

Case analysis: unpacking the Shell ruling in appeal

I Introduction

1. In this case analysis, we will discuss the key considerations and takeaways of the ruling of the Court of Appeal of The Hague in the case between Milieudefensie et al. and Shell Plc. (**Shell**).

II The Shell case in first instance

2. Milieudefensie et al. represent the collective interest of current and future Dutch residents, (potentially) affected by dangerous climate change. To mitigate the effects of dangerous climate change, Milieudefensie et al. claim that Shell should align its business model with the goals of the Paris Agreement and therefore reduce its greenhouse gas (**GHG**) emissions.
3. In May 2021, the District Court of The Hague ruled that Shell has a duty of care to mitigate its contribution to dangerous climate change and was therefore required to reduce its GHG emissions by 45% by 2030, based on 2019 levels. The court ruled that Shell has a 'result obligation' with respect to the Shells group GHG emissions (**Scope 1 and 2**) and a 'best-efforts obligation' for its suppliers and customers (**Scope 3**).
4. The district court based this duty of care on the open standards of Dutch tort law (Article 6:162 of the Dutch Civil Code) as well as on human rights and soft law instruments. The first instance ruling emphasised that Shell-group's global emissions significantly impact climate change, which poses 'serious and irreversible' risks to Dutch residents. In setting this reduction obligation for Shell, the district court considered several factors, including the global emissions impact, the human rights of Dutch citizens (such as the rights to life and family), and Shell's control over its subsidiaries within the Shell-group and supply chains. The ruling in first instance was considered a landmark judgment for ESG litigation globally, and particularly with respect to climate change (we refer to our earlier trend report on this [here](#)).

III Shell case in appeal

III.1 Procedural developments in appeal

5. In the appeal initiated by Shell, two other interest organisations Milieu & Mens and Clintel requested the court of appeal to join the proceedings on Shell's side.
6. Milieu & Mens represents the interests of Dutch citizens in the field of energy, with a focus on democracy, economy, environment, climate, and health. Milieu & Mens argued that not only the environment but also the economic interests of citizens should be considered while undertaking the energy transition. Milieu & Mens feared that the judgment in the Shell case would set a precedent and creates higher energy costs and an (artificial) scarcity of fossil energy. The Court of Appeal of The Hague ruled in its interim judgement in appeal of 25 April 2023 that Milieu & Mens had sufficient interest in joining the proceedings next to Shell, as the judgment would affect not only Shell, but also the citizens and businesses that Milieu & Mens represents (we refer to [the interim judgment](#)).

7. Clintel represents the interests of individuals who disagree that current climate policies (such as the Paris Agreement) are based on climate science that assumes (in short) a climate crisis. The Court of Appeal of The Hague ruled in its interim judgement in appeal of 25 April 2023 that Clintel did not have a sufficient interest in its motion for joinder because Clintel's views on climate science, which differ from the consensus between Shell and Milieudefensie et al., are outside the scope of the appeal and therefore could not be raised in the pending proceedings (we refer to [the interim judgment](#)).
8. In its final judgment on 12 November 2024, the Court of Appeal of The Hague acknowledged that dangerous climate change is one of the biggest issues the world currently faces, and that Shell has a duty of care to limit its GHG emissions due to climate-related human rights obligations. Despite that, the court of appeal found that it could not impose a specific reduction obligation to Shell. In its ruling, the court of appeal discussed seven pillars on which the court of appeal based its decision. We will discuss these in more detail below.

