition will increase significantly. The Shell Group expects that by 2025, approximately 50% of its total expenditure will be on low- and zero-carbon products and services.[462]

9.2.9 It follows, therefore, that the relief sought by Milieudefensie et al. (and ordered by the District Court) is broader than what will under all circumstances be unlawful by the end of 2030. Given the dynamic nature of the energy transition, it is highly likely that significant progress will be made in the eleven years between the start of these proceedings (nine years after the date of the District

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459 See e.g. Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 89 and p. 92.

460 One million tonnes of stored carbon dioxide is equal to the annual emissions of approximately 215,000 cars, using emissions data as published by the U.S. Environmental Protection Agency, see **Exhibit S-118**: EPA, *Greenhouse Gas Emissions from a Typical Passenger Vehicle*, p. 1.

461 Exhibit S-4, Shell plc, 10 March 2022, *Annual Report and Accounts 2021 (selection: Introduction and Strategic Report (p. 1 – 119))*, p. 15. For 2021, Shell achieved its target of a 2-3% (net carbon intensity) reduction by the end of 2021.

462 Exhibit S-57, Shell plc, 3 February 2022, *Fourth Quarter 2021 Results*, p. 19 ("*In 2025, ~50% of total expenditure expected to be driving Energy Transition*").

Court's judgment) and the end of 2030, the moment when the reductions sought by Milieudefensie et al. are to have been achieved. This is supported by the projections set out in para. 9.2.8. Again, Shell is committed to making that progress, regardless of the outcome of these proceedings. Furthermore, even if Shell's conduct would somehow become unlawful by the end of 2030 (which is denied), it is clear that there would still be compelling public interest reasons for many of the Shell Group's operations (as set out in Section 2), meaning that the Reduction Obligation should still be denied.[463]

The Reduction Obligation is not effective

9.2.10 The Judgment does not contain a comprehensive analysis of the effectiveness of the alleged Reduction Obligation on Shell, and thus of the relief sought. In the main discussion of the Reduction Obligation in the Judgment, there is no analysis of what control and influence Shell has over Scope 3 emissions, except for the passing reference that this is "*[t]hrough the energy package offered by the Shell group*". The Court's further analysis was limited to a separate and superficial discussion of "*the effectiveness of its reduction obligation*".[464]

9.2.11 In the part of the Judgment that deals with effectiveness, the District Court makes three points in response to the argument "*that the reduction obligation will have no effect, or even be counterproductive, because the place of the Shell group will be taken by competitors*".

(a) First, the District Court appears to say that it is of limited relevance whether the Reduction Obligation would be effective. "*Even if this were true, it will not benefit RDS. Due to the compelling interests which are served with the reduction obligation, this argument cannot justify beforehand there is no need for RDS to meet this obligation.*" In para. 4.5.5, the District Court notes, "*[t]he claimed order may only be rejected if Milieudefensie et al. had no interest, to be respected at law, in it. This could occur when the order cannot contribute to preventing the alleged imminent infringement of interests.*"

(b) Second, the District Court then asserts that each reduction of emissions, presumably any reduction of the emissions reported by the Shell Group, has a positive effect. "*It is also important here that each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change. After all, each reduction means that there is more room in the carbon budget. The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence*". Reference is then made to a specific finding in the Supreme Court judgment in *Kalimijnen*

[463] C.J.J.C. van Nispen, 'Verbod van een onrechtmatige gedraging', in: C.J.J.M. Stolker (red.), *Groene Serie Onrechtmatige daad*, Deventer: Wolters Kluwer, para. 6; C.J.J.C. van Nispen, *Sancties in het vermogensrecht (Monografieën BW nr. A11)*, Deventer: Wolters Kluwer 2018, para. 17.

[464] Judgment, para. 4.4.25.

regarding liability of companies which each caused part of the pollution in a river.[465]

(c) Third, the District Court raises the "*question*" of whether the argument that the relief would be ineffective is "*actually valid*" by which it appears to mean: factually correct. The District Court does not arrive at a conclusion on this point.

9.2.12 The District Court incorrectly held that effectiveness is not relevant.

(a) First, contrary to the District Court's analysis, effectiveness is always relevant; an order cannot be awarded unless it will be effective.

(b) Second, the alleged rule of unwritten law cannot exist (be "found") if it would be ineffective in achieving the desired result – i.e. contribute to preventing global climate change. The District Court has misapplied the law on this issue.

9.2.13 Strictly in the context of the Reduction Obligation, it is incorrect to state that "*each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change*".[466]

(a) First, if the Shell Group reduces the CO_2 emissions it reports by selling less oil and gas, the effect may simply be that the fossil fuel sales of another supplier may increase resulting in the same or more emissions (if that supplier is less energy efficient or uses sources with higher carbon intensity than the Shell Group) because, unless demand decreases, customers will simply turn to other suppliers (see paras. 3.2.19, 6.4.17 and Section 8.4 above).

(b) Second, emissions reductions made by an individual may also have negative effects on global emissions reductions (instead of the positive effects which the District Court assumes but does not substantiate). For example, India and China are moving away from coal and using other, less carbon intensive, energy sources like natural gas to reduce emissions. In such a context where increased natural gas sales reduce the amount of coal burned for power generation, increased sales would in fact result in an overall reduction of global emissions, even if those sales increase the scope 3 emissions reported by the company that sells the natural gas. It is clearly wrong, therefore to assume that each reduction of the use of gas has a positive effect on overall emissions (Sections 2.2 - 2.3 above).[467] Consequently, the ruling of the District Court of Justice in para. 4.4.40, that the importance of access to reliable

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465 Dutch Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, *NJ* 1989/743 (*Kalimijnen*).

466 Judgment, para. 4.4.49.

467 See also para. 18(b) of Shell's 17 December 2020 pleading notes on the relief sought by Milieudefensie et al. ("*Pleitaantekeningen: petitum*").

and affordable energy and the role played by the Shell Group therein would not affect Shell's Reduction Obligation, because that interest should be served within the framework of climate targets, is incorrect.

9.2.14 As a matter of law, the *Kalimijnen* judgment is not on point and therefore the District Court incorrectly relied on it in this context (see paras. 4.4.37 and 4.4.39, Judgment).

(a) First, *Kalimijnen* concerned defendants who *themselves* allowed polluting substances to flow into a river. In the case at hand (and which differentiates it from *Kalimijnen*), the vast majority of emissions at issue are Scope 3 emissions (see Section 8 above). It is not at all clear that – even if the Shell Group were to simply sell less oil and gas – it would result in lower overall global CO_2 emissions. To the contrary, there is a very high likelihood that those end-users would simply buy their oil and gas elsewhere.

(b) Second, the Supreme Court's finding in *Kalimijnen* (on which the District Court relied) were made in the context of establishing a causal connection for the purposes of assessing damages, rather than determining the lawfulness of the conduct at issue (it having been already established that unlawful conduct occurred, see para. 3.5.1, third paragraph of that judgment). The Supreme Court held that, in the circumstances of that case, damages proportionate to the share in overall polluting substances would be warranted. That is not the issue before the Court in the present proceedings. In this case the issue to be decided is whether, in view of all circumstances in this matter, there is an unwritten rule of law requiring the Shell Group to reduce emissions at issue by a specific net percentage by a specific date.

9.2.15 Considering the question as to whether the Reduction Obligation would be effective, the District Court incorrectly applied the legal test. It did not appreciate that the issue of effectiveness goes to the question of whether the alleged legal duty on Shell exists *at all*. In finding a new unwritten rule of law, it is relevant to consider whether such a rule would be effective in protecting the interests that would be the basis for such a rule. Milieudefensie et al. did not show that this would in fact be the case.

9.2.16 In other words, it is circular to assert that *"[t]he claimed order may only be rejected if Milieudefensie et al. had no interest, to be respected at law, in it. This could occur when the order cannot contribute to preventing the alleged imminent infringement of interests."* (para. 4.5.5, Judgment). The correct test is whether, *assuming* the duty to reduce exists *and* an imminent violation is established, the order sought will make any meaningful difference for the claimant.[468] If that is not the case, there is no need to investigate whether there is a duty and an imminent violation, because there can be no interest in the relief

[468] J.J. van der Helm, *Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk nr. 19)*, Deventer: Wolters Kluwer 2019, p. 25, para. 20 and the further literature referred to there.

sought. The question is therefore whether an order on one company to reduce CO_2 emissions by an *absolute* amount would contribute in a meaningful way to a mitigation of the risk of Milieudefensie et al. being harmed as a result of climate change. As Shell has set out above in para. 3.2.19, that is not the case.

9.2.17 Finally, the Reduction Obligation ignores the substantial growth and investment in new activities that will be required to achieve the energy transition and thus is not a suitable solution for the challenges of energy transition. This approach of the District Court contrasts sharply with the policy and strategy underpinning the EU Fit for 55, which prioritises investment in, and rolling out of essential infrastructure over the period covered by the District Court's Reduction Obligation in order to deliver deeper decarbonisation after 2030.

