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DE BRAUW BLACKSTONE WESTBROEK

District Court of The Hague
Hearings on 1, 3, 15 and 17 December 2020
Case number: C/09/571932 19/379

PLEADING NOTES: COURT'S ROLE IN THE DEVELOPMENT OF THE LAW 15 DECEMBER 2020
of *mr.* J. de Bie Leuveling Tjeenk, *mr.* N.H. van den Biggelaar and *mr.* D. Horeman

in the case of:

MILIEUDEFENSIE ET AL. versus ROYAL DUTCH SHELL PLC

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1 INTRODUCTION

1. Milieudefensie et al.'s claims compel the court, if awarded, to engage in making political choices about the energy system. That is not the role of the civil court, not even in a dispute between two private parties. We will now explain this on the basis of the following aspects:

   - Shell has no systemic influence on the global energy transition. Shell's role depends on the choices of many other players in that system. What Milieudefensie et al. are demanding from Shell would only be useful if the system itself were to change. Shell cannot achieve this itself, and that also requires major choices about the structure of society (part 2).

   - Legislators and other political bodies are making these choices: they are making policy on the structure of the energy system and the energy transition. That is fully under way, but what emerges in any event is that they are making choices that differ significantly from what Milieudefensie et al. desire from Shell (part 3).

- If the court were to anticipate all those choices in this case, that would create legal uncertainty (part 4).

- That role does not accrue to the court, not in general, nor with the application of an open standard. The choices desired by Milieudefensie et al. go beyond the court's role in the development of law (part 5).

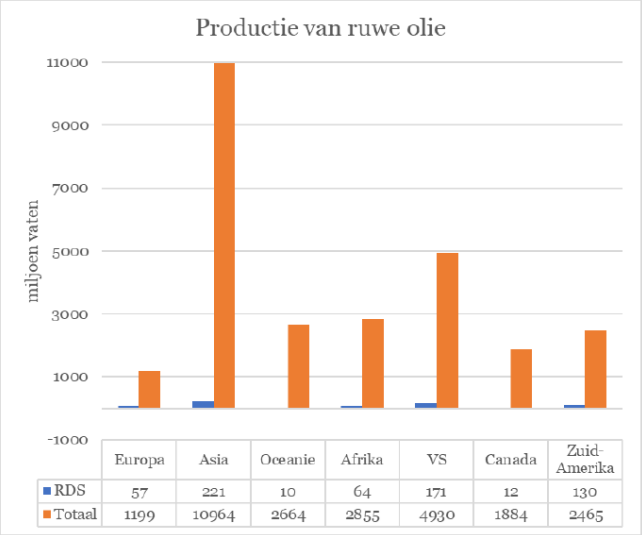
2 SHELL'S ROLE IN THE CONTEXT OF THE ENERGY SYSTEM: WHAT MILIEUDEFENSIE ET AL. DESIRE OF SHELL REQUIRES A SYSTEM CHANGE

2. Firstly, Milieudefensie et al. makes it appear as if Shell is a very large player on the world market for energy products. They suggest that by drastically changing its activities (and those of its customers) Shell will have a material impact on climate change caused by CO_2 emissions. The Mulder Report shows that this perception does not do justice to reality:[1]

> *"4.5 Shell's position in global oil and gas markets*
>
> *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% (Figure 4.6). In the case of natural gas, Shell's share in global supply is a fraction higher: in production, the share is 3% and in the global reserves 0.5% (Figure 4.7)."*

He illustrates this with figures such as these:

1 **Exhibit RK-35**, Mulder report, paragraph 4.5, pp. 75 and 77.



	Europa	Asia	Oceanie	Afrika	VS	Canada	Zuid-Amerika
RDS	57	221	10	64	171	12	130
Totaal	1199	10964	2664	2855	4930	1884	2465

3. Shell's role in the global energy system is therefore much more limited than suggested by Milieudefensie et al. Shell has no system influence on the energy transition.

4. But even aside from that fact, RDS pointed out in the opening arguments that Shell, as a single private party, cannot independently change the global energy system, but must operate within that system. Milieudefensie et al. now expressly acknowledge that: "*everyone is dependent on each other in order to achieve the objectives*".[2]

   (a) Change in the energy system requires choices by customers, including the choice of how much energy they consume: do they, for example, purchase energy-efficient products and limit their energy consumption by, for example, using the car less? Will they buy a car that uses a hydrogen cell, will they drive an electric vehicle or keep their petrol or diesel car? And if they opt for a carbon energy product, are they taking measures to capture or compensate CO_2 emissions?

   (b) Do car, ship and aircraft manufacturers invest in energy-efficient technology and technology that can use clean fuels, for instance?

2 Written arguments 5 Milieudefensie et al., margin number 80.

(c) What choices are made, in particular by States, on the supply side and the demand side of the energy market? And to what extent do they enforce a limitation of energy consumption?

5. Nevertheless, Milieudefensie et al. is persisting with the idea behind its entire argument: Shell must achieve the same percentage-wise reduction in CO_2 emissions in 2030 that is suggested in one scenario - not in any binding agreement or in the only possible scenario - for the world *as a whole*.[3] In addition, according to Milieudefensie et al., RDS must be responsible for all Shell companies and for the emissions by end-users of their energy products (scope 3). Milieudefensie et al. are therefore calling on RDS not only to *promote* that all 1,100 companies in its entire group, operating in dozens of countries, move towards reducing CO_2 emissions, they are demanding a "reduction obligation" (relief sought 1(a)) and are seeking that RDS "have reduced or caused the reduction" of those emissions in 2030 (relief sought 1(b)). And that not only concerns the approximately 15%[4] scope 1 and 2 CO_2 emissions of those subsidiaries, but also the 85% scope 3 emissions, at least if that is what Milieudefensie et al. mean by its vague term "*in CO_2 emissions connected to […] energy-carrying products of the Shell group*." In short, Milieudefensie et al. intend to make RDS responsible for a societal energy transition.

6. According to the relief sought, Milieudefensie et al. believe that RDS can be made fully and unconditionally responsible for reducing CO_2 emissions. In this process, they not only ignore the lack of a legal basis for this, but also the very essential choices that governments have to make and in which businesses and consumers can help; steps taken by society as a whole.

(a) What amount of energy consumption will be allowed: will the government be making the renovation and insulation of homes and the switch to energy-efficient transport compulsory, for instance, or will it be influencing the use of energy through taxes and subsidies?

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3 Summons, Chapter XI.2.

4 Statement of Defence, margin number 429, and **Exhibit RK-32(c)**, Shell 16 April 2020, Responsible Investment Annual Briefing, Slides, slide 15.