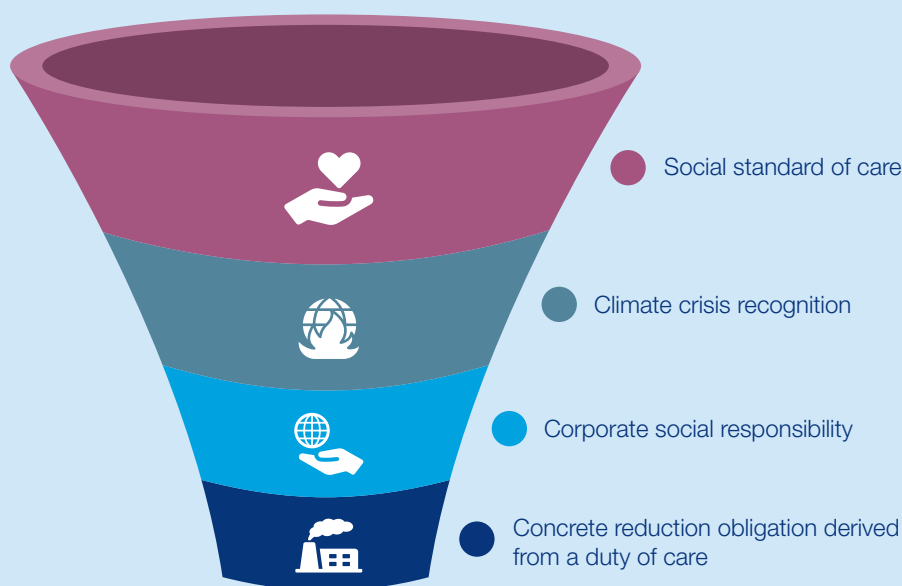
III.2 Climate change and human rights¹

9. The court of appeal considers that protection against dangerous climate change is considered a fundamental right that is protected by Articles 2 and 8 European Convention on Human Rights (**ECHR**). Various (Dutch and foreign) judgments have established that climate change protection is considered a fundamental right, among which the *Urgenda* ruling of the Dutch Supreme Court (we refer to our earlier blog on this ruling [here](#)) and the *Klimaseniorinnen* ruling of the European Court of Human Rights (we refer to our earlier blog on this ruling [here](#)).

III.3 Indirect horizontal effect of human rights²

10. The court of appeal considers that human rights generally only have a vertical effect (*i.e.*, citizen-government relationship). According to the court of appeal this does not alter the fact that these (human) rights may impact horizontal or private law relationships by giving substance to open standards (*e.g.*, social standard of care). This is referred to as the indirect horizontal effect of fundamental rights (we refer to our earlier trend report on this [here](#)).

Indirect horizontal effect of human rights on companies in relation to dangerous climate change



Compliance with Paris Agreement

¹ See para. 7.6-7.17 of the ruling in appeal ([link](#)).

² See para. 7.18-7.27 of the ruling in appeal ([link](#)).

11. The court of appeal recognizes the climate crisis by endorsing this as the biggest issue the world currently faces. Based on the recognition of the climate crisis, the court of appeal rules that the social standard of care (that applies to all actors in society, not only to Shell) in relation to dangerous climate change is interpreted on the basis of the protection that human rights (such as Articles 2 and 8 ECHR) provide for. Those human rights can therefore (also) be relevant for the interpretation of the social standard of care and for answering the question of what can be required of Shell, as a large and international company, under that social standard of care.
12. According to the court of appeal, the social standard of care in relation to the climate crisis brings a (legal) responsibility upon all legal actors to combat the dangers posed by climate change. To fulfil that responsibility, not only states but also (large) companies who contribute to the creation of the climate crisis could have a corporate social responsibility to mitigate dangerous climate change, even if such responsibility is not yet legally required. Soft law instruments like the OECD Guidelines and UNGPs, which Shell endorses, place such corporate social responsibility on large companies to take measures against dangerous climate change. Companies like Shell thus have their own corporate social responsibility in achieving the targets of the Paris Agreement.

III.4 Climate regulations of the European Union³

13. Citing various EU climate regulations initiatives, the court of appeal considers that Shell will have to prepare a climate transition plan that is consistent with the European Union's climate objectives and includes absolute reduction targets 'where appropriate'. The Corporate Sustainable Due Diligence Directive (**CSDDD**) for example introduces obligations for *in-scope* companies regarding sustainability and due diligence, aiming to enhance corporate accountability and setting forth comprehensive duties of care in relation to ESG issues (we refer to our earlier blog on this [here](#)).
14. However, the court of appeal notes that this type of climate legislation does not mandate an absolute reduction obligation of GHG emissions for an individual company or particular industry. Under the CSDDD for example, the specifics of compliance and the expectations for companies remain unclear. Therefore, the court of appeal could not derive a specific duty of care requiring a specific reduction obligation from this EU climate regulations.

III.5 Interim conclusion: Shell has an obligation to reduce its GHG emissions⁴

15. The court of appeal rules that protection from dangerous climate change is a human right and that states must protect citizens from its effects. The court of appeal ruled that human rights can influence companies' responsibilities via open standards like the social duty of care. According to the court of appeal, also soft law instruments (such as the OECD Guidelines) further define the social standard of care in relation to dangerous climate change.
16. The court of appeal concludes that, due to Shell's significant role in fossil fuel sector, there are heightened expectations for Shell compared to other companies (outside the fossil fuel sector) to reduce its GHG emissions. Companies, including Shell, are required to align their strategies with climate goals, such as those outlined in the Paris Agreement, but Shell's specific claim for a 45% reduction is still under legal review. While EU climate regulations set targets and provide incentives, they do not impose absolute reduction obligations or include a legal basis for such a specific obligation for Shell to reduce its GHG emissions with 45%. Therefore, according to the court of appeal, these EU climate regulations do not automatically entail a concrete duty of care for Shell to achieve that specific reduction.