There is a lack of sufficient interest in relation to Scope 1 and 2

9.2.18 Apart from the lack of an imminent violation and the lack of effectiveness of the relief sought, Milieudefensie et al.'s claim lacks sufficient interest in the sense of Article 3:303 DCC.[469] Specifically, Shell has committed to achieve very significant reductions of Scope 1 and 2 emissions by 2030, among other significant reduction targets set out in para. 2.7.5 above. Shell is committed to achieving these targets regardless of the outcome of this case. Thus, Milieudefensie et al. no longer have an interest in the order they seek.

The Reduction Obligation does not satisfy the requirement of relativity

9.2.19 The Reduction Obligation cannot be granted as it does not satisfy the requirement of relativity.

9.2.20 Conduct can be unlawful only in relation to certain persons. The analysis of whether certain conduct of a party is unlawful requires an assessment of whether that particular conduct is unlawful in relation to one or more particular other parties. This requirement of relativity is expressed, *inter alia*, in Article 6:162(1) DCC. The rationale behind the relativity requirement is to prevent excessive liability and the stretching of (legal) norms that would make them unmanageable.[470] The latter is exactly what will happen if the claim is awarded.

9.2.21 The requirement of relativity also applies to rules of unwritten law, such as duties of care.[471] Duties of care may only serve to protect the interests of others which one should be aware of.[472] According to the Supreme Court, a standard of care relates to: "[…] *the care that must be taken in a given relationship towards one or more particular others and is thus, by its very nature, not a standard*

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469 H.J. Snijders & A. Wendels, *Civiel appèl*, Deventer: Kluwer 2009, para. 80.

470 A.J. Verheij, *Onrechtmatige daad (Monografieën Privaatrecht nr. 4)*, Deventer: Kluwer 2019, para. 14.

471 K.J.O. Jansen, 'Inleiding; relativiteit bij maatschappelijke zorgvuldigheidsnormen', in: C.J.J.M. Stolker (red.), *Groene Serie Onrechtmatige daad*, Deventer: Wolters Kluwer, par. 4.3.1.

472 Dutch Supreme Court 30 September 1994, ECLI:NL:HR:1994:ZC1460, *NJ* 1996/196 (*Staat/Shell*), para. 3.8.4.

designed to protect the interests of all those who suffer damage as a result of the failure to exercise the requisite care towards those others."[473] Furthermore, the Supreme Court decided in 1973 that the requirement of relativity prevents the invocation of a certain rule (of unwritten law) by persons that do not themselves abide by that rule.[474]

9.2.22 The relativity requirement must also be satisfied if the claims concern declaratory relief or an injunction,[475] as Article 3:296 DCC requires that the conduct in question is unlawful "*towards another person*".[476] Accordingly, the District Court incorrectly held that relativity is "*not relevant to the order to be imposed*".[477] It must therefore be established that Shell's conduct in respect of CO_2 emissions is unlawful *in relation to* those people whose interests Milieudefensie et al. purport to represent on the basis of Article 3:305a (old) DCC, being the people residing in the Netherlands and the Wadden region.[478]

9.2.23 The claims of Milieudefensie et al. do not satisfy this relativity requirement. As explained in Section 8.3 above, the end-users are primarily responsible for their own emissions, even if Shell reports those emissions as Scope 3 emissions. It would be unprincipled to shift the entire responsibility for the emissions of end-users – which include Milieudefensie et al. as well as others residing in the Netherlands and the Wadden region – solely on Shell, when it is to a decisive extent the behaviour of the end-users themselves that give rise to the Scope 3 emissions reported by the Shell Group.[479] This also means that there can be no legal duty that is enforceable by Milieudefensie et al. against Shell in this respect.[480]

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473 Dutch Supreme Court 2 September 1994, ECLI:NL:HR:1994:ZC1564, *NJ* 1995/288 (*Poot/ABP*), para. 3.4.3.

474 See *Asser/Sieburgh 6-IV* 2019/137. See also Dutch Supreme Court 16 February 1973, ECLI:NL:HR:1973:AD7415, *NJ* 1973/463 (*Maas/Willems*): those who do not comply with the rule which they invoke have, "*by virtue of their own conduct,* […] *withdrawn from the protection under private law which, in so far as they used to comply with it, they could have derived from that rule against the offender on the basis of Article 1401 of the Civil Code*".

475 T.E. Deurvorst, *GS Onrechtmatige daad*, Article 6:162 DCC, under II, para. 2.1.2.3.

476 J.J. van der Helm, *Het rechterlijk bevel en verbod (Burgerlijk Proces & Praktijk nr. 19)*, Deventer: Wolters Kluwer 2019, para. 28. See also: K.J.O. Jansen, in: *GS Onrechtmatige daad,* art. 6:163 BW, para. 1.1.6 and para. 1.7: "*The main consequence of the consistent implementation of the relativity requirement in Title 6.3 of the DCC is that, in principle, only the party that has acted unlawfully can claim compensation from the perpetrator. Likewise, only that person can claim a court order or prohibition, as appears from the words 'towards another person' in Section 3:296 of the DCC.*".

477 Judgment, para. 4.5.4.

478 The District Court ruled that the claims of Milieudefensie et al. were not admissible to the extent they serve the interests of the world's population, except for the interest of Dutch residents and the inhabitants of the Wadden region. Judgment, para. 4.2.1 et seq.

479 Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*).

480 Dutch Supreme Court 23 February 2007, ECLI:NL:HR:2007:AZ6219, *NJ* 2008/492 (*De Groot/Io Vivat*). Cf. the doctrine of *in pari delicto* (Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*); Dutch Supreme Court 2 December 2005, ECLI:NL:HR:2005:AU2397, *NJ* 2007/5

The Reduction Obligation is unenforceable because it would require the development of an unprecedented judicial supervisory regime that the Court is not equipped to design or administer

9.2.24 The enforcement of the Reduction Obligation issued by the District Court would – in effect – require the Court to develop a sophisticated supervisory regime that is capable of taking into account a wide range of interests and considerations on an ongoing basis. As set out in Sections 2 and 5, the emissions reductions pathways required to limit the impact of climate change are influenced by a wide range of factors (including parallel regulatory regimes being developed in the Netherlands, EU, and globally), all of which are in a constant state of change. These enforcement challenges are particularly problematic in relation to Scope 3 emissions which, as explained in Section 8, are fundamentally unsuitable as the basis for an enforcement mechanism due to (among other things) the inherent double counting of emissions and lack of consistency in the application of reporting methodologies.

9.2.25 These factors mean that the enforcement of the Reduction Obligation would require the Court to take on the role of a regulator that continuously monitors and adjusts its regulatory rule to keep pace with any developments. As the New Zealand Court of Appeal has noted, "*[t]he design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process. Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices*."[481]

9.2.26 In this case, Milieudefensie et al.'s claim – and the Reduction Obligation made by the District Court, if upheld – would require unprecedented ongoing judicial supervision and result in continuous recourse to the courts for relief. As the High Court of New Zealand noted: "*These, and probably other, tasks would make it extraordinarily difficult to craft any form of injunction. Any orders would require continued judicial supervision – certainly up to 2030 and perhaps beyond. The Court's supervisory role would become akin to that of a regulator, requiring specialist, and not judicial, expertise*."[482] The

(*WE/Henselmans*); Joint Court of Justice 11 February 2014, ECLI:NL:OGHACMB:2014:22, *NJF* 2014/345; Dutch Supreme Court 16 February 1973, ECLI:NL:HR:1973:AD7415, *NJ* 1973/463 (*Maas/Willems*).

481 Exhibit S-58, *Smith v Fonterra Co-Operative Group Limited* [2021] NZCA 552, para. 26.

482 Exhibit S-59, *Smith v Fonterra Co-Operative Group Limited* [2020] NZHC 419, para. 108. As the court also notes at para. 107: "*The injunctions sought by Mr Smith would require the Court to go beyond enforcing the terms of the Climate Change Response Act, and require the Court to apply an emissions accounting methodology to determine gross emissions from each defendant. The Court would have to consider the extent to which each defendant should be responsible for supply chain emissions for which it is not directly responsible. It would have to guard against double counting between defendants (and entities overseas in the case of BT Mining) and potential future defendants in similar proceedings. The Court would have to select a methodology to apply to carbon dioxide equivalents, so that greenhouse gases could be meaningfully compared when taking into account the different effects of different emissions on global warming. It would have to determine whether an emissions trading type scheme would be required by any Court order (noting that Mr Smith seeks "net" zero emissions) and, if so, whether, how and to what extent units could be acceptable offsets against each defendant's gross emissions. The Court would have to put in place a system to verify each*

problems with such a remedy, and the fundamental issues with the enforcement of any such remedy before the English or Dutch courts, demonstrate that it cannot be granted. This is all the more true for the "significant best-efforts obligation" which the District Court imposed on Shell.[483]

defendant's acquisition and/or surrender or cancellation of units. The Court would have to consider what if any trajectory of net emission reductions each defendant would be required to achieve between 2020 and 2030 (the target date suggested by Mr Smith)."

[483] Judgment, paras. 4.1.4, 4.4.24, 4.4.37, 4.4.39, 4.4.52, 4.4.55.