(b) Will the State be facilitating that the entire energy demand can be satisfied without CO_2 emissions, for example by granting the necessary permits and subsidies and by building infrastructure such as hydrogen pipelines? Or will we be installing wind turbines along large sections of the coast, despite the strong resistance evidenced by the Council of State report? Or do we create solar farms in agricultural areas, which also come up against resistance?

(c) If CO_2 emissions are caused, is it up to the end-user to compensate or capture and store them (CC(U)S)?

(d) And what if after these choices a need for energy remains that is not CO_2-neutral? Is an energy company permitted to then provide for any remaining energy demand with oil, gas or other energy sources which involve CO_2 emissions?

(i) If so, who is the energy producer that is permitted to supply in that case? Is this left to market forces, so that a total budget is determined that can then be allocated by the market? Or will energy producers be judged by the share they had in 2019, as Milieudefensie et al. require according to the relief sought?

(ii) If not, who is to be denied? The Dutch State that, faced with a conflict situation, deploys the new F-35 fighter aircraft that are still to be delivered,[5] or the diesel-powered frigates[6] that will be delivered in the course of this decade? A gas-fired power plant without CC(U)S in a country which, thanks to this new plant, has been able to close an old and more polluting coal plant? Families who, because of the costs, have not yet insulated their homes and replaced their gas-fired central heating boiler? The organiser of holidays to Tenerife?

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5 See https://www.defensie.nl/actueel/nieuws/2019/10/08/nederland-koopt-extra-f-35-jachtvliegtuigen (last accessed 8 December 2020).

6 See https://www.defensie.nl/actueel/nieuws/2020/06/24/nieuw-fregat-wordt-schrik-onderzeeboten (last accessed 8 December 2020).

7. There are no simple answers to such questions. Milieudefensie et al. apparently believe that they can ignore those questions because States have made agreements from which it can be deduced that they *want* to achieve a limitation in the temperature increase, and want to give access to people in developing countries who are cut off from energy and hope to be able to do that using energy sources that do not cause CO_2 emissions. By sticking to a high-level argument with the emphasis on emissions reductions on the global scale, Milieudefensie et al. apparently want to avoid the truly complex questions about how that can be achieved, how likely it is to be achieved, and what to do if the world develops differently. Policymakers do not have that luxury. The court cannot close its eyes to these fundamental questions. If the court were to intervene in the manner that Milieudefensie et al. want, this would inevitably be based on fundamental choices regarding the organisation of the global energy system and the place of an individual private energy producer like Shell in that system.

8. And the answer to essential questions and choices in the energy system is also not, as Milieudefensie et al. would like, to put the burden of limiting emissions onto RDS in the form of a firm - court-ordered - obligation and for RDS to simply have to figure out how those choices will have to be made. The energy system is precisely that - a system - and part of that system cannot be tinkered with without considering how that part fits into the larger whole. These are not choices that are suited to private parties, but which require market organisation that falls under the government's remit.

9. RDS has already noted on several occasions that around 85% of the CO_2 emissions that Milieudefensie et al. have in their sights are not scope 1 and 2 emissions from Shell, but emissions from end-users.[7] Milieudefensie et al. have not substantiated why reducing these emissions, which depend on all kinds of choices made by end-users themselves, is reportedly the responsibility of RDS. Nor do they elaborate on how any reduction like this by RDS would affect other participants in the energy system, while such a consideration would

7 Statement of Defence, margin number 429.

indeed be necessary.[8] States also pursue a very explicit policy to regulate end-use and are developing that policy in more detail with a view to climate objectives.[9]

10. In other respects Milieudefensie et al. also ignore the fact that governments in many countries have to make important considerations. As Professor Mulder states, for example, governments issue exploration and exploitation permits and even participate alongside the energy companies, among other things, in order to increase the certainty of the revenues for the State.[10] We pointed out earlier Minister Wiebes's response to a member of parliament who asked whether he believed that granting new licences for oil and gas production is at odds with the climate objectives: *"[n]o, as explained in the answer to question 4, natural gas will still be necessary to meet the energy demand in the coming period and production from our own country is better for the climate."*[11] For countries, it is of strategic importance not to be entirely dependent on other countries for their own energy needs, as the *Agreement on an International Energy Programme* explicitly stipulates,[12] for example, in which the Energy Charter Treaty again emphasises the "*state sovereignty and sovereign rights over energy resources*" and "[e] *ach state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited*."[13] Energy treaties therefore leave no room for doubt that *energy security* is important, and that the exploitation of energy sources is a sovereign issue. But if the US or Canada wants to be independent of foreign energy sources and wants to use energy sources in their own country for that purpose, would that be unlawful? And, not insignificantly, there are large producing countries whose economies depend largely on the export

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8 Written arguments RDS Part I, part 3.3.

9 Written arguments RDS Part I, part 7.

10 **Exhibit RK-35**, the Mulder Report, pp. 15-16.

11 *Proceedings II* 2020-2021, 17355, 740, answer from Minister Wiebes to questions from Member Van Raan on the climate plans of oil and gas companies of 10 November 2020.

12 *Treaty Series* 1975, 47 as later amended, Article 41(1) *("The Participating Countries are determined to reduce over the longer term their dependence on imported oil for meeting their total energy requirements").*

13 *Treaty Series* 1995, 108, Article 18.

of fossil fuels and other natural resources, such as Saudi Arabia, Kuwait and Russia. Firstly, it is not clear what Milieudefensie et al. want to bring about, because any conviction by the court will not stop that production, but ensure that other parties take Shell's place. Secondly, however, if that were otherwise, this would make it a fact that the decision would thwart the policy of foreign states. RDS points out that there is good reason why the Paris Agreement leaves the specific measures to be taken to the States and refers to "*common but differentiated responsibilities*."[14] How exactly to flesh out the different interests at stake is up to those states, and not up the (Dutch) court.[15]

14 Article 4(2) of the Paris Agreement refers to *"nationally determined contributions*."

15 Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*), para. 3.3, at C.

3 LEGISLATORS AND OTHER POLITICAL BODIES ARE MAKING THOSE CHOICES AND THEY ARE MAKING CHOICES THAT FUNDAMENTALLY DEVIATE FROM WHAT MILIEUDEFENSIE ET AL. WANT, AND MANY CHOICES ARE STILL UNCERTAIN

11. In the opening arguments, we discussed at length political initiatives, legislative processes in particular, aimed at organising the energy system and shaping the energy transition. In the words of the Dutch government concerning the energy transition: *"By making choices with regard to organisation and regulation, central government determines the playing field and the rules of play for public and private parties."*[16] A conviction of RDS individually would thwart that legislative process.