III.6 Sidestep: new investments in oil and gas and Scope 3 emissions⁵

17. Before addressing Shell's Scope 1, 2, and 3 emissions, the court of appeal briefly examines Shell's planned investments in new oil and gas fields. It found it plausible that limiting the supply of fossil fuels is necessary to meet the Paris climate goals. The court of appeal emphasised that such investments could create a so called

³ See para. 7.28-7.54 of the ruling in appeal ([link](#)).

⁴ See para. 7.55-7.57 of the ruling in appeal ([link](#)).

⁵ See para. 7.58-7.62 of the ruling in appeal ([link](#)).

'lock-in effect', where significant infrastructure costs incentivize prolonged fossil fuel use, thereby slowing the energy transition and the reduction of GHG emissions. Shell is aware of this 'lock-in effect', acknowledging the long lifespan of energy infrastructure.

18. The social standard of care, based on Articles 2 and 8 of the ECHR and soft law guidelines, requires – according to the court of appeal – fossil fuel producers to take their responsibility for the energy transition and therefore, the reduction of GHG emissions. This includes accounting for the negative consequences of expanding fossil fuel supply. According to the court of appeal, Shell's planned investments, including significant spending on new oil and gas fields, may conflict with this responsibility. However, the court of appeal did not conclusively address this issue, as it was not part of Milieudefensie et al.'s claim. Instead, the court of appeal suggested that under certain circumstances, Shell could face a specific duty of care to refrain from new fossil fuel investments to mitigate dangerous climate change.

III.7 Shell's obligations as regards its Scope 1 and 2 emissions⁶

19. On Shell's Scope 1 and 2 emissions (which constitutes only 5% of Shell's total GHG emissions), the court of appeal rules that an imminent breach of a legal duty is required to grant the claims. The court of appeal found no imminent violation of a legal duty under Article 6:162 Dutch Civil Code. Shell demonstrated that it is on track to meet its ambitious target of a 50% reduction in Scope 1 and 2 emissions by 2030 compared to 2016, which exceeds Milieudefensie et al.'s demand. The court of appeal declined to impose a specific binding reduction target, reasoning that current climate law and scientific consensus do not allow for a clear minimum GHG reduction target for individual companies or sectors. The court of appeal also dismissed Milieudefensie et al.'s concerns about Shell's past policy adjustments, finding these concerns insufficient to justify further measures.

III.8 Shell's obligations as regards its Scope 3 emissions⁷

20. On Shell's Scope 3 emissions, the court of appeal noted that approximately 95% of the GHG emissions globally reported by Shell are Scope 3 emissions, primarily arising from the combustion of oil and gas sold by Shell. Additionally, about one-third of these emissions originate from Shell's own production activities. The court of appeal stated that, to limit global warming to 1.5 degrees, GHG emissions must be reduced by a net 45% by the end of 2030 and achieve a 100% reduction by 2050 compared to 2019 levels. However, for this reduction standard to apply directly to Shell, it must be plausible that Shell's product range and customer base reflect the global market, which the court of appeal found was not the case. Such a net reduction implies that some countries and sectors will need to reduce emissions more significantly, while others may need to reduce less. In other words: although Shell has a 'general' duty of care to combat dangerous climate change, no 'specific' duty of care with a specific reduction obligation for Shell on its Scope 3 emissions follows from the existing social standard of care (please see para. III.3-III.5 above).
21. Another reason for the court of appeal for dismissing Milieudefensie et al.'s claim on Scope 3 emissions is that it supported Shell's argument that ceasing the resale of fossil fuels would not lead to actual GHG emission reductions, as alternative suppliers would likely meet customer demand. Thus, the court of appeal determined that Milieudefensie et al. lacked sufficient interest in its claims concerning Scope 3 emissions.
22. Notably, the court of appeal acknowledged a potential causal link between production limitations and GHG emissions reductions, as previously indicated by the district court in first instance. However, Milieudefensie et al. failed to demonstrate a similar link between sales limitations and emissions reductions.

⁶ See para. 7.63-7.66 of the ruling in appeal ([link](#)).

⁷ See para. 7.67-7.111 of the ruling in appeal ([link](#)).