10. GRIEVANCES

10.1 Introduction

10.1.1 The Court is requested to overturn the Judgment and reject the claims in full.

10.1.2 Shell sets out 10 specific grievances below. These should be read in conjunction with all grievances set out above in the previous Sections of this Statement of Appeal.

10.2 Grievance I: the Judgment is wrongly premised on the existence of an unwritten norm that obliges Shell to reduce CO_2 emissions with net 45% by end 2030

Grievance I(a): the Judgment is wrongly premised on the existence of an unwritten norm that obliges Shell to reduce CO_2 emissions by net 45% by end 2030

10.2.1 In part 4.4 of the Judgment,[484] the District Court reached the conclusion that "*RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3)*".[485]

10.2.2 For the reasons set out in Sections 1 - 9 above, the District Court erred in reaching that conclusion, and the Judgment should be overturned. Furthermore, for the reasons explained at Section 3.2 above, there is no unwritten law that imposes a Reduction Obligation on Shell of any other specific percentage by the end of 2030 either. A reduction obligation as adopted by the District Court cannot be found in unwritten law and would require a specific norm expressly enacted in the law. This applies even more so to a reduction obligation with the degree of specificity in terms of scope and timing, that is contained in the Reduction Obligation.

10.2.3 There is a large degree of overlap between: (a) the claim by Milieudefensie et al. and the order imposed by the District Court to reduce emissions; and (b) the declaratory relief sought by Milieudefensie et al. The District Court declined to grant the declaratory relief sought by Milieudefensie et al. partly because Milieudefensie et al. lacked sufficient interest in relation to the relief sought, because it already granted the emissions reduction order that was requested by Milieudefensie et al. (compare Judgment, para. 4.5.9). Given the overlap between these issues, Grievance I also seeks (to the extent necessary) to annul that legal finding if and insofar as it is implied that – in the absence of the claimed order being granted – the declaratory relief would have been granted. Furthermore, all arguments submitted in this Statement of Appeal, including Shell's defences in first instance, which were not dealt with by the District Court,

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484 In combination with Judgment, paras. 4.1.3 - 4.1.4 and 4.5.

485 Judgment, para. 4.4.55.

also apply to Shell's defence against the declaratory relief sought by Milieudefensie et al.

Grievance I(b): the Judgment wrongly relies on 45%

10.2.4 The Judgment states that there is a "*widely endorsed consensus*"[486] for CO_2 emissions reduction by net 45% in 2030, which is part of "*reduction pathways [which] are global and do not proclaim anything about what can be expected from RDS*".[487]

10.2.5 It then continues, "*in light of the broad international consensus that each company must independently work towards achieving net zero emissions in 2050, RDS may be expected to do its part*"[488] and "*RDS should take as a guideline that the Shell group's CO2 emissions (Scope 1, 2 and 3) in 2030 must be net 45% lower relative to 2019 levels*".[489]

10.2.6 The leap made by the District Court between (a) a *general* global net reduction target and (b) a *specific* net reduction to be achieved by Shell is not properly justified in the Judgment. Nor is it legally or analytically well-founded. The proper legal framework for dealing with an alleged obligation under unwritten law is addressed in Section 3.2 above. The District Court did not follow that framework.

10.2.7 In this context, it is particularly important to note that:

(a) oil and gas products account for the majority of energy products supplied by Shell today, and Shell does not supply coal (para. 2.3.9 above and Judgment para. 2.2.3); and

(b) different pathways and government policies demonstrate that the emissions reduction expected from various sources differs. For the relevant period until 2030, those from oil and gas by 2030 are envisaged to decrease considerably less than, for example, those from coal, the phase down of which is prioritized. For example, as set out in para. 2.3.9 above, by 2030, the IEA NZE scenario anticipates a reduction of ~60% in emissions from coal combustion, a reduction of ~35% in emissions from oil combustion and ~18% reduction in emissions from gas combustion compared to 2019.[490] EU and Dutch policies have a similar focus on prioritising reduction in coal emissions to 2030 (see policy examples in para. 3.3.6 above).

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[486] Judgment, para. 4.4.29.

[487] Judgment, para. 4.4.32.

[488] Judgment, para. 4.4.36.

[489] Judgment, para. 4.4.39.

[490] Exhibit S-8, IEA, October 2021, *Net Zero by 2050*, 4th Revision, Annex A "Tables for scenario projections".

10.2.8 It follows that the District Court's very limited reasoning, viz., the notion that a company must "*do its part*", is insufficient to justify the conclusion that Shell has a specific legal obligation in terms of a reduction in emissions by a set percentage, let alone by the same percentage as the general global average from all sources of emissions. Moreover, the District Court's reasoning overlooks the fact that the aforementioned average includes particularly carbon intensive energy sources such as coal which Shell does not supply. Although the Judgment considers, in para. 4.4, no less than fourteen circumstances – many of them Shell-specific – to inform the specific interpretation of the alleged unwritten standard of care in this case, the District Court neglected to consider the highly relevant circumstances noted above. For that reason alone, the Judgment should be overturned.

10.2.9 Furthermore, as we have explained above at Section 2, there are challenging policy questions such as: what are the appropriate instruments through which reductions are to be realized and what should the level of reductions be for individual sectors, companies and/or individuals? It is up to governments to determine the optimal way in which the limited carbon budget must be divided, and to determine the associated trade-offs and policy judgments. These questions cannot be ignored. The District Court was wrong to dismiss them without any meaningful analysis by holding that "*the importance of access to reliable and affordable energy, as pointed out by RDS, and the Shell group's role in it, have no bearing on RDS' reduction obligation*".[491] To the contrary: such important considerations must plainly be weighed in the analysis when considering the existence of the purported obligation, as is explained in Section 2. The mere fact that Milieudefensie et al. only focus on emissions reductions in this case does not mean that the District Court could disregard the wider – and global – societal interest in energy, including security of supply.

10.2.10 The percentage set by the District Court therefore lacks any proper analytical basis, and is unfounded.

Grievance I(c): any Reduction Obligation expressed in absolute terms is unfounded

10.2.11 As noted above, the District Court considered that "*RDS should take as a guideline that the Shell group's CO2 emissions (Scope 1, 2 and 3) in 2030 must be net 45% lower relative to 2019 levels*".[492]

10.2.12 The absolute Reduction Obligation was set by the District Court without sufficient technical and practical analysis. For the reasons set out in para. 9.2.10, any reduction obligation on any one actor (or group of actors) which requires a

[491] Judgment, para. 4.4.40.

[492] Judgment, para. 4.4.39.

reduction in absolute terms[493] is ineffective, unfounded and thus contrary to Dutch law.

Grievance I(d): the Judgment is incorrect insofar as the Reduction Obligation applies to Scope 3 emissions

10.2.13 In part 4.4 of the Judgment (in combination with paras. 4.1.3 - 4.1.4), the District Court reached the conclusion that "*RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3)*".[494] Specifically, it held that this extends to Scope 3 emissions and that "*this is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible*".[495]

10.2.14 For the reasons set out in Sections 1 - 9 above, the District Court should not have reached that conclusion, and the Judgment must be overturned. Additionally, it follows from the above quote that whereas the (body of) the Judgment describes Shell's Reduction Obligation in respect of Scope 1 as an obligation of result, and in respect of Scopes 2 and 3 as a "*significant best-efforts obligation*",[496] para. 5.3 of the order itself does not reflect this difference. For this reason also the Judgment must be overturned.

Grievance I(e): the Judgment is wrong insofar as the Reduction Obligation applies to the emissions of all Shell Group companies under Shell's financial control

10.2.15 In para. 5.3. the District Court orders Shell: "*both directly and via 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 CO2 emissions into the atmosphere (Scope 1, 2*

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493 Measures used to track emissions and reduction performance vary, but include total emissions as well as intensity-based metrics such as carbon emissions per unit of GDP or revenue. The GHG Protocol allows for reporting on an intensity basis (see e.g. **Exhibit S-119**: GHG Protocol 2013, *Technical Guidance for Calculating Scope 3 Emissions*, *Appendix C Calculating emissions intensity metrics*). The Task Force on Climate-related Financial Disclosures Guidance on Metrics, Targets, and Transition Plans defines four widely-adopted metrics, including: i) Weighted Average Carbon Intensity; ii) Total Carbon Emissions; iii) Carbon Emissions to Value Invested; and iv) Carbon Emissions to Revenue Intensity (see **Exhibit S-120**: Task Force on Climate-related Financial Disclosures, October 2021, *Guidance on Metrics, Targets, and Transition Plans*, Appendix 2.

494 Judgment, para. 4.1.4.

495 Judgment, para. 4.1.4.

496 Judgment, paras. 4.1.4, 4.4.23 and 4.4.24.

and 3)".[497] As explained in para. 8.3.7 and footnote 389, Shell has chosen to report its emissions and climate targets on an *operational* control basis since 1997, which is permitted under the GHG Protocol. Therefore, insofar as the District Court held – in para. 5.3 of the Judgment – that the order extends to companies and legal entities that are under Shell's *financial* control, the District Court erred in reaching these conclusions for the reasons set out in para. 8.3.7 and footnote 389, and the Judgment should be overturned.