12. The EU ETS also plays a role at European level. The EU legislator sees that EU ETS as "*the cornerstone of the Union's climate policy,*" as stated in the opening arguments (part B).[17] That arrangement and the whole idea behind it are at odds with the claim submitted by Milieudefensie et al. It is useful to consider this because it illustrates how the issue on which the claim turns concerns a choice at system level, and because incidentally, regulation like this also stands in the way of award of the claim. Briefly put, CO_2 emissions regulated by the EU ETS were "permitted" by the government to Shell (and other EU ETS participants), taking into account a linear CO_2 emission reduction at Union level.[18] The proposed emission cap decreases in line with the targets for the EU under the Paris Agreement. As indicated in the opening arguments, those objectives will be raised and the emission cap and its limitation will still have to be adjusted accordingly.

13. The "cornerstone" of that regulation is the setting of a total CO_2 emission cap for large industry in the EU. In order to induce large industry to achieve that transition, a framework was conceived of that applies to a large part of the industry. A cap then applies in the EU for that part of the industry (Article 9 of Directive 2003/87). That cap is

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16 **Exhibit RO-266**, Climate Plan 2021-2030, p. 37.

17 Recital 6 of Directive EU 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to promote cost-effective emission reductions and low-carbon investments and Decision (EU) 2015/1814.

18 See also Statement of Defence, part 7.2.3.

reduced annually. In this way, emissions are reduced at a pace that is in line with the pace that the EU is aiming for, bearing in mind the UNFCCC and the Paris Agreement. This was adopted in the European Council.[19] The EU's *nationally determined contribution* under the Paris Agreement was submitted accordingly.

14. The EU ETS was subsequently tightened up and the following was considered in the Amendment Directive:[20]

> "*The European Council of October 2014 undertook to reduce the total Union greenhouse gas emissions by at least 40% in 2030 compared to 1990. All economic sectors must contribute to achieving those emission reductions and the target will be achieved in the most cost-effective manner through the EU Emissions Trading System (EU ETS), with a 43% reduction in 2030 compared to 2005. This was confirmed in the proposed nationally determined reduction commitment by the Union and its Member States submitted to the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC) on 6 March 2015."*(emphasis added, attorneys).

15. How the emission allowances still permitted by the cap are allocated and auctioned and thus divided among different market players is then a matter of market organisation and economic efficiency. Emission allowances are allocated via a system designed for that purpose. This system is designed to not only contribute to CO_2 reduction targets, but also to do so in a balanced manner to "*prevent carbon leakage risk as a result of climate policy"*, so to prevent what is reduced in the EU from being emitted elsewhere. Interests such as "*planning security, as regards investment decisions*" are stated in the allocation mechanism of emission allowances. And: "*it is a key priority of the Union to create*

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19 Conclusions of the European Council 23 and 24 October 2014, EUCO 169/14 available at https://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/nl/pdf (last accessed 14 December 2020).

20 Recital 2 of Directive EU 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to promote cost-effective emission reductions and low-carbon investments and Decision (EU) 2015/1814.

a resilient energy union to provide its citizens and industries with reliable, sustainable, competitive and affordable energy."[21]

16. Shell is subject to that system for a significant part of its activities in the EU, for example for oil refining. The same applies for many industrial customers, for example steel manufacturers and the chemical industry.[22]

17. Awarding the claims would thwart that system. After all, Milieudefensie et al. argue that Shell, as a private energy company, has the obligation to reduce its CO_2 emissions and the emissions by the end-users that purchase products from it by a specific factor compared to those CO_2 emissions in the past. Milieudefensie et al. want Shell to be bound to a certain reduction, even if Shell and its customers have emission allowances to give off those emissions. But that is not the system envisaged by the legislator: that system assumes a cap on total emissions, but leaves the allocation of the emission allowances thus determined to the market and therefore does not rule out that a certain party may have the same number of emission allowances, or more, than it had, if other parties do not have those emission allowances (or no longer have them). The European legislator has set up a balanced system to permit emissions up to a certain total limit for all activities covered by the EU ETS. In so far as Shell's emissions fall under the EU ETS, a reduction of those emissions enforced by Milieudefensie et al. will thwart the EU ETS and conflict with it, and Quebec and California, for example, have a similar “cap and trade” scheme.

18. Moreover, the effect will be that other parties will fill the gap, as Professor Mulder has demonstrated,[23] and that could also be outside the Union, so that the carbon leakage the EU ETS seeks to avoid will nonetheless occur.

19. The European Commission recently proposed to expand and tighten the EU ETS, as already explained in the opening arguments (in part B). Tightening it up by reducing the total ceiling further and faster. Expanding it by placing a larger part of the industry under the scope.

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21 *Ibid.*, recitals 5 and 6.

22 Directive 2003/87, Annex 1.

23 **Exhibit RK-35**, the Mulder Report, paragraphs 6-7.

Incidentally, Milieudefensie et al. seem to acknowledge that even in their view, the EU ETS will then be in line with the objectives of the Paris Agreement.[24] This revised system is therefore also thwarted from the outset by the claims.

20. To conclude these comments on the EU ETS: this does not only show that Milieudefensie et al. would thwart that system. It goes beyond that. It also shows that the assumptions underlying the claims of Milieudefensie et al. are not logical, and in any event require choices by politics, the legislator in particular. Milieudefensie et al. have not even asserted that legislators elsewhere have a system in mind that - as Milieudefensie et al. want - automatically applies a worldwide reduction of CO_2 emissions to individual private energy companies such as Shell on a one-to-one basis.

21. Politics, more specifically the legislator, have also taken on the regulation of the energy transition in other respects, including with regard to the position of parties such as Shell. The speed of the emission reduction by parties such as Shell compared to other parties is one such choice. Once society in a particular country has an objective to reduce CO_2 emissions, it must be determined where the necessary measures will be taken and when. Milieudefensie et al. make it seem as if Shell will simply "*have to follow the global emission reduction scenario*," i.e. will have to do the same as the world as a whole.[25] But there is no such thing as a pathway that is the same for every country and every private party in the world. The specific substantiation for the Milieudefensie et al.'s thinking is therefore entirely lacking. Politics can decide on good grounds that a desired reduction of emissions will be achieved by first addressing sectors other than those in which Shell operates. Will land use be dealt with first? Will all coal-fired power plants be closed immediately because coal is more CO_2-intensive than other energy sources? It is easy to give an illustration that shows such options are actually before legislators.

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24 Written arguments 4 Milieudefensie et al., margin number 67.