III.9 Conclusion: the court of appeal dismisses Milieudéfensie et al.'s claim but upholds the 'general' duty of care to mitigate dangerous climate change

23. The court of appeal upheld Shell's duty of care to reduce its GHG emissions but determined it could not impose a specific emissions reduction target. While the court in first instance ruled that Shell has a legal obligation to reduce its GHG emissions by 45% by 2030 relative to 2019 levels, the court of appeal found that existing climate laws and the prevailing scientific consensus do not impose specific targets on individual companies like Shell. Nevertheless, the absence of clear obligations does not exempt Shell from responsibility and therefore its duty of care, as climate science indicates various necessary reduction targets.

IV Case Analysis: What remains after the Shell ruling in appeal?

IV.1 Appeal with the Dutch Supreme Court?

24. Milieudéfensie et al. publicly expressed their disappointment with the Shell ruling. Milieudéfensie et al. believes for example that the court of appeal's legal reasoning regarding Scope 3 GHG emissions is flawed (that granting Milieudéfensie et al.'s claims would not be effective). According to Milieudéfensie et al., this is irrelevant because these Scope 3 claims are based on Article 6:162 Dutch Civil Code on tort, which is about Shell's own duty of care. The question – according to Milieudéfensie et al. – is therefore whether Shell has its own 'specific' duty of care to combat dangerous climate change, and then the follow-up question whether Shell is in breach of this duty of care by failing to reduce its Scope 3 GHG emissions. According to Milieudéfensie et al., the answer to both questions does not depend on the actions of other companies in Shell's sector, but (only) on what Shell actually does.
25. Aforementioned disappointment on Milieudéfensie et al.'s side could be one of the reasons for cassation. However, this presents a difficult issue for Milieudéfensie et al. to raise in cassation, as it largely involves a factual assessment by the court of appeal. In cassation, the factual record of the Shell case cannot be further supplemented; it is strictly a matter of assessing whether the court of appeal applied the law correctly. Milieudéfensie et al. cannot introduce new facts or evidence and cannot, for example, file new claims. In other words: the Dutch Supreme Court can only rule on legal questions, being if the court of appeal has applied the law correctly and has sufficiently substantiated its ruling. This, therefore, constitutes the main challenge for Milieudéfensie et al. in cassation. Milieudéfensie et al. have three months to appeal the appeal decision with the Dutch Supreme Court (*i.e.*, until 12 February 2025).

IV.2 Potential impact of the Shell ruling on ESG litigation

26. In this last paragraph we will analyse and discuss the potential impact of the Shell ruling on ESG litigation.

IV.2.1 The Shell ruling: affirming the indirect horizontal effect of human rights in climate change ESG litigation

27. The court of appeal affirms that protection against (dangerous) climate change constitutes a human right and that companies, such as Shell, bear a social corporate responsibility in this regard. While human rights are primarily directed at the relationship between individuals and the state (vertical effect), they can also indirectly influence private relationships, including those between individuals and corporations (indirect horizontal effect). This doctrine allows fundamental human rights to inform the interpretation of open standards, such as the social standard of care, when assessing private law obligations, including those related to climate action.
28. The court of appeal underscores that (major) companies like Shell, given their substantial contribution to the climate crisis and their capacity to address it, are obligated to reduce GHG emissions, even in the absence of explicit statutory mandates. This obligation is grounded in both human rights as well as soft law instruments like the OECD Guidelines and UNGP's, which obligation can be enforced through the open standards of Article 162 of the Dutch Civil Code, thereby establishing a social standard of care. In general, this translates to a duty of care that companies owe in the context of their operations. However, it is important to note that this duty of care does not yet entail a concrete, enforceable obligation to achieve specific GHG emission reductions.

IV.2.2 The Shell ruling: an implicit call for sector-wide climate obligations?