Grievance I(f): the Judgment did not properly account for regulatory emissions reduction mechanisms applicable in the jurisdictions in which the Shell Group operates

10.2.16 In paras. 4.4.44 - 4.4.48, the District Court correctly recognised that the Reduction Obligation overlapped with bespoke regulatory regimes[498] that are specifically designed to reduce emissions (such as the EU ETS). It acknowledged that emissions reduction measures such as the EU ETS, and some forms of similar non-EU mechanisms, have a partially "*indemnifying effect*"[499] for Shell up to the extent of the "*reduction percentage they aim to achieve*".[500] In doing so, the District Court correctly recognised that the existence of a specific regulatory mechanism designed to reduce emissions had the effect of partially displacing the Court's judicially imposed Reduction Obligation.

10.2.17 However, the District Court applied the "*indemnifying effect*" of the ETS in an insufficiently narrow way which did not accurately reflect the role that an ETS fulfils as one element of government's regulatory response to climate change. In particular, the District Court incorrectly:

(a) only recognised the "*indemnifying effect*" of the EU ETS and similar non-EU mechanisms to the extent the emissions reported by the Shell Group are specifically covered by an ETS. In this respect, while the EU ETS (consistent with many other ETS around the world) does not cover all emissions in the EU, it is part of a package of measures which collectively operate to reduce emissions across the entire EU economy – not just those sectors subject to the ETS;

(b) only recognised the "*indemnifying effect*" of the EU ETS and similar non-EU mechanisms to the extent Shell's Reduction Obligation does not extend "*beyond the reduction target of the ETS system*"[501]; and

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497 Judgment, para. 5.3.

498 In many of the jurisdictions in which the Shell Group operates (including, among others, the Netherlands and the EU) there are bespoke regulatory regimes that are specifically designed to reduce emissions and contribute to addressing climate change by imposing requirements, such as permits, which must be complied with to lawfully emit GHGs.

499 Judgment, para. 4.4.44.

500 Judgment, para. 4.4.47.

501 Judgment, para. 4.4.46.

(c) did not recognise, and did not take account of, non-market-based emissions reduction mechanisms that governments may select to reduce emissions in their jurisdiction, which can play an equally or more important role in reducing a State's overall emissions.

10.2.18 The District Court's reasoning is incorrect in each of these respects because the EU ETS and other EU measures (including a mix of standards, targets and market-based regulations) collectively regulate industry emissions throughout the EU (including the Scope 3 emissions reported by energy providers such as Shell that are the Scope 1 emissions of other industries). Other measures include, for example, renewable targets, including sectoral targets for the transport sector, under RED II and CO_2 emission performance standards for passenger cars and vans. These mechanisms are collectively used by the EU to *reduce emissions across the entire economy* in line with a chosen emissions reduction pathway, not just to reduce the specific emissions that are specifically covered by the ETS. As is described above, in implementing measures to address climate change, governments make a range of trade-offs and judgements about how best to implement emissions reductions in light of their national circumstances. This may also involve sectoral approaches designed to reduce emissions in some sectors more quickly than others (which are reflected in the reduction targets reflected in an ETS).

10.2.19 For example, a government may choose not to include a harder to abate sector (e.g. transport) within the scope of an ETS (or to include it, but impose an ETS cap on emissions that implies an emissions reduction in that sector that is *less than the average* economy-wide emissions reduction the State seeks to achieve). The government may then compensate for this by imposing an ETS cap on emissions in an easier to abate sector (e.g. power generation) that implies a level emissions reduction in that sector that is *greater than the average* economy-wide emissions that the State seeks to achieve. In these circumstances, the fact that an ETS does not apply to emissions in the transport sector does not imply that these emissions are beyond the scope of the government's mechanism for achieving emissions reductions. Indeed, their non-inclusion reflects an integral and considered element of the State's economy-wide response to emissions reductions (which may also include non-market mechanisms for achieving emissions reductions).

10.2.20 It follows from the foregoing that, by imposing the Reduction Obligation on Shell, the Court distorts in an unacceptable manner Shell's ability to compete, both in light of EU law and in light of the principle of equality of law (*égalité devant les charges publiques*).

10.3 Grievance II: The claim does not satisfy the threshold requirements for a court order because there is no concrete and real imminent violation of the alleged Reduction Obligation by Shell

10.3.1 In paras. 4.5.2 - 4.5.3 (in combination with paras. 2.5.18 through 2.5.20 and 4.5.1) of the Judgment, after considering "*policy intentions and ambitions*"[502] published by Shell, the District Court concluded that "*the policy, policy intentions and ambitions of RDS for the Shell group are incompatible with RDS' reduction obligation*"[503], and that "*this implies an imminent violation of RDS' reduction obligation*".[504] According to the District Court, this means that the court "*must*" allow the order, and that there is "*no room for weighing interests*".[505]

10.3.2 For the reasons set out in Sections 1 - 9 (more specifically Section 9.2) above, the District Court erred in reaching these conclusions, and the Judgment should be overturned.

10.4 Grievance III: The Judgment does not properly consider the (lack of) effectiveness of the relief granted

10.4.1 The District Court appears to say that it is of limited relevance whether the Reduction Obligation would be effective, stating that: "*Even if this were true, it will not benefit RDS. Due to the compelling interests which are served with the reduction obligation, this argument cannot justify assuming beforehand there is no need for RDS to not meet this obligation*".[506] In para. 4.5.5, the District Court notes, *"[t]he claimed order may only be rejected if Milieudefensie et al. had no interest, to be respected at law, in it. This could occur when the order cannot contribute to preventing the alleged imminent infringement of interests*".[507] The District Court then asserts that each reduction of emissions, and presumably any reduction of Shell's emissions, has a positive effect. The District Court, however, seems to assume that this means that each reduction in supply by Shell would also have a positive effect on global emissions – but this is incorrect, as set out in Section 9.2 above. The Judgment contains no comprehensive analysis of the effectiveness of the Reduction Obligation on Shell, and thus of the relief sought. In this context, the District Court found in para. 4.4.50 that there are possible scenarios "*in which other oil and gas companies also limit their investments in oil and gas, voluntarily, under pressure, or due to retreating investors, or as sustainable methods of energy generation become available worldwide, in the aim to meet the targets of the Paris Agreement*." This is not explained in more detail. As Shell has set out in

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502 Judgment, para. 4.5.2.

503 Judgment, para. 4.5.3.

504 Judgment, para. 4.5.3.

505 Judgment, para. 4.5.3.

506 Judgment, para. 4.4.49.

507 Judgment, para. 4.5.5.

paras. 0 and 2.2.12, it is widely accepted that oil and gas will inevitably continue to play a significant role in modern society until well beyond 2030. In Section 2, Shell explains why this is not contrary to the targets of the Paris Agreement. Furthermore, case law from other countries does not suggest that oil and gas companies in those countries will be forced to limit their investments in the way that the District Court apparently envisaged, as Shell has set out in paras. 4.2.18 and 5.5.2. Finally, the finding that certain scenarios may occur is insufficient to conclude that the Reduction Obligation actually will be effective. The reasoning underlying this finding by the District Court is therefore incorrect.

10.4.2 For the reasons set out in Section 9.2 above, the District Court erred in reaching these conclusions, and the Judgment should be overturned.

10.5 Grievance IV: The Judgment fails to take into account the relevant applicable laws

The discussion of applicable law in the Judgment

10.5.1 In para. 4.3 of the Judgment, the District Court applied Article 7 of the Rome II Regulation ("**Rome II**") to determine the applicable law of the claim. It decided that Dutch law applies, looking at (a) the event giving rise to the damage and (b) the country where the damage occurs.

(a) First, the event giving rise to the damage. In its analysis of the relevant event giving rise to the damage within the meaning of Article 7, the District Court rejected Shell's argument that the court should look to the actual emitting of CO_2 rather than policy setting as the "event giving rise to the damage".[508] After considering that "*[t]he underlying thought is that every contribution towards a reduction of CO2 emissions may be of importance*",[509] it held that "*[a]lthough Article 7 Rome II refers to an 'event giving rise to the damage', i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region*".[510]

(b) Second, the country where the damage occurs. In para. 4.3.7 of the Judgment, the District Court noted "*superfluously*" that "*the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar*

[508] Judgment, para. 4.3.2 - 4.3.4.

[509] Judgment, para. 4.3.5.

[510] Judgment, para. 4.3.6.

as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law".[511]

The District Court erred in determining applicable law and its consequences

10.5.2 As developed below, the analysis applied by the District Court cannot be upheld for the following four reasons:

(a) Article 7 Rome II is not applicable since the policy-setting for the Shell Group by Shell plc as such does not constitute environmental damage within the meaning of Article 7 Rome II. Instead, Article 4 Rome II must be applied (paras. 10.5.3 and 10.5.4);

(b) In the context of a claim regarding the reduction of emissions across the world, the laws of many countries apply, i.e. not just Dutch law (paras. 10.5.5 - 10.5.12);

(c) Even if only Dutch law were to apply, regard must still be had to local rules of safety and conduct in the (other) countries where the relevant conduct takes place (paras. 10.5.13 - 10.5.17); and

(d) The District Court erred in not recognizing that Milieudefensie et al. have not substantiated their claims on the basis of the applicable laws of other countries (para. 10.5.18).