25 Document explaining Milieudefensie et al.'s amendment of claim, margin number 9.

(a) The IEA NZE2050 scenario in fact provides for a very significant reduction in the period up to 2030 in the area of coal-fired power plants without CCS (emphasis added, attorneys):[26]

> CO_2 emissions from the power sector decline by around 60% in the NZE2050 between 2019 and 2030. Worldwide annual solar PV additions in the NZE2050 expand from 110 GW in 2019 to nearly 500 GW in 2030, while virtually no subcritical and supercritical coal plants without CCUS are still operating in 2030. The share of renewables in global electricity supply rises from 27% in 2019 to 60% in 2030 in the NZE2050, and nuclear power generates just over 10%, while the share provided by coal plants without CCUS falls sharply from 37% in 2019 to 6% in 2030. Power sector

(b) The EU's climate ambition also makes reducing coal emissions a priority compared to oil and gas in the period up to 2030:[27]

> Het bereiken van een vermindering van de broeikasgasemissies met 55 % zou leiden tot een nieuwe en groenere energiemix. Tegen 2030 zou het steenkoolverbruik met meer dan 70 % dalen ten opzichte van 2015, en het olie- en gasverbruik met respectievelijk meer dan 30 % en 25 %. Het aandeel hernieuwbare energie zal daarentegen toenemen. Tegen

(c) In the letter to the House of Representatives of 8 March 2019, the Dutch government wrote the following:[28]

> "***Tightening of the Proposed Bill on Prohibition of Coal***
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> *On 18 May 2018, I informed this House of a proposed ban on the use of coal as fuel for the production of electricity (Parliamentary Document 30 196, no. 600). A legislative proposal should result in coal no longer being used for the production of electricity from 1 January 2030. This ensures that the prohibition on coal for electricity production makes the maximum contribution to the ambition from the coalition agreement of 49% CO2 reduction in 2030."* (emphasis added, attorneys).

(d) In addition, most scenarios assign an important role to sustainable energy sources for electricity generation, but also gas plays an important role in the transition phase. It is clear,

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26 **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 123.

27 **Exhibit RO-267,** COM (2020) 562 (2030 Climate Target Plan), p. 10.

28 *Parliamentary Documents II*, 2018-2019, 32 813, no. 303.

for example, that China's net zero objective in 2060 can only be achieved by closing coal-fired plants and converting some of these into gas-fired plants.[29] If Shell were to supply that gas, Shell's emissions would increase, also the scope 3 emissions. However, gas is cleaner than coal: the gas supplied by Shell, with its corresponding higher emissions on the part of Shell, would then be used to reduce the total emissions on balance because less coal - which is more CO_2-intensive than gas - would be burned. Is that careless or does it contribute to China's climate objective? And if parties like Shell are not allowed to supply that gas, then the political choices made by China are thwarted. The example is about China, but the same consideration naturally also plays a role in other countries with significant generation of electricity from coal, such as Poland and Indonesia. This also means that the global emission reductions that Milieudefensie et al. envisage for now and in 2030 cannot simply be applied to Shell, while that is indeed what Milieudefensie et al. are demanding.

22. There are many more points to be mentioned, such as concessions, which countries, including the Netherlands, are still granting. To avoid unnecessary repetition, reference is made to the opening arguments.

23. What is new is the fact that Milieudefensie et al. themselves also gave numerous examples of policy which is being shaped politically, and which, depending on the choices to be made, will be thwarted by the order they are seeking. The suggestion by Milieudefensie et al. that basic needs satisfied with energy weigh less heavily than combating climate change because they are “just” mentioned in a resolution (SDG) instead of a treaty such as the Paris Agreement[30] is surprising. How Milieudefensie et al. can maintain that is a mystery to RDS since it is not in dispute that as a *basic human need,* energy is a necessary condition for providing for basic human needs such as access to clean water, sanitary facilities, nutrition, health and education.[31] It needs no

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29 This example was explained earlier in the oral arguments, during the discussion of ambitions on 15 December 2020.

30 Written arguments 5 Milieudefensie et al., margin number 11.

31 Statement of Defence, margin number 50.

further explanation that such basic needs have also been recognised in other treaties. But that is not the essence here. The key question is how to shape the energy transition, and how to regard the position of private energy companies such as Shell therein, and that requires considerations of all kinds of interests. Milieudefensie et al. devote a lot of words to the idea that averting climate change and achieving *sustainable development goals* constitute "a synergistic whole."[32] Milieudefensie et al. refer in that context first to general obligations that they claim States have entered into to reduce emissions. They then explain that these contain essential choices for states regarding the structure of the energy system. That is precisely what Shell is arguing, and what stands in the way of the District Court awarding the claims.

(a) The "*holistic whole*" that Milieudefensie et al. discover in the achievement of various objectives applies, according to them, "*provided that they are properly and carefully coordinated with each other. It is the task that these countries have set for themselves with this resolution they have adopted*."[33] But can this coordination not require, for example, that during this transition, use is made of gas like that which Shell can supply so that coal-fired plants can be closed? Milieudefensie et al. remain silent about this.

(b) *"Of course it is the case*," say Milieudefensie et al., "*that the synergy between the Paris Agreement and the 17 development goals does not automatically arise by having global consensus on it and by laying this down in a UN resolution. This synergy must be consciously sought in the translation into practice. This requires not only insight into the synergy that can be achieved through sensible choices and targeted policy, but also requires insight into the potential trade-off that may arise between objectives if unwise choices are made*."[34] And: "*all countries must make policy choices to promote the synergy between the*

32 Written arguments 5 Milieudefensie et al., margin number 3.
33 Written arguments 5 Milieudefensie et al., margin number 9.
34 Written arguments 5 Milieudefensie et al., margin number 74.

targets and this will differ from country to country, but these do not detract from the treaty climate objectives that the countries have entered into."[35] Here, too, Milieudefensie et al. say nothing about what role Shell may have in that "trade off", and in any event do not explain that this cannot mean that Shell must continue to supply oil and gas in cases that arise.

(c) Milieudefensie et al. refer to SDG 7 which makes universal access to energy a priority, but which also mentions that this must be "*reliable, sustainable*" energy. Milieudefensie et al. add that countries indicate in the SDG resolution "*that they want to take 'firm and transformative steps' worldwide*," and that "*without investments in renewable energy and energy efficiency*" it is impossible to achieve what they want.[36] Milieudefensie et al. therefore mention sub-objectives such as achieving energy efficiency in order to achieve SDG 7. They themselves add that the necessary improvement of that efficiency has not yet been achieved.[37] But the relevant question now, of course, is: if energy efficiency has not been achieved and the energy needs therefore remain and, at a certain point, that reliable, sustainable energy is not there in the form that Milieudefensie et al. would prefer, or is not "affordable" as also mentioned by SDG 7, should the person in question be denied energy in that case? Since SDG 7 is aimed at achieving access to energy, that is not logical. Milieudefensie et al. are silent when it comes to that choice.