29. The court of appeal overturned the first instance ruling requiring Shell to reduce its GHG emissions, emphasizing the lack of defined consensus on Shell's specific obligations. Unlike the *Urgenda* ruling, which established clear state obligations based on international consensus (we refer to our earlier blog on this [here](#)), the Shell case reveals gaps in applying such specific (reduction) obligations to individual companies (such as Shell). In other words: the consensus surrounding Shell's specific obligation remains less defined.
30. Nevertheless, the Shell ruling reinforces the legal principle that multinational companies bear a 'general' duty of care to combat climate change and respect human rights. Instruments like the CSDDD and private law standards offer a basis for this responsibility, potentially evolving into enforceable duties of care (please see our earlier blog [here](#) and cheat sheet on the CSDDD [here](#)).
31. Following the Shell ruling, a key issue remains: where exactly does the threshold lie for establishing an enforceable (specific) duty of care, derived from a social standard of care that imposes specific reduction obligations on one company, while competitors may benefit from its diminished market share?. This key issue raises a normative question: depending, of course, on the circumstances of the cases, is it fair to demand more from one company than its competitors? Furthermore, how can companies be held accountable under a specific duty of care to reduce their GHG emissions to a specific percentage?
32. The Shell ruling seems to show the added value for sector-specific regulations. An example of this is the CSDDD, which is a crucial step towards a more structured framework for companies in different sectors to ensure sustainability and respect for human rights. Initiatives such as the CSDDD reflect the EU's growing commitment to comprehensive and enforceable sustainability obligations, thereby creating a framework for consistent accountability across different industries, with a social standard of care that applies to all competitors in a given sector.
33. In our view, in such a case, companies have to meet specific reduction obligations based on an enforceable duty of care derived from sector-specific standards that reflect the social standard of care in that sector, depending, of course, on the circumstances of the case. Such enforceable reduction obligations can be effective because they apply to the entire sector and require direct competitors to adhere to the same standards. In this context, the (European) legislator has an important role to play, while sectors could also have a responsibility to engage in self-regulation and standard setting to standardize aforementioned social stand of care into a workable and an enforceable duty of care.

IV.2.3 The Shell ruling underscores the complexity of causality in climate change ESG litigation

34. The Shell ruling furthermore addresses a significant challenge in climate change ESG litigation: proving causality is complex due to the multifactorial nature of climate impacts.
35. The *Klimmaseniorinnen* ruling by the European Court of Human Rights in Strasbourg for example highlights these challenges, affirming that a causal link between a State's failure to mitigate climate change and adverse human rights impacts is sufficient to establish causality (we refer to our earlier blog on this [here](#)). However, it remains unclear how this applies in private law contexts, as seen in the Shell ruling.
36. In our opinion, the threshold for assuming causality is higher for companies than for states. Nevertheless, it could be argued that causality in this particular sense must be capable of ascertainment. This is a sliding scale where accountability based on a 'general' duty of care at some point turns into actual liability. The question that remains to be answered is when and under what circumstances can such concrete liability based on a specific duty of care be assumed? On the one hand, this necessitates the delineation of a general social standard of care, and on the other, future ESG litigation will ultimately have to demonstrate what constitutes the threshold from accountability to

concrete liability. This question will be increasingly important in future climate change litigation, particularly if claimants would seek damages from companies. In such cases, establishing causality between the alleged damages and the company's actions of failure to take actions is essential.

37. The evolving landscape of corporate liability demonstrates a growing recognition of the necessity for the establishment of specific, enforceable duties of care in order to effectively address ESG challenges. Ultimately, the Shell ruling signals that companies that fail to address these challenges may increasingly face enforceable duties of care as the legal landscape evolves.

IV.2.4 The Shell ruling: a gateway to ESG litigation blocking 'lock-in' investments

38. The court of appeal's ruling in Shell seems to suggest a path for new climate change litigation focused on preventing future emissions by aiming to block specific investment plans rather than addressing past emissions. This indicates that the legal framework for banning such investments may already be developing. The court of appeal emphasises the need to consider how fossil fuel investments can create a 'lock-in effect', where significant initial investments in fossil fuel infrastructure commit resources for the long term, delaying the energy transition. This reflects the court of appeal's recognition that mere investment strategies may not be effective in achieving GHG emission reductions without concrete regulatory frameworks or commitments.
39. The considerations of the court of appeal in this regard are for example interesting for another case of Milieudéfensie et al. against the ING Bank N.V. (**ING**) in the Netherlands. Milieudéfensie et al. demand that the bank halves its total GHG emissions and stops financing polluting companies that lack proper climate transition plans and that keep financing (new) fossil fuel infrastructures. In brief, Milieudéfensie et al. are calling upon ING to cease its role in perpetuating the 'lock-in effect' inherent in the operations of other companies. Milieudéfensie et al. argue that ING, as the largest bank in the Netherlands, significantly impacts the climate by funding projects contributing to GHG emissions. Milieudéfensie et al. seek to compel ING to align its policies with the Paris Agreement and take responsibility for preventing dangerous climate change. The question is whether ING also has an enforceable duty of care as a 'facilitator' towards companies, such as those in the fossil fuel sector, that are directly responsible for a 'lock-in effect'. To be continued.

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