Article 7 Rome II is not applicable as the relief sought by Milieudefensie et al. does not qualify as a non-contractual claim arising out of environmental damage

10.5.3 Milieudefensie et al. hold Shell liable in its capacity as the policy-setting entity of the Shell Group. This is because, according to Milieudefensie et al., the event giving rise to the damage within the meaning of Article 7 Rome II is the corporate policy as determined for the Shell Group by Shell. According to Milieudefensie et al., this in turn leads to emissions by not only Shell itself, but also by the companies which form part of the Shell Group (and even by third parties).

10.5.4 The alleged liability of Shell for "policy setting" does not in and of itself relate to environmental damage. Shell sets many policies for the Shell Group, for instance in connection with rules of safety to be observed. The alleged liability of Shell for setting a policy for the Shell Group is therefore a liability of a legal entity (Shell plc) which acts in its capacity as the direct or indirect shareholder of other companies. This alleged liability does not specifically relate to environmental damage, but is more general in nature, i.e. the alleged liability of top holding companies for setting a policy for the group which causes the group

[511] Judgment, para. 4.3.7.

to act in an allegedly unlawful manner. Such a liability does not fall under the scope of Article 7 Rome II, but under the scope of Article 4 Rome II.

Alternatively, if Article 7 Rome II is applicable, the District Court erred by not recognising that both the Handlungsort and the Erfolgsort lead to the applicability of the laws of many countries

10.5.5 The law applicable to claims of alleged environmental damage can, at the choice of the injured party, either be the law of the country where the damage occurs (*Erfolgsort*) or the law of the country in which the event giving rise to the damage occurred (*Handlungsort*). In this case, Milieudefensie et al. previously chose the law of the country where the event giving rise to the alleged damage occurs (*Handlungsort*). In those circumstances, the following analysis applies.

10.5.6 As regards the application of the law of the *Handlungsort*, contrary to what the District Court held, the court should look to the *actual* emitting of CO_2 rather than policy-setting as being the "event giving rise to the damage".[512] That is because when it comes to the matter of addressing climate change, the *Handlungsort* is the place where the CO_2 emissions that give rise to the damages relating to climate change, occur. In the case of CO_2 emissions, every person in the world is (to varying degrees) both contributing to a risk and the potential victim of that same risk.

10.5.7 In this case, Shell is alleged to be responsible for the CO_2 emissions of the Shell Group and the end-users of the products that the Shell Group sells. These emissions occur in nearly every country around the world. Consequently, the law of each of these countries where these emissions occur is applicable. This leads to the conclusion that the laws of all of these countries are applicable.

10.5.8 The District Court sought to ignore the ramifications of the application of the *Handlungsort* in a case such as this by simply confining the applicable law to one jurisdiction and focusing on the top holding company of the Shell Group.

10.5.9 This was the wrong approach. The event giving rise to the damage of climate change cannot simply be localised by picking a seat of a top holding company that adopts the policy for its group, and then tying that policy to CO_2 emissions across the world and across more than 1,000 subsidiaries, each incorporated under its own laws. As Von Hein explains, "*[t]he seat of a parent company alone does not suffice to localize the event in this country if the acts or omissions must actually be attributed to a subsidiary operation in a different jurisdiction.*"[513] This is precisely the case here.

10.5.10 Milieudefensie et al.'s position is that every event in the causal chain, including the adoption of policy, would give rise to the damage and would constitute a

[512] J. von Hein, 'Article 7 Environmental Damage', in: G-P Calliess (ed.), *Rome Regulations: Commentary*, Alphen aan den Rijn: Kluwer Law International 2020, p. 662.

[513] J. von Hein, 'Article 7 Environmental Damage', in: G-P Calliess (ed.), *Rome Regulations: Commentary*, Alphen aan den Rijn: Kluwer Law International 2020, p. 662.

Handlungsort. This is incorrect as a matter of law and the District Court was wrong to adopt it in the Judgment.

10.5.11 For the determination of the *Erfolgsort* under Article 7 Rome II, Article 4(1) Rome II itself states unequivocally that the law of the country in which the damage occurs applies irrespective of the country "*in which the **indirect** consequences*"(emphasis added) of the event giving rise to the damage take place. Also, the recitals of Rome II state that in liability matters connection must be sought "*with the country where the direct damage occurred*" (emphasis added).[514] This demonstrates that – for the purposes of finding the applicable law – the causal chain between event and damage is a short one. It would therefore be illogical and run counter to the text of Rome II itself if *indirect* events leading to the damage were deemed to be relevant for determining the applicable law pursuant to Article 7 Rome II. The correct interpretation of Article 7 Rome II (if it applies at all) is that only the *direct* event leading to the damage is decisive for the determination of the *Handlungsort*. In other words, the directness of the damage in Article 4(1) Rome II finds its counterpart in the directness of the event in Article 7 Rome II. This is also described by Von Hein, who states that "*only the final incident causing the damage should be characterized as the decisive 'event' within the meaning of Article 7*" (emphasis added).[515]

10.5.12 The foregoing makes clear that emitting CO_2, being the direct incident leading to environmental damage, is decisive for determining the *Handlungsort*. Furthermore, the *Erfolgsort* also leads to the conclusion that the laws of many countries are applicable. As Shell has stated above, the alleged damage suffered as a result of climate change may occur in any country around the world. Consequently, the laws of each of the countries where the damage occurs, apply.

The District Court erred by not taking into account local rules of safety and conduct (Article 17 Rome II)

10.5.13 Even if only Dutch law is found to be applicable, the analysis does not stop there.

10.5.14 In that case, the applicable regulations in all of the countries in which the Shell Group operates and in which all of its end-users are localised must be applied. This follows from Article 17 of Rome II, which provides that the rules of safety and conduct which are in force at the place and time of the event giving rise to

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514 Paragraph 16 of the recitals of Rome II provides: "*Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.*" (emphasis added)

515 J. von Hein, 'Article 7 Environmental Damage', in: G-P Calliess (ed.), *Rome Regulations: Commentary*, Alphen aan den Rijn: Kluwer Law International 2020, p. 662.

the liability, must be applied.[516] Thus, the Court must, regardless of which law is applicable, take into account all local rules of safety and conduct regarding the CO_2 emissions of each Shell Group company worldwide and of their end-users. It is important to reiterate that if the alleged damage is caused by the cumulative effect of several acts taking place in different countries, Article 17 Rome II should be understood as referring to the local safety rules of each of the countries in which a part of the harmful event is located.[517]

10.5.15 Paragraph 34 of the recitals of Rome II explains that in order to strike a reasonable balance between the parties, account must be taken of the rules of safety and conduct in operation in the country in which the (alleged) harmful act was committed "*even where the non-contractual obligation is governed by the law of another country*".[518] According to this consideration, "*rules of safety and conduct*" should be interpreted as "*referring to all regulations having any relation to safety and conduct*";[519] these rules of safety and conduct must therefore be interpreted broadly.[520]

10.5.16 Article 17 Rome II provides that a court, regardless of which law is applicable, must assess whether the activities of the Shell Group and its end-users in the countries in which they operate comply with local safety regulations and rules of conduct that regulate CO_2 emissions. The industry in which the Shell Group operates is heavily regulated. The Shell Group operates a compliance culture and there is no suggestion that it is not acting lawfully under the Health & Safety rules and regulations of all relevant jurisdictions. It certainly cannot be presumed that emitting CO_2 in these countries is not compliant with the applicable local regulations and rules of conduct. On the contrary: emitting CO_2 is generally *not* an unlawful activity for which a party can be held liable. For instance, a Shell Group company may have obtained a permit to emit CO_2 (e.g. under an ETS), which can, as is also the case under Dutch law,[521] be a relevant factor in determining whether the actions concerned are unlawful or not.

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516 Article 17 Rome II Regulation provides: "*In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.*"

517 P. Wautelet, 'Article 17', in: U. Magnus & P. Mankowski (ed.), *Rome II Regulation – Commentary*, Cologne: Otto Schmidt KG, Verlag 2019, p. 573.

518 Recitals Rome II, para. 34.

519 Recitals Rome II, para. 34.

520 It follows from para. 34 of the recitals of Rome II Regulation that rules of safety and conduct should be interpreted broadly, and also include laws in a substantive sense (*Asser/Kramer & Verhagen 10-III* 2022/1118). Examples are regulations adopted by competent public bodies, statutory enactments and other rules adopted by legislative bodies such as decrees, municipal ordinances, regional or state rules. A permit or authorization is also an important element to be taken into consideration when assessing the conduct of an alleged tortfeasor. See also Wautelet 2019, p. 569 and 570.

521 See e.g., Dutch Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823, *NJ* 2006/418 (*Ludlage/Van Paradijs*), par. 3.5.1.

10.5.17 Hence, as a result of Article 17 of the Rome II Regulation, the Court must have regard to the fact – which has not been challenged – that Shell has complied with the rules in force in the countries in which it is active (and it should be noted that Milieudefensie et al. have not claimed otherwise). The District Court did not do so – in the process overlooking other countries' laws and regulations and substituting its own views – and was therefore wrong to grant the requested relief.