(d) Milieudefensie et al. cite African countries that are pursuing policy to try to give everyone access to energy, and in fact immediately to renewable energy.[38] But it is far from certain that such policy will be continued successfully. What is more, Milieudefensie et al. acknowledge that "*developing countries cannot do that alone"*.[39] They point out that among other things, in the Paris Agreement developed countries pledged to provide

35 Written arguments 5 Milieudefensie et al., margin number 76.
36 Written arguments 5 Milieudefensie et al., margin numbers 40-42.
37 Written arguments 5 Milieudefensie et al., footnote 21.
38 Written arguments 5 Milieudefensie et al., margin number 60.
39 Written arguments 5 Milieudefensie et al., margin number 67.

financial resources to developing countries, but do not mention that in the run-up to the summit in 2021 (COP26), this assistance is a controversial point, which arose, for example, when, as host country, the United Kingdom recently reduced the support, against which *Friends of the Earth* (Milieudefensie's international organisation) published submitted letters.[40] Moreover, the IEA reported that in its estimates, Africa is "*a key source of global oil demand growth in our projections*."[41]

24. Milieudefensie et al. thus comprehensively acknowledge that different interests are involved and that they must be viewed in mutual context and must be weighed by countries. Milieudefensie et al. feebly make out as if RDS is arguing that the interests are "*at odds*" with each other, or *"contradictory*."[42] The point is that different parts of the energy system must be coordinated and that, indeed, that choice may be such that a system is chosen in which emissions from a particular party are reduced to lesser extent, in order to benefit the global energy system as a whole. Milieudefensie et al. themselves also mention an example here. This small example shows the correctness of the more general point RDS raises here: a desire to reduce net emissions at the level of the world as a whole cannot be translated into a firm obligation for individual private energy companies to reduce their scope 1 and 2 emissions (let alone scope 3 emissions) at the same pace. The example given by Milieudefensie et al. themselves is as follows: they explain that the energy consumption of the poorest people on earth is currently small and that it is often provided for with wood and biomass. "*This burning of wood and biomass causes unnecessarily high CO_2 emissions because it is an old-fashioned and inefficient way of heating and cooking. Compared to that, modern gas cooking appliances are, for example, much more efficient*," say Milieudefensie et al.[43] In that context, Milieudefensie et al. also explicitly acknowledge that:

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40 The Guardian 24 November 2020, *Aid budget cuts will worsen the climate crisis,* available at https://www.theguardian.com/environment/2020/nov/24/aid-budget-cuts-will-worsen-the-climate-crisis (last accessed 11 December 2020).

41 Written arguments Part I RDS, margin number 29(a) with references.

42 Written arguments 5 Milieudefensie et al., margin numbers 2 and 28.

43 Written arguments 5 Milieudefensie et al., margin number 49.

"providing energy access to the approximately 1 billion poorest in the world does not prevent the Paris temperature objective from being met, not even if they were to be provided with fossil energy sources."[44] But this is incompatible with what Milieudefensie et al. are claiming. After all, they provide an example of a situation, which is acceptable even to Milieudefensie et al. themselves, in which the scope 3 emissions of a gas producer increase (the emissions released by the end-user's burning of products from the gas supplier, because that gas supplier did not supply the wood or biomass that those people burned earlier) but the world is not worse off as a result: according to Milieudefensie et al., the total CO_2 emissions decrease because gas is more efficient.

25. What all these examples show is firstly that States have important policy choices to make when designing the supply and demand side of the energy system.[45] And secondly, that it is incorrect to assume a static situation in which an individual private energy company has the obligation to reduce its CO_2 emissions and the emissions caused by the end-users of its products by a specific factor compared to those CO_2emissions in the past. After all, the latter ignores the fact that the (political) choice can be made to divide the allocation of emissions that are permitted to remain within the context of allocation or trading (as in the EU ETS and other cap and trade schemes such as in Quebec and California). Moreover, it ignores the fact that a party like Shell may be able to take over another energy company or its market share, and that in that event, it is not acceptable to demand the reduction with respect to what Shell was in 2019, something that Milieudefensie et al. wrongly ignore.[46] The examples also show that the position taken by Milieudefensie et al. ignores the fact that the choice can be made not to reduce or to even increase the scope 3 emissions of one energy company, such as a gas supplier, in order to ensure that emissions by others - such as the coal-fired plants mentioned or the people who burn wood and biomass - are limited.

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44 *Ibid.*

45 See at length Written Arguments Part I RDS.

46 See also Written Arguments Part I RDS, margin number 39(b) with reference.

26. In short, Milieudefensie et al.'s claims are at odds with both existing legislation and choices actively being addressed by politics, legislators in particular.

4 IF THE COURT WERE TO ANTICIPATE ALL THOSE CHOICES IN THIS CASE, THAT WOULD CREATE LEGAL UNCERTAINTY, ALSO BECAUSE THE LEGISLATOR IS MAKING DIFFERENT CHOICES

27. And if, in the midst of all this, Milieudefensie et al. want the court to rule that an individual private party is indeed obliged to make specific reductions of scope 1, 2 and 3 emissions, what does that mean for other parties? Naturally, those other parties primarily look at the regulations that exist, and which are under development, in order to be able to orient themselves accordingly. We have already cited that, among other things, with the ETS and with climate plans, the EU legislator and the Dutch government, respectively, are explicitly devoting attention to the need to determine the playing field and the need for predictability in schemes to enable private parties to make investment decisions.

28. Awarding the claims would put all this up in the air again. Legal certainty would then be at stake. Delineating between Shell's position and that of other parties is difficult, and other parties would therefore not know where they stand. Shell’s scope 3 emissions are the scope 1 and scope 2 emissions of other parties. What would be the case for them? It would be undesirable for legal uncertainty to be created in this way.

29. Added to this is the fact that this kind of opinion would disregard the considerations of transitional law that are necessary in a legislative process that gradually imposes stricter requirements on all kinds of parties. The EU ETS, among other things, provides for a gradual reduction of the emission cap in predictable steps. This makes it clear at what rate a reduction of emissions is gradually required. That predictable system would be thrown up in the air if it were found that unlawful conduct was currently occurring and the court were to demand a specific reduction in 2030 from individual private companies.