As a result, the District Court also erred by not recognizing that Milieudefensie et al. failed to properly substantiate their claims in accordance with the laws that are applicable

10.5.18 Milieudefensie et al. and the District Court were wrong to assume that only Dutch law applies. Milieudefensie et al. have not substantiated their claims under the laws of each of the countries where CO_2 is emitted or where the environmental damage occurs. Milieudefensie et al. equally ignored the impact of Article 17 of the Rome II Regulation, even if Dutch law alone is the applicable law. Consequently, Milieudefensie et al. have not complied with their procedural obligation to furnish facts and substantiate their claim that Shell is subject to the alleged Reduction Obligation. As a result, the Judgment should be reversed and Milieudefensie et al.'s claims must be dismissed.

10.6 Grievance V: Shell as holding company cannot in effect be held liable for lawful actions of other Shell companies or third parties

10.6.1 The District Court ordered Shell to reduce its CO_2 emissions "*both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group*".[522] Through the part of the Reduction Obligation that includes Scope 3, this includes the end-users of each of those companies.

10.6.2 Shell was not only ordered to reduce the emissions that result from its own activities, but also those that result from the activities of its subsidiaries, and those of the end-users of products supplied by the Shell Group, in a great number of countries and jurisdictions.

10.6.3 As has been noted above, at paras. 3.3.15(b) and 8.3.4 et seq., the activities of those subsidiaries are lawful in all of the jurisdictions in which the Shell Group operates.

10.6.4 The inescapable conclusion of the Judgment is that Shell, as a parent company, is in effect being held liable for the *lawful* acts of its more than 1,000 subsidiary companies, including their end-users, even though those acts are lawful in the jurisdictions in question. The Judgment fails to confront this conclusion. It does not justify or explain it.

[522] Judgment, para. 5.3.

10.6.5 Specifically, the District Court did not explain at all why Milieudefensie et al. could bring a claim directly against Shell, and why an exception should be made to the general principle that claims should be brought against the (legal) persons committing the alleged unlawful conduct, i.e. the subsidiaries and end-users emitting CO_2.

10.6.6 There is no legal analysis underpinning that far-reaching finding except for the general statement in para. 4.4.23 that "*due to the policy-setting influence RDS has over the companies in the Shell group, it bears the same responsibility for these business relations as for its own activities*".[523] The District Court based this on factual statements in paras. 2.5.1 - 2.5.7 and 4.4.4 of the Judgment. This reasoning is clearly insufficient.[524] Again, there is no finding, and not even an allegation, that Shell's subsidiaries or its end-users acted unlawfully.

10.6.7 There is no precedent in Dutch law in which a parent company has been held liable directly for the actions of its subsidiaries and even of end-users, without an assessment of the (alleged) unlawful acts of those subsidiaries and end-users. Indeed, Milieudefensie et al. itself argued that the actions of Shell's subsidiaries should not be assessed in these proceedings.[525] This is impossible to reconcile with Milieudefensie et al. asking for a court order to curtail the activities of those same subsidiaries. There is a clear inconsistency in basing the applicable law on policymaking and then issuing an order to reduce actual emissions. For this reason alone, the Judgment cannot be upheld.

Liability for the conduct of others accepted only in limited cases and with explicit statutory basis

10.6.8 Finally, Shell notes that the approach taken by the District Court is also irreconcilable with tort law in general. Dutch law provides that (legal) persons can only be held liable for acts and omissions of other (legal) persons in a specified list of cases that have an explicit statutory basis.[526] By accepting a new rule of unwritten law which achieves the same thing, the District Court did not take the existing Dutch legal framework into account. There is no statutory basis for holding a parent company liable for the acts of its subsidiaries. Introducing this form of strict liability – even through a new rule of unwritten law – would require an explicit statutory basis.

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523 Judgment, para. 4.4.23.

524 M. Olaerts, 'Civielrechtelijke aansprakelijkheid', in: J.B. Huizink (ed.), *Groene Serie Rechtspersonen*, Deventer: Wolters Kluwer, par. 8.3.

525 Milieudefensie et al., Pleading notes 3, para. 10.

526 *Asser/Sieburgh 6-IV* 2019/169. Examples are liability of parents for the conduct of their children (Article 6:169(1) and (2) DCC), liability of an employer for wrongful acts of an employee (Article 6:170 DCC) and liability of a principal for wrongful acts of its non-subordinate (Article 6:171 DCC).

10.7 Grievance VI: The relativity requirement is not met because Milieudefensie et al. themselves do not adhere to the alleged rule that they invoke against Shell

Introduction: the relativity requirement in the Judgment

10.7.1 In para. 4.5.4 of the Judgment, the District Court held that "*RDS' invocation of the lack of relativity of book 6 Section 163 Dutch Civil Code is not relevant to the order to be imposed*".[527] In doing so, the District Court overlooked Shell's argument that relativity is also required through Articles 3:296(1) and 6:162(1) DCC.

10.7.2 Moreover, it erred as a matter of law. The District Court held that the standard that would be violated is "*for the protection of the interests of Dutch residents and the inhabitants of the Wadden region*",[528] but it simply overlooked Shell's argument that Shell's conduct in respect of CO_2 emissions must be unlawful *in relation to* those people whose interests Milieudefensie et al. purport to represent on the basis of Article 3:305a (old) DCC, being the people residing in the Netherlands and the Wadden region.[529]

10.7.3 The claims of Milieudefensie et al. do not satisfy this relativity requirement. As explained in paras. 8.3.21 - 8.3.27 above, end-users are responsible for their own CO_2-emissions, and this also applies to the people whose interests Milieudefensie et al. purport to represent. This also means that there can be no legal duty that is enforceable by Milieudefensie et al. against Shell in this respect.[530]

10.7.4 For the reasons set out in Section 9.2 above, the District Court erred in reaching these conclusions, and the Judgment should be overturned.

10.8 Grievance VII: Milieudefensie et al.'s claims are inadmissible because the underlying legal questions are insufficiently similar to be decided in a collective action and because their claims exceed the scope of the right to collective action

Introduction: admissibility in the Judgment

10.8.1 In para. 4.2.4 of the Judgment, after correctly holding that the action would not be permitted to proceed on the basis of representing the interests of the entire global population, the District Court held that "*the interests of current and*

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527 Judgment, para. 4.5.4.

528 Judgment, para. 4.5.4.

529 The District Court ruled that the claims of Milieudefensie et al. were not admissible to the extent they serve the interest of the world's population, except for the interest of Dutch residents and the inhabitants of the Wadden region, see Judgment, para. 4.2.1 and following.

530 Dutch Supreme Court 23 February 2007, ECLI:NL:HR:2007:AZ6219, *NJ* 2008/492 (*De Groot/Io Vivat*). Cf. the doctrine of *in pari delicto* (Dutch Supreme Court 6 June 1936, ECLI:NL:HR:1936:221, *NJ* 1937/67 (*Berntsen/Van Remmen*); Dutch Supreme Court 2 December 2005, ECLI:NL:HR:2005:AU2397, *NJ* 2007/5 (*WE/Henselmans*); Joint Court of Justice 11 February 2014, ECLI:NL:OGHACMB:2014:22, *NJF* 2014/345; Dutch Supreme Court 16 February 1973, ECLI:NL:HR:1973:AD7415, *NJ* 1973/463 (*Maas/Willems*).

future generations of Dutch residents and […] of the inhabitants of the Wadden Sea area, a part of which is located in the Netherlands […] are suitable for bundling, even though in the Netherlands and the Wadden region there are differences in time, extent and intensity to which inhabitants will be affected by climate change caused by CO2 emissions. However, these differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population and do not stand in the way of bundling in a class action".[531] The District Court erred in rendering such finding.

The legal threshold: sufficiently similar interests

10.8.2 Article 3:305a (1) DCC (old) requires that the interests for which a collective action is brought are sufficiently similar to allow them to be combined in a single piece of litigation. According to the Supreme Court, the requirement of similarity has been met: "*if the interests which the legal action seeks to protect lend themselves to bundling*" which means that it must be possible "*to adjudicate the points of dispute and claims raised by the legal action in one and the same procedure, **without any need to take into account the specific circumstances of the individual parties***" (emphasis added).[532]

10.8.3 Similarity also entails that the relevant interests can be combined in view of the questions of fact and law that are in dispute. In other words, the relevant facts and legal issues on the part of the individuals being represented must be sufficiently identical to allow the claims to be assessed in one single action. This is also reflected in the legislative history of Article 3:305a DCC, which indicates that it is possible that "*despite there being a common point of dispute, the questions of law and fact involved in this point of dispute must be answered for each individual separately*." [533] To the extent that there are facts and circumstances that are relevant to the question of unlawfulness that differ between the individuals that are represented in the collective, a collective action is not permissible.[534]

No sufficient similarity exists

10.8.4 The requisite similarity is lacking in this case. In this collective action, Milieudefensie et al.'s claims are all intended to establish that Shell is acting unlawfully. However, the question of whether Shell's conduct is in conflict with any unwritten standard of care cannot be answered in a single action for all those represented by Milieudefensie et al. After all, under Article 6:162 *et seq*. DCC,

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531 Judgment, para. 4.2.4.

532 Dutch Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, *NJ* 2011/473 (*Stichting Baas in Eigen Huis/Plazacasa*), para. 4.2.

533 *Parliamentary Documents II*, 1991-1992, 22 486, no. 3, p. 27.

534 See for instance District Court of The Hague 27 December 2017, ECLI:NL:RBDHA:2017:15380 (*Milieudefensie and Stichting Adem/Staat*), para. 4.111. The District Court held that the question whether the State in that case had acted unlawfully could only be decided on the basis of the specific circumstances of the individual case, which it found could be may be very different for each person, and therefore did not lend itself for resolution through a collective action.

conduct is not unlawful in general but only in the specific context in which it occurs and only *in relation to one or several specific persons*.[535] The group of people that Milieudefensie et al. purports to represent are the residents of the Netherlands and the Wadden Sea area.

10.8.5 As has been explained in Section 2 above, there is a scarce remaining carbon budget. The allocation of that budget requires the weighing of various interests, which are often at odds with each other. As regards the Netherlands, the government together with parliament is best placed to weigh those interests, as it is democratically legitimised to do so. That does not mean, however, that there is consensus amongst all inhabitants of the Netherlands and the Wadden region as to the desirability of the specific policies adopted by the government.

10.8.6 Indeed, it is a generally known fact that citizens in the Netherlands have different views on the question of the pace and the manner in which the energy transition must be implemented in the Netherlands. Many people in the Netherlands are still dependent on fossil fuels, and many people may worry about the price and have concerns over energy security, for example when it comes to heating their homes or purchasing fuel for their car. This issue was under active consideration by the Dutch government at the time of filing of this Statement of Appeal.[536] Those views are in all likelihood informed by their personal circumstances and interests, such as their income, wealth, beliefs and preferences. Consequently, many inhabitants of the Netherlands and the Wadden region may well disagree with the view that the relief sought in this civil action serves their interests. It is therefore reasonable to infer that significant numbers of them believe that the relief sought does not further their interests.

10.8.7 It is also reasonable to infer that the specific context of all the persons in the class of people for whose interests Milieudefensie et al. purportedly act will differ, and this difference in context directly impacts the analysis of whether Shell's conduct is unlawful in relation to each of the persons included in that class. Hence, the legal questions in these proceedings cannot be generalised such that the alleged unlawfulness of Shell's conduct (or of its customers who are largely outside the Netherlands) can be assessed in a single action.

The relief sought in this collective action exceeds the scope of the right to collective action because it concerns a political issue

10.8.8 This case concerns a political issue: a policy matter that requires careful balancing of competing interests. It is precisely because of these different interests of the inhabitants of the Netherlands and the Wadden region that a court, seized with a civil action launched by a group of NGOs in which they purport to advance a specific goal in the interests of the *entire population*,

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535 K.J.O. Jansen, 'Inleiding; het relatieve karakter van de onrechtmatige daad', in: C.J.J.M. Stolker (red.), *Groene Serie Onrechtmatige daad*, Deventer: Wolters Kluwer, par. 1.1.1.

536 **Exhibit S-121**: B. Knoop, 10 March 2022, 'Koopkrachtplan kabinet: btw op energie en accijns op brandstof omlaag', *FD*.

should exert the utmost restraint in awarding the relief sought. After all, those interest groups lack the democratic legitimacy which the Dutch government and parliament have to make the necessary policy choices and to enact the related legislation. It is not for interest groups to have this matter decided by the courts, for decades to come, on behalf of all inhabitants of the Netherlands and the Wadden region, through a claim whereby the interest groups determine who is and who is not a defendant and what the nature and extent of the claim is, while they do not have the democratic legitimacy to make such choices. Such a claim, which is alleged to serve the interests of all the inhabitants of the Netherlands and the Wadden region, and which is based on an alleged rule of unwritten law, goes beyond the limits of a collective public interest action. The District Court did not acknowledge this (see also Section 10.9 below).

10.8.9 For these reasons, the interests that Milieudefensie et al. claim to represent cannot be combined, the relief sought exceeds the scope of the right to collective action and Milieudefensie et al.'s claims are inadmissible in this collective action.

10.9 Grievance VIII: The District Court incorrectly found that it had to decide on the claims of Milieudefensie et al. and that doing so does not require decisions which go beyond the lawmaking function of the court

10.9.1 In para. 4.1.3 of the Judgment the District Court held that: (a) it does not follow Shell's argument that the claims of Milieudefensie et al. require decisions which go beyond the lawmaking function of the court, (b) the court had to decide on those claims and (c) determining whether or not Shell has the alleged legal obligation is pre-eminently a task of the court.

10.9.2 For the reasons set out in this Statement of Appeal, there are many pathways to net zero emissions and the allocation of the carbon budget between the different sectors and citizens requires the weighing of many competing interests in society.[537] The relevant policy choices are firmly in the domain of policy making by government and parliament, and government has the proper mechanisms to implement the policy choices made.[538] The ability of governments to develop and implement these policy choices extends far beyond what a court is able to apply in rendering a decision in a civil law dispute between private actors. This case concerns important societal, technical and political issues. The courts are simply not equipped to resolve these issues. For this reason, the District Court should have found the claims of Milieudefensie et al. to be inadmissible or it should have denied them.

10.10 Grievance IX: The establishment of the facts: the District Court did not fully establish the activities and climate targets of Shell and the Shell Group nor have

[537] See para. 1.3.5 and Sections 2.3 and 5.

[538] In this context, see the advisory opinion of A-G Hartkamp before Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, *NJ* 2002/217 (*Kernwapens*), under 6, in particular the second paragraph, and the case law mentioned there.

they been fully considered by the District Court, in a manner as they ought to have been

10.10.1 As noted by the District Court in Section 2, introduction of the Judgment, it has based its findings on the facts on the situation as per 13 January 2021. This means that the District Court did not establish the developments which have occurred since that date, not did it consider them. As regards the facts and circumstances until that date, the facts relating to the strategy, targets and activities of Shell and the Shell Group as established by the District Court are incomplete.

10.10.2 Hence, the facts as advanced by Shell in this Statement of Appeal which the District Court did not establish or did so in a way which is not evident, or which are at odds with the facts as established by the District Court must be considered as a grievance directed against the facts as established by the Court. This applies particularly (but not exclusively) to what is set out in this Statement of Appeal regarding the strategy, targets and activities of Shell and the Shell Group as these have been set or amended since 13 January 2021. These must, together with the various developments described in this Statement of Appeal regarding laws and regulations at national, EU and international levels, be taken into account in the context of assessing this matter on appeal.

10.10.3 Accordingly, the 14 factual circumstances as considered by the District Court in finding the alleged existence of the Reduction Obligation, are incorrect or incomplete. This is even more pressing in the context of the District Court's reasoning relating to the onerousness and the proportionality of the reduction Obligation. (paras. 4.4.53 and 4.4.54 of the Judgment, respectively).

10.10.4 In addition, the District Court's reasoning in paras. 4.5.2 and 4.5.3 lacks a sufficient factual basis. There, the District Court states that Shell's policy, policy intentions and ambitions for the Shell Group amount to rather intangible, undefined and non-binding plans for the long-term (2050) and that they are, therefore, incompatible with Shell's Reduction Obligation. In this connection, Shell refers to, among other things, Figure 8 at the end of para. 2.7.5 above. Also, the District Court's remark in para. 4.5.2 that targets for 2030 are lacking completely and that Shell's plans are not unconditional – in which context the District Court refers to the various disclaimers used by Shell – are at odds with the Scope 1 and Scope 2 targets for 2030, as recently announced by Shell.[539] The District Court's ruling that Shell allegedly insufficiently disputed Milieudefensie et al.'s allegations regarding Shell's investment policy and the District Court's finding that Shell's group policy mainly shows that the Shell Group monitors developments in society and lets states and other parties play a pioneering role (see para. 4.5.2 of the Judgment), also cannot be sustained in light of the above.

[539] See para. 2.7.5 and Figure 8.

10.11 Grievance X: The Judgment should be overturned and the claims rejected in their entirety

10.11.1 The Judgment should be overturned and the claims denied in full.

10.11.2 Shell presents the case for full review to this Court, with the sole exception of the District Court's findings in para. 5.1 and 5.2 of the Judgment regarding admissibility and the parts of para. 4.2 of the Judgment, which form the underlying reasoning for those findings. This means that Shell maintains its defences as raised against Milieudefensie et al.'s claims as those were raised in the first instance in full and a re-evaluation of those defences is respectfully requested.

11. OFFER OF PROOF, OBLIGATION TO FURNISH FACTS AND BURDEN OF PROOF; OTHER

11.1.1 In support of the grounds for its defence, Shell relies on the exhibits produced in first instance and the additional exhibits produced in this appeal. A cumulative overview of the exhibits is set out at the end of this Statement of Appeal.