5 THAT ROLE DOES NOT ACCRUE TO THE COURT, NOT IN GENERAL, NOR WITH THE APPLICATION OF AN OPEN STANDARD. THE CHOICES DESIRED BY MILIEUDEFENSIE ET AL. GO BEYOND THE COURT'S ROLE IN THE DEVELOPMENT OF LAW

30. The fundamental question - even if, strictly speaking, the court were requested "only" to apply an open statutory standard - is whether there is really a role reserved for the court to take the decision in the matter and thus shape the societal playing field. In Giesen's words, "the developing of the law is the same […] as the finding of law in difficult (or more difficult) cases".[47] Case law of the Supreme Court shows that this role of the court has limits. In the literature, various perspectives are derived from case law.[48] Jansen and Loonstra then also cite case law in which the Supreme Court went relatively far in its role in the development of law. And they then conclude:[49]

> "*However, it seems that the Supreme Court mainly finds that something goes beyond its role in the development of law when the system itself is up for discussion or requires change. The problem is more extensive than thought and the Supreme Court is in danger of ending up in political waters. It must weigh the advantages and disadvantages of a particular system, it cannot overlook the possible consequences of a judgment, it faces political or policy choices, or the problem is the subject of debate in Parliament or is on the political agenda. The judge oversteps a limit in that case, which he evidently finds in the division of powers of the various state bodies based on the Constitution and the trias politica. The Supreme Court is not a*

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47 I. Giesen, *Rechtsvorming in het privaatrecht,* Deventer: Kluwer 2020, p. 12.

48 C.J.H. Jansen and C.J. Loonstra, 'Grenzen aan de rechtsvormende taak van de rechter in het privaatrecht en het arbeidsrecht', *Arbeidsrechtelijke Annotaties* 2012/11, p. 3 et seq. Cf. J. Uzman & C.J.J.M. Stolker, *De politieke rol van de (burgerlijke) rechter revisited. Over de grenzen van de rechtsvormende taak en Alkema's institutionele moment in de rechterlijke beslissing*, in: T. Barkhuysen, M.L. van Emmerik and J.P. Loof (ed.), *Geschakeld recht – Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van prof. mr. Evert Alkema*, Deventer: Kluwer 2009, p. 475-496; C.J.J.M. Stolker, 'De politieke rol van de rechter in het burgerlijk recht', in: M.G. Rood (ed.), *Rechters en politiek - Nationale en internationale beschouwingen*, Zwolle 1993, p. 53-83. R. van der Hulle, *Naar een Nederlandse political question-doctrine? Een beschouwing over de rol van de rechter in politieke geschillen* (diss. Nijmegen), Deventer: Kluwer 2020, Chapter 9.4.

49 C.J.H. Jansen and C.J. Loonstra, *Grenzen aan de rechtsvormende taak van de rechter in het privaatrecht en het arbeidsrecht*, *Arbeidsrechtelijke Annotaties* 2012/11, p. 19-21.

> *political body. As De Savornin Lohman writes: 'If, when creating new rules, legal political choices have to be made about which there is disagreement within the legislative apparatus, the judge will have to let this chalice pass.' Kop adds that the Supreme Court is extremely cautious when moving on the intersection of law and politics and that reliance on the traditional position of the court in the state order is not an empty idea. 'That reliance is the sign that the Supreme Court pre-eminently respects the ideas underlying the trias politica. […] The legislator is still on the throne, the judge on a sturdy stool next to it." (footnotes omitted, attorneys).*

31. If the present case is held up to the bar of these perspectives that emerges from the case law and literature, then it is clear that Milieudefensie et al.'s claims raise issues that go far beyond the court's role in the development of law. The court also deliberately stayed away from this in the *Urgenda* case, as will be explained later. We are going through the case law with reference to three themes which, as already shown above, would make it extremely problematic in this case for the court to involve itself in the political considerations.

    (a) There are several solutions, system-level considerations are needed and the issue requires political decision-making.

    (b) The legislator has already taken on the subject matter and the court must not thwart that.

    (c) Demarcation problems and legal uncertainty result if the court sets about developing the law.

32. The court must firstly therefore exercise restraint where several solutions present themselves and choosing among those solutions requires considerations on the system level or depends on choices of government policy or legal politics, so that making that choice should be left to the legislator. That is relevant here, which was just explained as the first point (part 2). Politics must be given leeway to take policy decisions on circumstances that are largely still unforeseeable.

(a) In the judgment concerning the Employed Person's Allowance, the Supreme Court held: "*In cases* [...] *where several solutions are conceivable and the choice between those solutions partly depends on general governmental policy considerations, or if important choices of a legal-political nature must be made, it is recommended that the court leave the choice to the legislator for the time being, both in connection with the* [...] *judicial restraint preferred by constitutional law and because of the court's limited options in this area."*[50]

(b) If a problem is identified at system level, such as the energy system here, that is all the more relevant. Even in cases in which the State is the party being sued - as the party that levies tax and which is directly bound to those higher regulations with which the tax legislation is contrary - the court is reluctant to put its own opinion in the place of the political consideration which has been laid down in legislation - contrary to higher regulations. That became clear in the judgments on the box 3 levy last year: "*Such a breach at the system level is accompanied by a legal defect that cannot be addressed without making choices at the system level. These choices cannot be inferred clearly enough from the system of the law [...]. Then the court will exercise restraint in respect of the legislator when addressing such a legal defect at the system level. In principle, court intervention would be inappropriate, unless an individual tax subject is faced with an individual, excessive burden in violation of Article 1 of the First Protocol."*[51] Consequently, the court does not burn itself on the question of how to resolve a situation that is problematic at system level, but which solution requires choices at system level that cannot (yet) be derived from the law, even if, according to the same court, the situation is contrary to higher legislation.

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50 Supreme Court 12 May 1999, ECLI:NL:HR:1999:AA2756, para. 3.15.

51 Supreme Court 14 June 2019, ECLI:NL:HR:2019:816, para. 2.10.3. For the other judgments, see Supreme Court 14 June 2019, ECLI:NL:HR:2019:911; Supreme Court 14 June 2019, ECLI:NL:HR:2019:912; Supreme Court 14 June 2019, ECLI:NL:HR:2019:817; Supreme Court 14 June 2019, ECLI:NL:HR:2019:948 and Supreme Court 14 June 2019, ECLI:NL:HR:2019:949.

(c) In the nuclear arms judgment,[52] the court addressed the question of whether the use of nuclear weapons would be contrary to the law of war. The Supreme Court deemed the civil court competent to examine the claims against the State because the claims had been based on "*(threat of) unlawful conduct*."[53] The Supreme Court also held that: *"it* [should] *furthermore be noted that the claims lodged in the present case relate to questions of State policy in the areas of foreign politics and defence – policy which will largely depend on political considerations reflecting the circumstances of the case. This means that the civil court will have to exhibit great restraint when examining claims, like those lodged in the present case, that serve to qualify acts implementing political decisions in the areas of foreign policy and defence, which could be performed in the future, as unlawful and therefore as already forbidden at this point in time. After all, it is not for the civil court to consider such matters of politics. In addition, the civil court must, from the outset, give the relevant State bodies responsible sufficient latitude to consider these matters of politics based on specific circumstances of the case that are as yet unforeseeable, and refrain as much as possible from imposing any prior injunctions that would restrict this latitude by preventing these circumstances from being taken into consideration"*[54] (emphasis added, attorneys).

(d) Can an injured party that joined criminal proceedings independently lodge an appeal with a view to the decision on its claim for damages? The law does not provide that this is possible. In his opinion earlier this year, Advocate General Hofstee noted in the footsteps of previous judgments that although legislation is being prepared, "*various choices are conceivable in which differing interests of both a practical and fundamental nature are involved, which choices must comply with the starting point of a balanced and coherent system as a whole. The legislator has decidedly not yet made a clear,*

52 Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*).

53 *Ibid.*, para. 3.3, opening lines.

54 *Ibid.*, para. 3.3, in c.

definitive choice of legal remedies embedded in the current system of legal remedies. […] *The above-mentioned legislative developments do not diminish the fact that the creation of a legal remedy is entirely outside the Supreme Court's role in the development of law*."[55] The question that the court had to decide there is not insignificant, but is of very different importance than shaping a societal energy transition. Nevertheless, even there, the court decided that the matter exceeded its role in the development of law.

(e) And what do we see the judge then do in *Urgenda*? Although the State is obliged to achieve a certain reduction in its territory, the Supreme Court explicitly sought alignment with obligations to which the State itself was legally bound, namely the UNFCCC, the Paris Agreement and the ECHR.[56] And the court then explicitly leaves the fleshing out of the emission reduction, the formation of energy policy, to the State. The District Court held: *"[i]n the event that the claim is awarded, the State retains full freedom, which accrues pre-eminently to it, to determine how it complies with the order in question,"*[57] and the Court of Appeal, too, emphasised that *"the reduction order gives the State sufficient leeway to flesh out how it implements this order."*[58] The Supreme Court held: *"in the Dutch form of government, the decision making on reducing greenhouse gas emissions is up to the government and parliament. They have a great deal of freedom in making the political considerations necessary for that. It is up to the court to assess whether, when using that freedom, the government and parliament remained within the limits of the law to which they are bound."*[59] In this context, politicians must, after all, make major considerations in a global transition that is ongoing, the progress of which has not yet crystallised. The District Court also expressed the

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55 Opinion of Advocate General Hofstee, ECLI:NL:PHR:2020:507, no. 12 with reference to Supreme Court 4 July 2017, ECLI:NL:HR:2017:1277.

56 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, paras. 4.8, 5.7.3 and 6.1-6.2.

57 District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda v State*), para. 4.101. See also Statement of Defence, margin number 410 with more extensive quote.

58 Court of Appeal of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591, (*Urgenda v State*), para. 67. See also Statement of Defence, margin number 411 with more extensive quote.

59 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda v State*), para. 8.3.2.

following: *"[...] It is an essential feature of the rule of law that the actions of (independently democratically legitimised and supervised) political bodies, such as the government and parliament can – and sometimes must – be assessed by a court independent of these bodies. This constitutes a review of lawfulness. The court does not enter the political domain in the course thereof, with the associated considerations and choices. Separate from any political agenda, the court has to limit itself to* its *own domain, which is the application of law. Depending on the issues submitted to it, the court will review them with a greater or lesser degree of restraint. Great restraint or even abstinence is required when it concerns policy-related considerations of divergent interests which impact the structure or organisation of society. The court has to be aware that it only plays one of the roles in a legal dispute between two or more parties. Government authorities, such as the State (with bodies such as the government and the States General), have to make a general consideration, with due regard for possibly many more positions and interests.*"[60] (emphasis added, attorneys).

Milieudefensie et al. therefore confront the court with choices of a political nature, specifically at system level. It should not be the judge making these choices, but rather politics.

33. If the subject matter already has the legislator's attention, there is even less room for judicial development of the law. That is also the case, here; that was the second point we just explained (part 3). According to the Supreme Court, the court must not anticipate this or thwart the discussion that takes place in that context with its own judgment.

(a) In 1993, the Supreme Court did not interpret a statutory regulation broadly. In this context, the Supreme Court held not only that the alleged right could not be derived from the legal rules, but also that: "*it should be noted that* […] *the legislator has taken on this subject matter, without the final result thereof*

60 District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda v State*), para. 4.95.

having been established, since the relevant legislative proposal is in no way uncontroversial on this point. It is not desirable to now thwart this discussion with a decision that seeks alignment with that legislative proposal"[61] (the question was whether an obligation to provide information could be read into the regulation of the father's statutory access right).

(b) The Supreme Court emphasised the same when confronted with the question of whether an employment contract could be partially dissolved while the recently revised law did not provide for this and it had not been shown that the legislator intended to provide for that. No, according to the Supreme Court:[62] "*it currently goes beyond the Supreme Court's role in the development of law to provide for the possibility of partial dissolution of the employment contract. This applies all the more now that the government has established the Work Regulation Committee to advise on the changes in the labour market and the possible consequences for regulations. In the final report of the committee presented to Parliament on 23 January 2020, proposals are made to enable partial termination of the employment contract"* (footnote omitted and emphasis added, attorneys).

(c) In a different context, namely the application of reasonableness and fairness in company law pursuant to Article 2:8 of the Dutch Civil Code, Advocate General Assink wrote earlier this year (after having established that the Court of Appeal had applied a different, special provision in the challenged judgment and that, moreover, had done so correctly and the complaint had to be rejected) superfluously: "*it is established case law that the court, in cases in which existing legislation does not provide sufficient clarity or otherwise needs to be supplemented, tries to seek a solution that is in line with the system of the law and is in line with the cases that are indeed provided for by law. In that case, there is little chance of clashes within the trias politica. In principle, restraint is required*

61 Supreme Court 17 December 1993, ECLI:NL:HR:1993:ZC1187, *NJ* 1994, 332.

62 Supreme Court 21 February 2020, ECLI:NL:HR:2020:283.

in the court's role in the development of law. This applies all the more if the legislator is already working on the creation of regulation" (footnotes omitted and emphasis added, attorneys).[63] In the footnotes, he referred to, inter alia, the *Quint v Te Poel* judgment[64] cited by RDS and the opinion of the Advocate General in *Urgenda*.[65]

(d) The Advocate General also pointed out in the *Taxibus* judgment just discussed: "*the fact that the opinion laid down in the statutory system might no longer be in line with current societal views on the compensation of emotional damage is a circumstance that cannot lead to cassation. Even apart from the fact that changing the statutory system in this respect would go beyond the court's role in the development of law, this topic has the legislator's attention and it is not currently up to the court to anticipate possible legislation, the design of which has not been established at all*"[66] (emphasis added, attorneys).