11.1.2 Shell does not assume any burden of proof which does not, as a matter of law, rest on it. Shell submits that the burden of proof in these proceedings rests on Milieudefensie et al. In accordance with the main rule of Article 150 of the Dutch Code of Civil Procedure ("**DCCP**"), the obligation to furnish facts and the burden of proof of facts and circumstances which show that a defendant has acted unlawfully is on the injured party.[540] The same applies to a claim for specific performance (in the form of the requested order); the main rule of Article 150 DCCP provides that the obligation to furnish facts and the burden of proof regarding the existence of the obligation to give, to do or to not do, rests on the person who initiates the claim for specific performance.[541] Shell expressly offers counter-evidence in this respect.

11.1.3 Insofar as the burden of proof of any assertion is, in the judgment of the Court, on Shell, Shell offers to provide (additional) evidence thereof by all lawful means, in particular by hearing witnesses and by producing reports (yet to be drawn up) by experts. This offer of proof applies in particular (but not exclusively) to Shell's following statements:

(a) The inaccuracy of the "45%" percentage, in light of the activities of the Shell Group and the sectors and states in which it operates, as set out in particular in Sections 5.3 and 5.4.

(b) The fact that the order imposed by the District Court cannot be complied with in a manner that would not discourage or restrict intra-EU trade, as set out in Section 6.3.

(c) The distortion which the order imposed by the District Court causes in the competition between the Shell Group and other players in the market, leading to an undermining of the level playing field created by the EU internal market, as explained in Section 6.4.

(d) The risks of carbon leakage associated with the Reduction Obligation imposed on Shell, as set out in paras. 6.4.14 - 6.4.18.

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[540] R.J.B. Boonekamp & W.L. Valk, *Stelplicht & Bewijslast*, Deventer: Wolters Kluwer, commentary to Article 6:162 DCC.

[541] R.J.B. Boonekamp & W.L. Valk, *Stelplicht & Bewijslast*, Deventer: Wolters Kluwer, commentary to Article 3:296 DCC.

(e) The assertion by Shell that it does enough to help drive the energy transition in general, and specifically in comparison with its peers, as set out in paras. 3.2.16, 7.2.3(a)(iii) and 9.2.2.

(f) The fact that more than half of the products sold by the Shell Group are "*third-party products*", i.e. from oil and gas not extracted by the Shell Group itself, as explained in paras. 8.2.4 and 8.2.5.

(g) The fundamental issues associated with the use of Scope 3 reporting as a basis for the Reduction Obligation (including in particular the lack of an objective reporting standard; the problem of double counting; and the problem with reporting on third party products that are resold by the Shell Group but not produced by the Shell Group), as set out in particular in paras. 8.3.6 - 8.3.9.

(h) Shell's assertion that the Reduction Obligation is not an effective means to reduce global emissions and that the Reduction Obligation does not support the global energy transition, and the related lack of effectiveness of the relief claimed, in particular in light of the statements made in paras. 1.6.2(a), 3.2.19, 7.2.3(a)(iv), 8.4.1 – 8.4.6, 9.2.13, 9.2.16, 9.2.17 and 10.4.1 concerning the substitution risk.

(i) Milieudefensie et al.'s lack of interest in the relief sought insofar as Scope 1 and 2 are concerned, and in particular the grounds put forward in that context in para. 9.2.18.

(j) Shell's assertions on its method of reporting its emissions (based on operational control rather than financial control), and the fact that this is permitted by the GHG Protocol, as argued in para. 10.2.15.

(k) The operation of the EU ETS and similar non-EU mechanisms, in particular in light of the grounds set out in paras. 10.2.16-10.2.20.

(l) Shell's assertions with regard to the law applicable to the claims, including the application of the applicable law, insofar as the Court would rule that this is (in whole or in part) not Dutch law, as well as the application of the local safety regulations and rules of conduct in the countries where the Shell Group operates, in particular as set out in Section 10.5.

(m) The argument that Milieudefensie et al. are inadmissible in their claims, because the underlying legal issues are not sufficiently similar to be decided in a collective action, and in particular the grounds put forward in paras. 10.8.4 - 10.8.8.

11.1.4 Should the Court grant (any part of) the relief sought by Milieudefensie et al., Shell notes the following. These proceedings concern questions of law which are both fundamental and new. Insofar as any judgment against Shell would

constitute a limitation of Shell's freedom to set the policy of the Shell Group, such a judgment should therefore not be declared provisionally enforceable.

12. CONCLUSION

12.1.1 On the basis of all of the above, Shell requests the Court:

(a) to overturn the Judgment and

(b) to the extent possible by immediately enforceable judgment:

(i) to declare Milieudefensie et al. inadmissible in its claims, or dismiss all claims of Milieudefensie et al.; and

(ii) to order Milieudefensie et al. to pay the costs of the proceedings in first and second instance, as well as the usual subsequent costs, to be increased with statutory interest as referred to in Article 6:119 DCC as from fourteen days after the date of judgment of the Court.

[*signature*]

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Advocate

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[…]

GLOSSARY

2021 Annual Report	Shell plc's Annual Report and Accounts for the year ended December 31, 2021
CO_2	carbon dioxide
Climate Accord	The Hague, *Climate Accord*, 28 June 2019
Climate Act	Dutch act of 2 July 2019, providing a framework for the development of policy aimed at irreversibly and step-by-step reducing the Netherlands' emissions of greenhouse gases in order to limit global warming and climate change (Climate Act)
Coalition Agreement	Government of the Netherlands, 15 December 2021, *The Dutch Coalition Agreement 2021-2025*
Climate Plan	Dutch Ministry of Economic Affairs and Climate, *Climate Plan 2021-2030*, 1 April 2020
COP	Conference of the Parties of the UN FCCC
DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure
District Court	District Court of The Hague
Draft Norms	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights of the United Nations of 26 August 2003
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ETS	Emissions Trading System
EU	European Union

EU Fit for 55	EU's proposed "Fit for 55" package setting out an economy-wide pathway for achieving a 55% reduction in EU emissions by 2030, compared to 1990 levels
European Climate Law	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 Regulations (EC) No 401/2009 and (EU) 2018/1999
Framework	the UN Protect, Respect and Remedy Framework
GHG	greenhouse gases
GHG Protocol	World Resources Institute Greenhouse Gas Protocol
GHGP Corporate Reporting Standard	the GHG Protocol Corporate Accounting and Reporting Standard
GHGP Scope 3 Standard	GHG Protocol Scope 3 Value Chain Standard
Group companies	Shell plc's subsidiaries included in its consolidated financial statements.
HGVs	Heavy Goods Vehicles
Human Rights Impact	the situation in which a business 'causes', 'contributes to' or 'is directly linked to' an actual or potential negative human rights impact, also considered to be 'involvement' under the UNGP
ICCPR	International Protocol on Civil and Political Rights
IEA	International Energy Agency
IPCC	Intergovernmental Panel on Climate Change
IPCC SR1.5	IPCC’s Special Report Global Warming of 1.5°C

Judgment	Judgment of the District Court of The Hague of 26 May 2021 (the judgment in the first instance of these proceedings)
LNG	Liquid Natural Gas
LPG	Liquid Petroleum Gas
Milieudefensie et al.	the respondents in appeal, the claimants in first instance
NDCs or NDC	Nationally Determined Contributions
NZE	Net Zero Emissions
Paris Agreement	the climate change agreement adopted at the Paris climate conference (COP21) in December 2015
Principles	Principles on Climate Obligations of Enterprises
Reduction Obligation	the content of the District Court's order imposed on Shell to reduce Shell Group's aggregate Scopes 1, 2 and 3 emissions by net 45% relative to 2019 by the end of 2030
RED II	EU's Renewable Energy Directive II (Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast))
Rome II	Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations)
SAF	sustainable aviation fuel
Shell	Shell plc
Shell Group	Shell plc and the subsidiaries included in its consolidated financial statements

tCO_2e	Tonnes of CO_2 equivalent
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNFCCC	UN Framework Convention on Climate Change
UNGP	UN Guiding Principles on Business and Human Rights
WEF	World Economic Forum

[Unofficial English translation from Dutch original]

LIST OF EXHIBITS

*The difference made in the first instance proceedings between key exhibits ("**RK**") and other exhibits ("**RO**") has been discontinued for the appeal phase. Since in the first instance two separately numbered lists were used, it is not possible to continue numbering. Hence, the exhibits submitted in the appeal phase have a new number, denoted by a capital "**S**", followed by a number, starting at 1.*

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Exhibit RK-4	IEA, World Energy Outlook 2018
Exhibit RK-5	OECD, Energy Report 2011
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Exhibit RK-8	Shell, Sky Report (Overview), 2018
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Exhibit RK-17	Shell, CDP Report 2019

Exhibit RK-18	Greenhouse Gas Protocol, Protocol Scope 2 Guidance 2015
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Exhibit RK-36	IEA, World Energy Outlook 2020
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Exhibit RO-9	Mulder, Journal of Renewable and Sustainable Energy, 2014

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Exhibit RO-11	Energy Today, Barriers to Renewable Energy Technologies Development, 25 January 2018
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Exhibit RO-13	Davis et al., Net-zero emissions energy systems, 29 June 2018
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