It emerges, for example, that the court should not interfere with politics in issues that politics, the legislator in particular, has taken on itself. That is the case here.

34. If award results in a societal breach and legal uncertainty, problems of a transitional nature, and a flood of lawsuits, these are indications that the court does not have any role in the development of law. Each of those circumstances also arises in this case (opening arguments and part 4 above). Milieudefensie et al. are quick to admit this. They want a far-reaching judgment because they are hoping "*for cross-fertilisation and interaction of climate issues*" and that "*more and more climate-related cases will be brought in the world*."[67] "*It can be expected"*, according to Milieudefensie et al., "*that as such, lawsuits will be brought in several countries by individual claimants supported by NGOs, including the claiming NGOs* […]'.[68] What Milieudefensie et

63 Opinion of Advocate General Assink, ECLI:NL:PHR:2020:450, no. 3.25.

64 Supreme Court, 30 January 1959, ECLI:NL:HR:1959:AI1600. See also Statement of Defence, margin number 389 et seq.

65 Opinion by Advocate General Langemeijer and Wissink, ECLI:NL:PHR:2019:887.

66 Opinion of Advocate General Strikwerda, ECLI:NL:PHR:2002:AD5356, no. 46.

67 Written arguments 2 Milieudefensie et al., margin number 123.

68 Written arguments 2 Milieudefensie et al., margin number 113.

al. overlook is this: if judicial development of the law results in legal uncertainty, for example because the scope of the new rule cannot be properly defined, this is a reason for the court to refrain from intervention. This also applies if, strictly speaking, the court can use an open statutory standard on which to base its opinion.

(a) In *TNT v Weijenberg*[69] and *Rooyse Wissel v Hagens*,[70] the Supreme Court rejected the idea that the court should accept on the basis of an open standard - good employment practice as referred to in Article 7:611 of the Dutch Civil Code - that there is liability on the part of the employer in the event of "*structurally dangerous work*." In the latter judgment, it stated that this was rejected (i) because such liability is incompatible with the legal system surrounding the employer's duty of care and (ii) whereby it was noted that "that category of work cannot be properly defined."[71] The Supreme Court continued: "*Even though any delineation will be to some degree arbitrary, it should be borne in mind here that the industrial accident suffered by* [respondent] *did not occur in a place where De Rooyse Wissel exercised only limited control and influence as an employer – on the contrary, it occurred in the workplace itself. In that situation, acceptance of an insurance obligation for the employer, ensuing from good employment practices, would too drastically impair the legal system of employer's liability, which is based on a duty of care to prevent damage (and the employer failing in that duty of care). Moreover, this would cause a high degree of legal uncertainty, since the matter cannot be clearly separated from (other) industrial accidents where the employer is not subject to any insurance obligation*"[72] (emphasis added, attorneys). The broad application of a statutory open standard was therefore refrained from.

69 Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5215.

70 Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223.

71 Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, para. 4.5.2. In footnote 520 of the Statement of Defence, the ECLI number of the opinion for this judgment is erroneously cited.

72 Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5223, para. 4.5.2.

(b) In the *Taxibus* judgment, the Supreme Court was essentially confronted with the question of whether a strict interpretation of the law would be adhered to, entailing that emotional damage in the event of the death of a loved one would not be compensated, contrary to nervous shock, or that, by means of the notion that a fatal accident also constitutes an unlawful act vis-à-vis the victim's loved ones, a right to compensation for emotional damage would nevertheless be allowed.[73] A narrow interpretation of the statutory regulation was decisive. The Supreme Court held:[74] "*The system of the law entails that if someone with whom they had a close and/or affective connection dies as a result of an event for which another party is liable to him, he cannot assert a claim for compensation for loss due to the sadness they experience as a result of this death. After all, Article 6:108 of the Dutch Civil Code only gives a limited number of persons entitled to claim certain financial loss in such a case. Although this provision is rather recent, there may be grounds for reconsidering the reasons that led to the compensation scheme laid down therein. It cannot be ruled out that the legal system insufficiently meets the public's need for some form of redress to be given to those who in their lives have to suffer the serious consequences of the death of any person with whom they – as here – had an affective relationship. However, offering compensation in this respect without question and at variance with the legal system would exceed the court's role in the development of law. After all, in the first place the pros and cons of the current system would have to be considered, which is the preserve of the legislator. Further, any modification of the current system would require delineating the cases in which compensation is deemed appropriate and specifically identifying the persons entitled to such compensation. Finally, it is also for the legislator to decide whether and, if so, to what extent, financial limits should be set on the award of such compensation, in connection with the consequences this may entail."* (emphasis added, attorneys).

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73 Part 1.3 of the cross-appeal in cassation, cited in Advocate General Strikwerda's Opinion, ECLI:NL:PHR:2002:AD5356, no. 45.

74 Supreme Court 22 February 2002, ECLI:NL:HR:2002:AD5356, para. 4.2.

> This represented a rejection, therefore, of the view that a consideration that the legislator had made in the context of limiting compensation for surviving dependants (Article 6:106 of the Dutch Civil Code, old) was removed via the back door by applying a general rule broadly (assuming an own unlawful act vis-à-vis the surviving dependants and thus compensation for damage to the person pursuant to Article 6:106 of the Dutch Civil Code).

This shows that legal uncertainty that would arise is a reason for the court to refrain from developing the law. This also shows that this finding also applies when the court is asked to apply an existing open standard, such as Article 6:162 of the Dutch Civil Code in this case. In the aforementioned judgments, the Supreme Court refrained from using the open standard in order to develop law where this would lead to legal uncertainty.

35. In short, Milieudefensie et al. ignore the fact that the claims they have submitted actually involve shaping a part of the global societal energy transition that is under way and in which important political choices must be made. By failing to recognise this, Milieudefensie et al. submitted claims that exceed the limits of the court's role in the development of law. The claims must be denied.

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Attorneys